No. 76876-0-I

No. 96767-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TONI GAMBLE

Plaintiff/Petitioner,

v.

CITY OF SEATTLE, a municipal corporation,

Defendant/Respondent.

PETITION FOR REVIEW

THE SHERIDAN LAW FIRM, P.S.

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A. IDENTITY OF PETITIONER / INTRODUCTION

Toni Gamble is a former employee of the City of Seattle.

B. COURT OF APPEALS DECISION

The opinion of the Court of Appeals was entered on December 24, 2019 (the "Opinion" or "Op."). The Opinion affirmed the trial court's decisions in all respects. See appendix.

The issue here was identified by the Court as follows:

> At oral argument, Gamble's counsel asserted that the exchange between employer and employee is only necessary before an individual is determined to have a qualifying disability. RCW 49.60.040(7)(d) provides '[o]nly for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process.' But just because an interactive process is required when determining whether a qualifying disability exists, does not mean that an interactive process is not also required for determining the reasonableness of accommodations. Gamble offers no support for the proposition that an employee never has to go back to the employer with their ongoing concerns, and our decision in Frisino counsels otherwise. See 160 Wash.App. at 779, 249 P.3d 1044 ('[T]he best way for the employer and employee to determine a reasonable accommodation [(not a qualifying disability)] is through a flexible, interactive process." (emphasis added)).

Gamble v. City of Seattle, __Wn. App. __, 431 P.3d 1091, 1096 (2018).

C. ISSUES PRESENTED FOR REVIEW

Whether it is of substantial public interest to the People of Washington that once an employer has accepted an employee as

qualifying for reasonable accommodations, and once those accommodations are in place, under the liberal interpretation of the WLAD, if an employer wants to end or reevaluate the status of a disability and the accommodations already in place, does not the employer have the duty to give notice to the employee that the disability and accommodations are being reevaluated before removing them without notice, and without a medical basis to do so?

D. STATEMENT OF THE CASE

In 1989, while working for Seattle City Light, Ms. Gamble suffered a back injury that required accommodations, or "modified duty," in order to return to work. *See* CP 62-67. The City's records from the time reflect that based on the injury, Dr. James Champoux opined that Gamble was "likely [to] get recurrent flare-ups of back pain associated with her heavy laboring type activities. Accordingly, it might be prudent for her to consider changing occupations." CP 63-64. The City's records state that Ms. Gamble at the time said she had "little interest in changing" from the Laborer position, as "sedentary activities are just as painful as physical labor and that actually, moving around helps reduce the pain…." CP 63.

In 1996, Gamble's doctor provided the City with information stating that Gamble had permanent restrictions that precluded her from performing the duties of Electrician Constructor Apprentice. CP 68. As a

reasonable accommodation, the City then offered to employ Gamble as an Electrical Service Representative ("ESR") in the Customer Engineering unit, which Gamble agreed to as her new assignment. CP 73-74.

Since 2007, Kelly Enright has been the Director of the Customer Care Branch at Seattle City Light. She reported to Phil West, who was a direct report to the Superintendent Jorge Carrasco. CP 32. Her branch provides "cradle to grave customer service," including "customer service engineering, meter reading, technical metering, business process improvement, all of the customer account services including collections." CP 29. Director Enright has numerous direct reports including managers over technical metering, meter reading and office services, account services, the business process improvement team, the electric service engineering group, the north service center and the south service center, the advanced metering program, and the mobile work force project. CP 37.

From 1990, until he retired in 2012, Bryan Leuschen was the manager over the Customer Engineering at the South Service Center ("SSC") supervising Electrical Service Representatives ("ESR"), and reporting to Kelly Enright for most of that time. CP 46-47, at ¶¶2-3, 7; CP 42, CP 36. "Customer Engineering provides assistance to contractors, developers, and property owners with the installation of new or rewired electrical services." CP 46, at ¶2. Mr. Leuschen states, "In a typical

account, we would do an initial intake, give electrical design advice and regulation advice to the customer as to the process, inspect the customer's installation prior to having our crews come out, and coordinate with the crews and others, including the billing department." *Id*., at ¶2.

Plaintiff worked for Mr. Leuschen as an ESR. Leuschen testifies that "Toni Gamble came to us with back problems." CP 47, at ¶8. After several years, Mr. Leuschen promoted Ms. Gamble from Senior ESR to Supervising ESR. *Id.* According to Leuschen, "Toni did her job fine. She was a hard worker. And never hesitated to take on new roles, assignments and challenges. If there was something to be done, she always did it right away. She was a quick study. She was a bit of a perfectionist. She wasn't hesitant to tackle any situation. She was good with customers." *Id.*

Mr. Leuschen was "aware that Toni Gamble had a back injury that sometimes required accommodation." CP 48, at ¶10. Leuschen testifies, "Some days her back seemed to hurt more than others," and that he authorized the following accommodations whenever they were needed:

a. Standing desk
b. Rubber floor mat
c. Tried to get her a car. We got her pads for her back.
d. We had a schedule that allowed her to drive as little as possible.
e. We gave her Wednesdays off so she would have one less travel day. I was aware that she was using Wednesdays to see doctors.
f. I let Toni work 4x10s as an accommodation for her back.

We offered it to anyone who wanted it, but it was intended to help her.

g. There was a time that Toni was working 32 hours as flex time after a surgery. Again, it was offered as an accommodation.

h. We did a little experiment to arrange for her to get computer access at home through a VPN account after surgery. I didn't approve a full 8 hours of work at home; she was able to be productive 2-4 hours a day doing phone work from home. She had to come in for supervision.

CP 48, at ¶10.

Gamble thrived under Leuschen's supervision. Her performance evaluations show that she "exceeded expectations," and an email attached to Mr. Leuschen's declaration shows that he permitted Gamble to stand in for him when he was gone reflecting "[his] trust in Toni." CP 49, ¶¶15-17.

Gamble confirmed in her interrogatory responses both the disability and the accommodations provided. CP 80-81 (under Leuschen, "I was treated with respect, I was productive, and I was given accommodations for my back injury and back pain, so that I could do my job.") and CP 92 ("I was accommodated . . . until Trout became my manager.").

After Bryan Leuschen retired, the absence of any management interest or awareness of the need to accommodate employees with disabilities became evident. Director Enright's lack of knowledge of, or involvement in, accommodation issues demonstrates a lack of interest in

the legal requirements of providing accommodations for her employees. When asked to give a "thumbnail" sketch of the requirements for accommodation, her response was, "I don't think I can give you particulars." CP 30. When asked to identify persons in human resources who work with disabled persons who need accommodation, she said, "No, I don't know the name in particular." CP 31-32. When asked if she has consulted anyone with accommodation expertise regarding any of her employees since she has been hired, she said, "I've not had to consult anyone," and confirmed she does not have to approve accommodations within her organization. CP 33. When asked what she did to apprise herself of the condition of her employees upon her hiring, she said, "I don't know the condition of people. I would speak with managers and try to get to know people on an individual basis." CP 40-41. Even so, upon her hiring, Director Enright did not review employee personnel files, accommodation files, or worker's compensation files. *Id.*

Director Enright admits to knowing Toni Gamble. CP 33-35. Despite being aware that Ms. Gamble had back problems, Enright never asked her or anyone else whether Gamble needed accommodation or had a disability. CP 42. Director Enright states she knew that Ms. Gamble had a back problem as Ms. Gamble missed work owing to her back problem, and Enright read doctors' forms regarding Ms. Gamble. CP 42-43.

Director Enright hired Dave Wernli as Manager of the Electrical Service Engineers ("ESE") in March or April 2012, with responsibility for supervising Jon Trout once he was hired. CP 38-39, 415. Wernli had a business degree, not an engineering degree, and worked for Qwest before coming to the City—he had no prior experience in power generation. CP 110. Ms. Gamble testifies that she told Wernli when he first started that her assignment to the Customer Engineering workgroup "was because of a back injury, and that [she]'d had several surgeries, and that [she]'d been accommodated ever since [she has] been in that position, from [her] prior manager." CP 556-557. When Wernli was asked if he knew that Gamble was getting accommodations, he admitted to knowing she had a standing desk, but denied knowing "what it was for, whether it was hip or back or knee or what it was." CP 112-13. At his deposition, Wernli also admitted to knowing that there was a process for determining whether a person had a disability and needed accommodation, and admitted that he did not inquire whether anyone under his charge had a disability or needed accommodation. CP 114-116.

Wernli hired Jon Trout. CP 111. Jon Trout began working for the City in August 2012. CP 124. Gamble testifies that she also told Trout that her assignment to the workgroup "was because of a back injury, and that [she]'d had several surgeries, and that [she]'d been accommodated ever

since [she has] been in that position, from [her] prior manager." CP 556-557. Trout admits that when he was hired, he reviewed files in a file cabinet in the office, which included reviewing Ms. Gamble's accommodation file ("a lot of files were very old, many years prior to when I started"), pages of which were filed in the trial court at CP 61-74 (Trout Dep. Ex. 5). *See* CP125-127. Trout knew "Gamble had authorization for family medical leave conditions and [he] remember[s] several occasions when Toni told [him] she had back pain." CP 126.

Instead of continuing the accommodations that had enabled Ms. Gamble to perform her job, Trout removed accommodations as follows:

> A standing workstation, including an adjustable keyboard tray, a tall, adjustable ergonomic chair, and a two-step support: Trout assigned [Gamble] to work from the North Service Center ("NSC") in or about mid-December 2012. The standing workstation that Leuschen had obtained for [Gamble] as an accommodation was located at the South Service Center ("SSC"). [Gamble] informed both Jon Trout and David Wernli that if [she] was to continue to be assigned to work from the NSC, [she] would need a standing workstation for the NSC, as [she] was having increased pain from [her] back condition and driving to the NSC was further aggravating [her] back. Typically, when an employee has their work location changed at the City, management will issue a work ticket for the Facilities department to move the reassigned employee's workstation and equipment. Neither Wernli nor Trout contacted Facilities on [Gamble's] behalf to put in place [her] existing accommodations at the NSC. After getting no response nor action from Jon Trout for approximately one month, [Gamble] contacted Facilities [herself] to request a relocation of [her] workstation to the NSC.

A rubber floor mat: Like the standing workstation: Trout did not provide [Gamble] any rubber mat at the NSC, where he was assigning [her]. He made no effort to make [her] workstation at the NSC similar to the 'accommodated' workplace that Leuschen had developed at the SSC, to prevent aggravation of [her] back condition. After Trout ignored [her] requests, [she] found a smaller rubber mat at the SSC that was not being used and took it to the NSC.

Meetings and work were scheduled so [she] could do less driving: Trout's assigning [Gamble] to work from the NSC meant that [she] had added driving time of up to 2 hours per day.

[She] worked "4x10s" (4 days a week, 10 hours a day): David Wernli, Jon Trout, and Kelly Enright held a meeting for which [Gamble] was not present. After the meeting, it was announced that employees would no longer be permitted to work "4x10s." When [Gamble] returned to work and learned of the change, [she] asked Jon Trout if [she] could continue to work 4x10s so that [she] could attend physical therapy and doctor appointments. That request was denied.

[Gamble] had Wednesdays off so [she] would have one less travel day. [She] also used Wednesdays to see doctors so [she] didn't have to miss work for medical appointments and it gave [her] a rest: See item … above. Trout cancelled that.

After surgery, [Gamble] was allowed to work 32 hours as flex time as an accommodation: Pre-2007 (*i.e.*, before [Gamble] began working 4x10s as an accommodation), [she] was allowed to work a 32-hour work week – less than full-time – as an accommodation for a period. [She] did not seek to revert to that schedule after Mr. Leuschen left in 2012, and instead unsuccessfully sought to maintain [her] 4x10s schedule. In June 2013, Trout did not allow [Gamble] to return to part-time work from [her] injury in June of 2013 on a trial basis, in accord with [her] doctor's request. Trout stated that he did not have any work for [Gamble].

> [Gamble] was allowed to work 2-4 hours a day doing phone work from home: Trout would not approve [Gamble] to work from home or to telecommute.
>
> [Gamble] was allowed to take time off or adjust my schedule, for physical therapy and doctor appointments: [Gamble] know[s] of at least two instances when [she] asked Trout to let [her] adjust [her] schedule to be able to attend appointments for medical treatment or PT and was denied. There may have been more. After Trout denied these requests, [Gamble] was discouraged from requesting any adjustments to [her] schedule.

CP 16-18, ¶¶2-10.

Trout taking away Gamble's accommodations required her to spend more time driving, and increased her back pain. CP 18, at ¶12. Gamble testified, "I did my job as I was instructed to do to the best of my ability, and I just dealt with the pain at work. I took more pain medication than I needed to, just to get through the day. Of course, I was limited to not driving while I was doing that, so there were days that I stayed in the office days -- two or three days at a time, because there was no real need at that particular time to go to the field. But, again, all that sitting aggravated it more, so it was -- it was just intolerable…." CP 554. "When [Gamble] had to travel more, [her] back pain worsened, and [she] … told that to both [her] doctor and [her] manager." CP 549; *accord* CP 569 (testifying the drive to North Service Center, where Trout had reassigned Gamble to work, "tended to increase [her] back pain").

Gamble complained to Trout and Wernli about her back pain and her need for a standing workstation at the North Service Center—where Gamble was reassigned to work—owing to the fact that "[her] back pain was increasing." *See* CP 555-58; CP 565.

Gamble testified that her back pain "was making it hard to even concentrate," CP 553, and that it "made [her] miss work." CP 552.

Gamble's physician, Dr. Elizabeth Wise, who has treated Ms. Gamble for back pain since 1989, testified in her declaration that she was "advised that until August 2012, Ms. Gamble received various accommodations for her back pain at her job with the City of Seattle," but that "[n]o one from the City of Seattle ever contacted [her] to inquire about accommodating Ms. Gamble. There was no interactive process involving [her]. If the City had called, [she] would have recommended and supported the accommodations" that Mr. Leuschen provided to Ms. Gamble, which "would make it easier for her to perform her job." CP 579-80.

In addition to revoking the accommodations earlier authorized by Bryan Leuschen, Mr. Trout drafted a performance evaluation that criticized Ms. Gamble form missing too much work, even though the work missed was taken pursuant to authorized leave or FMLA. CP 18, ¶11; CP 141 (Trout draft of Gamble performance evaluation). Trout marked Ms.

Gamble as "needs improvements," indicating that, "Toni's reliability is intermittent and her productivity is significantly hindered. Based on historical attendance records, I see that Toni has been absent from work far more than the average employee in her position." *Id*. Trout obtained Gamble's attendance records going back three years. CP 128-29. After that, he gave her a performance evaluation that reflected his concern that her "pattern of absences … prevented her from getting her work done." CP 137. Trout noted in the evaluation that, over the past three years, Ms. Gamble had been "absent from work a total of 3,682 hours, which is about 59% of a normal full-time work schedule." CP 423. Trout's criticism of Gamble's performance failed to account for the circumstances surrounding her time off; she was off-duty for the 2010 year due to her on the job injury. *Id*. The performance evaluation outlined her absences, and the first draft marked her down for missing work, even though the missed work was authorized. *See* CP 141; CP 18.

E. ARGUMENT

1. Standard of Review

An appellate court reviews "a summary judgment order *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party." King v. Rice, 146 Wn. App. 662, 668, 191 P.3d 946 (2008).

"Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When making this determination, we consider all facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party." Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014). "In discrimination cases, summary judgment is often inappropriate because the WLAD 'mandates liberal construction' and the evidence 'will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury.'" Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 30, 244 P.3d 438 (2010) (citations omitted); *accord* Harrell v. Washington State ex rel. Dep't of Soc. Health Servs., 170 Wn. App. 386, 398, 285 P.3d 159 (2012) ("Reasonable accommodation claims often involve disputed facts best left for a jury to decide.").

2. The WLAD Provides for Liberal Interpretation, and the Narrow Construction Given the Law by the Court of Appeals Raises an Issue of Substantial Public Interest

> The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of . . . sex [is] a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010; Martini v. Boeing Co., 137 Wn.2d 357, 376–77, 971 P.2d 45 (1999) (the law against discrimination provides a remedy for the

employee who had been discriminated against and the liberal interpretation provision of the statute operates to protect that remedy). Marquis v. City of Spokane, 130 Wn.2d 97, 112, 922 P.2d 43 (1996) (RCW 49.60.030(1) is broadly stated, is to be liberally construed and, as part of the law against discrimination, is meant to prevent and eliminate discrimination in the State of Washington).

The Court of Appeals acknowledged that "RCW 49.60.040(7)(d) applies '[o]nly for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process.'" Gamble, 431 P.3d at 1096. The court then turns the statue on its head and proceeds to treat Ms. Gamble's fixed accommodations as being temporary or transient once a new manager took over and ignored these fixed accommodations, which had been in place for years.

The court relied on Conneen v. MBNA Am. Bank, N.A., which is a 1996 Third Circuit case analyzing the ADA, in which that court found:

> Although MBNA clearly knew of Conneen's allegedly disabling morning sedation, it had every reason to believe that the condition no longer existed at the time of the June 1998 meeting, and Conneen did nothing to inform MBNA that it did. In fact, through words and deeds she confirmed and corroborated MBNA's conclusion that it did not.

Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 331 (3rd Cir. 2003). Here, the City cannot argue that it's managers "had every reason to believe

that the condition no longer existed." They knew she was disabled, but ignored the accommodations already in place.

No parallel exists between this case and Conneen. This Court must fix what the Court of Appeals has broken.

The Court must accept review to clarify the burdens once an employer recognizes that an employee has a disability and implements accommodations. To encourage stability in employment, and to ensure that a subsequent manager who does not wish to uphold the requirements of the WLAD cannot arbitrarily take away what has been carefully provided so that an employee may remain a productive citizen, the Court should categorically hold that RCW 49.60.040(7)(d) is limited by its own language, and only applies before an accommodation is implemented to a disabled employee. After that, the employee may enjoy the accommodation provided until such time as the employee and employer agree that those accommodations are not needed, or if an employer gives notice that questions either the status of the disability or the effectiveness of the accommodation. At that time, the employer may reevaluate under RCW 49.60.040(7)(d). But no employer may simply rip existing accommodations from an employee as was done here, without notice, and without a basis to do so.

F. CONCLUSION

For all of the foregoing reasons, the Court should grant review.

The order on the City's cross-motion for summary judgment should be reversed and the case remanded for trial on the failure to accommodate claim.

Respectfully submitted this 22nd day of January, 2019.

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DECLARATION OF SERVICE

Mark Rose states and declares as follows:

On January 22, 2019, I caused to be delivered a copy of the Petition for Review via the Court's electronic delivery service to:

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TONI GAMBLE, Appellant, v. CITY OF SEATTLE, a municipal corporation, Respondent.	No. 76876-0-I DIVISION ONE PUBLISHED OPINION FILED: December 24, 2018

MANN, A.C.J. — Toni Gamble sued Seattle City Light (City Light) alleging that it failed to reasonably accommodate her disability in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. The trial court granted summary judgment in favor of City Light after concluding that Gamble failed to establish a prima facie case for a failure to reasonably accommodate. We affirm the trial court.

I.

Gamble began working for the City of Seattle (City) as a laborer in 1987. In 1989, Gamble suffered a work related back injury. By 1996, the injury had worsened to where Gamble could no longer work as a laborer. Gamble transferred to a position as an Electrical Service Representative (representative) with City Light, a public utility and

department of the City. As a representative, Gamble provided customer service support to City Light's customers while working out of City Light's South Service Center in the SODO/Georgetown area.

To accommodate her back injury, Gamble's then manager, Bryan Leuschen, provided her with a standing desk, rubber floor mat, and padded seat cushions for her work vehicle. Leuschen also allowed Gamble to work a "four ten" schedule,[1] which allowed her to have every Wednesday off, and allowed her to work a part time flex schedule after she underwent an unrelated surgery.[2]

In 2012, Leuschen retired and Jon Trout became Gamble's permanent supervisor. From August through December 2012, Trout occasionally asked Gamble to work out of the City Light's North Service Center. Then, in December 2012, Trout asked Gamble to assist an overburdened senior representative by covering Seattle's Queen Anne and Magnolia neighborhoods, out of the North Center.

On February 26, 2013, Gamble was almost in a motor vehicle collision while driving a City Light vehicle. The event caused her to hurt her shoulder and aggravate her back. As a result, Gamble went on medical leave from February 27, 2013 through July 1, 2013.

In 2015, Gamble sued City Light alleging, among other things, that it had failed to reasonably accommodate her disability in violation of the WLAD. Gamble alleged that City Light failed to accommodate her by removing her standing work station, and by

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[1] A four ten schedule allows an employee to work four days per week with ten hour shifts each day.

[2] While this schedule benefitted Gamble's medical condition it is not clear if it was officially offered to her as an accommodation because everyone who worked for Gamble's unit was allowed to work four tens.

failing to provide her with a rubber mat at the North Center. Gamble also alleged that meetings and work duties were scheduled at times and places that required her to drive more than was necessary. Further, Gamble alleged that after her 2013 medical leave City Light failed to allow her to work a four ten schedule, prevented her from returning to work on a part time flex schedule, and refused to let her work from home. Finally, Gamble alleged that City Light refused to let her switch her day off on one particular incident so that she could attend a doctor's appointment.

Before trial, Gamble moved for summary judgment on her failure to accommodate claim. The City responded with a cross motion for summary judgment. The trial court denied Gamble's motion and granted the City's motion. Gamble's other claims then went to a jury, who returned a verdict in favor of the City on all counts. Gamble appeals the trial court's grant of the City's motion for summary judgment, denial of her motion for summary judgment, and denial of her motion for reconsideration.

II.

We review decisions on summary judgment de novo. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003). When reviewing a summary judgment decision, we "engage[] in the same inquiry as the trial court." Hines v. Todd Pacific Shipyards Corp., 127 Wn. App. 356, 366, 112 P.3d 522 (2005). Summary judgment is appropriate if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Hines, 127 Wn. App. at 366.

Claims arising under the WLAD are typically inappropriate for resolution at summary judgment "because the WLAD 'mandates liberal construction' and the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury." Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 27, 244 P.3d 438 (2010) (citing RCW 49.60.020). We will nevertheless "grant summary judgment when the plaintiff fails to raise a genuine issue of fact on one or more prima facie elements." Johnson, 159 Wn. App. at 27.

The WLAD prohibits an employer from discriminating against any person because of "the presence of any sensory, mental, or physical disability[,]" RCW 49.60.180(3), and provides a cause of action "when the employer fails to take steps reasonably necessary to accommodate an employee's" disability. Johnson, 159 Wn. App. at 27. The WLAD defines disability as "the presence of a sensory, mental, or physical impairment that: (i) is medically cognizable . . . or (ii) exists as a record or history; or (iii) is perceived to exist." RCW 49.60.040(7)(a).

To set out a prima facie case for a failure to reasonably accommodate a disability, the plaintiff must show that (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job, and either (a) the impairment had a substantially limiting effect on the individual's ability to perform the job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment or (b) the employee put the employer on notice of the impairment's existence and medical documentation established a reasonable likelihood that engaging in the job functions

without an accommodation would create a substantially limiting effect; (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. See Davis v. Microsoft Corp., 149 Wn.2d 521, 532, 70 P.3d 126 (2003); Johnson, 159 Wn. App. at 28; RCW 49.60.040(7)(d).

Employers have an obligation to accommodate an employee's disability unless it "would impose an undue hardship on the conduct of the employer's business." Doe v. Boeing Co., 121 Wn.2d 8, 18, 846 P.2d 531 (1993). This duty "is limited to those steps reasonably necessary to enable the employee to perform his or her job." Doe, 121 Wn.2d at 18. And this duty "does not arise until the employer is aware of the . . . disability and physical limitations." Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995). The onus is on the employee to "giv[e] the employer notice of the disability." Goodman, 127 Wn.2d at 408 (internal citations removed). The employee also "retains a duty to cooperate with the employer's efforts. . . . [The WLAD] thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best" possible results. Goodman, 127 Wn.2d at 408-09 (internal citations removed).

III.

Gamble has a qualifying disability under the WLAD. Gamble's back injury required her to change jobs in 1996 and required City Light to provide her with

accommodations. Therefore, her back injury was a physical impairment that was both medically cognizable and existed as a record or history. RCW 49.60.040(7)(a)(i)-(ii).

But to establish a prima facie case for a failure to accommodate, Gamble has to show more than just a qualifying disability. She also has to show that her disability substantially limited her ability to perform her job,[3] that she notified City Light of her need for accommodations, and that upon notice City Light failed to affirmatively adopt reasonable accommodations. RCW 49.60.040(7)(d); Davis, 149 Wn.2d at 532; Johnson, 159 Wn. App. at 28. It is the latter two of these requirements that are lacking. Even if we assume that Gamble's back injury had a substantially limiting effect, for each of City Light's alleged failures, Gamble either failed to notify City Light of her need for updated accommodations, or City Light reasonably accommodated her needs.

A.

City Light appropriately accommodated Gamble's request for a standing work station. When Gamble was temporarily transferred to the North Center she told Trout that she required a standing work station. While Trout did not respond to her request with the speed that Gamble desired, she contacted the facilities department herself and City Light provided her a standing work station.[4]

City Light also appropriately accommodated Gamble's request for a part-time schedule after returning from medical leave. On Monday June 24, 2013, Gamble contacted City Light and asked if she could return to work part time that Tuesday, June

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[3] Or alternatively, that medical documentation established a reasonable likelihood that engaging in her job without an accommodation would create a substantially limiting effect. RCW 49.60.040(7)(d)(ii).

[4] We decline to address whether the month delay in Gamble receiving the standing work station, in and of itself, amounted to a WLAD violation because the parties did not brief this issue. Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (We "will not consider an inadequately briefed argument.")

25, and Thursday, June 27, and then full time the following week. Trout replied that he did not have any work for her the next day, but that he would "work[] with the team . . . to create a modified work schedule for [Gamble] that will meet [her] physical restrictions."

While Gamble alleges that this was a failure to reasonably accommodate her disability, the WLAD "does not require an employer to offer the employee the precise accommodation he or she requests." Doe, 121 Wn.2d at 20. It was unreasonable for Gamble to contact City Light after being on medical leave for months and expect to be accommodated the next day. Trout did not deny her request for accommodation but instead informed her that he would be able to accommodate her request the next week. Gamble chose to return to work full time the following week, and was able to do so without incident. This was not a failure to accommodate.

B.

For the majority of Gamble's allegations, she failed to properly put City Light on notice of her need for accommodations. Gamble argues that because City Light and Leuschen were on notice of her disability since 1996, that this notice was imputed to Trout in 2012. See Kimbro v. Atl. Richfield Co., 998 F.2d 869, 876 (9th Cir. 1989) (finding the employer to be on constructive notice of the employee's disability when the employee's manager had actual knowledge of the disability). We agree. But here the relevant issue is not whether City Light was on notice of Gamble's disability but rather whether City Light was on notice that her previous accommodations were no longer reasonably accommodating her disability. City Light's knowledge of Gamble's disability

does not relieve Gamble of her duty to inform City Light that her accommodations were lacking.

> An employer must be able to ascertain whether its efforts at accommodation have been effective in order to determine whether more is required to discharge its duty. The employee therefore has a duty to communicate to the employer whether the accommodation was effective. This duty flows from the mutual obligations of the interactive process. To hold otherwise would be inequitable to the employer and would undercut the statute's goal of keeping the employee with the impairment on the job.

Frisino v. Seattle School Dist. No. 1, 160 Wn. App. 765, 783, 249 P.3d 1044 (2011) (internal citation omitted) (citing Goodman, 127 Wn.2d at 408-09). The WLAD envisions an exchange between the employer and the employee to ensure that the employee's needs are properly addressed. See Goodman, 127 Wn.2d at 408 ("Reasonable accommodation [is] an exchange between employer and employee").

At oral argument, Gamble's counsel asserted that the exchange between employer and employee is only necessary before an individual is determined to have a qualifying disability. RCW 49.06.040(7)(d) provides "[o]nly for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process." But just because an interactive process is required when determining whether a qualifying disability exists, does not mean that an interactive process is not also required for determining the reasonableness of accommodations. Gamble offers no support for the proposition that an employee never has to go back to the employer with their ongoing concerns, and our decision in Frisino counsels otherwise. See 160 Wn. App. at 779 ("[T]he best way for the employer and employee to determine a reasonable accommodation [(not a qualifying disability)] is through a flexible, interactive process." (emphasis added)).

Here, Gamble failed to inform City Light that she required a rubber mat at the North Service Center. In fact, she testified that she never asked anyone for a rubber mat because "a little floor mat was not worth bothering anyone about." Gamble also never discussed with Trout how her work schedule was affecting her back. To the contrary, she testified that on the days that she was at work she was never forced to miss a work requirement because of her back.

Similarly, Gamble never asked for permission to work from home as an accommodation. Gamble testified at her deposition that she asked Trout permission to work from home in order to have "more quiet time and private time to do" her work.[5] And Leuschen only allowed Gamble to work from home occasionally. He explained, "We did a little experiment . . . I didn't approve a full 8 hours of work at home; she was able to be productive for 2-4 hours [and] had to come in for supervision." The trial court noted: "She was never told she could work at home. She was told she could work on occasion. . . but her job is a face-to-face job." Therefore, Gamble did not put City Light on notice that she needed to work from home as an accommodation for her disability.

Gamble alleged that City Light failed to allow her to adjust her schedule for a doctor's appointment. Gamble asked Trout if she could switch her day off from Wednesday, October 3 to Friday, October 5, but did not specify this was because of a doctor's appointment. Trout asked Gamble to keep her regular day off because a training had previously been scheduled for October 5 that Gamble, as the training supervisor, was supposed to lead. One of Gamble's duties as a supervising representative includes "planning and directing employee training." Gamble agreed to

[5] Gamble also asked Trout for permission to work from home once because her mule was sick.

keep her scheduled day off, but then took a sick day on October 5 anyway. Gamble never notified City Light that she required the schedule change to accommodate her disability or because she had a doctor's appointment that day, and she took October 5th off in any event.

C.

Gamble's allegation that City Light failed to reasonably accommodate her by preventing her from working a four ten schedule requires a separate analysis. Before Gamble left on medical leave, Gamble was allowed to work a four ten schedule. When viewed in the light most favorable to Gamble, this schedule was offered to her as an accommodation. While Gamble was on leave, City Light changed its policy and no longer allowed anyone to work four tens. Gamble's four ten schedule was the only accommodation that was at least arguably removed. However, neither Gamble nor City Light discussed the sufficiency of the new schedule or whether it reasonably accommodated Gamble. Therefore, the question becomes whose duty it was to discuss the sufficiency of Gamble's new schedule with the other.

In Frisino, this court analyzed whether a school district's trial and error process of finding appropriate accommodation was reasonable. 160 Wn. App. at 779. The court noted that the employee had the burden to communicate with the employer because "determining whether the accommodation[s] w[ere] effective turned on information in [the employee's] control." Frisino, 160 Wn. App. at 783.

Here, upon returning from leave, Gamble requested to work the new schedule which allowed for one day off every two weeks: "I understand that we are no longer working 4/10's so I would like the [new] schedule with alternating Wednesdays off." City

Light granted her request. Therefore, as far as City Light knew, Gamble's new schedule was precisely the accommodation that she desired. Had this schedule been insufficient that was information solely in Gamble's control.

In Conneen v. MBNA America Bank, N.A., the Third Circuit analyzed a similar situation under the Americans with Disabilities Act (ADA). 334 F.3d 319 (3rd Cir. 2003). There, Conneen suffered from a disability that made it difficult for her to arrive at work on time, and MBNA accommodated her by allowing her to work an adjusted schedule. MBNA later came under the impression that Conneen no longer required her accommodation. Upon the removal of her accommodation, Conneen did not inform MBNA that her disability remained or that she still require the adjusted schedule. See Conneen, 334 F.3d at 321-24. In affirming the trial court's grant of summary judgment in favor of MBNA, the Third Circuit noted that "neither the law nor common sense can demand clairvoyance of an employer." Conneen, 334 F.3d at 331.

Conneen is similar to Gamble's situation. In Conneen, the employee was previously accommodated but when her accommodations were removed she failed to inform her employer of an issue. Conneen, 334 F.3d at 321. Similarly, here, Gamble's four ten accommodation was removed but Gamble never told City Light that this was an issue. In Conneen, MBNA "had every reason to believe that the [disability] no longer existed . . . and [Conneen] did nothing to inform [MBNA] that it did." Conneen, 334 F.3d at 331. Further, "once [MBNA] threatened to withdraw the accommodation, [Conneen] remained silent. [She] never contacted [her doctor], and never notified [MBNA] of her condition." Conneen, 334 F.3d at 333. Similarly here, City Light had every reason to

believe that the new schedule was reasonably accommodating Gamble and she did not put City Light on notice that it was insufficient.

The burden fell to Gamble to inform City Light that she required a four ten schedule as an accommodation for her disability. Not only did Gamble fail to inform City Light that her new schedule was negatively impacting her disability, but she specifically requested the new schedule. Therefore, City Light did not violate the WLAD by failing to provide Gamble with a four ten schedule.

We affirm.

Mann, ACJ

WE CONCUR:

Becker, J.

1. I, Bryan Leuschen, residing at 21120 North Circle Cliffs Drive, Surprise, AZ 85387, make the following statement based on personal knowledge.

2. I was employed with the City of Seattle from 1971 to 2012. My final job was as Manager of Customer Engineering at the South Service Center ("SSC"). Customer Engineering provides assistance to contractors, developers, and property owners with the installation of new or rewired electrical services. In a typical account, we would do an initial intake, give electrical design advice and regulation advice to the customer as to the process, inspect the customer's installation prior to having our crews come out, and coordinate with the crews and others, including the billing department. I was also responsible for the cashier window at the SSC, and some senior meter readers. We also initiated new customer accounts. Our primary function was helping customers with new construction.

3. I started with the City as a Meter Reader; then became an ESR; Senior ESR; Supervising ESR 1980-1990; and a Manager in 1990, a position I held for about 22 years until my retirement. As manager, I supervised ESRs and clerical staff.

4. Being an ESR or ESE requires an aptitude for math, design, and understanding diagrams. Those skills are all interlaced with having good customer relation skills and good people skills. The positions require practical knowledge of electrical systems. There is very little about those two jobs that cannot be learned through the on-the-job process.

5. As to my education, I had a few years in civil engineering; took an advanced management program at the University of Washington, which I completed in 1990; and attended Washington State University in 1969, and 1970. I also

completed an in-house 2-year engineering specialist course and took a number of other seminars and courses (technical and management) over the years.

6. At one point, I worked out of class for several months as Director of South Electrical Services, while that position was being filled. Dave Smith was eventually hired for that position, and after that I sometimes worked out of class when he was gone for more than a few days (rotating with other managers), Later there was a reorganization, and Dave's position was eliminated.

7. I was already a manager when Kelly Enright was hired, and I reported to her until my retirement. I was accepted as a manager, and never felt that not having a degree hurt my career.

8. Toni Gamble came to us with back problems. She came from our north office (and the crews before that). After several years I promoted her to Supervising ESR from Senior ESR. Toni did her job fine. She was a hard worker. And never hesitated to take on new roles , assignments and challenges. If there was something to be done, she always did it right away. She was a quick study. She was a bit of a perfectionist. She wasn't hesitant to tackle any situation. She was good with customers.

9. We had a plan for her. We got approval for a fourth supervisor position based largely on our needs for a dedicated training role due to the many new employees we were getting and anticipating getting in the future due to projected retirements etc.. She worked under my supervision until I temporarily transferred to manage the streetlight unit (while indirectly continuing to assist in the management of my original group). Jon Trout came along about the time I left.

When David Wernli came in prior to Jon Trout, I reported to him. I got along well with him and helped him learn many of our practices. He didn't know the specific workings of the electric utility business and how we handled things, hut he also learned quick and handled customer service very well.

10. I am aware that Toni Gamble had a back injury that sometimes required accommodation. Some days her back seemed to hurt more than others. I authorized the following accommodations whenever they were needed.

a. Standing desk
b. Rubber floor mat
c. Tried to get her a car. We got her pads for her back.
d. We had a schedule that allowed her to drive as little as possible.
e. We gave her Wednesdays off so she would have one less travel day. I was aware that she was using Wednesdays to see doctors.
f. I let Toni work 4x10s as an accommodation for her back. We offered it to anyone who wanted it, but it was intended to help her.
g. There was a time that Toni was working 32 hours as flex time after a surgery. Again, it was offered as an accommodation.
h. We did a little experiment to arrange for her to get computer access at home through a VPN account after surgery. I didn't approve a full 8 hours of work at home; she was able to be productive 2-4 hours a day doing phone work from home. She had to come in for supervision.

11. To get the equipment and the desk, we did paperwork, and we got an ergonomic specialist to come out, review her disability, and decide what she needed.

12. We had an ergonomic specialist, but we didn't have anyone to go to other than human resources. I recall seeing doctor's paperwork early on for Toni. Once I realized she had a legitimate disability, HR instructed me to provide any necessary accommodation. , I took that to mean that it was my job to accommodate her as best as I could, to help her do her job.

13. Toni never took unauthorized time off. I never felt that she wasn't pulling her weight. Toni did exactly what we wanted her to do.

14. We started to make her into a supervisory training roll as planned. That's when Margy Jones came in as my direct supervisor/manager. She had other plans for my positions, and started transferring, cutting and reassigning positions and altering my budget. So the training role seemed to be put on a low priority. I began adding a few duties to Toni's daily workload to fill in her day... including more field responsibilities and staff for her to supervise, but with the training role suspended she still may have had spare time. If she didn't have enough to do it was not her fault and she was always good about requesting more work to help others in the unit.

15. Exhibit 1 is a true and correct copy of Toni's 2007 performance evaluation as a second-year Supervising Electric Service Representative. I completed this. I noted that her overall rating was, "exceeded expectations." I recognize the signatures at the end as being mine, Toni's and Kelly Enright's signatures. I recall that Toni was unrelenting in the rules and regulations and had a high standard in her expectations of others she supervised. She was popular with the customers.

16. Exhibit 2 is a true and correct copy of Toni's 2008 performance evaluation as a third-year Supervising Electric Service Representative. I completed this one as well. Again, her overall rating was, "exceeded expectations." I recognize the signatures at the end as being mine, Toni's and Margy Jones' signatures.

17. Exhibit 3 is a true and correct copy of an August 25, 2008 email I sent out announcing that Toni would be standing in for me while I was gone. It reflected my trust in Toni. She did a good job.

18. ESE and ESR are not that different. Jackie Smith went from senior ESR to the ESE position and did just fine. The Electrical Services customers are ones that have services of a larger Ampacity than the typical Senior ESR job. Senior ESRs often did the same size jobs and successfully handled these larger services. When an ESE has a complicated engineering issue, they seldom solve it themselves, instead consulting with the distribution design engineers or Network design Engineers.; And as for the actual electrical design and crew work orders they are required to go an Electrical engineer in the Distribution Design Engineering unit or Network design unit (same as a Senior ESR in my unit does).

I declare under penalty of perjury under the laws of the State of Washington, and under the laws of the State of Arizona, that the foregoing is true and correct to the best of my knowledge.

Dated this 5th day of April, 2016, in Surprise, AZ.

Bryan Leuschen

THE SHERIDAN LAW FIRM, P.S.

January 22, 2019 - 12:52 PM

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