FILED

SEP 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COA No. 303551

IN THE COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

LISA BUHR,

Appellant,

v.

STEWART TITLE OF SPOKANE, LLC, and STEWART TITLE COMPANY,

Respondents.

APPELLANT'S OPENING BRIEF

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Attorney for Appellant

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2. The trial court erred in failing to instruct the jury on the necessity of reasonable accommodation. *CP 2272, 2274; Court's Instruction No. 8, 8a and 9.*

3. The court abused its discretion in terminating Lisa Buhr's right to discovery when discovery had just initiated. *CP 101, CP 260-61.*

4. The court abused its discretion in sanctioning Plaintiffs' counsel for failing to provide supplemental discovery to the Defendant after its order terminating discovery. *CP 2301-03.*

II. ISSUES PRESENTED FOR REVIEW.

1. Employee Lisa Buhr's disability required intermittent absences, but she remained capable of a productive 40-hour work week. Her Defendant employer Stewart Title acknowledged the disability, but refused to accommodate it. Was Stewart entitled to summary judgment dismissing Buhr's claim for failure to accommodate her disability?

2. Buhr intended to show the jury that she could perform her job with reasonable accommodation. But the trial court excluded the concept of reasonable accommodation from trial. The trial court instructed the jury that if Buhr was treated the same as other employees, no discrimination existed. Is Buhr entitled to retrial?

3. Discovery was just being initiated by both parties, and Stewart Title had failed to answer Buhr's requests for production. Buhr had been able to set only two depositions. The trial court terminated Buhr's access to discovery—seven months before trial—because Stewart Title didn't agree that Buhr's discovery could continue. Is Buhr entitled to remand for discovery and retrial?

4. After terminating Buhr's access to discovery, the trial court sanctioned Buhr's counsel for failing to provide supplemental discovery to Stewart Title. No supplemental discovery existed. Is Buhr's counsel entitled to have the sanctions vacated?

III. SUMMARY OF APPEAL

Disability discrimination in any form is premised upon the concept of reasonable accommodation—the duty of an employer to provide reasonable accommodation, and the right of a disabled

employee to show they could perform the essential functions of their job with reasonable accommodation. Here, the trial court refused to guide the jury or instruct on the element of accommodation. When the defendant employer, Stewart Title, argued it had no duty to accommodate plaintiff employee Lisa Buhr's disability, the trial court granted Stewart summary judgment dismissal of Buhr's claim for failure to accommodate. When Stewart argued that Buhr had no right to show she could perform her job with reasonable accommodation, the trial court removed the accommodation element from the jury's consideration; it instructed the jury that if the disabled Buhr was treated exactly the same as any other employee, disability discrimination did not exist. These court's rulings and its instructions to the jury are contrary to law, and require reversal and remand for retrial.

Even before these rulings came to pass, the trial court had preemptively denied Buhr a fair trial. The trial court used its judicial discretion to deny Buhr her entitlement to access to civil rules discovery just as discovery was being initiated, and seven months before trial. It continued to enforce this order on Buhr, but it conversely sanctioned Buhr's counsel for not providing supplemental

discovery to Stewart, and granted Stewart discovery through trial, including an expert deposition and record production. Buhr was denied a fair trial, and her counsel improperly sanctioned for nonexistent discovery violations. This matter should be reversed and remanded for proper discovery and retrial.

IV. STATEMENT OF THE CASE.

Plaintiff Lisa Buhr filed claims for disability discrimination against her former employer, Defendant Stewart Title of Spokane, LLC, under RCW 49.60.180(2)(3) and 49.60.030(1)(a). *CP 20.* She alleged failure to accommodate and disparate treatment, including wrongful discharge. *CP 28-29.* Stewart acknowledged Buhr was disabled, and that it knew of her disabilities. *CP 40: 12-15;* CP 307:8-10.[1] Buhr also filed wage claims, and claims under FMLA. *CP 29-32.*

Discovery.

The trial court first terminated Buhr's right to obtain discovery seven months before her August 2011 trial. *CP 101.* Prior to the first January 10, 2011 discovery cut-off, Buhr moved to continue trial and to

[1] Buhr has sight disabilities and suffers from intermittent migraine headaches. *CP 23, para. 5.10 - 5.12; CP 40: 12-24.*

push back the discovery cutoff with it. *CP 88-89.* Discovery had been delayed, and depositions were just about to commence. *Id.* The parties had agreed to a trial date in August 2011—eight months away. *CP 88.* Stewart had gone through a myriad of counsel changes.[2] The parties had set only three depositions of material witnesses—all of them after the discovery cut-off. *CP 89: 7-10.* Completion of discovery had been problematic, and only two of the "primary participant" defendants had been set for depositions. *RP, Feb. 11, 2011, p. 6: 13-16.*

On Feb. 11, 2011, the trial court continued the trial date to August 8, 2011. *CP 101.* It then terminated Buhr's ability to conduct discovery effective January 10, 2011, except for the two primary depositions to which Stewart had agreed. *CP 101, 102.* The court held, "[C]ounsel are not in agreement relative to the discovery cut-offs." *CP 101.*

Following her allowed two depositions, Buhr moved for limited, but critical, discovery. *CP 104-107 (motion).* Stewart had not produced initially requested alarm system records, employee time

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[2] *Including CP 35 (Willert); CP 55 (Hesler); CP 58 (Stuart); CP 67 (King).*

cards, or even evidence of Ms. Buhr's wages for dates in question. *CP 105-06*. Stewart had instead responded to interrogatory and production requests with objections. *CP 149-50; and see CP 160-63 and CP 174-76 (both Defendants' interrogatory answers objecting to production on relevance grounds)*. Buhr argued such responses were improper, and sanctionable. *CP 149: 21-26*. She argued that disparate treatment and pretext discharge claims required comparisons between three categories of evidence—alarm records, time cards, and PIN numbers—to show systemic processes, and Stewart was refusing Buhr this evidence. *CP 104-07; CP 148-54*. The trial court denied Buhr's request for this specific discovery. *CP 261*. It self-selected one limited part of one of Buhr's requests relative to "pin numbers in alarm records," and ordered Stewart to provide only that information. *CP 261*. It denied her request for access to discovery. It ignored its earlier February rationale terminating Buhr's discovery because the parties "did not agree" to the discovery cut-off, and now concluded that Buhr had "agreed" to the early cutoff in January. *CP 260*.[3] Buhr could not obtain the initial and

[3] It found that defense counsel's declaration was "initialed by Ms. Schultz and provided the discovery cut-off would be closed." *CP 260*.

necessary evidence Stewart had refused her.

Stewart moved for summary judgment—the trial court dismissed Buhr's claim for failure to accommodate her disability. *CP 1966: 1-10.* It also dismissed her Washington Leave Act and public policy claims. *CP 1966.*

Trial commenced on Buhr's remaining disparate treatment/wrongful discharge disability discrimination claims and remaining wage claims on August 8, 2011. Stewart President Anthony Carollo acknowledged Stewart was starting a new office in Spokane, and that he contacted Buhr to offer her a job because of Buhr's reputation in the title industry, and her ongoing clientele. *RP 148: 18-21; RP 156: 3-16.* [4] Carollo offered Buhr a position as a full-time associate, i.e., work of at least 40 hours per week. *RP 209: 11 – RP 210: 2.* Carollo knew that Buhr would be consistently absent from work during the day due to migraines associated with computer strain and having only a single eye. *RP 212: 15-21; RP 227: 2-20.* But in

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[4] Stewart employee Christianne Reid confirmed that if a particular employee is known in the industry, if those employees move, the clients will go with them. *RP 641: 10-14.* Buhr had one of those types of followings. *RP 641: 22-25.* Buhr was "very well known in the industry," and had a following of clients. *RP 637: 21-25.*

spite of such absences, Buhr brought quality clients, commercial real estate companies, and top producers to Stewart Title. *RP 1387: 2-5; RP 235: 6 – RP 236.* Buhr was productive, and was considered a good employee; she got her work done. *RP 226: 13-18.* Per Carollo, Buhr's absences never impacted her work performance, and she never fell behind with her clients. *RP 227: 2 – RP 228: 25.*

But Buhr's permanent medical condition resulted in ongoing absences during 8 a.m. - 5 p.m. work hours (as discussed at the time of her hire), and Buhr's absences were logged by Stewart as sick or vacation leave. *RP 1370-71.* Once Buhr used up her leave time, it was exhausted. *RP 1372: 14-17.* This was the policy for everyone else, and it was the policy for Buhr. *RP 1372: 18 – RP 1373: 1.* Buhr would necessarily run out of both sick and vacation time. *RP 261: 10-25; RP 264: 1-20.* Once Buhr's sick and vacation time were exhausted, if she didn't come in to work, she would not get paid, "as does any employee." *RP 264: 16-20.* Carollo testified: "That's the way it is with any employee." *RP 265: 18.*[5]

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[5] Buhr knew of no one else at Stewart with a medical condition that would necessarily result in absences. *RP 1373: 9-24.*

Carollo testified he made no effort to accommodate Buhr, or to discuss accommodation with Buhr, because "[T]he position doesn't allow that...," and "there was no ability to accommodate in that position." *RP 266: 11-20.* Carollo made no effort to talk with Buhr about working evenings, or putting her in a different position. If Buhr was out during the week, her work would be delegated to other employees. *RP 267: 22 – RP 268: 5.*

But from the outset of her employment, Buhr had always performed her work after hours and on weekends. *RP 1235: 19 – RP 1236: 1; RP 1246: 19 – RP 1247: 10.* Carollo acknowledged Buhr's work was performed primarily through computerized programs using microfilm, microfiche, and databases. *RP 162: 8 – 163: 16.* Employees often worked at night on transactions for the following day. *RP 168: 25 – RP 169: 2.* Title customers themselves could work around the clock. *RP 166: 25 – RP 167: 1.* Stewart staff could get calls at any point, including on weekends. *RP 167: 8-13; RP 172: 13-20.* Employees thus had 24-hour/7 day-a-week access to the building. *RP 172; 21-23.* Stewart simply required Buhr to use up her leave time if she were not in the office during the day. *See e.g. RP 264:16-20.*

By July 2007, Buhr's sick and vacation time were nearly exhausted. *RP 1260: 15-23.* Carollo required Buhr to fill out FMLA leave paperwork. *RP 1260: 10-12.*

In September 2007, Carollo now told Buhr that if she was not in the office between 8:00 a.m. – 5:00 p.m., she could not make up her time after-hours. *RP 1269: 3-8; RP 1270: 5-19.* If Buhr worked less than a 40-hour work week, time would be deducted from her salary. *RP 210: 15-17.* By September, Buhr's absences had not only used up her leave, but she was struggling with a new medication, and needed to make up time to "get in as close to 40-hours as I could." *RP 1270: 7-13.* Buhr asked Carollo for permission to work outside of 8-to-5 to achieve her hours. *RP 1270: 1-19.* Carollo denied Buhr permission. *RP 1270: 1-19.* Carollo knew that Buhr could not achieve a full-time work week under his conditions. *RP 274: 8-22.* Buhr told Carollo she could not complete her projects under such conditions. *RP 1269: 3-8.* Carollo told Buhr she would be required to delegate her work to others. *RP 270: 5-10; RP 274: 2-4.*

Carollo testified: "We don't guarantee 40 hours a week … she ran out of sick time; she ran out of vacation time. She doesn't work,

she doesn't get paid." *RP 271: 22-24.* Carollo testified: "We treated her the same as everybody else. I wouldn't allow any employees at that point, you know, at that discussion, to work hours outside of 8 to 5, and I didn't for her either ... we treated everybody the same." *RP 2012: 17-23.* No discussion ensued about flexible hours. *RP 2023: 25 – RP 2024: 1-2.*

The discharge.

Buhr went in to the Stewart office to work on Saturday, September 22, having been absent Wednesday and Thursday of that week. *RP 1282: 1-21.* She worked three hours, and wrote five hours down on her Saturday time card. *RP 1282: 25 – RP 1283: 3.* Two of the listed hours were lunch hours worked earlier that week. *RP 1283: 21- RP 1284: 3.*[6] All Saturday hours listed were within Buhr's 40 hours per week. *RP 1285: 2-6.*

On Monday, Buhr told her immediate supervisor Scott Montilla she didn't have authorization for *any* of the hours and did not expect to

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[6] Buhr testified that Carollo wanted a certain presentation on his employees' time cards to show the corporate Stewart Title in Houston, so employees just "moved (their time worked) around." *RP 1245: 13 – RP 1246: 12.* Other employees confirmed this policy. *See, e.g., Christianne Reid* at RP 651-52; *Heather O'Hare* at RP 442-43; *Carrie Dove* at RP 470-71; *Andrea Kilgore*, RP 506-07.

be paid even though she had worked Saturday, and through those lunch hours that week. *RP 1283: 21 – RP 1284: 6.* Supervisor Montilla approved her card. *RP 1284: 18 – RP 1285: 1.*

At 4:30 p.m., that day, Carollo discharged Buhr. *RP 1287.* Carollo told Buhr she had stolen from the company, and was fired. *RP 1287: 11-14.* Carollo had reviewed Buhr's time card that morning, ordered alarm records, noted that Buhr had clocked in and out of the building in three hours, and discharged her for placing five hours on her time card—deciding such was theft. *RP 1287.*

Buhr was replaced by a non-disabled person. *RP 725: 22 – RP 726:1.*

In closing argument, Stewart argued its refusal to allow Buhr to work after-hours or on weekends was its treating her the same as it treated all other employees, and, as a result, it did not discriminate. *RP 2241: 1-10.* Stewart counsel argued "…[s]he was treated the same as Ms. Hurd and Ms. Dove. No difference. Treated the same. Exactly what she wanted. Never asked for anything different. You heard her testify; you heard the others testify." *RP 2241: 21-25.*

The jury entered a defense verdict. *CP 2298-2300.*

ARGUMENT.

1. Reasonable accommodation must be provided to a disabled employee, regardless of the nature of a disability claim.

Washington's Law Against Discrimination (WLAD) prohibits an employer from discriminating against any person in the terms or conditions of employment, or from discharging any employee because of the presence of any physical disability. *RCW 49.60.180(2),(3); RCW 49.60.030(1)(a)*. The WLAD requires an employer to reasonably accommodate the physical limitations of a disabled employee, unless the accommodation would pose an undue hardship to the employer's business. *Frisino v. Seattle School Dist. No. 1,* 160 Wn.App 765, 777-778, 249 P.3d 1044 (2011). The scope of an employer's duty to accommodate is limited to those steps reasonably necessary to enable the employee to perform his or her job. *See e.g., Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004), citing *Doe v. Boeing Co.,* 121 Wn.2d 8, 18, 846 P.2d 531 (1993). An employer's failure to reasonably accommodate a known disability constitutes disability discrimination.

Dean v. Municipality of Metropolitan Seattle-Metro, 104 Wn.2d 627, 632, 708 P.2d 393 (1985).

A. Stewart Title's claim that it had no duty to accommodate, and did not accommodate, did not entitle it to summary judgment on Buhr's failure-to-accommodate claim.

i. Summary Judgment Standard.

Stewart moved for summary judgment, in part, on Buhr's failure-to-accommodate claim. *CP 300-02; CP 306-09.*

A motion for summary judgment presents a question of law reviewed de novo. *Frisino*, 160 Wn.App. at 776. When reviewing an order of summary judgment, the appellate court conducts the same inquiry as the trial court. Summary judgment is appropriate only when, after reviewing all facts and reasonable inferences in the light most favorable to the non-moving party, there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Frisino*, 160 Wn.App. at 776. Summary judgment is often inappropriate in discrimination cases because the WLAD mandates liberal construction. *Id.,* citing RCW 49.60.020. Evidence "will generally contain reasonable but competing inferences of both

discrimination and nondiscrimination that must be resolved by a jury." *Id.* Whether a question of material fact exists depends on inferences drawn from the record. *Frisino*, 160 Wn.App. at 784. Buhr is entitled to all reasonable inferences from the evidence before the court at summary judgment. *Id.*

ii. Buhr created an issue of fact as to whether Stewart Title provided her reasonable accommodation, and was entitled to trial on her failure-to- accommodate claim.

To establish a prima facie case for failure to accommodate a disability and avoid summary judgment, Buhr had to show that: (1) she had a disability; (2) she could perform the essential functions of her job with or without reasonable accommodation; and (3) she was not reasonably accommodated. *Easley v. Sea-Land Service, Inc.*, 99 Wn.App. 459, 468, 994 P.2d 271 (2000); *and see Frisino*, 160 Wn.App. at 778.

Buhr met that burden. Buhr's disability was not disputed, nor was the existence of her notice to Stewart of her medical condition which would require absence from work. *CP 307: 8-10; CP 40: 12-24.* At summary judgment, Buhr thus had only the burden of showing that

she could perform the essential functions of her job with reasonable accommodation. *Easley*, 99 Wn.App. at 468; *Frisino*, 160 Wn.App. at 778. She did so. She evidenced that, through flexible time, she could achieve her full 40 hours per week, and service her clients productively. *CP 1818, paras. 26-27.* She evidenced that such a schedule was reasonably available to Stewart, because Buhr had been on that schedule for months from the start of her employment. *Id.* Stewart simply insisted on exhausting her leave time for the hours missed during the day, instead of accepting flexible scheduling. *CP 307: 10-26.* Buhr thus showed that by the use of flexible hours, she could perform her job.

The burden now shifted to Stewart to show that this proposed (or continued) solution, or any other solution, was not feasible, or was an undue hardship on Stewart. *Wilson v. Wenatchee School Dist.*, 110 Wn.App. 265, 270, 40 P.3d 686 (2002), citing *Pulcino v. Federal Express Corp.*, 141 Wn.2d at 629, 643, 9 P.3d 787 (2000). Where disability and need for accommodation is obvious, the inquiry is not whether accommodation is needed, but rather, what kind of accommodation is needed. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138,

148, 94 P.3d 930, 935-36 (2004). The employer's duty to provide accommodation requires it to try to find a solution which would allow Buhr to perform the essential functions of her job so as to avoid termination, and thereby allow Buhr to continue working indefinitely. *Frisino*, 160 Wn.App. at 777, 781. (The duty to accommodate is continuing—if one mode of accommodation is not effective, another must be tried). *Id.* at 781. "Reasonable accommodation" envisions a flexible interactive process between employer and employee. *MacSuga v. Spokane Cnty.*, 97 Wn.App. 435, 443, 983 P.2d 1167 (1999). It anticipates an exchange between the employee and employer to achieve the best match between the employee's capabilities and available positions. *Id. at 444.*

Stewart failed to meet its burden. Stewart President Carollo testified that he made *no* effort to accommodate Buhr, did *not* accommodate Buhr, and did not *intend* to accommodate Buhr. *CP 458: 11-21, citing Plaintiff's Exhibit 55 (Carollo deposition) at p. 40: 2 – p. 41: 23.* Carollo conversely considered it an "accommodation" by Stewart to allow Buhr to use her sick and vacation leave for her absences. *Id., p. 40: 14-15.* Carollo fully understood Buhr could not

work 8-to-5, five days a week, and could not achieve her 40 hours a week of full-time employment on such a requirement. *Pl. Ex. 55, p. 39: 17-22.* Carollo understood that Buhr could not physically work a straight 40-hour work week. *Pl. Ex. 55, p. 41: 6- 13.* Carollo offered Buhr no solution. Carollo testified: "We didn't make an effort to accommodate her needs." *Pl. Ex. 55, p. 40: 5-6, reiterated at p. 41: 14-23.*

As a result, when the burden shifted to Stewart to show it had tried to reasonably accommodate Buhr, Stewart failed to meet its burden. It provided no evidence it had attempted any form of accommodation. *See Carollo declarations at CP 291-94 and CP 1871-73.* Neither of Carollo's declarations filed to support summary judgment offer evidence of any effort to accommodate Buhr, or any recognition of that duty. The evidence was uncontroverted—no effort to accommodate had been made.

Stewart counsel alternatively argued that Stewart *did* reasonably accommodate Buhr by allowing Buhr use up her sick and leave time until her leave was exhausted. *CP 307-308, § 1.* But Buhr's medical condition was permanent. Leave inevitably was exhausted. *CP 1819-*

1820. Much as in *Frisino*, whether Stewart's requiring a permanently disabled employee to use up leave time for absences (and then prevent her from performing work outside 8-5 hours) is a reasonable effort at accommodation is a question of fact for a jury. *Frisino*, 160 Wn.App. at 780-81; *and see Wilson*, 110 Wn.App. at 271, citing *Pulcino*, 141 Wn.2d at 643.

Stewart also argued it was not required to allow Buhr the ability to work outside normal business hours. *CP 308-09*. It argued that such was not a reasonable accommodation. *CP 308: 10-22*. But it offered no other solution for accommodation. Its position presented only a genuine issue of material fact as to whether Stewart tried to "reasonably accommodate" Buhr's disability. See, e.g., *Frisino*, 160 Wn.App. at 777, 781.

With no evidence of any effort to accommodate Buhr beyond docking her sick and leave time, Stewart was not entitled to summary judgment on Buhr's claim. *CP 1966: 1-10*. The trial court's order granting summary judgment should be reversed, and Buhr's claim for failure to accommodate must be remanded for trial.

B. **An employer's duty to provide reasonable accommodation is a necessary element of disparate treatment discrimination. The trial court's failure to allow evidence on, or instruct on, that concept and duty, requires retrial.**

An employer who fails to accommodate an employee's disability faces an accommodation claim; while an employer who discharges an employee for a discriminatory reason faces a disparate claim. *Becker v. Cashman*, 128 Wn.App. 79, 84, 114 P.3d 1210 (2005).

Here, the court dismissed Buhr's failure to accommodate claim on summary judgment. Her disparate treatment and wrongful discharge claims remained for trial. And at trial, on both claims, Buhr was entitled to show the jury that she was qualified to perform the essential functions of her job with reasonable accommodation. *See, e.g., Easley*, 99 Wn.App. at 468, *Riehl v. Foodmaker, Inc.* 152 Wn.2d 138, 145-46, 94 P.3d. 930 (2004)(holding that the duty to accommodate is limited to the steps necessary to effect this result). Under RCW 49.60.180, the disparate treatment of a disabled employee, including wrongful discharge, both allows and requires the employee to show the

employee can perform these essential functions of the job with that accommodation. *Easley*, 99 Wn.App. at 468; *Riehl*, 152 Wn.2d at 145-46. This concept is incorporated into Washington's Pattern Civil Jury Instruction 330.32 as the second element of disability discrimination.[7] A disabled employee's ability to perform the essential functions of their job is necessarily premised on the employee being given the reasonable accommodation which would enable the employee to do so. The foundation of the WLAD is that of according the right to a disabled employee to compete on equal footing with a non-disabled employee; this is implicit in the WLAD's requirement that an employer provide

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[7] WPI 330.32 states as follows in relevant part:

"Disability Discrimination—Treatment—Burden of Proof

Discrimination in employment on the basis of disability is prohibited.
To establish ...[her] claim of discrimination on the basis of disability, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That ... [she] [has a disability] ...;

(2) That ...[she] is able to perform the essential functions of the job in question [with reasonable accommodation]; and

(3) That ... [her] [disability] ...was a substantial factor in (name of defendant's) decision [to terminate]...[her] .....

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) .... On the other hand, if any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.32 (6th ed.)

accommodation as a premise to any assessment of disability discrimination. *Dean*, 104 Wn. 2d at 632; *Riehl*, 152 Wn.2d at 145; *Easley*, 99 Wn. App. at 468. Where less favorable treatment exists between two equal performers, then the reasons for that less favorable treatment can be more properly weighed. *See, e.g., WPI 330.32.* That is why the reasonable accommodation element precedes the third disparate treatment element in WPI 330.32.

The concept of reasonable accommodation cannot therefore be separated from any disability discrimination claim. While failure to accommodate is a claim unto itself, the same duty of the employer to accommodate its employee exists in any disability discrimination claim, including a disparate treatment and/or wrongful discharge. *See WPI 330.32.* It is only after accommodation exists that the disabled and the non-disabled employees are now at a level of general equality of performance.

The pattern instructions define this difference for a trial court. Any disparate treatment claim includes the concept of reasonable accommodation. *WPI 330.32.* The comments to WPI 330.32 inform the trial court that a <u>different</u> instruction—WPI 330.33—is used with a

stand-alone failure-to-accommodate claim. *See WPI 330.32 comments.*[8] Both instructions use the same universal element of the employee's ability to perform the essential functions of the job with

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[8] WPI 330.33 states in relevant part as follows:

"Disability Discrimination—Reasonable Accommodation—Burden of Proof

Discrimination in employment on the basis of disability is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's disability. To establish ...[her] claim of discrimination on the basis of failure to reasonably accommodate a disability, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That ...[she] had an impairment that is medically recognizable or diagnosable or exists as a record or history; and

(2) That either...

(b) no notice was required to be given because the employer knew about the employee's impairment; and

(3) That either:

(a) the impairment [has] [had] a substantially limiting effect on

(i) ... [her] ability to [perform ..her job].; or

(ii) ... [her] ability to access [equal benefits] [privileges] [terms] [or] [conditions] of employment; or

(b) the plaintiff has provided medical documentation to the employer establishing a reasonable likelihood that working without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect;

and

(4) That ....[she] would have been able to perform the essential functions of the job in question with reasonable accommodation; and

(5) That the employer failed to reasonably accommodate the impairment....

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for the employer [on this claim].

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.33 (6th ed.)

reasonable accommodation. But in the failure-to-accommodate claim, in WPI 330.33, the ensuing fifth element is that of the employer's actual failure to accommodate the employee. *Id.*

Here, the trial court rejected this critical concept of accommodation in two material ways, requiring reversal and remand for trial:

i. The court improperly restricted evidence on Buhr's right to accommodation, and her right to show she could perform the essential functions of her job with accommodation.

Stewart argued that the concept of accommodation played no role in Buhr's disability discrimination trial because her failure-to-accommodate claim had been dismissed. *CP 1999 (motion in limine)*. Stewart argued, "[A]ccommodation is not relevant. It's a disability claim." *RP 48: 18-21*. This is obvious error. *See, e.g., Dean*, 104 Wn.2d at 632; *Frisino*, 160 Wn.App. at 777-78. But the trial court first granted Stewart's pretrial motion in limine, *CP 1999*, precluding reference to accommodation altogether. *RP 53: 19 – RP 54: 1*. It permitted the word "accommodation," but only in the "ordinary, everyday … parlance." *RP 56: 21 – RP 57:1; RP 59: 10-15*. The word

could be used, but not to denote any legal concept, duty, or right of accommodation. *See RP 55 – RP 59: 15.*

The court thereafter, e.g., declined to ask a juror's question inquiring why Buhr was not offered a flexible schedule, *RP 1397: 24 – RP 1399: 19-20, referencing juror question at CP 2085*; it refused to allow questions about "flex time" as accommodation, *RP 265: 19 – RP 266: 2;* it allowed the phrase "work around," or "accommodate" in a limited fashion, *RP 265-66*; it refused to allow Buhr to testify whether Anthony Carollo talked with her about some form of accommodation, *RP 1943: 8-13; RP 1945: 17-21*; and it sustained an objection to Buhr's inquiry of Carollo as to whether or not he had the responsibility to initiate discussions with Buhr to ensure that she could complete her work, and her full time position. *RP 2022: 10-23.*

The court's restriction of evidence and questioning was error of law. Restricting or excluding the legal concept of "accommodation" fails to guide the jury as to what role accommodation plays in the questioning, and impliedly directs the jury that no such right or duty is at issue. *See Easley*, 99 Wn.App. at 469, 472. This is error requiring remand. *Id.*

ii. The court failed to properly instruct the jury on the requirement of, and right to, accommodation.

The trial court's error in failing to guide a jury on Buhr's right to accommodation of her disability became fatal in jury instructions. Jury instructions are to be considered in their entirety. *Easley v. Sea-Land, Serv., Inc.*, 99 Wn.App. at 467. Instructions are not erroneous if: 1) they permit both parties to argue their theory of the case; 2) they are not misleading; and 3) when read as a whole, they properly inform the trier of fact of the applicable law. *Id.*

Buhr proposed WPI 330.32—the general disability discrimination elements instruction. *CP 1920; 1939; Plaintiff's Instruction No. 10.* Therein, at element two, lies the precursor of accommodation. *Id.* She also proposed WPI 330.34, which explains the duty of an employee to provide reasonable accommodation. *CP 1943.* The court rejected Buhr's instructions. It gave neither pattern instruction. *CP 2272-74, Instructions No. 8, 8a and 9.* Nowhere in the court's jury instructions was the jury advised of the concept of, duty to provide, or right of a disabled employee to, reasonable accommodation. *CP 2272-74.* In its disability elements instruction, the trial court even

removed WPI 330.32's second element, whereby Buhr could show she could perform her job with reasonable accommodation, prior to the jury assessing her claim of less favorable treatment.[9]

Where an erroneous instruction results in prejudice, meaning the error affects or presumptively affects the outcome of the trial, the ensuing verdict must be vacated and remanded for retrial. *Easley*, 99 Wn.App. at 467. Here, the trial court's refusal to instruct the jury on accommodation caused prejudice—the improper exclusion of accommodation gave Stewart an unwarranted and complete defense to disability discrimination. By omission, the court's instruction No. 8 now stated only that Buhr must show that Stewart had treated her less favorably in the terms and conditions of employment when compared to other similarly situated non-disabled employees, and that her disability was a substantial factor in Stewart's less favorable treatment. *CP 2272, Court's Inst. No. 8.* But because Stewart gave Buhr no

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[9] Again, Stewart had argued that the second element"implies that the employer has some reasonable accommodation obligation," and "there is none in this case. The court has dismissed that claim." *RP 1660: 10-20.* Stewart argued that using the pattern instruction "would suggest that reasonable accommodation is something a duty that the employer has yet to prove that they fulfilled, and it's not in this case." *RP 1665: 4-7.* It argued that none of the remaining disability claims – i.e., discharge and disparate treatment, "have anything to do with reasonable accommodation." *RP 1665: 2-4.*

assistance at all, the instructions accorded it a complete defense to disparate treatment. By *refusing* to assist Buhr, Stewart treated Buhr like any other employee, and thus did not accord her less favorable treatment. By refusing to accommodate, Stewart was absolved from any discrimination claim. This is reversible error. The first step in any disability discrimination claim is the equalization of the disabled employee by reasonable accommodation, and the ensuing ability of that employee to show that she could now perform the essential functions her job. This precursor element was denied her.

This trial court's instructions violated all three of the tenets of proper jury instructions as detailed in *Easley*, 99 Wn.App. at 467. The instructions: 1) did not permit Buhr to argue that she could have performed the essential functions of her job with reasonable accommodation; 2) they are misleading by failing to instruct the jury on her right to this accommodation; and, 3) when read as a whole, they do not properly inform the trier of fact of this applicable law. *Easley, at 467.*

In *Easley*, a trial court's analogous refusal to instruct on, or allow evidence of, the concept of "undue hardship" with respect to

accommodation resulted in the appellate court vacating a judgment and remanding for a new trial. *Easley*, 99 Wn.App. at 472. In *Easley*, when the concept of hardship was used at trial, the jury had no guidance to its relevance. 99 Wn.App. at 469. The instructions failed to provide the jury with any indication of the legal relationship between reasonable accommodation and undue hardship. *Id.* at 472.

Similarly, here the trial court failed to provide the jury with any instruction on Stewart's duty to accommodate Buhr's disability before assessing disparate treatment. *CP 2272-74; Insts. 8, 8a and 9.* The trial court refused to instruct the jury on accommodation in any fashion. *Id.* The jury had no guidance on the duty of, or the right to, accommodation; the jury could thus naturally conclude that if Buhr was treated the same as everyone else, no discrimination existed. This is precisely what Stewart argued. As in *Easley*, this trial court's failure to properly instruct regarding the concept of accommodation as a duty, and as a right, is reversible error. *Id.*

The jury verdict in Stewart's favor must be vacated, and the matter remanded for retrial under proper instructions.

2. **The trial court abused its discretion in managing discovery to deny Buhr a fair trial on all of her claims.**

A. A trial court may not use its judicial authority to remove a party's access to civil rules discovery.

Exercises of trial court authority over discovery issues are generally reviewed for abuse of discretion. *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011); *Flower v. T.R.A. Industries, Inc.*, 127 Wn.App. 13, 38, 111 P.3d 1192 (2005). A trial court abuses its discretion when its ruling is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Flower,* 127 Wn.App. at 38.

It is well recognized by the appellate courts that extensive discovery is necessary to effectively pursue a plaintiff's claim. A party's right of access to the courts thus includes the broad right of discovery as authorized by civil rules. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009); *Flower v. TRA*, 127 Wn.App. at 38; *John Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991). Parties may obtain discovery regarding any matter, not privileged, which is relevant to the

subject matter involved in the pending action. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011), citing CR 26(b)(1). All relevant information likely to lead to admissible evidence is discoverable. *Id.* at 717. A trial court may not narrow discovery in a way that prevents discovery of information relevant to the issues that may arise in a lawsuit. *Id.*, 172 Wn.2d at 717. Where discovery may not proceed, the record is incomplete, and remand is required for appropriate discovery. *Id.* at 719. This remedy applies here.

B. The trial court abused its discretion in terminating Buhr's discovery rights without reasonable cause as discovery was being initiated.

Here, the trial court terminated plaintiff Buhr's discovery right in January 2011, seven months before trial. When it did so, it knew that discovery by both parties had just initiated. It knew that Stewart had failed to comply with requests for production.[10] It knew that Buhr had been able to schedule only two Stewart employees for depositions.

[10] Stewart was required to either provide answers to interrogatories and produce requested documents, or move for a protective order. *Neighborhood Alliance*, 172 Wn.2d at 718.

The trial court's sole precipitating factor for terminating Buhr's access to discovery under these conditions was: "[C]ounsel are not in agreement relative to the discovery cut-off." *CP 101.* Buhr did not need Stewart's agreement to be allowed access to discovery. *Putman*, 166 Wn.2d at 979; *Neighborhood Alliance*, 172 Wn.2d at 717. No violation of any case scheduling order had occurred. No concerns were cited about the need for case management, nor backlog, nor conservation of judicial resources. No delay, violation of orders, dilatory conduct, nor fault, was found. No prejudice was found. *CP 101.*

The trial court's use of its judicial discretion to remove Buhr's access to discovery because Stewart didn't agree her discovery should continue is a decision based on untenable grounds. Remand for discovery and retrial is required. *Neighborhood Alliance*, 172 Wn.2d at 717.

Even after this initial order terminating discovery, Buhr moved to show that, at the minimum, three limited categories of documents were necessary to investigate her claim—again, categories of information intentionally and improperly not produced by Stewart. The

trial court refused to allow it. *CP 260.* It now held that Buhr had "agreed" to terminate discovery in January, controverting the very April motion it was then determining, as well as its own prior order. *Compare CP 260 with CP 101.* It now cited an earlier misdirected initialing on a document to force "agreement" on Buhr to finalize its termination of her access to discovery rules. This is abuse of discretion exercised on an untenable basis. Where discovery orders prevent evidence from being properly collected or presented to carry a burden of proof, remand is required, and any subsequent order granting summary judgment must likewise be vacated. *Neighborhood Alliance*, 172 Wn.2d at 719; *Blair*, 171 Wn.2d at 351-352.

C. The trial court's termination of discovery was materially prejudicial and unbalanced.

The material prejudice caused by the trial court's order was demonstrated at trial. As only one example, Buhr's theory was that her discharge for falsification of her Saturday time card was pretext for a discharge based on her disability. Buhr and her witnesses testified that

it was Stewart policy to record worked lunch hours elsewhere on a time card, and make their time cards look a certain way, regardless of when the lunch hours were worked. *Buhr, RP 1245*; *Reid, RP 651-52; O'Hare, RP 442; Dove, RP 470; Kilgore, RP 506.* To refute Buhr's claim of pretext, Stewart presented two employees who testified that they recorded their worked lunch hours accurately, and that such was required, without producing their time cards. *RP 1469 – RP 1471; RP 1485 (McNair); RP 1507-09 (McCorgary).* The veracity of this evidence, or lack thereof, could be confirmed by the comparative time cards and alarm records Buhr had requested in her original requests for production—time cards and alarm records which Stewart refused to produce when the court terminated Buhr's discovery. *CP 105-06; CP 149.* These time cards had been specifically requested for Stewart witness McNair. *RP 1545: 3-25.* Buhr thereupon again requested that the court require Stewart to produce the time cards given its presentation. *RP 1542-43.* The trial court again refused. *CP 1550: 6-8; CP 2316-17.* Per its order, the court found the cards were "not relevant," "the discovery cutoff had passed," the cards would "confuse the jury," and allowing production would be "inconsistent" with its

previous April 20, 2011 order. *CP 2316-17*. The material prejudice of the court terminating discovery continued at trial. Now, the same order was being used to prevent Buhr from responding to Stewart's verbal representation of the content of time cards it refused to produce.

The right to cross examine a witness is guaranteed by the due process clause of both state and federal constitutions in both civil and criminal proceedings. *Baxter v. Jones*, 34 Wn.App. 1, 3-4, 658 P.2d 1274 (1983). The court used its discovery termination order to not only prevent Buhr from investigating her claims pretrial, it also used the order to deny her the trial right to cross examine Stewart witnesses called to attest to what they were protected from producing. The court's termination of Buhr's discovery was abuse of discretion causing material prejudice.

D. The trial court abused its discretion by sanctioning Buhr for failure to provide supplemental discovery to Stewart Title after its order terminating discovery.

In contrast to the trial court's termination of Buhr's access to discovery, it continued to allow defendant Stewart discovery from Buhr through trial. It not only granted Stewart discovery, it sanctioned

Buhr's counsel for failing to provide it.

The trial court sanctioned Buhr's counsel $1,000 for an expert bringing PowerPoint slides to court to illustrate his testimony. *RP 613: 24-25, referencing Stewart at RP 593: 8-10.* The court retracted this sanction. *RP 619: 6-9.* It then sanctioned Buhr's counsel again, concluding that Buhr failed to supplement materials "relied upon by (the expert) in forming his opinions." *RP 701: 17 – RP 702: 7; CP 2302 (Order).* The trial court required Buhr to pay the cost of Stewart's taking West's deposition, including paying the court reporter's fee and transcription costs, and paying for Texas defense counsel's air travel change fees, and his fees in preparation for, and taking of, the deposition. *RP 701 – RP 702: 7; CP 2302 (Order).*

The court's sanction was not based on *any* CR 26(e) supplementation requirement to which Buhr was obligated. It was contrary to its own orders terminating discovery months earlier, and it was contrary to the requirements of CR 26(i), and CR 37. The sanctions are abuse of discretion, and should be vacated.

Sanctions for discovery violations are reviewed for abuse of discretion. *Blair v. TA-Seattle East No. 176*, 171 Wn.2d at 348.

Monetary sanctions do not require consideration of the same factors as do more severe sanction orders such as default, dismissal, or exclusion of testimony. *Id.*, *referencing Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 33 P.2d 1036 (1997). But violating *something* must occur for any sanction to be proper. *See, e.g., Blair*, 171 Wn.2d at 342 (where the party sanctioned had continually failed to disclose witnesses); *Burnet v. Spokane Ambulance*, 131 Wn.2d at 484 (where a party failed to describe the contents of an expert's opinion as required by a scheduling order); *Allied Fin. Servs. v. Mangum*, 72 Wn.App. 164, 168, 864 P.2d 1 (1993)(where defendants failed to name their witnesses until trial).

Buhr did not engage in any discovery violation. She timely disclosed to Stewart her expert economist Eric West. She provided Stewart an extensive draft written report from this economist of all intended opinions and the basis for such in March 2011. *Pl. Ex. 70; RP 693: 20-22*. Stewart chose not to pursue a deposition, nor to request further discovery. Buhr provided Stewart yet another extensive updated written report in July 2011. *Pl. Ex. 71; RP 694: 2-3*. Per Stewart, the report "had no curriculum vitae attached to it." *RP 693:*

25. But again, Stewart had chosen not to pursue a deposition, nor to request further discovery.

It was not until trial was underway that Stewart moved to strike expert West as Buhr's expert, now claiming Buhr had engaged in a discovery violation because she did not produce, information "from the early part of 2010." *RP 591: 8-12; RP 593: 4.* Stewart claimed Buhr did not produce "any of the background information, résumé, brief summary of the grounds for opinion, or a list of prior lawsuits or testimony...," *RP 591-92.*[11] Stewart argued that Buhr failed to "supplement" her earlier interrogatory answers from early 2010. *RP 591: 8-12; RP 593: 4.* Stewart's argument was meritless. The information Stewart was requesting was not supplementation.

CR 26(e)'s rule regarding supplementation is relevant only when a party has responded to a request for discovery with a response that was *complete* when it was made. *See CR 26(e).* The duty to supplement arises where a complete response is later rendered erroneous or incorrect by subsequently discovered information. *See, e.g., CR 26(e)(2).* Supplementation is also required if a new witness is added, or the address

[11] The witness's CV was in the Plaintiff's exhibit binders. *RP 611: 22-25.*

of a witness previously disclosed changes. *CR 26(e)(1)*. In other words, supplementation addresses *changes* in, or additions to, responses complete when made. *See, e.g., Lampard v. Roth,* 38 Wn.App. 198, 201, 684 P.2d 1353, 1354-55 (1984)(where a party was held to have failed to properly supplement where that party added a new expert three days before trial). No duty existed under civil rules requiring Buhr to "supplement" the information Stewart was requesting. *CR 26(e)*. Buhr added no new expert, nor did she come into possession of information rendering her expert's prior reports now incorrect. *CR 26(e)*. CR 26(e) was not applicable. In fact, Stewart was moving to compel answers to 2010 interrogatories, now claimed to be incomplete since the year 2010. *RP 591: 8-17; RP 592*. CR 37 is used by an adverse party when something produced is incomplete, as alleged here; CR 26(e)'s supplementation is used when answers are delivered complete, but something new arises to change the prior answers.[12] Stewart was moving for CR 37 compel relief—not supplementation.

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[12] The court concluded that no willful or intentional discovery abuse occurred. *RP 701: 9-12*. Moreover, CR 26(i) directs a court not to entertain any discovery motion under CR 26 - 37 unless both counsel have previously conferred on the motion. Contrary to Buhr earlier arguing by motion months earlier that Stewart had failed to produce requested documents, as part of the need for discovery to continue, Stewart's motion at

The trial court used CR 26's supplementation rule to avoid having Stewart's request be viewed as a motion to compel. A CR 37 motion would have to be denied given the trial court orders terminating *all* discovery months earlier, and the denial of Buhr's requests for time cards she had also requested in "early 2010." *CP 2316-17, and see supra.* The trial court thus used "supplementation" to provide Stewart discovery during trial, and to sanction Buhr's counsel, while denying similar discovery to Buhr as "inconsistent with prior orders." *Id.* This was misuse of the supplementation rule, grossly unbalanced, and an untenable use of judicial discretion.

CR 26(e) provides no proper basis for the trial court to have sanctioned Buhr's counsel, as it does not apply to the information demanded by Stewart. Discovery was terminated as of January 2010, *CP 101*, and it was untenable to sanction Buhr's counsel for not thereafter providing discovery. The sanction order should be vacated.

V. RAP 18.1 – ATTORNEY FEES AND COSTS

Under Rule of Appellate Procedure 18.1, applicable law may

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trial was the first Buhr's counsel heard of any alleged missing information. *RP 609: 12 – RP 610.*

grant to a party the right to recover reasonable attorney fees or expenses on review. *RAP 18.1*. Here, RCW 49.60.030(2) provides for attorney fees on appeal. *Frisino*, 160 Wn.App. at 786. Fees on appeal are preserved—they are not allowed at this appellate level unless Buhr prevails at trial. But if Buhr prevails at trial, then all fees and costs for this appeal are to be awarded by the trial court in its fee determination, and the trial court must be so directed. *Frisino*, 160 Wn.App. at 786.

VI. CONCLUSION

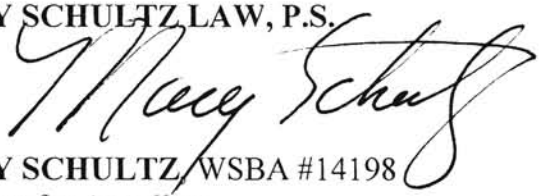
The trial court's termination of Buhr's civil rule discovery rights when she had obtained only two depositions, incomplete production, and seven months prior to trial, requires reversal of *all* dismissal rulings on all claims. Second, the punitive sanctions imposed against Buhr's counsel for failing to supplement should be vacated. Third, Buhr was entitled to proceed to trial on her claim of failure to accommodate her disability. The trial court's summary judgment dismissal of that claim should be reversed and remanded for trial. Finally, the trial court's refusal to instruct on the right of a disabled employee to show that she had the ability to perform her job with reasonable accommodation is error requiring that the verdict entered be vacated. The matter should

be remanded for retrial under the proper law.

The trial court should be directed to award all appellate fees and costs if Buhr prevails.

DATED this 24 day of Sept., 2012.

MARY SCHULTZ LAW, P.S.



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CERTIFICATE OF SERVICE

The undersigned certifies she is a person of such age and discretion as to be competent to serve papers; and that on the 24 day of Sept, 2012, she served a copy of **Appellant's Opening Brief** to the following individuals, in the manner below:

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Dated this 24 day of September, 2012.

Tina Ingram

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