CASE NO. 303551

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

LISA BUHR,

Appellant,

vs.

STEWART TITLE OF SPOKANE, LLC,

Respondent.

BRIEF OF DEFENDANT–RESPONDENT STEWART TITLE OF SPOKANE, LLC

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I. INTRODUCTION

Appellant-Plaintiff Lisa Buhr ("Buhr" or "Plaintiff") asserted disability discrimination claims against her former employer, Stewart Title of Spokane, LLC ("Stewart Title of Spokane"), under two separate theories—failure to accommodate and disparate treatment. The trial court properly granted summary judgment in favor of Stewart Title of Spokane on Plaintiff's failure to accommodate claim. Plaintiff proceeded to trial on her disparate treatment claim, and the jury found in favor of Stewart Title of Spokane.

Plaintiff now appeals, arguing that the trial court erred by dismissing her failure to accommodate claim on summary judgment, by limiting evidence on reasonable accommodation at trial, and by not including a jury instruction on reasonable accommodation. Plaintiff's arguments are unsupported by the facts and the law. Buhr's failure to accommodate claim was properly dismissed because Buhr did not require or request any accommodation other than allowances for absences which Stewart Title of Spokane liberally provided. Because Plaintiff's reasonable accommodation theory had been properly dismissed on summary judgment, the trial court then properly limited reasonable accommodation issues and evidence at trial and did not include Plaintiff's requested jury instruction on reasonable accommodation.

Plaintiff also argues that the trial court treated her unfairly and abused its discretion by denying her motion to allow additional discovery and by sanctioning her counsel for failing to timely provide documents that her expert relied upon and intended to use at trial. Those arguments are also without merit. The trial court acted within its discretion to deny Plaintiff's motion for additional discovery and to impose sanctions for her counsel's untimely production.

Defendant Stewart Title of Spokane submits this brief in answer to Plaintiff's appeal, and respectfully requests this Court affirm the trial court's rulings in all respects and deny Plaintiff's request for fees and costs on appeal.

II. STATEMENT OF ISSUES

1. Whether the trial court properly granted summary judgment for Stewart Title of Spokane on Plaintiff's failure to accommodate claim where it was undisputed that Stewart Title of Spokane liberally and without limitation granted Buhr sick leave in response to each of her requests and Buhr did not require any further accommodation to help her perform her job, avoid termination or avoid aggravating her disability.

2. Whether the trial court properly limited issues and evidence related reasonable accommodation at trial and did not include a jury instruction on reasonable accommodation where Plaintiff's reasonable

accommodation claim had been previously dismissed on summary judgment, and Stewart Title of Spokane did not dispute that Plaintiff was qualified for her position.

3. Whether the trial court abused its discretion by denying Plaintiff's motion for additional discovery where she had ample opportunity to obtain the discovery she sought within the discovery period and previously stipulated to the established discovery deadline.

4. Whether the trial court abused its discretion by sanctioning Plaintiff's counsel for her failure to produce documents relied upon by her expert when she had previously indicated she would produce those documents without objection.

III. STATEMENT OF THE CASE

Plaintiff Lisa Buhr (hereinafter referred to as "Buhr") suffered from a rare form of eye cancer as a child, and in 2000 she had a prosthetic eye inserted. (CP 332-333.) Following this surgery, Buhr's prosthetic eye caused her to suffer migraine headaches which increased in severity and frequency over time. (CP 333-334.) In addition to the severe migraine headaches, Buhr incurred dryness, irritation, bleeding, problems with vision, and inability to focus, among other problems. (CP 334-335.) Consequently, Buhr has a lifelong history of suffering from depression,

tension, anxiety, trouble sleeping and social isolation, dating back to her childhood. (CP 336-337.)

A. Buhr Becomes A Customer Service Representative For Stewart Title of Spokane.

In June 2006, Anthony Carollo (hereinafter referred to as "Carollo") interviewed Buhr regarding a customer service representative position at Stewart Title of Spokane. (CP 345-346.) On June 30, 2006, Buhr was hired for that position. (CP 345-346, 375.)

During her interview, Buhr informed Carollo of her medical issues and need for repeated absences. (CP 347.) In fact, Buhr specifically told Carollo that if she was hired, she would incur sick days that go beyond the "normal allotted," and if that was a problem, not to hire her. (CP 347, RP 1345-1346.)

During her interview, Buhr additionally emphasized that because of her medical issues she needed medical insurance from "day one." (CP 350.) In response, Stewart Title of Spokane covered the cost of Buhr's COBRA coverage during her 90-day probationary period. (CP 350.)

B. Buhr Was Expected To Work Between 8:00 a.m. and 5:00 p.m.

Buhr was scheduled to work 8:00 a.m. to 5:00 p.m., Monday through Friday at Stewart Title of Spokane. (CP 351, 411.) This was a

typical workweek for most Stewart Title of Spokane employees. (CP 382, 411.)

Although there was the potential for 40 paid hours per week, Buhr testified that there was no guarantee that she would receive 40 paid hours per week. (CP 348, 383; RP 1350.) Consistent with Buhr's testimony, Carollo testified that Buhr had the opportunity, but was not guaranteed, to work 40 paid hours per week. (CP 382.) Notably, during her employment with Stewart Title of Spokane, Buhr never raised this issue with Carollo. (CP 386, RP 1372-1375.)

Buhr testified that she was expected to work 8:00 a.m. to 5:00 p.m. Monday through Friday at Stewart Title of Spokane and that she never raised the possibility of working outside those normal business hours with anyone at Stewart Title of Spokane:

> Q. Did you ever have a specific discussion with anybody at Stewart Title of Spokane about having an accommodation schedule that allowed you to work different hours, other than regular business hours, prior to September of 2007?
>
> A. No.
>
> Q. In fact, prior to September 2007, you were expected to work regular business hours, correct? 8 to 5?
>
> A. Yes.

(CP 351; *see also* RP 1372-1375, 1557-1558.) Likewise, Carollo testified that Buhr never raised the issue of working outside normal

business hours with him; i.e., coming in at night or on weekends. (CP 387-388.)

Buhr testified that any hours worked outside her normal business hours required prior approval from her supervisor. This included any hours needed to complete work resulting from her absences. In that regard, Buhr testified, in pertinent part:

> Q. Did you have an ongoing arrangement that you could make up sick time in any week where you had sick time?
>
> A. No.
>
> * * *
>
> Q. Did you have an arrangement with Mr. Carollo that if you took sick time that was unpaid that you had a right to make up that time during that same week by working extra hours?
>
> A. No.
>
> Q. Did you have that arrangement with Dave [Chromy]?
>
> A. No
>
> * * *
>
> Q. And so, before working additional hours in a particular week outside of regular work hours, was it your practice that you would ask if it was okay at Stewart Title of Spokane?
>
> A. Yes.
>
> Q. And it was not automatic that it would be permitted, correct?
>
> A. Correct.
>
> Q. It was discretionary on a week-by-week basis at the discretion of the manager, correct?
>
> A. Correct.

(CP 387-388.)

In September 2007, Carollo announced that no hourly employee was to work outside 8:00 a.m. to 5:00 p.m. without advance authorization. (RP 1610, 1987-1988.) He did so because the economy was slowing, there were enough employees there to complete all work without extra hours being worked, and he did not want to lay anyone off. (RP 1987-1988; see also RP 275.) After that announcement, Buhr made a request on behalf of herself and co-employees Carrie Dove and Allyson Hurd (hereinafter referred to as "Dove" and "Hurd") to work beyond 5:00 p.m. in order to accomplish work that was required by new guidelines implemented by the Washington Insurance Commissioner. (CP 356.)[1] Carollo denied that request from Buhr, Dove and Hurd. (CP 356.) Carollo treated Buhr "the same as the other two" regarding that group request. (CP 356.)

Buhr's testimony is consistent with the Stewart Title of Spokane policy that employees must obtain permission before working outside normal business hours or working overtime. (CP 380-381, 383-384, 388, 392, 420-421.)

On September 4, 2007, Scott Montilla (hereinafter referred to as "Montilla") was hired for Stewart Title of Spokane's Title Manager

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[1] This is the request referenced on page 10 of Plaintiff's Opening Brief. It was not a request for a medical accommodation as suggested therein.

position. (CP 409-412.) At that time, Montilla became Buhr's supervisor, replacing Dave Chromy. (CP 410-412.)

C. Buhr Was a Valued Employee of Stewart Title of Spokane.

Buhr testified that Carollo trusted her to perform special tasks not available to other customer service representatives. (CP 359.) These tasks included, but were not limited to, providing special training, meeting with sales representatives and technology personnel, and educating real estate agents on what Stewart Title of Spokane could offer them. (CP 359.) In fact, Buhr testified that Carollo gave her more responsibility and demonstrated more confidence in her than other employees. (CP 359.)

Likewise, Carollo testified, in pertinent part, that he viewed Buhr as a productive employee:

> Q. All right. When Ms. Buhr came into Stewart Title in June of '06, and let's say for the next year, for the first year of her employment, was she a productive employee?
>
> A. I would say yes. She seemed to get her work done.
>
> * * *
>
> Q. Do you remember any issues with her that were adverse to her work performance or to the company?
>
> A. I don't recall anything performance related. Is that what you're looking for?
>
> Q. Yes.
>
> A. I don't recall anything performance related.

Q. Do you recall anything that you discussed with her, whether performance related, personal, or otherwise, that caused you concern?

A. No. Nothing that I discussed with her.

(CP 377-379, 385.)

D. Buhr's Absences at Stewart Title of Spokane Were Liberally Granted and Did Not Impact Her Work Performance.

At the time Buhr was hired, she was aware that Stewart Title of Spokane provided its employees with 12-days of paid sick leave per year, and that after those days were used, the employee would have to use vacation time to be paid for additional absences. If the employee used all paid sick time and vacation time during the year, any remaining absences were unpaid. (CP 346-347, 349, 353.)

Buhr testified that her absences increased at Stewart Title of Spokane. (CP 340.) Buhr further testified that she incurred absences that surpassed her paid sick and vacation time, requiring her to incur unpaid sick time. (CP 340, 347.)

Stewart Title of Spokane *never* denied a request by Buhr for a day off because she was sick, having migraines or having any other medical issue that made her uncomfortable or unable to come to work. (CP 347.) All requests by Buhr for days off were granted even after those absences exceeded the paid sick time allotment at Stewart Title of Spokane. (CP 347; RP 1392-1393.) Despite repeated absences, Buhr testified that

Stewart Title of Spokane never questioned her regarding those absences. (CP 347; RP 1350, 1795-1796.) On days when Buhr was absent, Stewart Title of Spokane was informed by her in the morning and responded "that was fine." (CP 347; RP 1350.)

Consistent with Buhr's testimony, Carollo testified that he never monitored her absences nor raised them with Buhr:

> Q. The first year that she was working for Stewart Title of Spokane, she had absences from work, though, correct?
>
> A. Yes.
>
> Q. How did you monitor those absences, if you did?
>
> A. I didn't personally monitor. Other than the time records, I don't keep notes or do anything else.
>
> Q. Did you ever discuss her absences with her during that first year of her employment?
>
> A. We had casual conversation about her absences that went something along the lines of her saying, "Hey, sorry. I'm sick. I've got this migraine." And me saying, "That's fine. Do what you can."

(CP 379.)

Moreover, Carollo testified that he did not view her absences as impacting her work:

> Q. She did have absences, as I understand it?
>
> A. She did.
>
> Q. Was it your understanding that there was an ongoing condition that would result in absences?
>
> A. Yes.
>
> Q. What was your understanding of what that condition was?

A. It's my understanding, from what Lisa Buhr told me at the time, was she would get migraines as a result of having only one eye.

Q. Did you accept that as sounding legitimate?

A. Yes.

Q. And did you accept that as being legitimate as an excuse for her sick leave?

A. I accepted that as an excuse for her sick leave, yes.

Q. Did her sick leave ever become a problem to you?

A. No.

Q. So during the time that she was employed, was there ever a point where you said, "She's just gone too much"?

A. No.

Q. She continued to work well up until the time you terminated her?

A. Work well in terms of productivity?

Q. Yes.

A. She was a productive employee when she was there.

Q. Did you have any problems with her during the time she worked with you, up until you started to hear these employees say she was padding her time?

A. I had no problem or issues, concerns with her productivity while she was at work.

(CP 379, 385.)

Similarly, Montilla testified that when he started working for Stewart Title of Spokane as Buhr's supervisor on September 4, 2007, Carollo never discussed with him Buhr's medical condition or her reoccurring absences. (CP 413-414.) Instead, Montilla only became aware of Buhr's medical condition when she raised it during a casual conversation Montilla had with Buhr to introduce himself. (CP 413.)

Montilla testified that he never talked to Buhr about her absences nor did he raise that issue with Carollo during the short time he worked with Buhr. (CP 413-415.) Likewise, Montilla testified that Carollo never discussed Buhr's absences with him:

> Q. And the one that's gone more than the others has told you that she has a medical condition, right?
>
> A. I believe so.
>
> Q. So are you saying that with that understanding, i.e., that here's an employee with a medical condition, and she's gone a few times during the very brief period of time that you're there so far, you never raised that with Mr. Carollo?
>
> A. I don't recall a conversation regarding her absences with him.
>
> Q. Did Mr. Carollo ever come to you and say, "Oh, well, Ms. Buhr, she is absent a lot. Don't worry about it," or anything of that nature?
>
> A. I don't believe so, no.
>
> Q. Did the two of you have any interaction about why she was gone so much?
>
> A. I don't recall a conversation, no, regarding her absences.
>
> Q. Did the two of you have any conversation about what her medical condition may or may not be?
>
> A. I don't believe so, no.
>
> Q. Did you have any conversation with Mr. Carollo about Ms. Buhr in any way that first few weeks that you were there?
>
> A. I don't recall.
>
> Q. Do you recall anything specific being raised by Mr. Carollo or that you brought to Mr. Carollo's attention about Ms. Buhr?
>
> A. No, I don't.

(CP 414-415.)

E. Buhr's Employment Was Terminated For Falsification of Her Time Card.

Stewart Title of Spokane expects its employees to accurately fill out their timecards. Consistent with this policy, Stewart Title of Spokane employee, Dove, was reprimanded for failing to report all the time she worked, and Dove was paid for her actual work hours. (CP 376, 389.)

Carollo had heard from at least two employees that Buhr had been padding her timecard with extra hours. (CP 381, 392, 394.) When Buhr submitted a time card showing five hours worked on a Saturday, within weeks of Carollo's announcement that employees should not work outside Monday to Friday 8:00 a.m. to 5:00 p.m. without pre-approval, he became suspicious and ordered alarm records to see if Buhr had actually worked the hours reported. (CP 381, 392, 394, 561.) By comparing Buhr's timecard to building alarm records, Carollo discovered that Buhr had intentionally falsified her time card, recording more time than she had actually worked on Saturday September 22, 2007. (CP 376, 394, 396.)

Consequently, on October 1, 2007, Buhr was terminated by Carollo and Montilla for submitting an intentionally false timecard; i.e., recording hours she did not work, which amounted to stealing from the company, and for not getting prior permission before working extra time on that Saturday as required. (CP 390-391, 417-419.) Buhr admitted that

she submitted a false timecard claiming that she worked 5 hours on Saturday, September 22, 2007, when in actuality, she worked 3 hours:

> Q. On the line for September 22, which was a Saturday, you had five hours of time billed for that day, on your card for that day; is that correct?
>
> A. Yes.
>
> Q. Did you work five hours that day?
>
> A. I did not.
>
> Q. And so that information that you put on your time card was false information, correct?
>
> A. Yes.
>
> * * *
>
> Q. And, in fact, you did know it was false information when you placed it on your time card, correct?
>
> A. For that day, yes.
>
> * * *
>
> Q. And that you put false time down on your time sheet at that time?
>
> A. Yes.

(CP 356; *see also* RP 1352.)

Buhr further testified that she was not pre-authorized to work on that Saturday and that prior permission was required before working outside her 8:00 a.m. to 5:00 p.m. Monday through Friday schedule. (CP 356.) This was an additional reason cited by Carollo for her termination. (CP 390, 393.)

F. The Lawsuit.

In October 2009, Buhr sued Defendant Stewart Title of Spokane asserting a variety of wrongful termination and disability discrimination claims. (CP 20-34.) Specifically, in Plaintiff's First Amended Complaint ("Complaint"), Buhr sued Stewart Title of Spokane for violations of the Washington Law against Discrimination, RCW 49.60.010 *et. seq.*; Washington State Family Leave Act, RCW 49.78.010 *et seq.*; Washington Minimum Wage Act, RCW 49.46.010(5); Washington Wage Rebate Act, 49.52.050; and for alleged wrongful discharge. (CP 28-32.)

The trial court issued an initial scheduling order setting a trial date of March 14, 2011 and a discovery cutoff of January 10, 2011. (*See* CP 85, 90, 126.) Plaintiff served discovery on Defendant in the fall of 2010, and Defendant timely served proper objections and responses to Plaintiff's requests. (CP 134.) Plaintiff's counsel never sought a ruling from the court on Defendant's objections to that discovery during the discovery period. (CP 134-135.)

Defendant attempted to schedule depositions in late 2010 and January 2011, but because Plaintiff's counsel, Mary Schultz, had a busy trial schedule, Ms. Schultz was not able to attend depositions or conduct other discovery at that time. (CP 96-97, 120-121.) To accommodate Ms. Schultz's schedule, Defendant's counsel agreed to continue the trial date

so that depositions for the specifically identified material witnesses could take place outside of the discovery period and so that the parties could participate in mediation before trial. (CP 97.) Defendant's counsel made this agreement with the caveat that other case scheduling deadlines, including the discovery deadline, would not be extended. (CP 96-98.)

On February 11, 2011, Plaintiff's counsel filed the parties' Joint Motion to Continue Trial Date reflecting their agreement. (CP 96-100.) The Joint Motion identified depositions which had been scheduled outside of the discovery deadline and sought to continue the trial setting to August 8, 2011, "with the caveat that certain case scheduling deadlines be closed," including the discovery deadline. (CP 96-100.) Plaintiff's counsel filed the Joint Motion along with the corresponding Declaration of William J. Schroeder in support of the motion and was at all times aware and in agreement that the discovery period – which ended a month prior on January 10, 2011 — would remain closed. (CP 96-100.) Indeed, Buhr's counsel made notations on the order she submitted for the parties. (CP 97.)

At the hearing on the Joint Motion, Plaintiff's counsel unexpectedly requested that the Court extend the discovery period without any justification or basis for doing so. The Court heard Plaintiff's counsel's arguments, continued the trial date, and issued a new case

scheduling order consistent with the parties' agreement as set forth in the Joint Motion. (CP 101-102.) The discovery deadline remained closed, as had been requested by the parties in their Joint Motion. (CP 101-102.)

Then, on March 21, 2011, more than three months after the discovery deadline, Plaintiff filed a Motion to Allow Additional Discovery and Reset Discovery Cutoff ("Motion to Allow Additional Discovery"). (CP 104-109.)

Plaintiff's Motion to Allow Additional Discovery was based on her alleged need for three categories of documents and a 30(b)(6) deposition of a corporate representative from Stewart Title Guaranty Company, which was not a named defendant in the case. (CP 104-108.) The specific documents Plaintiff claimed she needed were (1) "alarm system cards upon which Stewart Title bases its discharge of [Plaintiff]"; (2) "evidence that it [Stewart Title of Spokane] ever paid [Plaintiff] for the hours reported on her timecard on the date she was discharged"; and (3) "additional employee timecards . . . to allow Plaintiff to investigate the consistency of the alleged management policy directing employees not to list time worked." (CP 104-108.)

Defendant responded that good cause did not exist to reopen the discovery period because: (1) Plaintiff already possessed the information she claimed she needed—Defendant had produced documents in

categories (1) and (2) to Plaintiff (CP 135, 140-141); (2) Plaintiff had ample opportunity to conduct discovery in accordance with the rules of procedure during the discovery period and took no action during the discovery period to expand or extend discovery; and (3) Plaintiff had previously agreed the discovery period would remain closed and had jointly requested entry of an order confirming same. (CP 137-144.)

Defendant further explained that reopening the deadlines would unfairly prejudice Defendant because Defendant would be forced to incur additional costs and expenses for no purpose other than to accommodate an exploratory venture that would not have resulted in the discovery of any new facts or additional evidence relevant or reasonably calculated to lead to evidence supporting Plaintiff's claims. (CP 138, 142.)

On April 15, 2011, the trial court held a hearing on Plaintiff's Motion. At the hearing, Plaintiff also argued that she needed PIN numbers that corresponded to the alarm records. The trial court ordered Defendant to produce these records (CP 261), and Defendant promptly did so. In all other respects, the trial court denied Plaintiff's Motion. (CP 110, 258, 260-261.)

On June 2, 2011, Stewart Title of Spokane moved for summary judgment on all of Plaintiff's claims. (CP 300-323.) With respect to Plaintiff's failure to accommodate claim, Stewart Title of Spokane argued

that Plaintiff did not require any accommodation other than the allowance of liberal absences, which it provided. (CP 306-309.) The trial court granted summary judgment on this claim, Plaintiff's claim under the Washington State Family Leave Act, and Plaintiff's claim for wrongful discharge in violation of public policy. (CP 1961-1967.) The trial court denied summary judgment on Plaintiff's claim for disparate treatment disability discrimination based on her termination and/or the company's alleged failure to allow Plaintiff to work outside normal business hours, Plaintiff's claim for violation of the Washington Minimum Wage Act, and Plaintiff's claim for violation of the Washington Wage Rebate Act. (CP 1961-1967.)

Stewart Title of Spokane filed a motion in limine seeking to prevent Plaintiff from referencing any legal obligation to accommodate Plaintiff's disability, as it appeared Plaintiff's counsel intended to conflate the dismissed accommodation claim with her disparate treatment claim. (RP 46-48.) The judge agreed that references to "accommodation" as contemplated by the applicable law would be likely to confuse the jury but ultimately denied the motion and instead suggested that counsel use "an appropriate amount of circumspection so that there won't be any confusion with the dismissed claim." (RP 59.)

On August 8, 2011, trial commenced on Plaintiff's remaining claims. (RP 1-4.) Before the presentation of Plaintiff's economic expert, Defendant objected and moved to strike the expert witness based on Plaintiff's late production of the expert's report and Plaintiff's intention to use slides containing summaries of the grounds for his opinion that were not produced until the very day the expert was scheduled to testify. (RP 590-596, 603-605.) Defendant had previously served Plaintiff with an interrogatory and a request for production requesting information on the subject matter of the expert's testimony, the substance of the facts and opinions on which the expert was expected to testify, a brief summary of the grounds for each such opinion, a list of prior lawsuits and testimony in other cases, and copies of documents reviewed by the expert. (RP 591-592.) Plaintiff did not object to these requests; indeed, she affirmatively represented in her 2010 responses that she would supplement her production with additional information, but she completely failed to do so. (RP 591-596, 603-605, 682, 690-691, 695.)

The trial court denied Defendant's motion to strike but permitted Defendant's counsel to interview the expert regarding the documents. (RP 607-613.) On interview, Defendant's counsel discovered that expert possessed a large binder full of documents upon which he had relied and which Plaintiff's counsel had never produced to Defendant. (RP 677-682,

690-691, 695-696.) On this basis, Defendant's counsel again moved to strike the expert. (RP 678, 697.) The trial court again denied the motion to strike; instead, the trial court ordered Plaintiff's counsel to produce the expert for deposition at her cost and allowed her expert to testify. (RP 701-702.)

Following the close of evidence, the parties submitted their proposed jury instructions, at which time Plaintiff sought instructions which included references to "reasonable accommodation" and a definition of same, even though Defendant conceded that Plaintiff was a "qualified individual" and even though the accommodation claim had been dismissed. Defendant argued that Plaintiff's proposed instructions would confuse the jury and misstate the law. The judge rejected Plaintiff's proposed jury instruction.

At the conclusion of trial, the jury found in favor of Stewart Title of Spokane on all issues, and the Court issued final judgment dismissing Plaintiff's remaining claims. (CP 2298-2300, 2327-2328.) Plaintiff timely appealed. (CP 2324-2326.)

IV. ARGUMENT

A. The Trial Court Properly Granted Summary Judgment on Plaintiff's Reasonable Accommodation Claim.

Plaintiff argues on appeal that she created a material fact issue with respect to her accommodation claim, and that the trial court erred by

granting summary judgment on the claim. (Appellant's Brief at 15-19.) Plaintiff asserts that it was Defendant's burden to show that the accommodation she identified at summary judgment—flexible scheduling—was an undue hardship, and Defendant failed to provide evidence that any effort had been made to accommodate Plaintiff. Plaintiff's arguments have no merit. (*Id.*)

1. Standard of Review.

A trial court's grant of summary judgment is reviewed *de novo*. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

2. Stewart Title of Spokane Satisfied its Duty to Accommodate Buhr.

To establish a prima facie case of failure to accommodate a disability, Buhr was required to show that she (1) had a sensory, mental, or physical abnormality that substantially limited her ability to perform the job; (2) was qualified to perform the essential functions of the job with or without reasonable accommodation; (3) gave the employer notice of the disability and its accompanying substantial limitations; and (4) upon notice, the employer failed to reasonably accommodate her. *Becker v.*

Cashman, 128 Wn. App. 79, 84, 114 P.3d 1210 (2005). If Buhr failed to establish a prima facie case of discrimination, Defendant was entitled to prompt judgment as a matter of law. *See Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001).

On summary judgment, Stewart Title of Spokane did not dispute that Buhr had health conditions during her employment that constituted a disability under the Washington Law Against Discrimination and that Buhr was qualified to perform the essential functions of her job. (CP 307, 377-379, 385, 432, 436.) It was also undisputed that Stewart Title of Spokane liberally and without limitation granted Buhr leave in response to each any every one of her requests even after she had used her paid sick leave and vacation time—the company did not even request a doctor's note certifying Buhr's medical need for the absences during her first year of employment. (CP 347, 442-43.) Stewart Title of Spokane repeatedly responded to Buhr's request for additional time off with "that was fine."[2] (CP 347, 442.)

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[2] For the period of August 16, 2006 through September 30, 2007 there were 272 work days, to which Buhr took 43 sick days off, without Stewart Title of Spokane raising an issue as to the same. This means that Buhr was absent approximately 16% of work days without her absences ever being questioned. (CP 638-685.)

Buhr's disability and the resulting absences did not prevent her from performing her work satisfactorily. Carollo, Stewart Title of Spokane's president, did not view Buhr's absences as impacting her substantive work. (CP 377-379, 385.) Carollo did not monitor Buhr's absences, never discussed Buhr's absences with her, and did not discuss Buhr's disability with any other employees at Stewart Title of Spokane (CP 377-379, 385.) Buhr's termination had nothing to do with the quality of her work; rather, Buhr was terminated for submitting an intentionally false timecard. (CP 390-391, 417-419.)

Buhr complains on appeal that Stewart Title of Spokane did nothing more than allow her to use her sick and vacation time, and that somehow this was not an appropriate accommodation. (Appellant's Brief at 18-19.) In Buhr's case, however, Stewart Title of Spokane was not required to accommodate Buhr beyond steps already taken. Buhr's condition did not affect her work performance; consequently, there was no need for any further action by Stewart Title of Spokane to facilitate Buhr in the performance of her job.

The duty to reasonably accommodate a disability extends only to measures which will help an employee perform her job, avoid termination or avoid aggravating a disability. *Jane Doe v. Boeing Co.*, 121 Wn.2d 8, 14, 20, 846 P.2d 531 (1993); *see also Becker*, 128 Wn. App. at 85 ("The

record simply does not show that [plaintiff's] physical abnormality substantially limited his ability to do his job. Consequently, he fails to establish the first element of a prima facie case of failure to accommodate."). Contrary to Plaintiff's assertions (and assumption), the WLAD does not guarantee a disabled worker a minimum of forty hours of work per week.

By granting Buhr liberal and unrestricted sick days, Stewart Title of Spokane accommodated Buhr's disability in such a manner that she was able to perform satisfactorily and continue her employment at Stewart Title of Spokane. This is exactly the goal of accommodation for employees with a disability.

The cooperation which Stewart Title of Spokane demonstrated in granting Buhr sick leave days upon request (CP 347) more than satisfied its obligation to reasonably accommodate Buhr's disability. Consequently, Buhr cannot establish required element number 4 of her prima facie case, viz., failure of Stewart Title of Spokane to accommodate her disability. Buhr's claim for failure to accommodate was properly dismissed as a matter of law.

3. Reasonable Accommodation Did Not Require Allowing Buhr To Work Outside of Normal Business Hours.

In a strained attempt to extend Stewart Title of Spokane's obligation to reasonably accommodate a disability beyond what is legally required, Buhr contends that that duty of accommodation required Stewart Title of Spokane to always allow Buhr to work outside of normal business hours in order to make up time which Buhr missed because of absences due to her disability. (Appellant's Brief at 15-16.)

While she was employed at Stewart Title of Spokane, Buhr never actually requested to work outside of normal business hours as a disability accommodation. (CP 351, 386-388, RP 1372-1375, 1557-1558.) Carollo and Montilla did not believe Buhr's work suffered from her absences. (CP 379, 385.) Carollo was not aware of Buhr's belief that she needed to work outside of business hours to perform her job. (CP 351, 386-388, RP 266.) Although Carollo was aware of Buhr's disability and attendant absences, he was not aware, and Buhr never informed him that she believed she needed to work outside of normal business hours in order to perform her job. (CP 379, 385.)[3]

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[3] Plaintiff's only request in this regard came in September 2007 when Buhr claimed that she, Hurd, and Dove needed to work more because of new regulatory requirements – not because of her disability.

Even if Buhr had requested to work outside of normal business hours because of her disability after September 1, 2007 (when Carollo announced nobody could work after hours without permission), Washington law does not require an employer to offer a disabled employee the precise accommodation the employee requests. *Wilson v. Wenatchee Sch. Dist.*, 110 Wn. App. 265, 270, 40 P.3d 686 (2002). Stewart Title of Spokane was under no obligation to allow Buhr to work outside normal business hours, where such accommodation was not requested and was not necessary to enable Buhr to perform the essential functions of her job as a customer service representative.

Stated another way, Washington law imposes no duty on Stewart Title of Spokane to accommodate Buhr's personal desire to make more money (and/or make up time missed) by working outside normal business hours where such alleged accommodation was not necessary to enable Buhr to perform the essential functions of her job. *Jane Doe*, 121 Wn.2d at 20. Stewart Title of Spokane was required under its accommodation obligation to do that which would allow Buhr to remain employed, which was accomplished by the liberal granting of leave. As such, Buhr cannot establish required element number 4 of her prima facie case, viz., failure of Stewart Title of Spokane to reasonably accommodate her disability, and her claim was properly dismissed as a matter of law. *Sharpe v. Am. Tel. &*

Tel. Co., 66 F.3d 1045, 1050 (9th Cir. 1995) (where the employer provides a reasonable accommodation, its legal obligation is satisfied and the "inquiry is over").

4. Even If Flex-Time Was Required, Buhr's Flex-Time Remained Constant During Her Employment.

Assuming, *arguendo*, that Stewart Title of Spokane was required to permit Buhr to work outside normal business hours because of her disability, Buhr's flex-time actually did remain constant throughout her employment. (CP 1872, 1888-1889.) Stewart Title of Spokane records reflected that for the period of August 16, 2006 through September 30, 2007, Buhr's work hours (per pay period) outside normal business hours – 8:00 a.m. to 5:00 p.m. – remained relatively consistent throughout her employment, with Buhr working between 0 to 11 hours per pay period outside those normal business hours all the way up to her termination on October 1, 2007, when she admittedly submitted an intentionally false timecard. (CP 1872, 1888-1889.) Buhr's implication that her pay was reduced failed on this basis.

Buhr's hour logs for the period of August 16, 2006 through September 30, 2007 also demonstrate that she did not work on the weekends to make up time missed, with the only exceptions being her falsified time record for work performed on Saturday September 22, 2007

and an hour-and-a-half worked on a Sunday in March 2007. (CP 638-685, 1872.)[4]

The undisputed facts demonstrate as a matter of law that Stewart Title of Spokane satisfied its obligation to reasonably accommodate Buhr's disability. As such, Buhr failed to establish a prima facie accommodation case. The trial court's dismissal of the claim on summary judgment should be affirmed.

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[4] Buhr's claim that Stewart Title of Spokane had previously provided Buhr accommodation via a flexible work schedule is also factually inaccurate and unsupported by admissible evidence—the evidence reflected the number of hours she worked outside of 8:00 a.m. to 5:00 p.m. and the absence of weekend work remained relatively consistent throughout her employment.

Even if Stewart Title of Spokane could be deemed to have provided Buhr with discretionary flex-time accommodation by allowing Buhr to work outside of normal business hours in response to her request to do so – satisfying her personal desire to make more money (and/or make up time missed) – in addition to the reasonable accommodation of unrestricted sick leave, Stewart Title of Spokane had the right to discontinue such a discretionary flex-time accommodation at any time.

There is no requirement that an employer continue to provide an employee with any accommodations that extend beyond those that are reasonable, even where it has done so in the past. *See, e.g., Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26 (1st Cir. 2001) (finding the employer was not obligated to continue providing a job-sharing accommodation); *Amadio v. Ford Motor Co.*, 238 F.3d 919, 929-30 (7th Cir. 2001) (finding the employer was "more than generous" in granting the plaintiff "numerous and extended leaves," but was not required to continue doing so). To hold otherwise, would discourage employers from granting discretionary accommodations beyond what is reasonable. *Phelps*, 251 F.3d at 26.

B. Plaintiff Was Not Entitled To Prove Reasonable Accommodation at Trial.

Despite the dismissal of her accommodation claim at summary judgment, Buhr claims that the Court erred by restricting her presentation of evidence regarding accommodation and by failing to issue a jury instruction which included a reference to and definition of reasonable accommodation.

1. Standard of Review.

A trial court's admission or refusal of evidence lies within the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. *Norris v. State*, 46 Wn. App. 822, 826, 733 P.2d 231 (1987).

Jury instructions should be considered in their entirety. 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. *Easley v. Sea-Land Serv.*, Inc., 99 Wn. App. 459, 467, 994 P.2d 271 (2000). An erroneous instruction should not be reversed unless prejudice is shown. *Id.* Unless the error affects or presumptively affects the outcome of the trial, it is not prejudicial. *Id.*

2. Reasonable Accommodation Is Not a Necessary Element of Disparate Treatment Discrimination.

It is well established that reasonable accommodation and disparate treatment are two distinct theories of disability discrimination. As stated by the Supreme Court of Washington,

> Under RCW 49.60.180, a disabled employee has a cause of action for at least two different types of discrimination. The employee may allege failure to accommodate where the employer failed to take steps reasonably necessary to accommodate the employee's condition. The employee also may file a disparate treatment claim if the employer discriminated against the employee because of the employee's condition.

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004) (quotations and citations omitted). (*See also* Appellant's Brief at 20 (citing *Becker*, 128 Wn. App. at 84.)

It is also well established that a theory of disability discrimination based on disparate treatment does not necessarily involve any issues regarding reasonable accommodation. *Becker*, 128 Wn. App. at 85 (stating the elements of disparate treatment without any mention of reasonable accommodation); *Riehl*, 152 Wn. 2d at 153 (same); (CP 472).

In Plaintiff's Response Memorandum to Stewart Title of Spokane LLC Motion for Summary Judgment, she noted "Disparate Treatment means nothing more than a showing that the defendant treats certain groups differently because of their protected characteristic. (CP 471

(citation omitted).) Plaintiff further explained, "With disparate treatment, an employer simply treats some people less favorably than others because of their [protected characteristic]." (CP 471 (quotation omitted).)

Plaintiff's accommodation claim was dismissed on summary judgment. In her remaining disparate treatment claim, Plaintiff alleged that (1) she was not allowed to work outside of business hours because of her disability, and (2) that her employment was terminated because of her disability. (CP 471, 472, RP 120, 123, 126, 2192-2199, 2209-2211.)

The elements of Plaintiff's claims for disability discrimination were that she was: (1) disabled, (2) subject to an adverse employment action, (3) doing satisfactory work, and (4) discharged under circumstances that raise a reasonable inference of unlawful discrimination. *Callahan v. Walla Walla Housing Auth.*, 126 Wn. App. 812, 819-820, 110 P.3d 782 (2005). Her ultimate burden was to produce enough evidence for a trier of fact to reasonably conclude that discrimination was a substantial factor for the adverse employment action. *Hill*, 144 Wn.2d at 186-87.

Nonetheless, Plaintiff now claims that it "is implicit in WLAD's requirement that an employer provide accommodation as a premise to *any* assessment of disability discrimination" (Appellant's Brief at 21-22) and "The concept of reasonable accommodation cannot therefore be separated

from *any* disability discrimination claim" (Appellant's Brief at 21-22 (emphasis added).) These assertions are disingenuous at best.

Buhr's Brief cites *Easley*, 99 Wn. App. 459 and *Riehl*, 152 Wn.2d 138 for the proposition that reasonable accommodation is itself an element of disparate treatment. Neither of the cases support Plaintiff's proffered proposition.

Easley is a reasonable accommodation case, not a disparate treatment case. 99 Wn. App. 459. In *Easley*, the plaintiff was not trying to prove reasonable accommodation as an element of disparate treatment. Rather, "Easley's theory of the case was that [his employer] failed to reasonably accommodate his disability" and his employer's theory was that "Easley could not perform the essential functions of his job and that he failed to prove [the employer did] not make a reasonable accommodation." *Id.* at 464. Thus, *Easley* has no bearing on Plaintiff's burden of proof in a disparate treatment case.

Likewise, in *Riehl*, the plaintiff asserted both accommodation and disparate treatment claims, but the discussion of Riehl's disparate treatment claim made no mention whatsoever of reasonable accommodation. *Riehl*, 152 Wn.2d at 149-153. Riehl does not support Plaintiff's argument that reasonable accommodation cannot be separated from *any* disability discrimination claim.

Buhr complains that the jury instructions given could have allowed the jury to conclude that if Buhr was treated the same as everyone else, no discrimination existed, and that this is error. (Appellant's Brief at 29.) Even if it were true, it is not error in this case.

Significantly, where a disabled person has been adequately accommodated, otherwise treating that person the same as everyone else is not discrimination. *Doe*, 121 Wn.2d at 20 ("identical treatment may be a source of discrimination only when the work environment fails to take into account the unique characteristics of the handicapped person"). In its dismissal of Plaintiff's reasonable accommodation claim, the trial court properly concluded that Stewart Title of Spokane had appropriately taken Buhr's unique characteristics into account. Thus, in Buhr's case, otherwise identical treatment could not be a source of discrimination, as Buhr claims.

At trial, Buhr's claim for failure to accommodate had already been dismissed; the Court did not err by preventing Buhr from improperly injecting that theory back into the case.

a. The Court Properly Instructed the Jury On Disparate Treatment.

Plaintiff contends her argument that reasonable accommodation should have been included at trial is supported by the second element of

disability discrimination as stated in Washington's Pattern Civil Jury Instruction 330.32 and that the Court erred by not including instructions regarding reasonable accommodation. The opposite is true.

Buhr mischaracterizes Washington's Pattern Civil Jury Instruction 330.32. In fact, the second element of the instruction states that a plaintiff seeking to establish disability discrimination "has the burden of proving . . . (2) That [he] [she] is able to perform the essential functions of the job in question [with reasonable accommodation]." WPI 330.32. However, the "note on use" of the instruction specifically states:

> Use the bracketed words as appropriate for the type of claim being made. *Id.* In proposition (2), use the bracketed phrase "with reasonable accommodation" and the definition of reasonable accommodation in WPI 330.34 *if, in order to make a threshold showing of qualification for the position*, the plaintiff must show that he or she could perform the job's essential functions with reasonable accommodation.

Id. (emphasis added). Thus, the instruction explicitly contemplates that in cases where Plaintiff is not required to make a threshold showing of qualification for the position, it may not be appropriate to include instructions on reasonable accommodation.

The general instructions for use of Washington's Pattern Civil Jury Instruction are also instructive:

> Use of pattern jury instructions—In general. The committee writes pattern jury instructions to assist the trial judge and the attorneys in preparing clear, accurate, and balanced jury

> instructions for individual civil cases. Pattern instructions are examples that apply to a general category of cases, rather than an exact blueprint for use in every individual case. They provide a neutral starting point—not an ending point—for the preparation of instructions that are individually tailored for a particular case. Trial judges and attorneys must consider whether modifications are needed to fit the individual case.
>
> Sometimes, this process can . . . mean omitting language that does not apply to an individual case. The goal, always, is to finish with a set of instructions that clearly and accurately state the law that applies to the particular case, no more and no less.
>
> . . .
>
> Bracketed language. Many of the pattern instructions include bracketed language. The brackets signify that the enclosed language may or may not be appropriate for a particular case. . . . The judge and attorneys should carefully consider which terms should be included. Inclusion of terms that do not apply to the facts of a case could confuse the jury or inadvertently insert unintended issues into the case.

WPI 0.10.

In this case, there was no dispute regarding Buhr's qualification for her position. (CP 472, RP 46-47, 1656-1657, 1663-1664.) Stewart Title of Spokane stipulated to her qualification and never argued or even implied that Buhr was unable to perform the essential functions of her position. (RP 46-47, 1656-1657, 1663-1664.) Stewart Title of Spokane's President admitted that he had no concerns about her performance; he regarded her as a productive employee. (RP 225-226, 2101.) Buhr was not terminated for poor performance; she was terminated for falsification

of her timecard. (RP 2101.) As a result, the inclusion of the second element from Pattern Jury Instruction 330.32, particularly the bracketed words "with reasonable accommodation," and the definition of reasonable accommodation Plaintiff sought did not apply to Plaintiff's case. Instructions on reasonable accommodation were unnecessary, inappropriate and would have confused the jury in this case, which is why Plaintiff wanted them included. The trial court did not err by not including these instructions.[5]

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[5] Buhr attempts to analogize the *Easley* court's reasoning regarding jury instructions to this case to support her argument that the trial court should have instructed the jury on reasonable accommodation. But this analogy is flawed. In *Easley*, the defendant argued that there should be no instruction on undue hardship in Easley's failure to accommodate case because the defendant had not raised the issue of undue hardship. 99 Wn. App. at 468. The *Easley* court found that contrary to the defendant's assertions, undue hardship was an issue at trial, and cited to several instances on the record where defendant had raised the alleged hardship that the plaintiff's requested accommodation would cause. *Id.* at 468-69. The court also referenced the close relationship between the concepts of reasonable accommodation and undue hardship. *Id.* at 469-72. In conclusion, the appellate court determined that the trial court had erred by failing to include an instruction on undue hardship because the jury could have concluded that the accommodation would have presented undue hardship. *Id.* at 472.

By contrast, in this case, Buhr argued that there should have been a jury instruction on reasonable accommodation so that Buhr could prove she was qualified for her position. (RP 1661.) Stewart Title of Spokane argued that there should be no instruction on reasonable accommodation because it presented no evidence or argument that Buhr was not qualified for her position. (RP 46-47, 1656-1657, 1663-1664.) Buhr has cited no evidence or argument regarding Buhr's inability to perform the essential functions of her job. (*See generally* Appellant's Brief.) Moreover, unlike reasonable accommodation and undue hardship, the concept of reasonable accommodation is not necessarily connected to the concept of disparate treatment. *See supra* pp. 30-33. As a result, it is not

Buhr was permitted to argue her theory of the case—that she was not allowed to work outside of business hours because of her disability, and that her employment was terminated because of her disability. The jury was not misled by the instructions, and when read as a whole, they properly informed the trier of fact of the applicable law. The court's rulings with respect to the given jury instructions should be affirmed.

b. The Court Properly Exercised Its Discretion in Admitting or Refusing Evidence on Accommodation.

Buhr further complains that the Court granted Stewart Title of Spokane's Motion in Limine on Accommodation. (Appellant's Brief at 24.) In fact, the Court amended its ruling before opening statements, denying Stewart Title of Spokane's Motion in Limine, but suggesting that counsel use the word accommodation "with an appropriate amount of circumspection so that there won't be any confusion with the dismissed claim." (RP 59.)

To the extent the Court restricted any evidence on accommodation, it properly did so in order avoid confusing the jury. Plaintiff's accommodation claim had been dismissed. Allowing extensive questioning and testimony regarding accommodation in the legal sense

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reasonable to conclude that the jury's verdict could represent a finding that Buhr failed to prove she could perform the essential functions of her job.

would have confused and misled the jury. Any refusal by the trial court of evidence relating to reasonable accommodation was well within its discretion and should not be disturbed on appeal.

C. The Trial Court Did Not Abuse Its Discretion By Denying Plaintiff's Motion to Allow Additional Discovery.

Plaintiff contends in her brief that the court erred in denying her Motion to Allow Additional Discovery and asserts that because she was not able to conduct sufficient discovery any subsequent order granting summary judgment[6] must be vacated and that remand for discovery and retrial is required. (Appellant's Brief at 31-35.)

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[6] When a party requires additional discovery in order to respond to summary judgment, the proper way to request that evidence is through a CR 56(f) motion. A party must comply with CR 56(f) to preserve his or her contention that summary judgment should be delayed or denied on that basis. *See MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 628-29, 218 P.3d 621 (2009); *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 24-25, 851 P.2d 689 (1993); *Turner v. Kohler*, 54 Wn. App. 688, 693-94, 775 P.2d 474 (1989). A contention by a party that she required additional evidence to respond to summary judgment cannot be successfully presented for the first time on appeal. *See Id.*; *accord* RAP 2.5 (permitting an appellate court to refuse to review any claim of error which was not raised in the trial court).

Plaintiff never filed a CR 56(f) affidavit or otherwise indicated that she needed more time to gather facts to oppose Stewart Title of Spokane's summary judgment motion. Because Plaintiff failed to seek a continuance under CR 56(f) or otherwise indicate (even in the alternative) that she required additional evidence to respond to summary judgment, the trial court acted properly in hearing the motion on the basis of the showing before it.

1. Standard of Review.

The decision to grant a continuance is at the discretion of the trial court and its decision will be upheld absent an abuse of discretion. *Harris v. Drake*, 152 Wn.2d 480, 492-93, 99 P.3d 872 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

The trial court's decision here was neither unreasonable nor based on untenable grounds. Plaintiff did not offer a good reason for her delay in obtaining evidence during the fourteen-plus months available prior to the discovery deadline.

Plaintiff's Motion to Allow Additional Discovery was based on her alleged need for three categories of documents and a 30(b)(6) deposition of a corporate representative from Stewart Title Guaranty Company, which was not a named defendant in the case. (CP 104-108.) The specific documents Plaintiff claimed she needed were (1) "alarm system cards upon which Stewart Title bases its discharge of [Plaintiff]"; (2) "evidence that it [Stewart Title of Spokane] ever paid [Plaintiff] for the hours reported on her timecard on the date she was discharged"; and (3) "additional employee timecards . . . to allow Plaintiff to investigate the

consistency of the alleged management policy directing employees not to list time worked." (CP 104-108.)

Defendant produced documents in categories (1)[7] and (2)[8] to Plaintiff. (CP 135, 140-141.) To the extent Plaintiff did not receive documents from category (3) or the requested 30(b)(6) deposition, she had ample opportunity to obtain discovery of these during the discovery period and gave no valid reason for her failure to do so. (CP 141-142.)

With regard to the documents requested in category (3), Plaintiff's Motion asserted that additional discovery should be allowed so that she might obtain all hourly timecards for Stewart Title of Spokane employees between January 2007 and December 2007. (CP 106-107.) It was and remains Defendant's position that those records were not relevant to

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[7] Defendant Stewart Title of Spokane had previously produced all alarm records in its possession, including the record that was relied upon by Mr. Carollo in connection with the termination of Plaintiff's employment. The records were provided on September 23, 2010, with Defendant Stewart Title of Spokane's responses to Plaintiff's Request for Production. (CP 135, 140-141.) The documents were produced even though Plaintiff and her counsel already had them in 2008 from state agency proceedings. (CP 135, 140-141.) Plaintiff also argued that she needed PIN numbers that corresponded to the alarm records. The court ordered Defendant to produce these records (CP 261), and Defendant promptly did so.

[8] Plaintiff's Motion argued that Defendant did not produce evidence that Plaintiff was paid for the hours reported on her final timecard when she was discharged. (CP 106.) Plaintiff never requested this information from Defendant in Interrogatories or Requests for Production of documents during the discovery period; however, Defendant voluntarily provided the records to Plaintiff on April 8, 2011, after receiving Plaintiff's Motion. (CP 135, 140-141.)

Plaintiff's specific claims in this case and were sought for purposes unrelated to the claims and issues to be resolved. (CP 141.) Defendant timely objected on this basis to Plaintiff's request for production of those records. (CP 134-135, 141.) Plaintiff's counsel never sent Defendant correspondence requesting additional records, nor did she seek a ruling from the Court on Defendant's objections during the discovery period. (CP 134-135.) Instead, Plaintiff and her counsel waited until discovery closed, and until after depositions scheduled outside the discovery period for their convenience were completed, to challenge Defendant's valid objections. (CP 134-135, 141.)

Moreover, at trial, when Plaintiff re-urged her request for the time cards, the trial court concluded that in addition to the request being untimely, the records were not relevant and would confuse the jury. (CP 2316-2317.) Accordingly, there were no requests for relevant documents outstanding.

Allowing the requested discovery months after the close of the discovery period would have unfairly prejudiced Defendant by requiring it to expend additional time and resources engaging in additional discovery which could and should have been conducted during the discovery period. (CP 142.)

Pursuant to the court's scheduling order, Plaintiff had over fourteen months to pursue and engage in discovery under the rules of procedure, and she elected not to do so. Moreover, Plaintiff agreed, through counsel, that both the discovery period and the deadline to join additional parties would remain closed when the parties agreed to push the trial setting back six months to allow time for mediation. (CP 96-98.) Plaintiff had no reasonable excuse for her failure to obtain the discovery within the discovery period that she now claims she needed. A heavy trial schedule is not a reasonable excuse for not complying with court orders.[9] Thus, the trial court's denial of Plaintiff's Motion to Allow Additional Discovery was proper.[10]

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[9] This conclusion is supported by disciplinary action cases which recognize that "[a] heavy workload is not an excuse," *In re Loomos*, 90 Wn.2d 98, 103, 579 P.2d 350 (1978), and that "[a] case overload is a matter of personal control and not a defense." *In re Kennedy*, 97 Wn.2d 719, 723, 649 P.2d 110 (1982).

[10] By repeated citation to *Blair v. TA-Seattle East, No. 176*, 171 Wn.2d 342, 344, 254 P.3d 797 (2011), Plaintiff's Brief appears to suggest (though it never explicitly states) that the trial court improperly failed to apply the standard set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), in evaluating Plaintiff's Motion to Allow Additional Discovery. (Appellant's Brief at 20-24.) However, *Burnet* is inapplicable.

Unlike *Burnet*, in this case the Defendant did not request, and the court did not impose, any sanction on Plaintiff. Rather, the court acted within its discretion to deny Plaintiff's request for additional discovery where Plaintiff presented no good cause for amending the case schedule order and extending the discovery deadline.

Even if *Burnet* did apply to this case, the record regarding the additional discovery requested indicates that in the colloquy between the bench and counsel,

D. The Trial Court Did Not Abuse Its Discretion By Sanctioning Plaintiff's Counsel for Her Failure to Supplement.

Finally, Plaintiff argues that the trial court improperly sanctioned her for failing to produce documents relied upon by her expert. (Appellant's Brief at 35-40.)

1. Standard of Review.

A trial court's sanctions for discovery violations are reviewed for abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). In punishing a discovery violation, "the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery." *Burnet*, 131 Wn.2d at 495-96.

Where a court does not impose the severe sanction of witness exclusion, but instead imposes lesser sanctions, such as monetary sanctions, a trial court has broad discretion to fashion remedies for

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all of the factors identified in *Burnet* were considered in the trial court's determination of whether to permit additional discovery.

Plaintiff's counsel did not dispute her noncompliance with the court's case scheduling order. Plaintiff willfully disregarded the court order without any reasonable excuse or justification. Defendant would have been materially prejudiced if Plaintiff's request to reopen discovery had been granted. From these facts, the trial court clearly concluded that Defendant would be prejudiced by an extension of the discovery period. Moreover, lesser "sanctions" were not appropriate in this case. The trial court properly exercised its broad discretion in denying Plaintiff's Motion to Allow Additional Discovery.

discovery violations. *Mayer*, 156 Wn.2d 684; *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355, 858 P.2d 1054 (1993).

2. The Monetary Sanction Imposed on Plaintiff's Counsel Was Well Within the Trial Court's Discretion.

Discovery sanctions may be imposed under CR 26. If a violation of CR 26 is found, the imposition of sanctions is mandatory. In her brief, Plaintiff argues that there was no discovery violation because there was no violation of a court order and because Stewart did not move to compel prior to the close of discovery. (Appellant's Brief at 37, 39-40.) She also argues that because her responses to Defendant's Interrogatories and Requests for Production were incomplete, she had no duty to supplement. (*Id.* at 38-39.) These arguments are without merit.

Discovery sanctions based on the failure to comply with CR 26 do not require a showing that the party violated an order compelling discovery. Instead, the court must consider all surrounding circumstances and determine whether the attorney complied with CR 26. CR 26(g); *Fisons*, 122 Wn.2d at 343. When applying the rules to the facts, the trial court must ask whether the attorney's certification to responses to Interrogatories and Requests for Production were made after reasonable inquiry and (1) were consistent with the rules, (2) were not interposed for

any improper purpose, and (3) were not unreasonable or unduly burdensome or expensive. *Id.* at 344. In short, the responses must be "consistent with the letter, spirit and purpose of the rules." *Id.*

In Plaintiff's responses to Defendant's request for production, she affirmatively stated that she would supplement with the requested information on her expert. (RP 595-596, 691.) She completely failed to do so, even after changing her expert. (RP 14, 591-596, 603-605, 682, 690-691, 695.) Instead, Plaintiff produced a final expert report on the eve of trial and withheld documents reviewed by that expert which he brought with him to trial. Her actions, or inaction, did not comply with "the letter, spirit and purpose of the rules."

The court had the authority under CR 26 to impose sanctions for her failure to do so regardless of the fact that Buhr had not violated an order to compel discovery. "A motion to compel compliance with the rules is not a prerequisite to a sanctions motion." *Fisons*, 122 Wn.2d at 345. Moreover, it would be unreasonable in this instance to have expected Stewart Title of Spokane to file a motion to compel because Plaintiff asserted no objections in response to the requests and affirmatively stated that she would provide the information requested. (RP 591-596, 603-605, 682, 690-691, 695.)

Buhr also suggests that the court erred by imposing discovery sanctions because there was no showing that her conduct was intentional. (Appellant's Brief at 39 n.12.) However, a showing of intent is not required before sanctions may be imposed. *Fisons*, 122 Wn.2d at 345. A showing of intentional conduct is not required as even an inadvertent failure to disclose is enough if there is a violation of the rule without a reasonable excuse. *See In re Estate of Foster*, 55 Wn. App. 545, 548, 779 P.2d 272 (1989). Here, Buhr may or may not have intended to make incomplete discovery responses, but there was no reasonable excuse for Buhr's failure to supplement the requested information regarding her expert. Thus, the court did not err by concluding that Buhr's counsel committed a discovery violation and exercising its discretion to impose a sanction.

V. ATTORNEY'S FEES

Plaintiff requests an award of attorney's fees and costs on appeal pursuant to RCW 49.60.030(2) and RAP 18.1. RCW 49.60.030(2) has been interpreted as granting the prevailing party a right to attorney's fees on appeal. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn. 2d 340, 362, 172 P.3d 688 (2007) (awarding fees only after concluding that the appellant prevailed on the merits of her underlying claim). However, "[w]here a party has succeeded on appeal but has not yet prevailed on the

merits, the court should defer to the trial court to award attorney fees." *Riehl*, 152 Wn. 2d at 153.

Because Plaintiff's appeal is meritless, she should not prevail on appeal, and therefore she has no claim to attorney's fees. Even if her pending appeal was successful, however, Plaintiff would not be entitled to attorney's fees because she has yet to prove the merits of her claims. Plaintiff is not entitled to attorney's fees on appeal, and her request for attorney's fees should be denied.

VI. CONCLUSION

For the above-stated reasons, Respondent-Defendant Stewart Title of Spokane, LLC respectfully requests that this Court affirm the trial court's rulings in every respect and deny Appellant-Plaintiff Buhr's request for fees and costs on appeal.

RESPECTFULLY SUBMITTED this 24th day of October, 2012.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via regular mail, postage prepaid, on this day, to:

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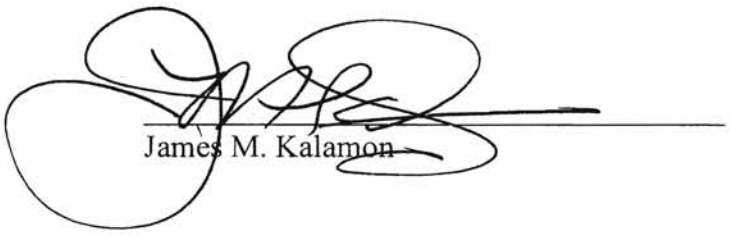
Dated this 24th day of October 2012, at Spokane, Washington.



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