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NO. 69332-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JASON AND ELIZABETH BROOKS,

Appellants,

vs.

BPM SENIOR LIVING COMPANY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff Elizabeth Brooks ("Brooks") had her day in court, presenting her claims against her former employer BPM Senior Living Company ("BPM") over the course of a seven-day trial. She failed to prevail. This Court should reject her 16 assignments of error. Brooks might be dissatisfied with the result, but she establishes no reversible error. While Brooks disputes many of the trial court's findings, substantial evidence supports them. No legal basis supports reversal. This Court should affirm the deliberative decision of the Honorable Bruce E. Heller

Brooks worked as the Vice President Sales at BPM from 2007 until she voluntarily resigned in March, 2010. She disputes that her resignation was voluntary. But the trial court fully explained its factual finding that she resigned with express reference to substantial evidence in the record and the conclusion that BPM President Dennis Parfitt's testimony was more credible on this point. CP 67-70 at FF 48-53 (see Appendix), citing Exs. 50, 51, 166, 14, 49, 53, and 57. No basis exists to reverse this finding. The record supports the conclusion that there was no adverse employment action.

Because there was no adverse employment action, the trial court correctly found in BPM's favor on the majority of Brooks' claims. Brooks failed to carry her burden of proof on the remaining claims.

While Brooks attempts to present a case that BPM terminated her because she had a baby, in fact it was Brooks who was unwilling to perform the travel legitimately required by her position as a Vice President

of Sales for a multi-state business experiencing a financial and marketing crisis. Brooks was unwilling to consider other, lower-paying positions that did not include travel even when BPM's President raised this with her. Brooks' change of personal priorities is understandable, but it does not make BPM liable. The trial court's judgment correctly reflects this.

This Court should affirm the judgment in favor of BPM.

II. STATEMENT OF THE ISSUES

Brooks' issue statements do not accurately frame the issues before this Court. The issue statements assume facts not supported by the record. They are premised on misconceptions of the trial court's findings and conclusions of the law. The issues correctly stated are:

1. Is Brooks, the party with the burden of proof, entitled to any relief where she never requested a new trial, makes no evidentiary challenges on appeal, does not argue that she was entitled to judgment as a matter of law and presents no argument or authority supporting her request for remand and a new trial?

2. Does substantial evidence support the numerous factual findings of the trial court to which Brooks assigns error, including the material findings that Brooks left her job voluntarily (Assignments of Error 5, 11, 14, 15, and 16) and that her travel requirements as Vice President of Sales in 2010 were not pretextual but an essential function of her job based on legitimate, non-discriminatory business reasons (Assignment of Error 8)?

3. Based on the pivotal finding that Brooks voluntarily resigned, did the trial court correctly find for BPM on all of her claims dependent on an adverse employment action, i.e., Gender Discrimination, Disability Discrimination, Retaliation, and Interference with Maternity Leave? (Assignments of Error 15 and 16).

4. Based on the pivotal finding that the travel requirements were legitimate and non-discriminatory, and an essential requirement of Brooks' job, did the trial court correctly find for BPM on her claims of Gender Discrimination and Disability Discrimination based on failure to accommodate? (Assignments of Error 8, 9, and 13).

5. Did Brooks fail to carry her burden of proof and does substantial evidence support judgment for BPM on Brooks' claims of (1) harassment based on sex, (2) disability discrimination based on failure to accommodate, and (3) interference with maternity leave?

6. Can Brooks' attorney obtain review of sanctions imposed against her by the trial court for improperly communicating with a represented witness where she lacks standing because she never appealed the sanction order, the Opening Brief fails to assign error to the sanction order and, in any event, the issue is moot because the trial court suspended the sanctions?

III. STATEMENT OF THE CASE

This case arises from BPM's employment of Brooks as Vice President of Sales and her eventual resignation on March 16, 2010.

A. BPM operates senior living facilities across the western United States.

BPM operates seventeen senior-living facilities in seven states across the country from Washington to Arizona. CP 58 at FF 1. BPM's corporate offices are in Portland, Oregon. *Id.* BPM is a business of approximately 1,800 employees owned by Walter Bowen. VR 6/20/12 at 9 (Bowen).

Occupancy is a critical factor in the success of the company. Occupancy rates are critical in the senior housing industry because "occupancy drives revenue which drives everything." VR 6/14/12 at 35 (Jason Brooks).

Multiple BPM executives testified at trial. They included President Dennis Parfitt (VR 6/18/2012 148-191, VR 6/19/2012 72-133), Chief Operating Officer Dan Lamey (VR 6/18/2012 122-147), and Director of Human Resources Neil Wilson (VR 6/18/12 114-121). Owner and Chief Executive Officer Walter Bowen also testified. VR 6/20/12 7-54. Parfitt's testimony was especially significant. He was a friend of Brooks and her husband. VR 6/14/12 at 94-95 (Brooks); VR 6/18/12 at 149-50 (Parfitt). Parfitt and Brooks had numerous conversations in 2009 and 2010 regarding her role in the company. VR 6/14/12 at 84-88 (Brooks); VR 6/18/12 at 171-74 (Parfitt). Brooks communicated her resignation and negotiated her severance with Parfitt. *See* CP 67-69 at FF 48-52; Exs. 50-51; VR 6/19/12 at 79–81 (Parfitt). The trial judge credited Parfitt's testimony over that of Brooks. CP 69-70 at FF 52.

B. Brooks is Vice-President of Sales at BPM responsible for occupancy at BPM's multi-state senior living facilities

Brooks began working at BPM in 2005. On May 16, 2007, she was promoted to Vice President (VP) of Sales. CP 59 at FF 5. In April 2007, Brooks' immediate supervisor, BPM's Senior Vice President of Marketing and Sales Fara Gold, left the company. CP 59 at FF 7. BPM did not immediately hire a replacement for Gold, but instead asked Brooks to assume some of Gold's most critical marketing responsibilities, as well as continue her existing duties as VP of Sales. CP 59 at FF 8.

The primary purpose of Brooks' position as VP of Sales was to grow the occupancy in BPM's 17 senior living communities by "increasing the number of move-ins to try to help the occupancy increase." VR 6/18/12 at 129 (Lamey). To fulfill that purpose, Brooks' duties as VP of Sales included "coaching, training, recruiting and encouraging the team to increase the occupancy" at all 17 BPM properties. CP 59 at FF 5. Brooks testified that in her role as VP of Sales she "was involved in coaching and supporting the on ground team, the sales and marketing directs at each community. . . I was their coach, their support, and a contact for them in the industry and a bridge from corporate to the actual building." VR 6/14/12 at 67–68.

As VP of Sales, Brooks was required to travel regularly to the head office in Portland, Oregon and to the company's 17 properties from her home in Kirkland, Washington. CP 59 at FF 9; VR 6/14/12 at 68 (Brooks). "Her job was to visit the communities, to coach, and to give direction to

those people on site." VR 6/18/12 at 185 (Parfitt). Brooks agreed that travel was a part of her job responsibilities as VP of Sales. VR 6/14/12 at 82 (Brooks). She testified that in 2007 to 2008 she generally traveled to the communities "every other week." VR 6/14/12 at 68. The trial court found, based upon its review of Brooks' work calendars, that "Ms. Brooks typically traveled between 1.86 and 2.67 weeks out of every month. In 2008, the year for which she had the heaviest travel calendar, Ms. Brooks' schedule included 69 nights of overnight travel." CP 59-60 at FF 10; Ex. 74, 164 and 165. These findings are unchallenged.

The precise amount of Brooks' travel varied based on the needs of BPM and its particular properties. She testified that she made more frequent weekly trips to a property if it was struggling and that her travel was driven by the needs of a particular property at the time. VR 6/14/12 at 68-76, Exs. 164-65. Traveling to visit the properties was essential to Brooks' position as VP of Sales because a trip to the property was the only way "to see the community itself and how its appearance is; to see the model units to make sure they're up to the standards [BPM] expect[s]; to view or visit the competition to find out maybe what they're doing that [BPM is] not doing." VR 6/18/12 at 128 (Lamey). *See also* VR 6/18/12 at 157 and 185 (Parfitt).

C. The senior living industry and BPM are hit hard by the economy as their occupancy rates suffer.

Beginning in or around 2007 to 2008, the senior living industry "was experiencing a decline in occupancy." VR 6/20/12 at 37-38 (Bowen).

Brooks' husband Jason, who also works in the senior housing industry, testified that rather than increasing occupancy, senior living facilities were striving just to keep their occupancy rates from plummeting, stating: "By the time 2008 hit the mantra was flat is the new up, meaning if you can be flat [on occupancy rates] you're doing great, because everybody was tanking." VR 6/14/12 at 35. According to Jason Brooks, most senior citizens sell their home and use the proceeds of that sale to pay to move into a senior living facility. *Id.* In 2008 with the economy and "housing market crashing and people not being able to get value out of their homes or people not feeling like they could get enough value out of their homes, a lot of people were choosing to go with in-home care . . .holding off [moving to an assisted living facility] thinking their home value will come back and then they can turn round and sell their home and move into an assisted living" facility. VR 6/14/12 at 35–36.

BPM in particular was struggling as a company. In 2009, the occupancy rates at BPM's properties declined significantly, falling "far below the industry standards." VR 6/20/12 at 52-53 (Bowen); CP 60 at FF 14. BPM's revenue for 2009 was accordingly lower than annual budget estimates by more than $1.4 million. CP 60 at FF 14. In March 2009, Walt Bowen criticized Brooks' performance based on the sagging occupancy rates. CP 60-61 at FF 15-16; Ex. 3. BPM's decreasing occupancy and revenue prompted a reconsideration of sales and marketing strategy and personnel. CP 60 at FF 14. During the spring of 2009, BPM interviewed candidates for the position of Senior VP of Marketing and Sales,

previously held by Fara Gold, but the company ultimately did not hire anyone to fill the opening. CP 61 at FF 17. As the occupancy rates continued to sag, it became essential that BPM "ramp[] up marketing and sales efforts" to increase occupancy rates at its communities. VR 6/18/12 at 135 (Lamey). On August 16, 2009, Bowen sent an email to Parfitt outlining a reorganization plan for the sales and marketing teams that included the hiring of a new director who would travel four days a week "to continually evaluate the market." CP 61 at FF 18. Subsequently, BPM again attempted to recruit a senior director of marketing and sales via an outside recruiting agency. *Id.*

Eventually, BPM did not hire anyone for that position and abandoned the effort, determining in 2010 to continue to rely on Brooks as VP of Marketing and Sales and hire two directors to assist her and report to her. CP 64 at FF 34; VR 6/18/12 at 181-82 (Parfitt). BPM believed that this approach would facilitate the company's focus on bringing occupancy up and support Brooks' efforts. VR 6/18/12 at 181-82 (Parfitt); VR 6/18/12 at 140 (Lamey on 2010 priorities for company). Kim Homer, the new Community Relations Director hired March 1, 2010, would be responsible for facility visits in Arizona, California and Nevada. VR 6/18/12 at 188. Homer's responsibility for visiting these areas would significantly reduce Brooks' travel obligations. Francesca Barrett would support corporate marketing as the Sales and Marketing Coordinator. VR 6/19/12 at 48-49 (Barrett). Just as this new team was getting started, however, Brooks resigned. *See* CP 68-69 at FF 50-52; 6/19/12 at 32-42

(Homer); 6/19/12 at 51 (Barrett).

D. Brooks has a baby, takes maternity leave, and returns.

As a counterpoint to the worrisome economy experienced in 2008 and 2009, Brooks and her husband had happy personal news. In late February 2009, Brooks announced her pregnancy. CP 60 at FF 13. BPM has a high majority of female employees and experiences on average 30-35 maternity leaves per year, with the great majority of its workers returning to work after the maternity leave. VR 6/18/12 at 116, lines 1-8 (Lamey). Brooks requested six weeks of maternity leave, intending to work on a part-time or light-duty basis for an additional six weeks. CP 61 at FF 20. Brooks worked through September 18, 2009, and gave birth to her first child, Grace Brooks, on September 20, 2009. CP 61-62 at FF 21.

On September 24, 2009, Parfitt advised Brooks via email about Bowen's reorganization plan for the sales and marketing teams, including the search for a new executive to replace Farrah Gold. CP 62 at FF 22. Brooks had concern that her job was in jeopardy. CP 62 at FF 23. Parfitt told her he would do what he could to save her job. *Id.*

On October 28, 2009, Brooks requested that she be able to return to work at BPM on a part-time basis, writing in an e-mail: "I am excited to come back and would like to actually come back 'part time' prior to my 12 weeks. . . . is this possible? I would love to perhaps start off one day a week, starting next week?!?!?!, for two weeks and then come back 2 days a week for the month until I return full time. . . . ?!?!" CP 62 at FF

25; Ex. 117. BPM granted her request. On November 5, 2009, Lamey announced Brooks' return to BPM in an e-mail that read: "I am pleased to announce that Elizabeth Brooks will be returning to active duty at BPM on Monday, November 16th . . . . I am thrilled to have her back. . . ." CP 62-63 at FF 25; Ex. 10. Brooks thus returned to work on November 16, 2009 on a part-time basis working from home. CP 63 at FF 26. While she was working on a part-time basis, she did not travel to any of BPM's properties or its corporate headquarters. *Id.*

Brooks was scheduled to and did return to work full-time on December 21, 2009. CP 64 at FF 30.

E. Conflicts between Brooks and BPM after her return.

On December 10, 2009, Brooks and Parfitt met for lunch. CP 63 at FF 28. Parfitt testified that, at the lunch, Brooks informed him that she was not able to travel because she had a small child; Brooks did not mention to Parfitt that she was having any trouble breastfeeding. VR 6/18/12 at 171-72 and 175 (Parfitt). During the lunch Parfitt and Brooks brainstormed to "explore other [job] options, if she was unwilling to travel." *Id.* For example, Parfitt testified that, other than continuing in her position as VP of Sales with the same responsibilities she had had in the past, they "discussed the possibility of her going to [BPM's] property in Redmond, Washington, Overlake Terrace. She would have to go back as a marketer on site [which d]id not pay anywhere near what she was making." VR 6/18/12 at 172-73; CP 63 at FF 28. They also discussed Brooks working as

an outside contractor "not only taking over the Traci Bild program but possibly using people that would go visit the properties on site to in fact verify or feel verified that what is being told telephonically is in fact taking place." VR 6/18/12 at 174; *see also* CP 63 at FF 28. Brooks also asked whether if she left the company she could receive a one year severance. VR 6/18/12 at 173. Parfitt told her that he would not be able to get authority for that amount of severance. *Id.* Parfitt and Brooks were unable to resolve how Brooks would fulfill her job responsibilities given her desire not to travel. VR 6/18/12 at 174 (Parfitt).

As Brooks was adapting to her new responsibilities as a parent, BPM was continuing to struggle with its occupancy rates, which were lower than its competitors. CP 60 at FF 14; VR 6/18/12 at 136-37 (Lamey). According to COO Lamey, in 2009 and 2010 "we were all at risk if the company didn't start performing better." VR 6/18/12 at 131. BPM's overall goal for 2010 was to get occupancy up and expenses down. VR 6/18/12 at 140. To reach that goal, it was important that Brooks as VP of Sales and any new senior director of marketing and sales travel to the properties. Brooks never disputed this. In fact, Brooks testified that in addition to the demands of the economy, BPM had purchased two "distressed properties" that required extra attention to raise their occupancy levels. VR 8/20/12 at 86-87.

It is undisputed that Brooks worked into 2010 until March 16, 2010. CP 64 at FF 30-34, CP 64-70 at FF 35-53 (demonstrating continued employment from January to March 16, 2010), CP 71 lines 17-25, CP 77

lines 6-10. *See also* VR 6/14/12 at 28 (Jason Brooks testifying wife "still had a job" in January). While Brooks testified she was told upon her return that December 31, 2009 would be her last day, Brooks acknowledges that in fact her job continued into the new year as Judge Heller found. *See id.; Op. Br.*, 34 (BPM "rescinded" notice).

In mid-January 2010, Lamey proposed to Brooks a travel schedule for the first few months of 2010. CP 64-65 at FF 35. The trial court found that the proposed schedule would have required Brooks to travel almost every week from February 2, 2010 through the end of April 2010. *Id.* The amount of travel was meant to meet the goal of "addressing the communities that were having the most challenges with occupancy." VR 6/18/12 at 137-40. According to Lamey, "that's what we had always done with Elizabeth is focus on the communities that were struggling and those were the priories for her attention on site visits." VR 6/18/12 at 137.

Brooks did not immediately commit to the proposed schedule, and on February 3, 2010, she told Parfitt that "[a]s it turns out, there are some scheduling conflicts as I do have some appointments and commitments that I cannot change. . . . however there are many things that I was able to finagle and change so that I could be on the road as often as possible." CP 65 at FF 36; Ex. 33. Parfitt responded, "I would prefer that we do not adjust this schedule unless we have [a] significant rationale that supports that a change is necessary. Please let me know what the conflicts and appointments are that cannot be changed. I would appreciate what you are proposing as an alternative schedule." *Id.* Brooks did not mention any

issue with breastfeeding at that time, nor had she mentioned any issue related to breastfeeding to Lamey when he showed her the proposed travel schedule in January. VR 6/18/12 at 145 (Lamey); VR 6/18/12 at 186 (Parfitt).

On February 9, 2010, Brooks wrote to Parfitt: "As you know, I am still nursing my daughter. Travelling requires that I, essentially, bring a nanny to watch Gracie as I am still her food source. . . . I assumed that my travel would be comparable if not less frequent than my previous schedule prior to my maternity leave. After all, it's only fair that you make a reasonable accommodation for my need to nurse my baby after returning from maternity leave." CP 65 at FF 38; Ex. 37. Parfitt responded stating: "I am not understanding why you are making the assumption that your travel will be comparable if not less frequent than your previous schedule. . . . [Y]ou have the duty and responsibility to respond to fluctuations in market conditions and changes that directly impact revenues and occupancy at all of our communities." CP 66 at FF 40; Ex. 32.

Parfitt nonetheless revised the schedule, presenting Brooks with a new, lighter schedule on February 18, 2010. CP 66 at FF 42. The schedule required two visits to the home office in Portland per month and a quarterly visit to each of the company's seventeen facilities. Parfitt stated he was "open to any tweaks and/or suggestions," but it is undisputed she never presented any. *Id.*; Ex. 142. The trial court found that "Ms. Brooks acquiesced to the schedule because on February 23, 2010, Mr. Bowen told her he was 'pleased that you and Dennis have reached agreement on your

travel schedule. . . .' He also said, '[w]e are very fortunate to have you as the leader of our marketing and sales team.' Ms. Brooks did not respond or dispute Mr. Bowen's assertions that an agreement had been reached." CP 66-67 at FF 43; Ex. 40. Lamey testified that the travel schedule was not intended to be punitive in any way. VR 6/18/12 at 183. Indeed, according to Lamey, the travel to the communities was about equal to what Brooks had always been doing in her role as VP of Sales. VR 6/18/12 at 140.[1]

Despite the travel schedule, Brooks did not travel to any of the BPM properties in January, February, or March 2010. VR 6/14/12 at 83–86 (Brooks). Travel was halted by Walt Bowen until Brooks completed plans of action for each of the 17 BPM properties. *Id.*; CP 67 at FF 46; *see also* VR 6/18/12 at 61 (Brooks) and 189 (Parfitt).

BPM also added two employees in February 2010 to assist Brooks: Kim Homer and Francesca Barrett. VR 6/14/12 at 86 (Brooks); VR 6/14/12 at 143–44 (Brooks). Homer was promoted to Regional Director of Sales and Marketing. CP 67 at FF 45. Homer was to take over the majority of the travel to the southern properties listed on Brooks' travel calendar.

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[1] Brooks' co-workers also testified that she always traveled often in her role as VP of Sales. *See* VR 6/18/12 at 129 (Lamey). Her travel was not changed in any significant way after she returned from maternity leave. VR 6/19/12 at 99, 109-10, and 116 (Parfitt). Kim Homer currently travels three weeks per month to the corporate office and all 17 communities. VR 6/19/12 at 42-45 (Homer).

This had the effect of substantially reducing Brooks' travel obligations. *Id.*; VR 6/14/12 at 131, 143 (Brooks); VR 6/20/12 at 52 (Bowen). Going forward Homer would "have primary responsibility for [BPM's] senior living communities located in Arizona, Nevada, California . . . she would be the one travelling to those properties." VR 6/18/12 at 188-89 (Parfitt); *see* CP 67 at FF 45. Brooks testified that she was "excited" to be getting the help she needed and "pleased beyond belief" to have Homer on board. VR 6/14/12 at 143–44 (Brooks).

Unbeknownst to BPM, on February 23, 2010, Brooks obtained a doctor's note from Dr. Bonnie Gong prohibiting travel as long as she was breastfeeding. CP 67 at FF 44; Ex. 61. Brooks did not inform anyone at BPM about the doctor's note until March 10, 2010. On March 10, 2010, Brooks provided Parfitt the doctor's note and informed him that the proposed travel schedule (to which she had previously acquiesced, which had not been put into effect, and which was moot in light of Kim Homer's taking over travel to half the properties) "seriously impacted my ability to produce milk and to feed my daughter. In my doctor's opinion this is negatively affecting Gracie's health as well as my own health. In her medical opinion I should not travel during the time that I am breastfeeding and I am providing you her note stating that medical fact." CP 67 at FF 47; Ex. 49. While Brooks' explanation of the note was inaccurate and exaggerated as to the scope of the doctor's opinions, the note does prohibit any travel. Parfitt took the doctor's note at face value to mean that Brooks could not travel anywhere while breastfeeding. VR 6/19/12 at 76-77

(Parfitt). Brooks did not travel anywhere for work after she provided Parfitt her doctor's note on March 10, 2010. VR 6/14/12 at 83–86 (Brooks).

F. Brooks resigns

Despite that BPM had voluntarily revised Brooks' proposed travel schedule and suspended it for early 2010 and had hired two assistants to lighten her load, including Kim Homer who would cover half her prior travel obligations, Brooks was unsatisfied with her job duties. She wrote Parfitt on March 16, 2010 about the travel expectations of her job: "I am certain [Kim Homer] could assist in travelling and we could together cover all of our communities [sic] needs and more. . . I just do not understand why the expectations for my travel have been ramped up so significantly since my return from maternity leave." CP 67-68 at FF 48; Ex. 50. Parfitt responded immediately, taking issue with Brooks' assertion that her travel responsibilities had increased dramatically, writing:

> Your job has always required significant travel and will continue to do so. . . . That said, if you wish to bring your child along on your business trips, as I understand you have been doing, I am more than happy to permit that if that is something you are interested in. . . I am also willing to take a look to see if there are any positions within the organization that do not require travel. But if you take one of those, it most likely would require you to work at Overlake Terrace, and the only positions I can think of offhand, pay a lot less than what you currently make, so I do not know whether that is an option you wish to discuss. Regardless, let me know if you are interested in that, as I would like to see you to [sic]

> remain with our organization. . . . Elizabeth, let me know if you have any suggestions that I have not considered. If you can't fulfill the requirements of this position, then we need to come to a quick resolution of this situation.

CP 68 at FF 49; Ex. 51.[2] The above communication also solicited input and ideas from Brooks, and raised alternative positions including one at Overlake Terrace near her home.

Later that same afternoon, Parfitt and Brooks talked by telephone. The trial court found that the two mutually agreed on a separation with severance, as follows:

> Ms. Brooks told [Mr. Parfitt] she could still travel to Portland and Las Vegas. Mr. Parfitt responded that he could not allow any travel based on the doctor's note and that they did not have many options. Ms. Brooks said she wanted to work something out. She suggested severance pay and told Mr. Parfitt that six months would be agreeable to her. Mr. Parfitt said he would try to get approval for the six months. After the conversation ended, he obtained approval from Mr. Bowen for a $55,000 severance package and communicated this to Ms. Brooks. According to Mr. Parfitt, Ms. Brooks "seemed very happy and satisfied with this number." Mr. Parfitt told her she would have to sign a severance agreement and release.

CP 68-69 at FF 51-52; *see also* VR 6/19/12 at 79–81 (Parfitt).

Brooks testified at trial that she never agreed to resign in exchange

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[2] BPM CEO Dan Lamey also testified that he would have allowed Brooks to transfer to a non-travelling position at a local BPM property in Kirkland, Washington rather than resigning. VR 6/18/12 at 124. It was uncontested that Brooks never asked Lamey is she could transfer to a position at a BPM property. VR 6/18/12 at 147 (Lamey).

for six months of severance pay, but that testimony was inconsistent with the sworn testimony she provided prior to trial that she did not know whether she agreed to resign in exchange for six months' severance pay. VR /18/12 at 68–69. The trial court credited Parfitt's testimony that Brooks was not involuntarily terminated, *see* VR 6/19/12 at 84, based on other corroborating evidence and the circumstances, articulated as follows:

> First, Ms. Brooks' contemporaneous notes of the March 16 telephone conversation do not establish by a preponderance of the evidence that she was terminated. The notes include the term "separate ways," but not "you're being let go." In addition, Ms. Brooks' notes of a telephone conversation the next morning are more consistent with Mr. Parfitt's testimony that Ms. Brooks requested six months' severance and that Mr. Parfitt would try to get authority for that: "Walt not in yet. Steve felt '6 months work for him!' Understands why I want 6 mo. Fight for 6 months." Ex. 166. An employee who has agreed to leave but wants certain terms in return is more likely to negotiate aggressively over severance pay than an employee who has been fired.
>
> Second, Mr. Parfitt's version is more consistent with the email he sent her shortly before the phone call, including "Let me know if you are interested in that [Overtake Terrace], as I would like to see you to [sic] remain with our organization," Ex. 51.
>
> Third, the cheerful tone of Ms. Brooks' subsequent correspondence with Mr. Parfitt is more consistent with a mutually agreed separation than an involuntary termination. As previous correspondence reflects, Ms. Brooks was quite capable of being assertive with Mr. Parfitt. See Exhibits 15, 49. Yet, in response to Mr. Parfitt's

> March 17, 2010 email in which he stated that he would have a final check for her that afternoon, Ms. Brooks wrote, "I will have my email [announcing her departure] for your review this morning!" Ex. 53. Later that day, after submitting the draft announcement, Ms. Brooks wrote to Mr. Parfitt: "[L]et me know what you think of the rough draft email (and , yes, you can tease me about 'too' versus 'two'!) Have a drink for me!"
>
> Fourth, the company's March 18, 2010 Personnel Action Notice reflects a mutual parting of the ways rather than a firing. Under the "dismissal" box, the document refers the following statement at the bottom of the document: "Negotiated separation by mutual agreement and subject to separate severance agreement." After the question "would you rehire?" the "yes" box is checked. Ex. 57.[3]

CP 69-70 at FF 52. On the Personnel Action Notice, BPM answered "yes" to the question "would you rehire" because Brooks "was a really valuable employee and we hoped someday she'd be able to return." VR 6/19/12 at 84 (Parfitt). Indeed, after Brooks left BPM, COO Lamey provided Brooks a good reference when a prospective employer called him. VR 6/18/12 at 124 (Lamey).

Brooks' draft e-mail to be distributed to her colleagues at BPM after her departure further supports that she was not terminated. It read in part: "I will be walking away with a smile on my face and tremendous warmth in my heart. . . Fortunately, I found that I could combine my love

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[3] Director of Human Resources Neil Wilson also testified that he was aware that Brooks and BPM had mutually agreed that she would separate from BPM. VR 6/18/12 at 117–21 (Wilson).

of work, and my ethics of family within my employment at BPM Senior Living however a new chapter in my life has been unfolding and I need to be true to that experience and go my own way." Ex. 159; VR 6/20/12 at 65 (Brooks). Brooks' attorney characterized her resignation e-mail as "upbeat." VR 6/20/12 at 77. Brooks' email presents a realistic, personal explanation for her decision to "walk away." BPM sent Brooks a written Separation Agreement consistent with the negotiated resignation that she never signed. CP 70 at FF 53; VR 6/19/12 at 82-84 (Parfitt).

G. BPM's executives testify that they did not discriminate against Brooks

BPM's executives explicitly testified at trial that they did not discriminate against Brooks. For example, Bowen testified that he did not discriminate against Brooks because she had a child or breastfed her child. VR 6/20/12 at 21-22. Likewise, Lamey testified that he never discriminated or treated Brooks differently because she had a baby or because she breastfed her baby and never observed anyone else at BPM acting with discriminatory motives against Brooks either. VR 6/18/12 at 123–24.

The record demonstrates that BPM consistently offers and supports maternity leave and return to work after leave without discrimination. Director of HR Wilson testified that every year at BPM approximately 30

to 35 employees take maternity leave and most of those employees return to employment after leave. VR 6/18/12 at 116. *See also* VR 6/20/12 at 14 (Bowen). In 2009 to 2010, BPM "made it a point to accommodate the need for expressing breast milk." *Id.*; *see also* VR 6/18/12 at 176 (BPM employees returned to work at BPM while breastfeeding and never had a problem) (Parfitt). Bowen testified that his executive assistant of twelve years had twins while working for him and he set up a special area in the office where she could bring her children and breastfeed. VR 6/20/12 at 22 (Bowen). *See also* VR 6/18/12 at 176 (Parfitt) (same).

COO Lamey also testified that it is important to him that BPM treats employees well when they have children. VR 6/18/12 at 129. Lamey testified: "Our work force is predominantly female. And beyond that, I think we want to have a reputation of being a company that people want to work for. So treating the employees well is an important part of that." *Id.*

H. Procedural History

Elizabeth and Jason Brooks sued BPM, asserting the following causes of action in their Complaint: (1) discrimination based upon sex and/or disability; (2) wrongful termination in violation of public policy; (3) retaliation; (4) outrage; (5) negligent infliction of emotional distress; and (6) loss of consortium on behalf of Jason Brooks. CP 1–4. In the weeks approaching trial, Brooks asserted in briefing new, unpleaded

claims including (1) discrimination for/interference with taking maternity leave; (2) failure to accommodate Brooks's alleged disability; and (3) harassment that the trial court ultimately allowed. CP 70 ("Claims Asserted by the Parties").

The case was tried to Judge Heller from June 13 to June 25, 2012. CP 58 lines 16-17. On August 2, 2012, Judge Heller issued 21-pages of Findings of Fact and Conclusions of Law, finding in favor of BPM and against the Brooks on all claims. CP 58-80 (Appendix). Judgment was entered on August 23, 2012. CP 55-80. (Appendix).

Brooks never requested a new trial from the trial judge. She did not seek reconsideration or propose alternative findings.

Elizabeth Brooks and her husband timely filed a notice of appeal. CP 81 ("Identification of Appellants: Petitioners as Appellants are Elizabeth Brooks and Jason Brooks."). Brooks' attorney Lori Haskell did not file a notice of appeal on Haskell's behalf.

I. Sanctions against Brooks' attorney Lori Haskell.

During trial, Brooks' attorney Lori Haskell engaged in ex parte communications with a speaking agent of BPM, misrepresented to Judge Heller what had occurred, and was sanctioned $250 for her violation of the

Washington Rules of Professional Conduct.[4] Ultimately, Judge Heller concluded and ruled that Attorney Haskell had violated the ethical rules and imposed against Attorney Haskell a sanction of $250. VR 6/19/12 at 30-31. When Judge Heller entered the final Judgment in this case, he suspended the $250 sanction. CP 55.

IV. STANDARDS OF REVIEW

BPM agrees with Brooks that this Court reviews whether the trial court's findings are supported by substantial evidence and whether the findings support the conclusions of law. *See Opening Brief* ("*Op. Br.*") 22-23. *See also Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004); *Dorsey v. King County*, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988).

"Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). In a case like this, where the

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[4] On June 18, 2012, BPM's counsel learned that Attorney Haskell had called and interviewed Soher Bishai, a speaking agent of BPM, outside the presence of and without notice to BPM's counsel. *See* VR 6/18/12 at 1-10. BPM's counsel brought the issue to the attention of Judge Heller. *Id.* Attorney Haskell represented to Judge Heller that she did not interview Bishai over the telephone. VR 6/18/12 at 10. Judge Heller let Bishai testify. Bishai's testimony established that Attorney Haskell in fact interviewed the witness during the telephone conversation. VR 6/18/12 at 17-19 and 22-24. BPM moved for sanctions against Attorney Haskell for violations of the ethical rules. VR 6/18/12 at 91-92.

trial court evaluated the evidence and witnesses, the reviewing court defers to the trial court's determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony. *Snyder v. Haynes*, 152 Wn. App. 774, 779, 217 P.3d 787 (2009); *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671 (2005). All reasonable inferences from the facts are made in favor of the trial court's determination. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Henry v. Bitar*, 102 Wn. App. 137, 142, 5 P.3d 1277 (2000). "Unchallenged findings are verities on appeal." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). So long as there is substantial evidence, the reviewing court will not substitute its judgment for that of the trial court even if the court might have resolved a factual dispute differently. *Korst*, 136 Wn. App. at 206; *see also Thorndike,* 54 Wn.2d at 573.

This Court should reject the unsupported assertion in Brooks' Assignments of Error that numerous factual findings present "mixed error[s] of law and fact." *See Op. Br.* 1-3 at numbers 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. Brooks offers no authority or discussion regarding the proper standard. In fact, Brooks' Assignments of Error 6, 7, 11, 12, 13, 14, 15, and 16 present only factual issues. The finding that Brooks was not terminated (Assignments of Error 6, 7, 11, 14, 15, and 16) is a finding of fact. *See State v. Anderson*, 51 Wn. App. 775, 778, 755 P.2d 191 (1988) ("If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact."), quoting *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986). In

addition, the findings that (1) Brooks was not able to perform the essential functions of her job and (2) Brooks failed to establish that BPM did not provide a reasonable accommodation (Assignments of Error 12 and 13) are findings of fact. *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 31–32, 244 P.3d 438 (2010).

Nor do Brooks' Assignments of Error 8, 9, or 10 present "mixed error[s] of law and fact." In Assignment of Error 8, Brooks assigned "error to the trial court's failure to conclude that the travel schedule taking Elizabeth out of town three weeks out of every month was pretextual." *Op. Br.* 1. Contrary to Brooks' unsupported contention, this is not "a mixed error of law and fact." Whether an employer's asserted justification for its act was actually a pretext for discrimination is an issue of fact reviewed under the substantial evidence standard. *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 642, 911 P.2d 1319 (1996); *Thorndike,* 54 Wn.2d at 573.

The Washington Supreme Court explained in *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 494, 859 P.2d 26 (1993), that to resist a motion for judgment as a matter of law and proceed to trial a plaintiff asserting an employment discrimination claim must offer evidence of pretext under the *McDonnell Douglas* burden-shifting paradigm. But once the plaintiff's claim survives this initial challenge and proceeds to a decision by the fact-finder at trial, the *McDonnell Douglas* "burden-shifting scheme drops from the case." *Id.* at 491–92. At trial, the plaintiff no longer must prove pretext, but instead "bears the burden of proving the ultimate fact -- that the defendant intentionally discriminated

against [her]." *Id.* at 492. Judge Heller's finding that Brooks did not establish that the travel schedule was a pretext for discrimination is a finding of fact, which need only be supported by substantial evidence.

Likewise, the findings that alleged harassment was not based on sex and was not sufficiently pervasive to create a hostile work environment are not "mixed error[s] of law and fact." *See Op. Br.* 2, Assignments of Error 9, 10. The standard on review is whether Judge Heller's findings of fact—including those unchallenged factual findings, which are verities on appeal—support his decision that the alleged harassment was not based on sex and was not sufficiently pervasive to create a hostile work environment. *See Robel*, 148 Wn.2d at 45. If the trial court made the necessary findings to support his decision, which he did, then no further inquiry is needed. *Id.*

Applying these standards, this Court should affirm. Judge Heller's reasoned findings are supported by substantial evidence, and those findings adequately support his conclusions of law.

V. ARGUMENT

The trial court correctly found for BPM. Brooks challenges the outcome as to four of her claims: Gender Discrimination (based on disparate treatment and harassment); Disability Discrimination (based on disparate treatment and failure to accommodate); Retaliation; and Interference with Maternity Leave. *Op. Br.* 3-4. Her challenges fail. The outcome is supported by the unchallenged findings of fact and the substantial evidence in the record. This Court should affirm.

Throughout her brief Brooks argues that she submitted substantial evidence to support an alternative outcome in which she prevails, and that this demonstrates trial court error. *See Opening Brief*, 25, 31, 35, 47. As one example, Brooks argues, "Substantial evidence exists contradicting the Finding that Ms. Brooks left her job voluntarily." *Id.* at 47. Brooks misunderstands her burden on appeal and the role of this Court. That evidence may have supported a different outcome is inconsequential. Brooks' burden here is to show that the evidence supported only one outcome: success on the merits of her claims. She does not argue this, nor could she. The evidence was susceptible to Judge Heller's interpretations. She raises no evidentiary issues. The trial was fair. This Court has nothing to correct and no reason to second-guess the proper weighing of the evidence and conclusions reached by Judge Heller.

A. The judgment is supported by the substantial evidence in the record supporting the trial court's finding that Brooks voluntarily resigned and the attendant conclusion that she suffered no adverse employment action.

After considering the evidence, including the contradictory testimony from witnesses Brooks and Parfitt regarding the circumstances of Brooks' departure from BPM, Judge Heller found that Brooks voluntarily resigned from BPM. That finding is supported by substantial evidence. Indeed, Judge Heller carefully and explicitly spelled out the evidence he considered to make that factual finding.

The finding that Brooks voluntarily resigned from BPM establishes

that no adverse employment action occurred. This is dispositive of Brooks' claims of Gender Discrimination, Disability Discrimination, Retaliation, and Interference with Maternity Leave, which require as an essential element an adverse employment action. The substantiated finding that Brooks did not suffer an adverse employment action supports affirmance of Judge Heller's conclusion that Brooks failed to establish her claims of Gender Discrimination, Disability Discrimination, Retaliation, and Interference with Maternity Leave.

1. Substantial evidence supports the finding that Brooks voluntarily resigned.

Substantial evidence supports the finding that Brooks voluntarily resigned. Brooks misunderstands the standard of review when she argues, "Substantial evidence exists contradicting the Finding that Brooks left her job voluntarily." *Op. Br.* 47. Brooks wholly fails to identify what this evidence is. But, more importantly, the question is not whether evidence would have supported a different finding, but whether the finding made is supported. Whether a different trier of fact might have reached a different conclusion is not dispositive. *Korst*, 136 Wn. App. at 206; *see also Thorndike,* 54 Wn.2d at 573. Here, the trial court recognized Brooks' testimony at trial that she was fired. CP 68 at FF 50. Nonetheless, substantial evidence supports the finding that she resigned. The trial court found Mr. Parfitt's account of the events more credible, stating: "The court credits the testimony of Parfitt on the issue of whether Brooks was involuntarily terminated . . . ." CP 69-70 at FF 52. The trial court then

went on to enumerate four reasons for its finding. *Id.*

The four reasons cogently rely on documentary evidence supporting Parfitt's recollection of the events. First, Brooks' contemporaneous notes of her March 16 and 17, 2010 telephone conversations with Parfitt support the finding that Brooks resigned and negotiated aggressively for six months' severance pay. CP 69-70 at FF 52. Brooks' notes included the term "separate ways," and not "you're being let go." CP 69 at FF 52. Brooks' notes stated: "Walt not in yet. Steve felt '6 months work for him!' Understands why I want 6 mo. Fight for 6 months." CP 69 at FF 52; Ex. 166.

Second, an e-mail Parfitt sent to Brooks before their March 16, 2010 telephone conversation was more consistent with Parfitt's recollection of events, rather than Brooks' testimony regarding the same. That e-mail from Parfitt stated: "Let me know if you are interested in that [Overtake Terrace position], as 1 would like to see you to [sic] remain with our organization." CP 69 at FF 52; Ex. 51.

Third, "the cheerful tone of Ms. Brooks' subsequent correspondence with Mr. Parfitt is more consistent with a mutually agreed separation than an involuntary termination," particularly when "previous correspondence reflects [ ] Ms. Brooks was quite capable of being assertive with Mr. Parfitt." CP 69 at FF 52; Exs. 15, 49. On March 17, 2010, for example, after the telephone calls in which Brooks contends she was terminated, Brooks and Parfitt exchanged emails. Parfitt stated that he would have a final check for her that afternoon. She responded by saying,

"I will have my email [announcing her departure] for your review this morning!" CP 69 at FF 52; Ex. 53. Later that same day, Brooks wrote to Parfitt: "[L]et me know what you think of the rough draft [departure notice] email (and , yes, you can tease me about 'too' versus 'two'!) Have a drink for me!" CP 70 at FF 52; Ex. 53.[5]

Fourth, BPM's March 18, 2010 Personnel Action Notice confirmed a mutual parting of the ways, rather than a firing. The form reflects a negotiated separation, explaining: "Negotiated separation by mutual agreement and subject to separate severance agreement." After the question "would you rehire?" the "yes" box is checked. CP 70 at FF 52; Ex. 57.

Additionally, there was no adverse employment action in December 2009. The trial court correctly ruled that BPM did not effectively terminate Brooks in December 2009. CP 64 at FF 30-34; CP 71 lines 17-25; and CP 77 lines 6-10. Brooks does not assign error to any of these findings, including the finding that Brooks remained employed after December 31, 2009, as follows:

> On December 30, 2009, Mr. Parfitt informed Mr. Lamey "Walt wants to get EB back involved." Ex. 18. Mr. Bowen's assistant called Ms. Brooks and asked her to attend a meeting in Portland the following week, indicating that Ms. Brooks would still be employed by the company

[5] Additionally, she drafted a very "cheerful" (in the words of her counsel) departure notice that explained to her colleagues that she wanted to be "true to her experience" Ex. 159; VR 6/20/12 at 65 (Brooks); VR 6/20/12 at 77.

after the end of the year.

CP 64, at FF 33.[6] Unchallenged findings are verities on appeal. *Robel*, 148 Wn.2d at 42; *Keever & Assoc., Inc. v. Randall*, 129 Wn. App. 733, 741, 1991 P.3d 926 (2005), *rev den.* 157 Wn.2d 1009 (2006). Despite raising the issue in her Assignment of Error 16 whether Brooks was terminated in December 2009, Brooks fails to assign error to the relevant factual findings and presents no issues related to these unchallenged facts. As the record discloses throughout, Brooks in fact continued to work from January to March 16, 2010. The record does not support the conclusion that Brooks' employment terminated in December 2009.

Substantial evidence and unchallenged findings support the conclusion that BPM never terminated Brooks and that Brooks voluntarily resigned on March 16, 2010.

2. Because substantial evidence supports the finding that Brooks voluntarily resigned, this Court should affirm the judgment in favor of BPM on Brooks' claims requiring an adverse employment action.

Because Brooks voluntarily resigned, judgment for BPM on all claims requiring an adverse employment action should be affirmed. These include Brooks' claims of Gender Discrimination (based on disparate treatment), Disability Discrimination (based on disparate treatment), Retaliation, and Interference with Maternity Leave.

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[6] Brooks in fact did not dispute at trial that her employment continued into 2010. All witnesses questioned on the subject including Brooks at VR 6/14/12 at 118-120 testified that she remained employed into 2010.

First, to establish her gender discrimination claim based on disparate treatment,[7] Brooks was required to prove that (1) she suffered an adverse employment action, (2) the adverse employment action was due to her pregnancy or condition related to childbirth, and (3) that the adverse employment action was not justified or excused by a business necessity. *Kastanis*, 122 Wn.2d at 493–94; *Hegwine*, 162 Wn.2d at 354–56. An adverse employment action means a "tangible change in employment status, such as hiring, firing, failing to promote, reassignment with different responsibilities, or a decision causing a significant change in benefits." *Crownover v. Dept. of Transportation*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011) (internal quotation marks and citation omitted). Threats to terminate are not an adverse employment action. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 464, 98 P.3d 827 (2004). Brooks unsuccessfully attempts to distinguish *Kirby*, *see Op. Br.* at 34, but cannot prevail where no tangible change occurred in her job and she lost not one day of work in December 2009. Judge Heller correctly concluded that Brooks did not suffer an adverse employment action. Judgment in BPM's favor on this claim was proper. This Court should affirm.[8]

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[7] Claims of discrimination based on pregnancy-related conditions, including conditions related to childbirth, are evaluated as claims for discrimination based on sex or gender. *Hegwine v. Long-view Fibre Co.*, 162 Wn.2d 340, 12 P.3d 688 (2007).

[8] Judge Heller further properly concluded that even "[a]ssuming, without deciding, that increasing Ms. Brooks' travel responsibilities constituted an adverse employment action by virtue of being 'a reassignment with different responsibilities,' *Crownover*, 165 Wn. App. at 148 . . . [BPM] successfully established a legitimate, non-discriminatory explanation for

Second, to establish a disability discrimination claim based on disparate treatment Brooks was required to prove that BPM intentionally discriminated against her because she was disabled, by proving the following essential elements: (1) she had a disability; (2) she was able to perform the essential functions of her job with or without a reasonable accommodation; (3) she suffered an adverse employment action, i.e. was terminated; and (4) her disability was a substantial factor in the decision to terminate her employment. *Kastanis*, 122 Wn.2d at 492; WPI 330.32. The trial court's substantially supported finding that Brooks chose to leave BPM pursuant to a negotiated severance package supports the rejection of her claim of disability discrimination based on an involuntary termination. Judgment on this claim in BPM's favor was proper. This Court should affirm.[9]

Third, with regard to Brooks' claim of retaliation pursuant to RCW 49.60.210(1), Brooks was required to prove that: (1) she engaged in statutorily protected activity; (2) BPM took an adverse employment action; and (3) there is a causal link between her statutorily protected activity and BPM's adverse employment action. *Francom v. COSTCO Wholesale Corp.*, 98 Wn. App. 845, 861-62, 991 P.2d 845 (2000). Judge Heller's reasoned finding that Brooks did not suffer an adverse

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the travelling requirements. *See* Section V.B, *infra*.

[9] As an additional reason to support rejection of Brooks' claim of disability discrimination, she also had no disability. *See* discussion at Section V.C, *infra*.

employment action supports the entry of judgment in BPM's favor on this claim. That judgment should be affirmed.[10]

Fourth, with regard to Brooks' claim that BPM interfered with her right to maternity leave by allegedly attempting to force her out of her job in retaliation for taking leave, Brooks was required to prove that BPM subjected her to an adverse employment action. *Edgar v. JAC Products, Inc.*, 443 F.3d 501, 508 (10th Cir. 2006). Accordingly, Judge Heller's finding that Brooks did not suffer an adverse employment action supports judgment in BPM's favor on this claim. This Court should affirm.[11]

B. The judgment is supported by the substantial evidence in the record supporting the trial court's finding that the travel requirements of Brooks' job were legitimate, non-discriminatory, and essential.

At trial, Brooks contended that the travel schedule BPM asked her

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[10] As an additional reason to support rejection of Brooks' retaliation claim pursuant to RCW 49.60.210(1), Brooks never has argued that she was terminated for allegedly engaging in any "statutorily protected ***opposition activity***." *See Graves v. Dept. of Game*, 76 Wn. App. 705, 711-12, 887 P.2d 424 (1994) (emphasis added) (to prevail on such a claim, an employee must show that he or she "engaged in a statutorily protected opposition activity"). She never has identified any "opposition activity" and fails to do so on appeal. Brooks instead has argued that she was terminated for giving birth, taking maternity leave and/or breastfeeding her child. None of these is an opposition activity.

[11] As an additional reason to affirm the rejection of Brooks' claim of Interference with Maternity Leave, the trial court found that any threat of termination was not based on Brooks' taking leave. CP 76–77 citing Ex. 3. Therefore, any threatened termination could not give rise to an interference with leave claim. *See* RCW 49.78.300(1)(a) (prohibiting interference with maternity leave).

to maintain in her position as VP of Sales after she returned from maternity leave gave rise to a claim of Gender Discrimination and Disability Discrimination based on a failure to accommodate. Judge Heller concluded that the travel schedule was an essential function of Brooks' job based upon BPM's legitimate, non-discriminatory business needs. CP 74-75. Judge Heller also concluded that she could not perform these essential functions. *Id.* These findings are supported by the unchallenged findings of fact and the substantial evidence in the record. These substantiated findings support the trial court's judgment in BPM's favor on Brooks' claims of Gender Discrimination and Disability Discrimination based on a failure to accommodate.

1. Substantial evidence supports the finding that the travel requirements of Brooks' job were an essential function of her job for legitimate, non-discriminatory business reasons.

Substantial evidence supports Judge Heller's findings that BPM demonstrated legitimate, non-discriminatory reasons for requiring Brooks to travel in her position as VP of Sales after she returned from maternity leave and that performing that travel was an essential function of Brooks' position as VP of Sales.

Brooks does not assign error to or contest the factual findings that as "VP of Sales, Ms. Brooks was required to travel regularly to the head office in Portland and the company's seventeen facilities" across the country, from Washington to Arizona and "typically traveled between

1.86 and 2.67 weeks out of every month" before having a child, including 69 nights of overnight travel in 2008. CP 59-60 at FF 9-10; Exs. 74, 164 and 165. Nor does Brooks assign error to the findings that "[d]uring 2009, the occupancy rates at BPM's properties declined significantly and were lower than those of its competitors. The company's revenue for 2009 was accordingly lower than annual budget estimates by more than $1.4 million. The decreasing occupancy and revenue prompted a reconsideration of sales and marketing strategy and personnel." CP 60 at FF 14; Exs. 4 and 5.

These uncontested findings, which are verities for the purposes of this appeal, and the referenced documentary evidence substantially support Judge Heller's finding that BPM established a legitimate, non-discriminatory explanation for Brooks' 2010 travelling requirements and that travelling to BPM's properties and to its corporate headquarters in Portland was an essential function of her job. Judge Heller explained why the declining occupancy rates legitimately required this travel, as follows:

> It is undisputed that by early 2010, the occupancy rates at BPM's properties had declined significantly and were lower than those of its competitors. As VP of Sales, it had always been Ms. Brooks' responsibility to travel to the company's facilities. Given the crisis in which the company found itself, BPM had legitimate, non-discriminatory reasons for insisting that Ms. Brooks retain, and even increase, her travel responsibilities. Ms. Brooks has not established that requiring her to travel an average of 3.6 weeks per month was a pretext for discriminating against her for having a child. Ms. Homer, the Regional Director of Sales for the southern region, who did not take pregnancy leave, testified that she travels three weeks per month.

CP 72 lines 7-15. The testimony from numerous witnesses including Jason

Brooks regarding the crisis over occupancy rates was uncontested.

Testimony at trial also demonstrated why a visit to the properties was necessary to fulfill the responsibilities of VP of Sales. VR 6/18/12 at 128 (Lamey). *See also* VR 6/18/12 at 157 (Parfitt); VR 6/18/12 at 185 (Parfitt); VR 6/14/12 at 67–68 (Brooks). Brooks never disputed the value or need for on-site visits to the properties to fulfill her job duties. Thus, the evidence was substantial that Brooks' job legitimately required travel and that by early 2010 due to a crisis in occupancy rates her travel responsibility continued and was even increased.

Moreover, as additional ground for affirmance, Judge Heller also concluded that Brooks was unable to fulfill the essential function of her position to travel to at least some of BPM's properties across the country. CP 70 line 22 to CP 75 line 2. On March 10, 2010, Brooks informed Mr. Parfitt by email that, in her doctor's opinion, the travel schedule BPM had proposed to her "is negatively affecting Gracie's health as well as my own health. In her medical opinion I should not travel during the time that I am breastfeeding and I am providing you her note stating that medical fact." CP 67 at FF 47; Ex. 49. The note unequivocally barred all travel for Brooks. Ex. 61. Brooks does not challenge the finding that Dr. Gong's note "prohibit[ed] travel as long as she was breasteeding." CP 67 at 44.

Thus, the evidence was undisputed that (1) Brooks' job always had

required travel, (2) the need for travel continued or was increased based on market conditions and the declining occupancy rates at BPM's properties, but (3) that Brooks could not fulfill this responsibility.

2. Because substantial evidence supports the finding that the travel requirements were an essential function of her job, for a legitimate, non-discriminatory reason, this Court should affirm the judgment in favor of BPM on Brooks' claims of gender discrimination and disability discrimination based on a failure to accommodate.

The substantially supported finding that Brooks' proposed travel schedule as VP of Sales was based upon BPM's legitimate, non-discriminatory business necessity is dispositive of Brooks' Gender Discrimination claim based on disparate treatment and her Disability Discrimination claim based on failure to accommodate. The substantially supported finding supports affirmance.

Brooks never established the elements of these claims. As explained above, to establish Gender Discrimination, Brooks was required to prove that (1) she suffered an adverse employment action, (2) the adverse employment action was due to her pregnancy or condition related to childbirth, and (3) that the adverse employment action was not justified or excused by a business necessity. *Kastanis*, 122 Wn.2d at 493–94; *Hegwine*, 162 Wn.2d at 354–56. A hostile work environment may constitute an adverse employment action in certain circumstances. *Kirby*, 124 Wn. App. At 464. To establish a hostile work environment claim

based on gender, Brooks was required to prove the existence of the following elements: the harassment was (1) unwelcome; (2) because of the employee's sex; (3) sufficiently pervasive to affect the terms and conditions of employment and create an abusive work environment; and (4) is imputed to the employer. *Glasgow v. Georgia-Pacific*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985).

Judge Heller concluded that "[a]ssuming, without deciding, that increasing Brooks' travel responsibilities constituted an adverse employment action . . . [BPM] successfully established a legitimate, non-discriminatory explanation for the travelling requirements" which was not a pretext for discriminating against her for having a child. CP 72 lines 1-7. That is, "[g]iven the crisis in which the company found itself, BPM had legitimate, non-discriminatory reasons for insisting that Ms. Brooks retain, and even increase, her travel responsibilities." *Id.* at lines 10-12. Likewise, the travel schedule did not give rise to a hostile work environment because "pressuring her to increase her travel between January and March 2010 . . . was not based on Brooks' sex. The requirement that she travel was based on the occupancy rate crisis." *Id.* at lines 22-25. Brooks' travel schedule was based on BPM's legitimate, non-discriminatory business necessity in a turbulent market. Therefore, judgment in BPM's favor on her Gender Discrimination claims was proper and should be affirmed.

Moreover, the substantially supported finding that the proposed travel was an essential function of Brooks' job (which she asserted to BPM, and her doctor's note plainly stated, she could not perform) is

dispositive of Brooks' Disability Discrimination claim based on a failure to accommodate. To establish her failure to accommodate claim, Brooks was required to prove: (1) that she had a disability that substantially limited her ability to perform the job; (2) she was qualified to perform the essential functions of the job in question; (3) she gave BPM notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, BPM failed to affirmatively adopt measures that were available to it and medically necessary to accommodate Brooks's abnormality. RCW 59.60.040(7). Importantly, an employer's duty to accommodate does not include eliminating essential functions of the job, "as that would be tantamount to altering the very nature or substance of the job." *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 534, 70 P.3d 126 (2003). The trial court's finding that travelling to at least some of BPM's properties and to its corporate headquarters in Portland was an essential function of Brooks' job, and that Brooks was not able to perform the essential functions of her job with or without a reasonable accommodation because her doctor barred any travel supports entry of judgment in BPM's favor on Brooks' accommodation claim. The judgment should be affirmed.

Affirmance also is independently supported by the uncontested evidence that Brooks never in fact had to travel to any of the properties post-maternity leave because Bowen suspended the proposed travel schedules so that Brooks would complete plans of action for the properties. VR 6/14/12 at 83–86 (Brooks). Additionally, BPM accommodated Brooks by adjusting the proposed travel schedule and

hiring Kim Homer to work under Brooks and cover travel to properties in Arizona, Nevada and California. CP 67 at FF 45; VR 6/14/12 at 131, 143 (Brooks); VR 6/20/12 at 52 (Bowen). This still was insufficient to satisfy Brooks.

C. Brooks failed to establish that she suffered from any cognizable disability that could give rise to a disability discrimination claim as a matter of law.

The reasons set forth above are sufficient to affirm the Judgment in favor of BPM on Brooks' claim of Disability Discrimination based on disparate treatment and failure to accommodate. An additional reason supports affirming the Judgment on that claim. As a matter of law Brooks did not establish that she suffered from a disability. And, even if Brooks had established that she had a disability, the record evidence and findings of fact establish that BPM was not aware of the alleged "disability" during the majority of the relevant time period and that, upon notice of her alleged disability, BPM *did* offer Brooks an accommodation.

Brooks first did not offer evidence of a legally cognizable disability. Brooks based her Disability Discrimination claim on two alleged disabilities: (1) needing to breastfeed and (2) her diminished milk production allegedly as a result of job stress. These pregnancy-related conditions do not support disability discrimination claims but only employment discrimination claims pursuant to the Washington Supreme Court's decision *Hegwine v. Longview Fibre Co Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 172 P.3d 688 (2007). In *Hegwine*, the Supreme

Court held that pregnancy-related employment discrimination claims are not subject to a disability accommodation analysis because "neither pregnancy nor pregnancy related medical conditions are disabilities under Washington law" and "neither the WLAD nor its interpretative regulations call for an accommodation analysis in pregnancy related employment discrimination cases." *Id.* at 694-95. Therefore, "under the plain language of the WLAD and its interpretative regulations, pregnancy related employment discrimination claims are matters of sex discrimination. Such claims are not subject to an accommodation analysis similar to that used in the disability context." *Id.* at 693-94.

WAC 162-30-020 supports this analysis, stating that claims of alleged employment discrimination because of pregnancy, childbirth, or pregnancy related conditions are to be analyzed as matters of sex discrimination. "Pregnancy related conditions" include, but are not limited to, related medical conditions and the complications of pregnancy. WAC 162-30-020 ("Pregnancy is an expectable incident in the life of a woman. Discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.").

The rule that pregnancy related conditions are to be analyzed as matters of sex discrimination and not disability discrimination extends to discrimination claims based on childbirth, rearing a child, or breastfeeding. *See Maxwell v. Virtual Educ. Software, Inc.,* 2010 U.S. Dist. LEXIS 79682, 19-20 (E.D. Wash. Aug. 6, 2010) (citing WAC 162-30-020; *Hegwine,* 162 Wn.2d at 349)); *Bond v. Sterling, Inc.*, 997 F. Supp.

306, 311 (N.D.N.Y 1998).[12] Courts in other jurisdictions have ruled that a woman's "status as a breast-feeding mother does not constitute a 'disability.'" *Bond*, 997 F. Supp. at 311; *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d. 622, 632, 123 Ohio St.3d 216 (Ohio 2009) ("To hold that a woman is 'disabled' because she is pregnant or lactating evokes the paternalistic judicial attitudes towards working women that were apparent in the early twentieth century cases."); *Martinez v. NBC Inc.*, 49 F. Supp. 2d 305, 308-09 (S.D.N.Y. 1999). Indeed, in *Bond v. Sterling*, the court explained that "[i]t is simply preposterous to contend a woman's body is functioning abnormally because she is lactating." *Bond*, 997 F. Supp. at 311. Breastfeeding and conditions related thereto, like pregnancy, are not disabilities.

Accordingly, Brooks' alleged "disabilities" were pregnancy-related conditions, not disabilities. She presented no disability claim and no right to accommodation as a matter of law.

Even if this Court considered Brooks' alleged conditions as a "disability," affirmance would be proper because BPM offered Brooks accommodation once it learned of her alleged disability. The trial court found that BPM did not become aware of Brooks' difficulties with breastfeeding until March 10, 2010, when Brooks provided Dr. Gong's note prohibiting her from travelling. CP 67 at FF 47. At that time, Parfitt

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[12] Washington courts look to federal law to interpret the WLAD. *Antonius v. King County,* 153 Wn.2d 256, 266, 103 P.3d 729 (2004); *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 518, 844 P.2d 389 (1993).

reiterated his prior offer to Brooks of a non-travelling position "within the organization" including at Overtake Terrace in Kirkland. CP 68 at FF 49; Ex. 51. Brooks assigned no error to those factual findings, which are therefore verities on appeal. It especially puzzling why Brooks would represent to this Court that the record is devoid of any attempt at "an interactive search process" or an attempt on BPM's part "to have such an exchange with Elizabeth Brooks," *see Op. Br.* at 29, when Ex. 51 contains these solicitous remarks by Parfitt:

> I do not know whether that is an option you wish to discuss. Regardless, let me know if you are interested in that, as I would like to see you to remain with our organization . . . Elizabeth, let me know if you have any suggestions that I have not considered.

Ex. 51. Brooks' assertion to this Court that BPM failed "to interact" with Brooks or to make an "attempt to work" with Brooks, *see id.*, simply defies this record. Brooks failed to meet her burden of proof that, upon notice of her alleged disability, BPM failed to accommodate her.

For these additional reasons, this Court should affirm the trial court's Judgment against Brooks' Disability Discrimination claim.

D. Brooks and Jason Brooks assign no error and ask for no relief concerning claims of Negligent Infliction of Emotional Distress, Outrage, Wrongful Termination in Violation of Public Policy, and Loss of Consortium.

Brooks assigns no error to the judgment in favor of BPM on claims of negligent infliction of emotional distress, outrage, or wrongful termination in violation of public policy; her husband raises no issues

concerning his claim of loss of consortium. *See Op. Br.*, 1-3. She offers no issue or argument regarding these claims. These aspects of the judgment are therefore final. *See* RAP 10.3; *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (appellate court considers only claims raised by assignment of error and supported by argument and citation).

E. Brooks does not justify the relief of a new trial or a new trial judge that she inadequately raises.

Without explanation Brooks concludes her brief with a request for a new trial. *Op. Br.* 50. Brooks also inadequately supports her request for remand to a new trial judge. *Id.* at 49. This Court should reject such relief.

Brooks never sought a new trial before the trial court and does not provide this Court with argument or authority entitling her to a new trial now. Without argument and authority, this Court will not consider an issue on appeal. *McKee, supra*. Not only does Brooks fail to articulate grounds for a new trial, none exist. A new trial should not be granted absent adequate legal basis. *State v. Evans*, 45 Wn. App. 611, 615, 726 P.2d 1009 (1986); *Mulka v. Keyes*, 41 Wn.2d 427, 441, 249 P.2d 972 (1952).

Brooks also does not support her request for remand to a new trial judge, which she makes in all of four lines without any reference to the record or any argument. *Op. Br.* 49. This is insufficient argument for such relief. *McKee, supra*. Moreover, the record does not support the conclusion that Judge Heller is biased against Brooks or that his impartiality may be reasonably questioned. *See State v. Perala*, 132 Wn.

App. 98, 111, 130 P.3d 852 (2006) ("The trial court is presumed . . . to perform its functions regularly and properly without bias or prejudice" and, therefore, a "party moving for recusal must demonstrate prejudice on the judge's part.") (internal citations omitted); *see also State v. Palmer,* 5 Wn. App. 405, 487 P.2d 627 (1971) (insufficient showing of actual bias); *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009) (same). Bald accusations like Brooks' are insufficient to show even a suspicion of partiality.

Brooks is not entitled to a new trial or a new judge.

F. This Court should not examine the sanction of Brooks' attorney for improperly communicating with a witness represented by counsel because Brooks' attorney lacks of standing, the Opening Brief fails to assign error, and the issue is moot.

For numerous reasons this Court should not examine the sanction against Brooks' attorney for improperly communicating with a witness represented by BPM's counsel. *See Op. Br.*, 47-49.

First, Brooks' attorney did not file a Notice of Appeal. The sanction was imposed only against Brooks' attorney and not against Brooks. CP 56. The only Notice of Appeal identifies exclusively Brooks and her husband as appellants. CP 81. Any appeal by Brooks' attorney now is time-barred. RAP 5.3(a). Brooks' attorney is not a party and therefore lacks standing. *See Polygon N.W. Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 768, 189 P.3d 777 (2008) (citing *In re Guardianship of Lasky*, 54 Wn. App. 841, 848-50, 776 P.2d 695 (1989)) (an attorney is an

aggrieved party for purposes of appealing from an order imposing sanctions against her and only the aggrieved party has standing to appeal).

Second, and equally fatal, the Opening Brief fails to assign error to the sanction order or identify any issues related to the sanction order. This failure to comply with RAP 10.3 also justifies declining to reach this issue. *See McKee, supra.*

Finally, the issue is moot. The trial court suspended the sanction and did not permit its enforcement in the judgment. CP 56.

VI. CONCLUSION

BPM respectfully requests that this Court reject Brook' appeal and affirm the judgment. The findings of the trial court are amply supported by substantial evidence. The trial court's articulated, rational decision contains no error. The trial court more than adequately considered the evidence and evaluated the credibility of the witnesses to reach the well-supported findings. Brooks tried her case. She lost. The Court should reject Brooks' invitation to second-guess Judge Heller's careful determinations as the fact-finder. She establishes no legal error or any basis for a repeat opportunity to litigate.

Respectfully submitted this 16th day of August, 2013.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____

Farron Curry, WSBA #40559
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Attorneys for Respondent,
BPM Senior Living Company

APPENDIX

The Honorable Bruce E. Heller

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

ELIZABETH BROOKS and JASON BROOKS, husband and wife,

Plaintiffs,

vs.

BPM SENIOR LIVING COMPANY a/k/a STERLING PARKS, LLC,

Defendants.

No. 10-2-41987-0 SEA

[Clerk's Action Required]

JUDGMENT

This matter was tried by the Court from June 13, 2012 to June 25, 2013, the Honorable Bruce E. Heller presiding. Plaintiffs Elizabeth Brooks and Jason Brooks appeared personally and through their attorney of record, Lori S. Haskell. Defendant BPM Senior Living Company appeared through its President, Dennis Parfitt and through its attorneys of record, Elizabeth Schleuning and Farron D. Lennon of Schwabe Williamson & Wyatt, P.C.

The Court received the evidence and testimony offered by the parties, considered the pleadings and papers filed in this action, and heard the oral argument of the parties' counsel. The Court made findings of fact and conclusions of law, which were entered on August 3, 2012. A copy of the findings and conclusions is attached as **Exhibit 1**.

Consistent with its findings and conclusions, the Court enters final judgment in this matter as follows:

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711 Fax 206.292.0460

1. All claims made by Plaintiffs Elizabeth Brooks and Jason Brooks in this action are dismissed with prejudice.

2. Defendant BPM Senior Living Company's counterclaim for breach of contract in this action is dismissed with prejudice.

3. Defendant BPM Senior Living Company shall file a cost bill and/or motion for attorneys' fees and expenses within 10 days after the entry of this Judgment, pursuant to CR 54(d).

Entry of this Judgment does not effect or extinguish Defendant BPM Senior Living Company's right to move for sanctions and/ or fees and expenses related to Plaintiffs' violations of the discovery rules, or its right to present a separate judgment against Plaintiffs' counsel, Lori Haskell, for the sanctions Judge Heller issued against her on June 19, 2012. Defendant BPM Senior Living Company explicitly reserves its right to move for sanctions and/ or fees and expenses related to Plaintiffs' violations of the discovery rules and to seek entry of a judgment against Plaintiffs' counsel subsequent to the entry of this Judgment.

DONE ~~IN OPEN COURT~~ this 23 day of Aug., 2012.

The Hon. Bruce E. Heller

Presented by: * THE COURT SUSPENDS THE $250.00 SANCTION imposed on 6/19/12 - BEH

SCHWABE, WILLIAMSON & WYATT, P.C.

By:
Farron D. Lennon, WSBA #40559
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EXHIBIT 1

Hon. Bruce E. Heller

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

ELIZABETH BROOKS and JASON BROOKS, husband and wife, Plaintiffs, vs. BPM SENIOR LIVING COMPANY a/k/a STERLING PARKS, LLC, Defendants.	No. 10-2-41987-0 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following a bench trial that began on June 13 and concluded on June 25, 2012, the Court makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

A. Parties

1. Defendant BPM Senior Living Company ("BPM" or "the company") operates seventeen senior-living facilities in seven states across the country, from Washington to Arizona. Its corporate offices are located in Portland, Oregon. BPM is owned by Walter Bowen, its President is Dennis Parfitt, and its Chief Operating Officer is Dan Lamey.

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2. Sterling Parks, LLC, is a separate and distinct corporate entity from BPM. Sterling Parks, LLC, at no time employed Plaintiff Elizabeth Brooks nor had any other relationship with her relevant to this case. Sterling Parks, LLC, has no employees.

3. At all times relevant to this suit, Ms. Brooks was an employee of BPM.

4. Plaintiff Jason Brooks is the spouse of Elizabeth Brooks.

B. Elizabeth Brooks' Employment with BPM

5. Ms. Brooks began working at BPM in 2005. On May 16, 2007, she was promoted to Vice President (VP) of Sales. Her duties as VP of Sales included "coaching, training, recruiting and encouraging the team to increase the occupancy" at all seventeen BPM properties.

6. Ms. Brooks was based in Kirkland, Washington and performed a wide array of her duties from her home office via telephone.

7. In April 2007, BPM's Senior Vice President (SVP) of Marketing and Sales, Tara Gold, left the company. Ms. Gold had been Ms. Brooks' immediate supervisor.

8. BPM did not immediately hire a replacement for Ms. Gold, but instead asked Ms. Brooks to assume some of Ms. Gold's most critical marketing responsibilities, as well as continue her existing duties as VP of Sales.

9. As VP of Sales, Ms. Brooks was required to travel regularly to the head office in Portland and the company's seventeen facilities. She was in charge of her own travel calendar. The extent of such travel varied between 2007 and 2009.

10. As her work calendars in 2007, 2008, and 2009 demonstrate, Ms. Brooks typically traveled between 1.86 and 2.67 weeks out of every month. In 2008, the year for

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which she had the heaviest travel calendar, Ms. Brooks' schedule included 69 nights of overnight travel. Exhibit 74, 164 and 165.

11. Beginning in 2007, BPM began to implement a new sales and marketing system developed by consultant Traci Bild. This system, the "Traci Bild System," relied more heavily on phone contact than on in-person marketing efforts. Ms. Bild herself was retained as a consultant from 2007 to the end of 2009.

12. Implementation of the Traci Bild System decreased the need for Ms. Brooks to travel in early 2009 compared to 2008. She travelled 5.75 days per month over 2.67 weeks on average each month in 2008, and 4.85 days per month over 2.00 weeks on average each month from January to July 2009.

C. **Ms. Brooks' Pregnancy and Childbirth**

13. In late February 2009, Ms. Brooks announced that she was pregnant. Prior to becoming pregnant, Ms. Brooks had an excellent employment record at BPM. She had never been written up, had never been counseled on improvement, and had never received negative criticism for her work performance.

14. During 2009, the occupancy rates at BPM's properties declined significantly and were lower than those of its competitors. The company's revenue for 2009 was accordingly lower than annual budget estimates by more than $1.4 million. The decreasing occupancy and revenue prompted a reconsideration of sales and marketing strategy and personnel. Exhibit 4, 5.

15. In a March 6, 2009 email, Mr. Bowen criticized Ms. Brooks' performance based on sagging occupancy rates. Exhibit 2.

16. The next day, Mr. Bowen wrote: "Elizabeth has been promoted and she is not

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efficient in her position. I would suggest that given her situation as it now stands and the care that will be needed with her child that we approach her with the idea of being 'the marketing and sales manager' at Overlake. This would of course result in a decrease in her salary but this is better than the alternative. You and Dennis have been covering for her too long." Exhibit 3.

17. During the spring of 2009, BPM interviewed candidates for the position of SVP of Marketing and Sales, Ms. Gold's former position, but the company ultimately did not hire anyone to fill the opening.

18. On August 16, 2009, Mr. Bowen sent an email to Mr. Parfitt outlining a reorganization plan for the sales and marketing teams that included the hiring of a new director. Exhibit 4. Among other responsibilities, the director was to travel four days a week "to continually evaluate the market." In the email, Mr. Bowen also wrote: "I have had it with Elizabeth, she must move back to where she started and where her comfort level has been in the past. We have taken a sales lady and promoted her to the level of incompetence. . . . [W]e just need to move on immediately with a search for a replacement. We should search out the best recruitment agency to handle the assignment and take the necessary steps to move Elizabeth out. I just do not see a role for her in the company." *Id.* Subsequently, BPM again attempted to recruit a director of marketing and sales via an outside recruiting agency.

19. Beginning in August 2009 and continuing through the last two months of her pregnancy, Ms. Brooks did not travel to any of BPM's properties or its corporate headquarters.

20. On September 15, 2009, Ms. Brooks informed BPM that she wanted to take maternity leave for six weeks, after which she intended to work on a part-time or light-duty basis for an additional six weeks.

21. Ms. Brooks worked through September 18, 2009, and gave birth to her first

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child, Grace Brooks, on September 20, 2009. Sometime after the birth, Ms. Brooks decided to take twelve weeks of maternity leave.

D. Ms. Brooks' Maternity Leave and Return to Work on a Limited-Hours Basis

22. On September 24, 2009, Mr. Parfitt advised Ms. Brooks via email that the company was searching for a new executive: "I'm sure this comes as no surprise. But what has become a bit of a concern, is that Walt, on several occasions, has referred to the open position as the director of both marketing & sales. We both know that Walt can be rather unpredictable when it comes to his business strategies and personal relationships as demonstrated time and again. . . . I certainly don't mean in any way to alarm you, but I think it's only prudent for all of us to be aware of our options and employment opportunities if change were to happen. . . . and that includes me." Exhibit 7.

23. Following the September 24, 2009 email, Ms. Brooks became concerned that her job was in jeopardy. She testified that she contacted Mr. Parfitt by phone on September 25 to discuss the email, and he explained that he would do what he could to save her job.

24. On or prior to October 2, 2009, Ms. Brooks became aware that the recruiting agency hired by BPM had posted a job listing for what she believed might be her job. She contacted Mr. Parfitt via email and requested that they speak about the listing. Exhibit 8. Mr. Parfitt assured Ms. Brooks that the position for which the company was recruiting was not Ms. Brooks' position, but rather the position vacated by Ms. Gold in April 2007.

25. On October 28, 2009, Ms. Brooks requested that she be able to return to work on a part-time basis. "I am excited to come back and would like to actually come back 'part time' prior to my 12 weeks. . . . is this possible? I would love to perhaps start off one day a week, starting next week?!?!?!, for two weeks and then come back 2 days a week for the month until I return full time. . . .?!?!" Exhibit 117. Mr. Lamey announced her return on

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November 5, 2009: "I am pleased to announce that Elizabeth Brooks will be returning to active duty at BPM on Monday, November 16th. . . . I am thrilled to have her back. . . ." Exhibit 10.

26. On November 16, 2009, Ms. Brooks returned to work on a part-time basis from home. While she was working on a part-time basis, she did not travel to any of BPM's properties or its corporate headquarters.

27. On December 8, 2009, Mr. Parfitt invited Ms. Brooks to meet him for lunch on December 10. Ms. Brooks accepted the invitation but asked whether they were "going to coffee"—a euphemism referring to Mr. Parfitt's practice of taking an employee to Starbucks to tell the employee of his or her termination—to which Mr. Parfitt responded "No Starbucks. . . . you pick the place to meet for lunch." Exhibit 11.

28. Mr. Parfitt met Ms. Brooks for lunch on December 10, 2009. During the lunch meeting, he offered her a lower-paying, on-site position at the Overlake Terrace property in Redmond, Washington, which she refused. He also encouraged her to begin her own consulting business and offered her a six-month contract with BPM that would run from January 2010 to June 2010. He offered her severance pay amounting to three months' salary, which she declined. According to Ms. Brooks, she was being pressured to resign. Mr. Parfitt, on the other hand, testified that he was merely helping her brainstorm ways that she could avoid having to travel so she could stay home with her child.

29. The court credits the testimony of Ms. Brooks on this issue. The impetus to leave came from the company, not from Ms. Brooks. Other witnesses, including Lynly Calloway, Jason Brooks, Margaret Broggel, and Soher Bishai, all testified credibly that Ms. Brooks was emotionally distraught before and after the lunch meeting—suggesting that she felt she was being pushed out rather than voluntarily negotiating an exit that would allow her to spend more time with her daughter. Furthermore, the day after the lunch, Mr. Parfitt wrote

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to Mr. Bowen, expressing that "[t]he conversation that I had with Elizabeth did not go as well as I had hoped." Exhibit 11. The court concludes that Mr. Parfitt was acting at the behest of Mr. Bowen, who wanted Ms. Brooks out of the company. Exhibit 4.

E. Return to Work

30. On December 21, 2009, Brooks returned to work full time at BPM. On that same day Mr. Parfitt informed her that December 31, 2009 would be her last day because "Walt wants you off the payroll."

31. Consistent with this communication, Mr. Parfitt authored a memorandum to Mr. Lamey setting out the responsibilities Ms. Brooks would take on as a consultant for the company from January 2010 to June 2010. Exhibit 13.

32. On December 23, 2009, Ms. Brooks accused Mr. Parfitt of threatening to fire her in retaliation for taking maternity leave and failing to accommodate her needs for reduced travel after childbirth. Exhibit 16. Mr. Parfitt denied the allegations and reiterated that the company was recruiting an SVP of Marketing and Sales to replace Ms. Gold. "If that replacement was capable of implementing efficiencies with the Marketing Department, then your position may be effected [sic]." Exhibit 17.

33. On December 30, 2009, Mr. Parfitt informed Mr. Lamey "Walt wants to get EB back involved." Exhibit 18. Mr. Bowen's assistant called Ms. Brooks and asked her to attend a meeting in Portland the following week, indicating that Ms. Brooks would still be employed by the company after the end of the year.

34. On January 27, 2010, the company suspended its efforts to recruit a new SVP of Marketing and Sales. Exhibit 28.

F. Issues Related to Ms. Brooks' Travel Obligations

35. In mid-January 2010, Mr. Lamey created a travel calendar for Ms. Brooks that required her to travel almost every week from February 2, 2010 through the end of April

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2010. Exhibit 32. The schedule required her to travel 8.6 days over 3.6 weeks on average each month, for a total of 86 days of overnight travel between March and December alone. This travel frequency was nearly double that of 2009, significantly more than in 2008, and almost four times that of 2007. Ms. Brooks did not make any requests for accommodation after receiving the schedule, instead telling Mr. Lamey she "would have to double-check the dates on my home calendar." Exhibit 33.

36. On February 3, 2010, Ms. Brooks told Mr. Parfitt that "[a]s it turns out, there are some scheduling conflicts as I do have some appointments and commitments that I cannot change. . . . however there are many things that I was able to finagle and change so that I could be on the road as often as possible." Mr. Parfitt responded, "I would prefer that we do not adjust this schedule unless we have [a] significant rationale that supports that a change is necessary. Please let me know what the conflicts and appointments are that cannot be changed. I would appreciate what you are proposing as an alternative schedule." Exhibit 33.

37. On January 18, 2010, Mr. Bowen wrote to Mr. Parfitt, "I don't see how we can work it out with E but who knows. We will need E in Portland most of the time when she is not on the road, I will not put up with her residing in Kirkland." Exhibit 23. On January 29 Mr. Bowen wrote, "I need to know what she is doing, what are her goals next week. . . . We are going to demand accountability from E." Exhibit 31.

38. On February 9, 2010, Ms. Brooks for the first time made a request for accommodation: "As you know, I am still nursing my daughter. Travelling requires that I, essentially, bring a nanny to watch Gracie as I am still her food source. . . . I assumed that my travel would be comparable if not less frequent than my previous schedule prior to my maternity leave. After all, it's only fair that you make a reasonable accommodation for my need to nurse my baby after returning from maternity leave." Exhibit 37.

39. Mr. Bowen told Mr. Parfitt in an email that "she needs to do what I think is in

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the best interests of the company. . . . Are we to expect that because Elizabeth has a baby that the needs of the company become secondary to the needs of Elizabeth. Having a baby is not a disability and millions of women are working after child birth. Maybe if she thought it was going to change her career options she should have taken a different approach to her career." Exhibit 37. Neither Mr. Bowen nor Mr. Parfitt conveyed this sentiment to Ms. Brooks.

40. After receiving the above email from Mr. Bowen, Mr. Parfitt wrote Ms. Books on February 10, 2010: "I am not understanding why you are making the assumption that your travel will be comparable if not less frequent than your previous schedule. . . . [Y]ou have the duty and responsibility to respond to fluctuations in market conditions and changes that directly impact revenues and occupancy at all of our communities." Exhibit 32.

41. In response, Ms. Brooks suggested discussing a lighter travel schedule that would involve maintaining the Traci Bild program from her home office and one or sometimes two scheduled trips to Portland. Exhibit 32. During subsequent discussions, Ms. Brooks advised Mr. Parfitt that she would be weaning her baby by June, which would free her up to travel more. In the meantime, she would travel as much as possible, taking her baby along, as well as her mother-in-law to care for the baby.

42. On February 18, 2010, Mr. Parfitt presented Ms. Brooks with another travel schedule that "accomplishes what Walt has requested." The schedule required two visits to the home office in Portland per month and a quarterly visit to each of the company's seventeen facilities. Mr. Parfitt stated he was "open to any tweaks and/or suggestions." Exhibit 142.

43. Ms. Brooks requested that the travel requirements for March through May be reduced, after which point her baby would be weaned. Mr. Parfitt told her that Mr. Bowen would not agree. The court finds that Ms. Brooks acquiesced to the schedule because on February 23, 2010, Mr. Bowen told her he was "pleased that you and Dennis have reached

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agreement on your travel schedule. . . ." He also said, "[w]e are very fortunate to have you as the leader of our marketing and sales team." Exhibit 40. Ms. Brooks did not respond or dispute Mr. Bowen's assertions that an agreement had been reached.

44. Unbeknownst to the company, on February 23, 2010, Ms. Brooks obtained a doctor's note from Dr. Bonnie Gong prohibiting travel as long as she was breastfeeding. Exhibit 61.

45. On February 25, 2010, Mr. Parfitt announced the promotion of Kim Homer to Regional Director of Sales and Marketing, with primary responsibility for the senior living communities in California, Arizona, and Nevada. Exhibit 46. Ms. Homer was to take over the majority of the travel to the southern properties listed on Ms. Brooks' travel calendar. This had the effect of substantially reducing Ms. Brooks' travel obligations.

46. On February 25, 2010, Mr. Bowen instructed Mr. Parfitt to inform Ms. Brooks that all of her travel obligations would be on hold pending her completion of Plans of Action. "If these plans are not completed by the new deadline, she is to be suspended or demoted to a regional director of sales covering the NW region. . . . I realize this is a last step and one we are reluctant to take but I must look at the threat we face if we do not have the right person in a leadership position. . . ." Exhibit 45.

47. On March 10, 2010, Ms. Brooks informed Mr. Parfitt by email that the proposed travel schedule "seriously impacted my ability to produce milk and to feed my daughter. In my doctor's opinion this is negatively affecting Gracie's health as well as my own health. In her medical opinion I should not travel during the time that I am breastfeeding and I am providing you her note stating that medical fact." She provided Mr. Parfitt the note that Dr. Gong had given to her on February 23. Exhibit 49.

G. **Brooks' Resignation**

48. On March 16, 2010, Ms. Brooks wrote Mr. Parfitt about the travel expectations

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of her job: "I am certain [Kim Homer] could assist in travelling and we could together cover all of our communities [sic] needs and more. . . . I just do not understand why the expectations for my travel have been ramped up so significantly since my return from maternity leave. . . . I can maintain the travel schedule I had prior to maternity leave with the help of my mother-in-law who can accompany me to care for Gracie." Exhibit 50.

49. Mr. Parfitt responded immediately, taking issue with Ms. Brooks' assertion that her travel responsibilities had increased dramatically. "Your job has always required significant travel and will continue to do so. . . . That said, if you wish to bring your child along on your business trips, as I understand you have been doing, I am more than happy to permit that if that is something you are interested in. . . . I am also willing to take a look to see if there are any positions within the organization that do not require travel. But if you take one of those, it most likely would require you to work at Overlake Terrace, and the only positions I can think of offhand, pay a lot less than what you currently make, so I do not know whether that is an option you wish to discuss. Regardless, let me know if you are interested in that, as I would like to see you to remain with our organization. . . . Elizabeth, let me know if you have any suggestions that I have not considered. If you can't fulfill the requirements of this position, then we need to come to a quick resolution of this situation." Exhibit 51.

50. That same afternoon, Mr. Parfitt and Ms. Brooks talked by telephone. According to Ms. Brooks, Mr. Parfitt said, "There's no more going back and forth, it's done, we have to separate ways, you're being let go." After terminating her, Mr. Parfitt offered her $55,000 in return for her signing a separation agreement and release.

51. Mr. Parfitt, on the other hand, testified that Ms. Brooks told him she could still travel to Portland and Las Vegas. Mr. Parfitt responded that he could not allow any travel based on the doctor's note and that they did not have many options. Ms. Brooks said she wanted to work something out. She suggested severance pay and told Mr. Parfitt that six

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months would be agreeable to her. Mr. Parfitt said he would try to get approval for the six months. After the conversation ended, he obtained approval from Mr. Bowen for a $55,000 severance package and communicated this to Ms. Brooks. According to Mr. Parfitt, Ms. Brooks "seemed very happy and satisfied with this number." Mr. Parfitt told her she would have to sign a severance agreement and release.

52. The court credits the testimony of Mr. Parfitt on the issue of whether Ms. Brooks was involuntarily terminated, for the following reasons:

First, Ms. Brooks' contemporaneous notes of the March 16 telephone conversation do not establish by a preponderance of the evidence that she was terminated. The notes include the term "separate ways," but not "you're being let go." In addition, Ms. Brooks' notes of a telephone conversation the next morning are more consistent with Mr. Parfitt's testimony that Ms. Brooks requested six months' severance and that Mr. Parfitt would try to get authority for that: "Walt not in yet. Steve felt '6 months work for him!' Understands why I want 6 mo. Fight for 6 months." Exhibit 166. An employee who has agreed to leave but wants certain terms in return is more likely to negotiate aggressively over severance pay than an employee who has been fired.

Second, Mr. Parfitt's version is more consistent with the email he sent her shortly before the phone call, including "Let me know if you are interested in that [Overlake Terrace], as I would like to see you to [sic] remain with our organization." Exhibit 51.

Third, the cheerful tone of Ms. Brooks' subsequent correspondence with Mr. Parfitt is more consistent with a mutually agreed separation than an involuntary termination. As previous correspondence reflects, Ms. Brooks was quite capable of being assertive with Mr. Parfitt. See Exhibits 15, 49. Yet, in response to Mr. Parfitt's March 17, 2010 email in which he stated that he would have a final check for her that afternoon, Ms. Brooks wrote, "I will have my email [announcing her departure] for your review this morning!" Exhibit 53. Later

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that day, after submitting the draft announcement, Ms. Brooks wrote to Mr. Parfitt: "[L]et me know what you think of the rough draft email (and , yes, you can tease me about 'too' versus 'two'!). . . . Have a drink for me!"

Fourth, the company's March 18, 2010 Personnel Action Notice reflects a mutual parting of the ways rather than a firing. Under the "dismissal" box, the document refers the following statement at the bottom of the document: "Negotiated separation by mutual agreement and subject to separate severance agreement." After the question "would you rehire?" the "yes" box is checked. Exhibit 57.

53. On March 18, 2010, the company sent Ms. Brooks a Separation Agreement and Release. Ms. Brooks never signed it and therefore did not receive the negotiated severance pay.

II. CONCLUSIONS OF LAW

A. Claims Asserted by the Parties

Ms. Brooks has asserted the following claims: (1) Gender discrimination based on disparate treatment and harassment; (2) disability discrimination based on disparate treatment and failure to accommodate; (3) retaliation; (4) interference with maternity leave; (5) wrongful discharge in violation of public policy; (6) negligent infliction of emotional distress; and (7) outrage.

Mr. Jason Brooks has asserted a loss of consortium claim.

BPM has filed a counterclaim alleging that the filing of this lawsuit breached an agreement between the parties that in return for six months' severance pay Ms. Brooks would release the company from liability.

B. Gender Discrimination

(1) No Adverse Employment Action

The Washington Law Against Discrimination (WLAD), RCW 49.60, prohibits

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discrimination in employment based on sex or gender. Claims of discrimination based on pregnancy-related conditions, including conditions related to childbirth, are evaluated as claims for discrimination based on sex or gender. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 12 P.3d 688 (2007). To establish a claim of gender discrimination, the employee bears the initial burden of making a prima facie showing of discrimination. *Hill v. BCTI*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001). To establish a prima facie case, Ms. Brooks must show that (1) she belongs to a protected class, (2) she suffered an adverse employment action, and (3) the adverse employment action was due to her pregnancy or condition related to childbirth. *Hegwine*, 162 Wn.2d at 355. An adverse employment action means a "tangible change in employment status, such as hiring, firing, failing to promote, reassignment with different responsibilities, or a decision causing a significant change in benefits." *Crownover v. Dept. of Transportation*, 165 Wn.App. 131, 148, 265 P,3d 971 (2011) (internal quotation marks and citation omitted). A hostile work environment may also constitute an adverse employment action. *Kirby v. City of Tacoma*, 124 Wn.App. 454, 98 P.3d 827 (2004). However, threats to terminate are not an adverse employment action. *Id.*, 124 454, 464 ("yelling at an employee or threatening to fire an employee is not an adverse employment action").

The court concludes that Ms. Brooks did not suffer an adverse employment action. Had the company followed through with its threats to terminate Ms. Brooks by December 31, 2009, this would have constituted an adverse employment action. However, the company decided at the last minute not to pursue this course of action. Likewise, had the company terminated Ms. Brooks' employment in March 2010, this would also have been an adverse employment action. But, as already determined, Ms. Brooks was not terminated and instead agreed to leave in return for six months of severance. The fact that she ultimately decided not to sign the Separation Agreement and Release does not convert her resignation into a termination.

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Assuming, without deciding, that increasing Ms. Brooks' travel responsibilities constituted an adverse employment action by virtue of being "a reassignment with different responsibilities," *Crownover*, 165 Wn.App. at 148, Ms. Brooks established a prima facie case of discrimination based on the hostile emails by Mr. Bowen, which coincided with her pregnancy. However, applying the *McDonnell Douglas* burden-shifting protocol described in *Hill v. BCTI*, the company successfully established a legitimate, non-discriminatory explanation for the travelling requirements. It is undisputed that by early 2010, the occupancy rates at BPM's properties had declined significantly and were lower than those of its competitors. As VP of Sales, it had always been Ms. Brooks' responsibility to travel to the company's facilities. Given the crisis in which the company found itself, BPM had legitimate, non-discriminatory reasons for insisting that Ms. Brooks retain, and even increase, her travel responsibilities. Ms. Brooks has not established that requiring her to travel an average of 3.6 weeks per month was a pretext for discriminating against her for having a child. Ms. Homer, the Regional Director of Sales for the southern region, who did not take pregnancy leave, testified that she travels three weeks per month.

(2) No Harassment

To establish a hostile work environment claim based on gender, an employee must prove the existence of the following elements: the harassment was (1) unwelcome; (2) because of the employee's sex; (3) sufficiently pervasive to affect the terms and conditions of employment and create an abusive work environment; and (4) is imputed to the employer. *Glasgow v. Georgia-Pacific*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985).

The alleged harassment claimed by Ms. Brooks falls into two time periods—pressuring her to leave her job between September and December 2009 and pressuring her to increase her travel between January and March 2010. The harassment claim fails with respect to the second period because it was not based on Ms. Brooks' sex. The requirement that she travel was

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based on the occupancy rate crisis, not on Ms. Brooks' pregnancy. On the other hand, BPM's efforts to get Ms. Brooks to leave the company in late 2009 were related to her pregnancy. Therefore, the second *Glasgow* element is satisfied with respect to that incident.

However, Ms. Brooks has not established that the harassment was "sufficiently pervasive as to alter the conditions of employment and create an abusive work environment." *Glasgow*, 103 Wn.2d at 406. The court credits Ms. Brooks' testimony that while on maternity leave she had a number of phone conversations with Mr. Parfitt from which she reasonably concluded that her job was in jeopardy. Likewise, at the December 10 lunch, Mr. Parfitt pressured her to resign and become a consultant. However, there is no evidence that Mr. Parfitt ever engaged in abusive behavior towards her. While his communications were certainly upsetting to Ms. Brooks, this had to do with the possible loss of her job, not the way in which Mr. Parfitt communicated the message. Further, none of Mr. Bowen's harsh emails were disclosed to Ms. Brooks until discovery in this lawsuit. Thus, they cannot be a basis for a hostile work environment claim.

C. **Disability Discrimination**

The court's finding that Ms. Brooks chose to leave BPM pursuant to a negotiated severance package is dispositive of her claim of disability discrimination based on an involuntary termination.

Ms. Brooks also argues that the company engaged in disability discrimination by failing to accommodate her. This claim involves two different alleged disabilities: (1) her need to breastfeed; and (2) her diminished milk production as a result of job stress. With respect to the first, Ms. Brooks alleges that BPM failed to accommodate her need to breastfeed by requiring her to travel extensively. With respect to the second, she alleges that once she provided a doctor's note documenting her diminished milk production, the company was required to engage in an interactive process to determine whether another position within the

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company was available to her. *Goodman v. Boeing*, 127 Wn.2d 401, 899 P.2d 1265 (1995).

Breastfeeding, like pregnancy, is not a disability. Rather, it is a condition related to childbirth within the purview of the sex discrimination statutes. *Hegwine*, 162 Wn.2d at 348–52; WAC 162-30-020(2) ("Pregnancy is an expectable incident in the life of a woman. Discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.") *See also Allen v. Totes/Isotoner Corp.*, 915 N.E.2d. 622, 632, 123 Ohio St.3d 216 (Ohio 2009)("[t]o hold that a woman is 'disabled' because she is pregnant or lactating evokes the paternalistic judicial attitudes towards working women that were apparent in the early twentieth century cases.").

Whether an inability to breastfeed may constitute a disability is a closer question. The Court of Appeals in *Hegwine* suggested that while pregnancy itself is not a disability, a disability due to pregnancy might be. 132 Wn.App. 546, 565 (2006). Dr. Gong testified that Ms. Brooks' milk production was negatively impacted by work stressors. Assuming, without deciding, that such a temporary condition meets the definition of a disability under RCW 49.60.180, i.e., that it "substantially limits one or more major life activities," *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006), Ms. Brooks has failed to establish a failure to accommodate.

The duty of an employer reasonably to accommodate a disability does not arise until the employer is aware of the employee's disability. *Goodma*, 127 Wn.2d at 408. BPM did not become aware of Ms. Brooks' difficulties with breastfeeding until March 10, 2010, when Ms. Brooks provided Dr. Gong's note prohibiting her from travelling.

Further, an employer's duty to accommodate does not include eliminating essential functions of the job, "as that would be tantamount to altering the very nature or substance of the job." *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 534, 70 P.3d 126 (2003). The court concludes that travelling to at least some of BPM's properties and to its corporate headquarters

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in Portland was an essential function of Ms. Brooks' job. Therefore, Ms. Brooks was not able to perform the essential functions of her job with or without a reasonable accommodation.

In any event, BPM offered to accommodate Ms. Brooks by offering her a non-travelling position at Overlake Terrace in Kirkland that paid less. Exhibit 51. The duty to accommodate does not require an employer to maintain the employee's current rate of pay if there are no vacant lateral positions available. *Wilkerson v. Shinseki*, 606 F.3rd 1256, 1265 (10th Cir. 2010). There is no evidence that Ms. Brooks was interested in pursuing other lower paying jobs, preferring instead the six-month severance package offered by BPM.

Ms. Brooks has therefore failed to satisfy her burden of proving that BPM discriminated against her in violation of the WLAD by failing to reasonably accommodate a disability.

D. Retaliation

RCW 49.60.210(1) of the WLAD prohibits employers from discharging or discriminating against any person because the person opposes practices forbidden by the WLAD. To establish a claim for retaliation, Brooks must show that (1) she engaged in statutorily protected activity; (2) employer took an adverse employment action; and (3) there is a causal link between her activity and her employer's adverse action. *Francom v. COSTCO Wholesale Corp.*, 98 Wn.App. 845, 861-62, 991 P.2d 845 (2000).

Ms. Brooks cannot satisfy the second and third elements because she voluntarily resigned from BPM.

E. Wrongful Termination in Violation of Public Policy

To establish a claim for wrongful termination in violation of public policy, Ms. Brooks was required to prove each of the following elements: (1) that a clear public policy exists (clarity element); (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (jeopardy element); (3) that the public policy-linked conduct

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caused her dismissal (causation element); and (4) that BPM cannot offer an overriding justification for her termination (absence of justification element). To establish the second element—the "jeopardy element"—Ms. Brooks was required to establish that other means of promoting the public policy she alleges to be at issue are inadequate. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 529, 259 P.3d 244 (2011).

Ms. Brooks has alleged a public policy of preventing employers from terminating working breastfeeding mothers. However, the tort of wrongful discharge in violation of public policy adds nothing to the statutory remedies embodied in the WLAD. Therefore, the court dismissed this claim during trial.

F. Interference with Maternity Leave

Under RCW 49.78.300(1)(a), it is unlawful for an employer to "[i]nterfere with, restrain, or deny the exercise of, or the attempt to exercise" the right to maternity leave. There are no Washington cases interpreting this statute. Since § 105 of the Family Medical Leave Act, 29 U.S.C. § 2615, contains identical language, the court looks to federal authority for guidance.

Like the Washington leave statute, the FMLA does not define "interference." However, Department of Labor regulations provide that interference with an employee's right includes not only refusing to authorize FMLA leave but discouraging an employee from using such leave. *Howard v. Millard Refrigerated Services, Inc.*, 505 F.Supp.2d 867, 881 (D. Kan. 2007); 29 C.F.R. § 825.220(b). *Mardis v. Cent. Nat. Bank & Trust of Enid*, 173 F.3rd 864 (10th Cir. 1999) (informing an employee that she would be irrevocably deprived of all accrued sick leave and annual leave as a condition of taking FMLA leave discouraged employee from taking leave).

Ms. Brooks testified that she began working part time six weeks into her twelve week maternity leave because Mr. Parfitt encouraged her to show "she was back on track." There is

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no evidence, however, that Ms. Brooks was coerced into coming back early. Rather, her email communications with BPM's human resources director show that she herself wanted to return early. "I am excited to come back. . . . I would love to perhaps start off one day per week. . . ." Exhibit 117. The court concludes that BPM did not interfere with Ms. Brooks' rights under RCW 49.78.300(1)(a).

Ms. Brooks also alleges that BPM attempted to force her out of her job in retaliation for her taking maternity leave. Like other types of retaliation claims, retaliation for taking maternity leave requires an adverse employment action. *Edgar v. JAC Products, Inc.*, 443 F.3rd 501, 508 (10th Cir. 2006). As already determined, a threatened termination does not constitute an adverse employment action.

In any event, the court concludes that BPM did not threaten Ms. Brooks with termination because she took maternity leave. Instead, the threat was based on Mr. Bowen's assumption that as a new mother, Ms. Brooks would not be able to perform the functions of her job. See Exhibit 3. Had the company terminated Ms. Brooks in December, this may well have constituted gender discrimination as opposed to a violation of RCW 49.78.300(1)(a).

G. Negligent Infliction of Emotional Distress ("NIED")

To establish a claim for NIED, Ms. Brooks has the burden of proving: (1) a duty; (2) a breach of that duty; (3) proximate cause; and (4) damage or injury. *Haubry v. Snow*, 106 Wn.App. 666, 678, 31 P.3d 1186 (2001). An employee may recover damages for emotional distress in an employment context only if the factual basis for the claim is distinct from the factual basis for a discrimination claim. *Id.* Unlike the circumstances in *Chea v. Men's Warehouse, Inc.*, 85 Wn.App. 405, 413-14, 932 P.2d 1261 (1997), Ms. Brooks' NIED claim is based on the same facts that underlie her gender discrimination and retaliation claims—threatened and actual job loss based on her maternity leave and need to breastfeed. The court dismissed the NIED claim at trial because it is duplicative of her discrimination claim.

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H. Outrage

To establish a claim for outrage, Ms. Brooks must prove (1) extreme and outrageous conduct by BPM; (2) intentional or reckless infliction of emotional distress; and (3) actual resulting severe emotional distress. *Haubrey*, 106 Wn.App. at 680. To be "extreme and outrageous," the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly deplorable in a civilized community." *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

Ms. Brooks has not established any of these elements. While BPM's plan to terminate Ms. Brooks' employment in December 2010 would have been unlawful had it not been aborted at the last minute, the company's actions were not "outrageous." As the court found with respect to the harassment claim, Mr. Parfitt was never abusive in his emails or at the December 10 lunch. Secondly, there is no evidence that Mr. Parfitt intentionally or recklessly inflicted emotional distress on Ms. Brooks. Third, Ms. Brooks has not established that she suffered from severe emotional distress as defined in *Kloepfel v. Bokor*, 149 Wn.2d 192, 203, 66 P.3d 630 (2003) ("not transient or trivial, but distress such that no reasonable [person] could be expected to endure it."). She did not see a health care professional for stress, discomfort, or other signs or symptoms of emotional distress and has not offered any medical evidence to support her emotional distress claim.

In addition, the court finds that this claim is duplicative of her discrimination and retaliations claims. *Anaya v. Graham*, 89 Wn.App. 588, 596, 950 P.2d 16 (1998).

I. Loss of Consortium Claim of Jason Brooks

"Loss of consortium involves the loss of love, affection, care, services, companionship, society, and consortium suffered by a deprived spouse as a result of a tort committed against the impaired spouse." *Conradi v. Four Star Promotions*, 45 Wn.App. 847, 852–53, 728 P.2d

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617 (1986). No claim arises if no tort is committed against the affected spouse. *Id.* Because BPM committed no tort against Ms. Brooks, Jason Brooks may not maintain a claim for loss of consortium.

J. BPM's Counterclaim for Breach of Contract

BPM contends that a binding contract existed between BPM and Ms. Brooks, whereby BPM agreed to pay her six months' severance in return for Ms. Brooks' agreement not to sue the company. According to BPM, Ms. Brooks has breached this contract by filing this lawsuit. BPM claims it is entitled to its damages for Ms. Brooks' breach of this contract, including the costs and attorney fees incurred in defending this action.

The facts do not support this argument. Mr. Parfitt testified that after offering Ms. Brooks the $55,000 severance package, he told her she would have to sign a separation agreement and release. He did not advise her of the terms of the severance agreement, and, equally importantly, Ms. Brooks never committed to signing the document. Once Ms. Brooks saw the agreement, she declined to sign it.

For an agreement to be binding, the parties must agree on its essential terms. *McEachren v. Shervood & Roberts, Inc*, 36 Wn.App. 276, 579, 675 P.2d 1266 (1984). Here, there was a meeting of the minds that in return for the six months of severance pay, Ms. Brooks would leave the company. However, there was no meeting of the minds regarding the terms of the yet-to-be-drafted severance agreement and release.

III. CONCLUSION

Based on the preceding Findings of Fact and Conclusions of Law, Ms. Brooks' claims against BPM and BPM's counterclaim against Ms. Brooks are dismissed with prejudice.

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Dated this 2 day of August, 2012.

JUDGE BRUCE E. HELLER

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 2013, I caused to be served *via U.S. mail* the foregoing **RESPONDENT'S BRIEF** on the following party at the following address:

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Averil Rothrock

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