FILED
December 18, 2015
Court of Appeals
Division I
State of Washington
No. 73758-9-I

73758-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STACIA HARTLEBEN,
an individual,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SAMUEL CHUNG

BRIEF OF RESPONDENT

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I. INTRODUCTION

A place of public accommodation complies with the Washington Law Against Discrimination (WLAD) by providing the disabled and non-disabled the same opportunity to enjoy its services. Here, respondent University of Washington did that by offering appellant Stacia Hartleben additional time to complete her degree program and allowing her to do so with a reduced course load. These offers satisfied the University's duty to accommodate Hartleben's amnesia; the University did not unlawfully discriminate against Hartleben by asking that she pay tuition for any classes in which she re-enrolled, a condition of enrollment it applies to the disabled and non-disabled alike.

Hartleben's insistence that the University waive the fee normally charged for services stretches the WLAD beyond its intended purpose. The WLAD is meant to fight discrimination, not require covered entities to insure their customers by assuming all financial responsibility for any losses caused by a newly incurred disability. This Court should affirm the trial court's summary judgment order dismissing Hartleben's WLAD claim.

II. RESTATEMENT OF ISSUES

1. Does a university comply with the WLAD, which precludes requiring any disabled "person to pay a larger sum than the uniform rates charged other persons," RCW 49.60.215, by offering a student with amnesia accommodations (*e.g.*, extended time to complete her degree program) that give her the same opportunity to enjoy the service the university offers everyone – enrollment in classes in exchange for tuition?

2. Does the WLAD's requirement of "reasonable accommodation" require a university to "financially accommodate" a person by waiving tuition when a newly incurred disability undermines the value of classes provided by the university when that disability did not exist?

3. Does a waiver of tuition to accommodate a student whose disability allegedly diminishes the value of classes previously taken fundamentally alter the nature of the service a university provides to the public?

4. If a university's refusal to waive tuition was the result of its uniform requirement that all students pay tuition, does a discrimination claim fail as a matter of law for lack of evidence the

plaintiff's disability was a "substantial factor" motivating the university's decision?

III. RESTATEMENT OF FACTS

A. The University granted Hartleben's requests to withdraw from classes so she could treat her depression.

Stacia Hartleben enrolled in the University's Computational Linguistics Master's Program in 2008. (CP 77, 105) She participated in the program for two quarters, paying tuition for each class she took. (CP 105, 501) Hartleben then filed a petition for a hardship withdrawal because of her depression. (CP 57, 83, 105) The University granted Hartleben's petition and allowed her to withdraw from her classes during spring quarter in 2009. (CP 57, 83, 105) The University granted two additional hardship withdrawals in January and July 2010. (CP 57, 83, 105) In spring 2011, Hartleben went on leave for two quarters. (CP 57, 105)

In November 2011, Hartleben again asked to go on leave to seek medical treatment for her depression; the University granted the accommodation. (CP 57, 82-83) Hartleben then received electroshock therapy in December 2011. (CP 78, 85-86) As a side effect of the therapy, Hartleben lost memories from roughly 2007-08 to December 2011, including her memory of five completed

courses in the linguistics program. (CP 77-78, 155) She has no memory loss after the therapy and did not suffer any other side effects from the therapy. (CP 78, 118)

In February 2012, Hartleben emailed a professor in the Department of Linguistics, Dr. Emily Bender, seeking leave for winter quarter and explaining that her doctor believed her memory would return within six months. (CP 57, 60) Dr. Bender approved Hartleben's leave requests for winter and spring quarter. (CP 57) A year later, in February 2013, Hartleben emailed Dr. Bender again, explaining her memory had not, and would not, return. She requested to retake the classes she had forgotten. (CP 58, 62) Hartleben told Bender, "paying for tuition would not be an option." (CP 58, 62)

B. The University allowed Hartleben to return to her master's program and offered her multiple accommodations to address her memory loss.

On March 4, 2013, Hartleben met with Terri Dobrich at the University's Disability Resources for Students Office ("DRS") to ask that she be allowed to re-enroll in the classes she had forgotten without paying tuition. (CP 51, 88-89, 156) During their initial meeting, Hartleben refused to discuss other options, insisting the University allow her to retake classes at no cost. (CP 51-52) Dobrich

explained to Hartleben that she would investigate her request. (CP 52)

Dobrich spoke with several University administrators to determine whether the University could waive tuition as a disability accommodation. (CP 52) Dobrich contacted the Associate Dean of the Graduate School, who explained that while the Department of Computational Linguistics could accommodate Hartleben by welcoming her back and extending the timeframe for completing her degree, payment of tuition was necessary to participate in the program. (CP 52) The Registrar explained to Dobrich that a student could retake a class and receive a new grade, or audit the class. As an auditor the student attends lecture but cannot participate in class discussions, do homework, or take exams. (CP 52, 259) Both options require payment of tuition. (CP 52)

Dobrich also spoke with two psychologists to better understand electroshock therapy and conducted online research, looking at information from experts in disability and higher education, as well as accommodations provided by peer institutions. (CP 407-09) Bree Callahan, the Director of DRS, also contacted the Americans with Disabilities Act Coordinator at the University, who confirmed that waiving tuition was not a reasonable accommodation. (CP 50)

On March 14, 2013, Dobrich again met with Hartleben to explore possible accommodations other than waiving tuition. (CP 52) Dobrich explained that the University would extend the timeframe necessary to complete her program, would allow Hartleben to take a reduced course load, and that Hartleben could retake or audit any classes she had forgotten. (CP 46, 48, 52, 406) Hartleben rejected these accommodations, again insisting on a tuition waiver. (CP 52) Dobrich also referred Hartleben to the Division of Vocational Rehabilitation at the Washington State Department of Social and Health Services, which is another resource for students seeking accommodations. (CP 52)

Dobrich continued to explore a tuition waiver for Hartleben. (CP 53) After weeks of discussions with the Registrar, Student Fiscal Services and other departments at the University, Dobrich emailed Hartleben on May 2, 2013, explaining that "enrolling in a course requires payment of tuition" and that payment of tuition is required whenever a student repeats a course, even for health-related or emergency reasons. (CP 53, 55)[1] Dobrich did not tell Hartleben that

[1] Though students must pay tuition when they retake a class, the University refunds a portion of tuition if a student takes a hardship withdrawal from that class and submits a timely request. (CP 250-51) Hartleben received refunds for her hardship withdrawals. (CP 161)

she would be barred from re-enrolling in any classes she wanted to take. (CP 90) Instead, she told Hartleben the University does not allow students to enroll without paying tuition, either directly or indirectly through scholarships, grants, financial aid, or another source. (CP 53, 55, 90)

Hartleben concedes the University never discouraged her from re-enrolling in any classes after her leave of absence. (CP 90) While Dobrich suggested that Hartleben contact the University's financial aid office to see if she qualified for financial assistance, Hartleben concedes that she did not do so. (CP 53, 55, 98) Moreover, although it is undisputed that Dobrich told Hartleben that the University would accommodate any disabilities currently impairing her ability to learn should Hartleben re-enroll, Hartleben never discussed with Dobrich her current claim that she is disabled by the inability to focus or concentrate unless she is participating in a group setting. (CP 55, 91, 194)

C. After Hartleben sued the University, the trial court granted summary judgment for the University, holding that the University was not required to waive tuition as an "accommodation."

In May 2013, Hartleben filed a complaint with the University Complaint Investigation & Resolution Office (UCIRO) alleging disability discrimination. (CP 32, 36-40) Hartleben also filed a

complaint with the Office for Civil Rights (OCR) in the U.S. Department of Education. (CP 32) Hartleben alleged that Dobrich discriminated against her because she did not treat her request to take classes at no cost as a request to accommodate a disability and denied her request for a tuition waiver without offering any other reasonable accommodations. (CP 32-33, 36-40) Hartleben also alleged that Dobrich treated her unfairly by being unresponsive and communicating in a dismissive manner. (CP 32-33, 43)

UCIRO Investigator Kate Leonard handled both the UCIRO and the OCR complaints. (CP 32) Leonard interviewed five witnesses, including Dobrich twice. (CP 33, 203-11) Leonard found that Dobrich had offered multiple accommodations that would allow Hartleben to return, including modifying the timeframe within which her program must be completed and offering a reduced course load, in addition to the opportunity to retake or audit any previous classes. (CP 33, 42-49, 193-94)

Leonard met with Hartleben to explain her findings. (CP 33-34) Leonard offered Hartleben audio recordings of the five classes as an additional accommodation (some of which were the actual classes Hartleben had taken), but Hartleben rejected that offer. (CP 33-34, 194, 513-14) Hartleben became agitated when she learned

that UCIRO had not found discrimination, and left before Leonard could explain her reasoning. (CP 33)

Hartleben filed this action in King County Superior Court under the Washington Law Against Discrimination, RCW 49.60.030, alleging the University discriminated against her by "refusing and failing to provide her with reasonable accommodations that would allow her to re-take certain classes." (CP 2) The University moved for summary judgment arguing that Hartleben's failure to accommodate claim failed as a matter of law because (1) the University offered to accommodate Hartleben to obtain the education available to non-disabled students, (2) waiving tuition requires a fundamental alteration of how the University operates and is thus not a reasonable accommodation, and (3) Hartleben had no evidence that the University's actions were the result of discriminatory animus. (CP 14-29) The Honorable Samuel Chung ("the trial court") agreed, granting summary judgment on June 26, 2015. (CP 480-81) Hartleben appeals. (CP 482-83)

IV. ARGUMENT

A. Summary judgment is appropriate where undisputed facts establish the defendant did not discriminate and the plaintiff's sole requested accommodation is unreasonable as a matter of law.

This Court reviews a summary judgment order de novo, conducting the same inquiry as the trial court. *Christiano v. Spokane Cty. Health Dist.*, 93 Wn. App. 90, 93, 969 P.2d 1078 (1998), *rev. denied*, 163 Wn.2d 1032 (1999). Although this Court views conflicting evidence in the light most favorable to the non-prevailing party, it is not free to disregard undisputed evidence considered by the court below. RAP 9.12; *see Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court . . . .") (emphasis in original).

Summary judgment dismissal of a failure to accommodate claim is appropriate where reasonable minds could only conclude that the defendant reasonably accommodated the plaintiff or where the plaintiff's requested accommodation is unreasonable as a matter of law. *Christiano*, 93 Wn. App. at 94-95; *Snyder v. Med. Serv. Corp. of E. Washington*, 145 Wn.2d 233, 240-42, 35 P.3d 1158 (2001).

Here, no genuine issue of material fact exists and the University was entitled to judgment as a matter of law. This Court should affirm.

B. Hartleben's discrimination claim fails as a matter of law because it is undisputed the University offered her the same opportunity to enjoy its services that it offers the non-disabled.

The Washington Law Against Discrimination (WLAD) requires places of public accommodation to provide the disabled the same opportunity to enjoy the services provided to the non-disabled. Hartleben had the same educational opportunity enjoyed by non-disabled students at the University of Washington because the University offered to accommodate Hartleben's disability so that she could receive a meaningful education in exchange for tuition. Hartleben's WLAD claim fails as a matter of law.

The WLAD protects "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." RCW 49.60.030(1)(b). "'Full enjoyment of' includes the right to purchase any service . . . offered or sold on, or by, any establishment to the public . . . without acts directly or indirectly causing persons . . . with any sensory, mental, or physical disability . . . to be treated as not welcome, accepted, desired, or solicited." RCW 49.60.040(14). A place of public accommodation cannot, based on a

person's disability, engage in acts that result in "any distinction, restriction, or discrimination, or the *requiring of any person to pay a larger sum than the uniform rates charged other persons*, or the refusing or withholding from any person the admission . . . in any place of . . . accommodation." RCW 49.60.215 (emphasis added).

At its core, this language requires places of public accommodation to provide the disabled the same services or, if that is not possible, "comparable services" through "reasonable accommodations." *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 627-28, 635-36, 911 P.2d 1319 (1996); *see also* WAC 162-26-060 ("The purposes of the law against discrimination are best achieved when disabled persons are treated the same as if they were not disabled."); WAC 162-26-080. By its terms the WLAD does not require a place of public accommodation to authorize the disabled to purchase its services for *lesser* sums charged to others. RCW 49.60.215. Nor does the WLAD require a place of public accommodation "to offer *greater* service to disabled people than is available to nondisabled people." *Fell*, 128 Wn.2d at 640 (emphasis in original).

To establish a failure to accommodate claim a plaintiff must prove four elements, including that the defendant did not treat the

plaintiff comparably with non-disabled individuals and that the plaintiff's disability was a substantial factor causing that treatment:

> (1) they have a disability recognized under the statute; (2) the defendant's business or establishment is a place of public accommodation; (3) they were discriminated against by receiving treatment that was not comparable to the level of designated services provided to individuals without disabilities by or at the place of public accommodation; and, (4) the disability was a substantial factor causing the discrimination.

Fell, 128 Wn.2d at 637. "Comparable treatment" is the "touchstone" of the statute because without it the WLAD becomes "an entitlement statute" without a "principled limit." *Fell*, 128 Wn.2d at 626, 631.

Comparable treatment requires giving the disabled and non-disabled the same *opportunity* to enjoy services – it does not require the same *results*. *Fell*, 128 Wn.2d at 631 (WLAD was designed to "remove barriers to *equal opportunity* in our society") (emphasis in original); *Negron v. Snoqualmie Valley Hosp.*, 86 Wn. App. 579, 586, 936 P.2d 55 (1997) ("A reasonable accommodation . . . is one that allows a comparable opportunity") (App. Br. 26); *see also Alexander v. Choate*, 469 U.S. 287, 304, 105 S. Ct. 712, 722, 83 L. Ed.

2d 661 (1985) (federal Rehabilitation Act "does not, however, guarantee the handicapped equal results . . . .").[2]

Here, the University offered Hartleben multiple accommodations that afforded her the same opportunity to enroll and learn in classes as the non-disabled. The University repeatedly granted Hartleben's requests for leaves of absence from her program (refunding her tuition when it did so) and welcomed her back afterwards (which it does not do for students that simply drop-out). (CP 52, 57, 83, 105, 161) *See Christiano*, 93 Wn. App. at 94-95 (employer accommodated employee as a matter of law by granting multiple leave requests and offering her position in same pay range when she returned). The University offered to accommodate any lingering symptoms of her memory loss should Hartleben re-enroll, granted her extra time to complete her degree program, reduced the normal course load, and allowed her to retake or audit classes as she deemed necessary. (CP 46, 48, 52, 55, 406) *See also* 34 C.F.R. § 104.44 (suggesting as reasonable accommodation "changes in the

[2] The Washington courts look to federal decisions for guidance in applying the WLAD because it has "the same purpose as [its] federal counterparts." *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 442, 983 P.2d 1167 (1999), *rev. denied*, 140 Wn.2d 1008 (2000); *see also Kees v. Wallenstein*, 161 F.3d 1196, 1199 (9th Cir. 1998) (courts apply the same analysis under ADA and WLAD).

length of time permitted for the completion of degree requirements"). It also offered her, free of charge, recordings of the classes she had forgotten. (CP 33-34)

The University never discouraged Hartleben from enrolling in classes. It asked only that Hartleben pay the same tuition as everyone else. (*Compare* CP 90 ("Q. And no one . . . told you that you could not reenroll . . .? A. No.") *with* CP 2 (alleging University violated WLAD "by refusing and failing to provide . . . reasonable accommodations that would allow her to re-take certain classes")) The WLAD expressly allows the University to charge Hartleben the same fee for its services that it charges the non-disabled. RCW 49.60.215 (prohibiting the charging of "*a larger sum* than the uniform rates charged other persons") (emphasis added); RCW 49.60.040(14) (protecting "the right to purchase any service").

The accommodations offered by the University enhanced Hartleben's ability to succeed in her studies. By contrast, a waiver of tuition has no bearing on her academic success and thus cannot be viewed as a required "accommodation." *See Lipton v. New York Univ. Coll. of Dentistry*, 865 F. Supp. 2d 403, 410 (S.D.N.Y. 2012) ("The ADA cannot be read to mandate a waiver of fees in the present case, where the fees have no bearing on the disability alleged."), *aff'd*,

507 F. App'x 10 (2d Cir. 2013); *see also Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993) (employer not required to waive uniform dress code for transsexual employee because it "did not affect her ability to perform her job"); WAC 162-26-040(2) (reasonable accommodations are necessary where a person cannot "fully enjoy the services *because of* the person's . . . disability") (emphasis added).

When the University allows a student to enroll in a class it does not – as Hartleben apparently believes – guarantee acquisition and retention of all information presented. *See Marquez v. Univ. of Washington*, 32 Wn. App. 302, 310, 648 P.2d 94 (WLAD did not require University to "guarantee the 'making of a lawyer'"), *rev. denied*, 97 Wn.2d 1037 (1982), *cert. denied*, 460 U.S. 1013 (1983). Many students have learning disabilities that prevent them from successfully completing a class, even with extra time for assignments and exams. But if these students must repeat classes in order to benefit from them, it is no more discriminatory to charge them tuition, than it is to refuse tuition waivers to any other individual claiming that his or her disability makes payment of tuition an onerous condition of enjoying the same education as everyone else. Hartleben's notion of accommodation would require the University

to waive tuition for *any* disabled individuals who claim they cannot afford it.

The University did not attempt to make Hartleben "pay tuition twice" to enroll in a single class, as she asserts (App. Br. 27); it sought to charge her each time she enrolled, just as it does everyone else. (CP 53, 55) Hartleben received the "full and equal enjoyment" of the University's services when she enrolled in and completed the five classes (and was allowed to do so again), but due to circumstances entirely outside the University's control did not retain what she learned. In short, the University provided Hartleben the same *opportunity* it provides everyone; it cannot be held liable based on the ultimate *result* of that equal opportunity.

Hartleben is simply wrong in asserting that students who take a class twice are not charged each time they take the class. (App. Br. 5) The University does not allow students to retake classes free of charge even if they withdraw from the initial class for medical or emergency reasons. (CP 53, 55) Hartleben's request for tuition-free classes thus seeks "greater services" not required by the WLAD. *Fell*, 128 Wn.2d at 640; *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1119 (9th Cir. 2000) (covered entities are not required to provide services "which are not otherwise available to the general

public"); *Wright v. Giuliani*, 230 F.3d 543, 548 (2d Cir. 2000) ("the disabilities statutes do not require that substantively different services be provided to the disabled, no matter how great their need for the services may be"). Because the University offered Hartleben the same opportunity to enroll in classes it offers to the non-disabled, it did not fail to accommodate Hartleben.[3]

C. The WLAD requires *prospective* accommodation. It is not disability insurance meant to shift financial loss caused by disabilities.

Hartleben's claim seeks to shift financial responsibility for her memory loss to the University under the guise of a WLAD "accommodation." Because the purpose of the WLAD is to fight discrimination, not to insure against disabilities, this Court should reject Hartleben's unprecedented expansion of the WLAD.

Properly framed, Hartleben's request is not for accommodation of a current disability – it is for the re-provision of services because a subsequent disability has undermined the value of those services. Hartleben does not allege that she "did not get all of

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[3] This is not to say Hartleben is without recourse. Other public resources exist for addressing the financial stress of becoming disabled. *See, e.g.*, Social Security Disability Insurance, 42 U.S.C. § 423; Washington State Division of Vocational Rehabilitation (https://www.dshs.wa.gov/ra/division-vocational-rehabilitation, last visited December 17, 2015). The University also directed Hartleben to its financial aid office, but Hartleben declined to contact it. (CP 53, 55, 98)

the benefit of her tuition payments," that she was denied "full enjoyment" of the classes, or that the University failed to accommodate a then existing disability at the time she actually took the five classes. (App. Br. 27) Rather, she alleges her "memory loss[] has prevented her from *retaining the information* she learned in the five classes." (App. Br. 27) In other words, her subsequent disability has undermined the value of the services the University previously provided her.

If Hartleben's disability causes her financial hardship in meeting her tuition obligation, she may apply for financial aid on the same terms and conditions as any other student. The WLAD is not an insurance policy requiring covered entities to provide "financial accommodation" for losses caused by a disability that did not exist at the time they provided their services. Rather, the WLAD requires covered entities to provide reasonable accommodations that *prospectively* prevent discrimination. WAC 162-26-060 ("The law protects against discrimination because of the *'presence'* of a disability.") (emphasis added); *see also Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107 (Fed. Cir. 1996) (duty to accommodate under ADA is

"prospective from the time [the covered entity] gained knowledge of the disability").

For example, movie theaters must provide closed captioning for deaf customers. *Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 293 P.3d 413, *rev. denied,* 178 Wn.2d 1010 (2013) (App. Br. 24). And hospitals must provide interpreters so that patients have "the opportunity to explain symptoms, ask questions, and understand the treatment being performed." *Negron,* 86 Wn. App. at 586. Similarly, the University offers a host of accommodations to the disabled, including extra time to complete courses and degrees that was offered to Hartleben here. Hartleben cites no case (and counsel is aware of none) where a covered entity was required to waive the normal fee for its services as an "accommodation" because a new disability has impaired the value of previous services. To the contrary, under the WLAD a covered entity does not engage in discrimination by charging the disabled "the uniform rates charged other persons." RCW 49.60.215.

Hartleben's interpretation of the WLAD expands it far beyond its intended purpose of fighting discrimination, rendering it the "entitlement statute" *Fell* disavowed. 128 Wn.2d at 626. For example, under Hartleben's interpretation, a hospital must treat a

patient free of charge if a subsequent disability impairs the "benefit" of previous treatment. Any school charging tuition would be required to offer free classes to transfer students who claimed that they could "not get all of the benefit of" a higher level class because a disability prevented them from remembering a prerequisite. (App. Br. 27) (*See* App. Br. 33 ("It was incumbent on [the University] to . . . help her relearn the content of the classes without paying tuition again."))

The WLAD does not turn places of public accommodation into insurers of their services. This Court should reject Hartleben's unprecedented expansion of the WLAD far beyond its intended purpose of fighting discrimination.

D. The University correctly concluded after a diligent investigation that Hartleben's requested "financial accommodation" was not reasonable because it fundamentally altered the University's operation.

Hartleben's claim fails as a matter of law for another reason: even if it is considered an "accommodation" waiving tuition is not a "reasonable accommodation" because it fundamentally alters the University's programs. Payment of tuition is a foundational aspect of how the University's operates. This Court should affirm for this separate and independent reason.

In any failure to accommodate case, the plaintiff bears the initial burden of establishing that a *reasonable* accommodation exists and if the plaintiff fails to meet this burden, summary judgment is appropriate. *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1046, 1049 (9th Cir. 1999) (affirming summary judgment because student's proposed modifications to academic schedule were unreasonable as a matter of law); *Snyder v. Med. Serv. Corp. of E. Washington*, 145 Wn.2d 233, 240-42, 35 P.3d 1158 (2001) (affirming summary judgment because employee's request for new supervisor was unreasonable as a matter of law). An accommodation is not "reasonable," and thus not required, if it would "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 36.302; *Zukle*, 166 F.3d at 1046 ("The Supreme Court has made clear that an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones."); *cf. Fey v. State*, 174 Wn. App. 435, 452, ¶ 33, 300 P.3d 435 (2013) (WLAD does not require an employer to alter the fundamental nature of a job), *rev. denied*, 179 Wn.2d 1029 (2014).

Hartleben's requested "accommodation" – her enrollment in courses without funding from *any* source – is a fundamental

alteration of the University's services and thus unreasonable as a matter of law. It is a core principle of the University's operation that it recover the cost of a student's enrollment in classes. (CP 53, 55) Where tuition is not directly paid by the student, it is paid from some other source, *e.g.*, scholarships, grants, or financial aid. (CP 53) In contrast to surcharging the disabled for providing accommodations (which the WLAD prohibits), the WLAD allows the University to charge the disabled the essential *quid pro quo* for its services. *Compare* WAC 162-26-070 (covered entity cannot "charge for reasonably accommodating the special needs of a disabled person") *with* RCW 49.60.215 (covered entities may charge disabled "the uniform rates charged other persons").

Hartleben turns on its head the burden of proving a reasonable accommodation, asserting that the University had "no evidence" that her requested accommodation fundamentally alters the University's operation and that the University was relying solely on speculation. (App. Br. 31) *See McDaniels v. Group Health Co-op,* 57 F. Supp. 3d 1300, 1314 (W.D. Wash. 2014) (plaintiff bears burden of establishing requested accommodation is reasonable). In any event, Hartleben ignores that the University's Disability Resources for Students Office's (DRS) investigation included

contacting Hartleben's degree program, the Registrar's Office (twice), Student Fiscal Services, and the University's ADA Coordinator, as well as research of peer institutions and expert analysis of disability law and higher education, all of which confirmed that tuition was an essential condition for the education provided to students by the University. (CP 50, 52-53, 409) *See Zukle*, 166 F.3d at 1048 ("Deference is also appropriately accorded an educational institution's determination that a reasonable accommodation is not available.").[4] DRS did not "defer" to the Registrar or to any other University office by seeking input on what Hartleben herself characterizes as an unprecedented request. (*Compare* App. Br. 29, 32 *with* App. Br. 15-16)

The assertion that the University did not "engage with Ms. Hartleben" (App. Br. 33) is also refuted by the undisputed evidence. University representatives repeatedly met with Hartleben personally to offer Hartleben possible accommodations. (CP 33, 51-52) The University welcomed her back to her degree program, extended the time to complete her degree, allowed her to take a reduced course

[4] Hartleben mistakenly implies that the University acted improperly by not using the phrase "fundamentally alter" until its motion for summary judgment (App. Br. 31) when it consistently emphasized to Hartleben that tuition was an essential *quid pro quo* for the classes the University provides to students.

load, allowed her to retake or audit classes as she deemed necessary, and offered her, at no cost, recordings of the courses she wanted to retake. (CP 33-34, 46, 48, 52, 406) *See Zukle*, 166 F.3d at 1048 (noting university offered plaintiff "all of the accommodations that it normally offers learning disabled students"). The University referred Hartleben to its financial aid office and DSHS's Division of Vocational Rehabilitation. (CP 52-53, 55, 325) The University then thoroughly reviewed DRS's investigation to ensure that it had offered to accommodate her disability. (CP 32-33) Hartleben's assertion that the University failed to engage in an interactive process (App. Br. 32) and that the University did not "at any time [consider] alternative accommodations to Ms. Hartleben's proposal" (App. Br. 33) is refuted by the undisputed evidence before the court on summary judgment.[5]

Hartleben also patently misrepresents the actions of the University's employees. For example, she asserts that DRS's Director Bree Callahan decided within a day of Hartleben's initial meeting with DRS that "she did not see 'what/if anything' could be done." (App. Br. 33) In fact, Callahan said, "At this point *I am not sure*

[5] Hartleben also faults the University for not seeking additional medical records or speaking with her physicians, ignoring that Hartleben had already provided medical records. (*Compare* App. Br. 17 *with* CP 176)

what/if anything can be done retroactively in terms of accommodation as that is not how the process works. We would certainly consider accommodations if the student moved forward in the program." (CP 356 (emphasis added)) Hartleben provides no explanation why DRS would have conducted its exhaustive investigation *after* Callahan's statement if the University had already decided not to provide any accommodation. Regardless, Callahan's accurate statement of the law – that the WLAD requires prospective accommodation – is not evidence of discrimination. (Argument § C, *supra*)

Likewise, the University's internal complaint investigator did not offer Hartleben the class recordings on a "take it or leave it" basis – they were offered as one part of a package of accommodations offered by the University. (App. Br. 35) There was no "follow-up" on this accommodation (App. Br. 20) because Hartleben rejected it as soon as it was offered. (CP 33-34, 514) The University had no obligation to continue attempting to accommodate Hartleben after she ended the interactive process. *Allen v. Pacific Bell*, 348 F.3d 1113, 1115-16 (9th Cir. 2003) (affirming summary judgment dismissing

failure to accommodate claim because plaintiff refused to engage in interactive process).[6]

Hartleben rejected all of the University's proposed accommodations, insisting that a tuition waiver was the only "accommodation" that would suffice. (CP 33-34, 52)[7] But the WLAD does not entitle her to her preferred accommodation – only a reasonable one. *Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993) ("The Act does not require an employer to offer the employee the precise accommodation he or she requests."); *E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 471 (5th Cir. 2009) ("The ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation.").[8]

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[6] None of the cases relied on by Hartleben involved a plaintiff insisting on a single accommodation that fundamentally altered the defendant's services. *See, e.g., Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 249 P.3d 1044 (requested accommodation of allowing plaintiff to teach at another school), *rev. denied*, 172 Wn.2d 1013 (2011) (App. Br. 34-35); *Duvall v. Cty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (asking court to provide real-time transcription as accommodation) (App. Br. 35).

[7] Hartleben concedes she rejected every other accommodation offered by the University. She cites no evidence supporting her assertion that "she was not insistent participating in the classes again was the only option." (App. Br. 33; CP 90)

[8] Whether the University would face "hardship" in implementing her request is irrelevant (App. Br. 31) because "[f]inancial ability to provide a service is not enough" to establish discrimination. *Fell*, 128 Wn.2d at 631-32.

The University engaged in an extensive process with Hartleben and attempted to reasonably accommodate her disability. Hartleben simply refused to accept any accommodation save for one that would fundamentally alter the University's operations and was thus not required by the WLAD.

E. Hartleben presented no evidence that the University's denial of her requested accommodation was motivated by discriminatory animus.

Hartleben submitted no evidence that her disability was a "substantial factor" motivating the University's decision to deny her requested accommodation. *Fell*, 128 Wn.2d at 637 (plaintiff must prove "the disability was a substantial factor causing the discrimination"). This is another reason to affirm.

The University's refusal to waive tuition was the result of its uniform requirement that all students pay tuition to enroll in classes. Hartleben submitted no evidence of a causal connection between her disability, retrograde amnesia, and the alleged discrimination, the refusal to waive tuition. The University refused to waive tuition because it does not allow any student, for any reason, to retake a class without paying tuition, not because of any discriminatory animus. (CP 53, 55)

Hartleben alleges that DRS's employee, Terri Dobrich, "expressed her animus" (App. Br. 15) when she allegedly told the University's internal complaint investigator, Kate Leonard, that it is "[n]ot uncommon to see [an] 'I need it now' mind frame on someone w[ith] diagnosis of depression and anxiety." (CP 206; *see also* CP 332-34) That statement is not evidence of any discriminatory animus, let alone animus directed towards Hartleben's amnesia, the disability she claims the University failed to accommodate. Dobrich explained she was not referring "to any particular disability," but reflecting only the common sense notion that "sometimes [students] want an immediate answer." (CP 126-27)[9]

Hartleben herself stated that no one at the University ever made a derogatory remark about her amnesia. (CP 94) Even assuming Dobrich's comment was motivated by animus, it relates to depression and anxiety; it has nothing to do with the University's decision whether to accommodate her amnesia by waiving tuition. "[T]here must be some causal nexus between the act complained of and the resulting discrimination in order for the act to be an unfair practice under RCW 49.60.215." *Fell*, 128 Wn.2d at 640.

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[9] Leonard acknowledged that Dobrich's statement, which is recorded in Leonard's investigation notes, was "not a quote." (CP 206, 334)

Hartleben fails to explain how the University's description of her request as one for "*free classes*" shows discriminatory animus. That is precisely what she seeks. (*Compare* App. Br. 32 *with* App. Br. 2 ("Ms. Hartleben requested as a disability accommodation that the University allow her to attend the five courses without paying additional tuition.")) The University did not "discriminate" against Hartleben by accurately characterizing her request for a "tuition waiver" as "free tuition," nor by correctly concluding that it was not required to provide her "financial accommodation" by providing her its essential services free of the consideration paid by all others. Hartleben's claim fails as a matter of law because she presented no evidence that her amnesia was a substantial factor motivating the University's decision not to waive tuition.

V. CONCLUSION

This Court should affirm.

Dated this 18th day of December, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 18, 2015, I arranged for service of the foregoing Brief of Respondent, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 18th day of December, 2015.

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