No. 96767-9

SUPREME COURT
OF THE STATE OF WASHINGTON

TONI GAMBLE,

Petitioner,

vs.

CITY OF SEATTLE,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. SUMMARY OF ANSWER

Respondent City of Seattle respectfully submits that the Petition for Review should be denied. This case does not present an issue of substantial public interest.

The King County Superior Court found as a matter of law that Plaintiff/Petitioner Toni Gamble could not establish her claim that the City, her employer, had failed to accommodate her disability, a back injury. The Superior Court accordingly dismissed the claim on summary judgment. Ms. Gamble appealed that decision, and, on *de novo* review, the Court of Appeals reached the same result, holding that "for each of City Light's alleged failures, Gamble either failed to notify City Light of her need for updated accommodations, or City Light reasonably accommodated her needs." *Gamble v. City of Seattle*, __ Wn. App. 2d __, 431 P.3d 1091, 1095 (2018).

That holding is plainly correct. It is beyond dispute that the City appropriately accommodated Ms. Gamble's requests for a standing work station and a part-time schedule, *id.* at 1095, and that Ms. Gamble did not request a rubber floor mat, reduced driving requirements, the ability to work from home, or schedule adjustments as accommodations for her back injury, *id.* at 1096.

The only other alleged accommodation at issue is a four-day by ten-hour-per-week ("4 x 10") work schedule that was discontinued temporarily for all employees and was, according to the Court of Appeals, "the only accommodation that was at least arguably removed." *Id.* at 1097. But the Court of Appeals found on review of the record that even if this 4 x 10 work schedule could be construed as an accommodation that was withdrawn, Ms. Gamble did not ask to be allowed to work a 4 x 10 schedule as an accommodation for her back injury, but instead requested an alternative full-time work schedule, which the City promptly gave her. *Id.* The Court of Appeals also found that Ms. Gamble never informed the City that the new alternative schedule she requested and received was negatively impacting her back. *Id.* "Therefore," reasoned the Court of Appeals, "as far as City Light knew, Gamble's new schedule was precisely the accommodation that she desired. Had this schedule been insufficient that was information solely in Gamble's control." *Id.* The Court of Appeals concluded that the City had not failed to reasonably accommodate Ms. Gamble's disability with regard to the 4 x 10 schedule.

Contrary to Ms. Gamble's Petition (at pages 1-2), this case does not present the question of whether an employer has a duty to notify an employee that previously-afforded accommodations are being reevaluated or removed. The record establishes that there was no reevaluation of Ms.

Gamble's accommodations, and no accommodations were removed. Even if Ms. Gamble's 4 x 10 work schedule could be viewed as an accommodation that was temporarily withdrawn, this case would still present no new question as to the duties of employers and employees regarding reasonable accommodation of disabilities. Well-established Washington law requires employers and employees to engage in an interactive process. As the Court of Appeals correctly held and as a matter of basic common sense, this process is ongoing, and it can only function effectively if employees adequately communicate their needs. Because Ms. Gamble did not do so here (instead specifically requesting the very work schedule that she later claimed was inadequate), the City did not fail to accommodate her disability.

In sum, because Ms. Gamble received every accommodation she asked for and never advised the City that any accommodation was inadequate, the Court of Appeals correctly affirmed the Superior Court's grant of summary judgment for the City, and this case presents no issue of substantial public interest.

II. COUNTERSTATEMENT OF THE CASE

A. The Complaint.

Ms. Gamble's Second Amended Complaint, filed April 22, 2016, alleged claims against the City under the Washington Law against

Discrimination, RCW 49.60, for (1) "harassment and disparate treatment, owing to her gender, age, and/or disability," (2) retaliation, and (3) failure to accommodate. CP 679-90; *see esp.* CP 688.

B. Facts Relevant to the Failure to Accommodate Claim.

Ms. Gamble, a long-time employee of Seattle City Light, identified six accommodations that she claims were "taken away" from her during the limited time periods at issue. *See* Petn. at 8-10; CP 534. But for each accommodation, the record shows that her claim is groundless.

1. Standing Workstation.

At the City Light South Service Center, Ms. Gamble had a standing workstation. CP 227:21-25. She alleged that, upon her assignment to the North Service Center, she advised her manager that she needed a standing workstation to do her work at the NSC. CP 229:5-9; CP 16. She claimed the workstation accommodation was "removed" because her manager did not respond to her request. CP 16-17; Petn. at 9.

But the record contains no evidence that City Light refused her request for a standing workstation; Ms. Gamble simply complains that her new manager did not respond fast enough. CP 16. Moreover, Ms. Gamble did receive a standing workstation at the NSC: she contacted City Light's "ergonomics people" and they provided it. CP 16; CP 229:10-22, 230:7-13.

2. Request for Temporary Part-Time Schedule.

Prior to 2007, Ms. Gamble worked a reduced hours schedule of 32 hours per week. CP 17. She claims that her manager denied her request for a temporary "32 hours as flex time" schedule upon her return to work at the beginning of July 2013, following an extended absence. CP 17; CP 264:15-21, 265:5-11.

But the undisputed record shows that her manager did not deny Ms. Gamble's request. He responded in writing that he did not have a modified schedule ready for her during the week of June 24, 2013, and that the City would work to create a modified schedule to meet her needs; Ms. Gamble chose instead to return to work full-time on July 1. CP 518-19, 524, 527; CP 267:5-7. In deposition, Ms. Gamble admitted that her return to work was successful and she could not identify any way in which her manager's supposed refusal to let her work a reduced schedule before she came back full-time negatively impacted her health. CP 267:5-268:22.

3. Floor Mat.

At the SSC, Ms. Gamble had a rubber floor mat. CP 230:23-25. She argues that this accommodation was "removed" because her manager "did not provide" one to her at the NSC. CP 17.

But Ms. Gamble did have a rubber floor mat at the NSC—in fact, she herself brought one from the SSC. CP 17; CP 231:12-17. She

testified in deposition that she never asked anyone to provide her with a rubber floor mat at the NSC because "a little floor mat was not worth bothering anyone about." CP 232:1-14.

4. Working from Home.

Ms. Gamble claims that after a new manager became her supervisor she was no longer "allowed to work 2-4 hours a day doing phone work from home." CP 18.

But Ms. Gamble admitted that (i) her prior supervisor had only "occasionally" allowed her to work from home when inclement weather or a medical condition like a headache prevented her from making the long commute to the office but did not preclude her from working remotely (CP 236:7-17, 237:6-238:18); (ii) she never asked her new manager for permission to work from home because of back pain—or, for that matter, any medical condition (CP 217:4-219:1, 219:24-220:15, 221:7-225:12); and (iii) during the relevant time periods, she did not need to work from home in order to perform the essential functions of her job, was able to drive one-and-a-half hours each way to and from work, and was able to perform her job functions at the office or in the field (CP 249:13-21, 252:9-254:18, 256:19-25, 278:10-279:3).

5. One-Time Schedule Adjustment.

Ms. Gamble claimed that she was denied a request to change her flex day from Wednesday, October 3, 2012 to Friday, October 5, 2012, "for scheduled appointments." CP 320:19-321:19, 322:10-21; CP 333.

But Ms. Gamble admitted that her request regarding October 3 and 5, 2012 did not specifically reference a medical appointment or an appointment relating to back pain. CP 322:10-325:17; CP 333; *see also* CP 519. Her manager asked Ms. Gamble to keep her flex day on October 3 because her colleagues were relying on her to deliver a training on October 5. Ms. Gamble kept her flex day on October 3 and took sick leave on October 5, failing to deliver the training. CP 519. Also, Ms. Gamble admitted that her manager routinely allowed her to adjust her schedule so she could attend physical therapy and doctor's appointments; in fact, she testified that he was required to do so. CP 319:2-18.

6. Alternative Full-Time Work Schedule.

From August 29, 2012 through February 26, 2013, Ms. Gamble worked an alternative full-time 4 x 10 work schedule. From approximately February 27 to July 1, 2013, Ms. Gamble was on leave. From July 1, 2013 to June 18, 2014, she worked an alternative full-time schedule referred to as a "nine eighty" schedule (nine days totaling eighty hours over two weeks). From June 18, 2014 through March 18, 2015, she

returned to a 4 x 10 schedule. CP 258:24-259:2; 304:17-305:8, 306:1-25, 307:11-308:15; CP 467-90.

Ms. Gamble claims that the City denied her request for accommodation in the form of a full-time 4 x 10 work schedule from July 1, 2013 to June 18, 2014. CP 17.

But the record is undisputed that:

- During the period from July 1, 2013 to June 18, 2014, for customer service reasons, no one in the Customer Electrical Services Engineering group was allowed to work a 4 x 10 schedule. CP 492; 507-16.
- As Ms. Gamble returned to work from her leave, she knew that 4 x 10 schedules had been eliminated, but she did not request a return to her 4 x 10. Rather, she specifically requested the "nine eighty" schedule "with alternating Wednesdays off." Her manager met with her personally following her request, discussed her work schedule plan with her, and sent her an email summarizing their discussion; and he and Ms. Gamble signed her "Alternative Work Schedule Agreement." CP 306:1-18; CP 518 ¶ 4; 522; 524.
- Ms. Gamble never advised the City that the nine eighty schedule did not accommodate her back pain, either before or after she requested and agreed to it.

- Ms. Gamble admitted at deposition that working a nine eighty schedule for eleven-and-a-half months did not prevent her from performing any of the essential functions of her job—with the possible exception of "maybe one or two times" when she could not drive to a field visit due to increased back pain that she attributed to her schedule. CP 309:13-310:23, 313:24-317:14. She could not recall any particular missed field visit. CP 312:5-18, 315:20-317:14.
- Ms. Gamble conceded that on days when she might have had to miss a field visit, she could have arranged for someone to drive her to the appointment, rescheduled the visit, or had a colleague attend in her place. CP 311:21-312:1.

C. Disposition of Claims in Superior Court.

1. Summary Judgment Dismissal of Failure to Accommodate Claim.

Ms. Gamble filed a Motion for Partial Summary Judgment on Failure to Accommodate Claim. CP 3-14. She did not provide specific evidence of material facts to support each element of her prima facie case. Rather, she argued that she should be granted summary judgment on alleged grounds that the City removed accommodations she had previously received. *See id.*

The City opposed her motion and asked the Superior Court to enter summary judgment in its favor. CP 144-73.

Following oral argument, the Superior Court entered its Order Granting Defendant's Motion for Summary Judgment. *See* CP 621-24. The Superior Court denied Ms. Gamble's motion for partial summary judgment on her accommodation claim and granted summary judgment for the City on that claim. *See id.* The trial court dismissed the failure to accommodate claim with prejudice. CP 623.

2. Remaining Claims: Trial and Defense Verdict.

After further pre-trial motions, Ms. Gamble's remaining claims for disparate treatment discrimination based on gender or disability, hostile work environment based on gender or disability, and retaliation based on gender or disability, were tried to a jury of twelve from April 4 to April 21, 2017. CP 722-25. The jury returned a verdict for the City on all claims. CP 722-25; 719-21. Judgment was entered in favor of the City on May 25, 2017. CP 722-25.

D. Court of Appeals Affirmance of Dismissal of Failure to Accommodate Claim.

Ms. Gamble did not assign error to any aspect of the trial proceedings. She appealed only the partial summary judgment dismissal of her accommodation claim.

The Court of Appeals affirmed. *See Gamble*, 431 P.3d 1091.

III. ARGUMENT

The record fully supports the Court of Appeals' affirmance of the Superior Court's summary judgment dismissal of Ms. Gamble's failure to accommodate claim. Dismissal was proper under well-established standards for summary judgment based on the duties of employers and employees to engage in an interactive process regarding disability accommodations. There is no issue of substantial public interest.

A. The Premise of the Petition Is False.

The Petition for Review asserts that Ms. Gamble's various accommodations for her back injury were removed, taken away, "ignored," and "ripped from" her by the City. (See Petn. at 2, 8, 10, 11, 14, 15.) The record establishes that this assertion is not correct. The Petition is thus based on a false premise.

1. The City Did Not Remove the Standing Desk or Other Accommodations.

Ms. Gamble identified six accommodations she claims the City removed during the relevant, narrow time frames. The resolution of the first five of these accommodations, based on the undisputed record, is as follows:

1. **Standing workstation**: *Supplied by the City*. (See above at 4 and citations to CR therein.) *See Gamble*, 431 P.3d at 1095.

2. **Request for part-time schedule**: *The City advised Ms. Gamble that it would work with her* to accommodate her needs. She then opted for a full-time schedule. (See above at 4 and citations to CR therein.) *See Gamble*, 431 P.3d at 1095.
3. **Floor mat**: *Supplied by Ms. Gamble*. And she never asked the City for it. (See above at 5-6 and citations to CR therein.) *See Gamble*, 431 P.3d at 1096.
4. **Working from home**: *Ms. Gamble never asked* to work from home as an accommodation for her back injury. (See above at 6 and citations to CR therein.) *See Gamble*, 431 P.3d at 1096.
5. **Request for one-time schedule adjustment**: *Ms. Gamble never asked* for the one-time adjustment as an accommodation for her back injury. And she took the day off anyway. (See above at 7 and citations to CR therein.) *See Gamble*, 431 P.3d at 1096.

In sum, none of the five accommodations referenced above were removed. For each, either the City provided it, or Ms. Gamble quickly abandoned her request for it or did not ask for it.

2. The City Did Not Remove the Alternative Full-Time Schedule Accommodation.

Likewise, the sixth and last alleged accommodation at issue was not removed. The City did not deny Ms. Gamble an alternative full-time work schedule.

Ms. Gamble was working an alternative full-time schedule in a 4 x 10 format when she went on leave in February 2013. During her leave, City Light changed its policy for customer service reasons and eliminated the 4 x 10 schedule for all employees. When Ms. Gamble returned to work in July 2013, *at her request, the City granted her an alternative full-time schedule in a nine eighty format*. Ms. Gamble never advised the City that the nine eighty alternative full-time schedule did not accommodate her back injury. (See above at 7-9 and citations to CR therein.) *See Gamble*, 431 P.3d at 1096-97.

An employer's duty reasonably to accommodate an employee's disability is satisfied if the employer ultimately provides a reasonable accommodation. *Frisino v. Seattle School Dist. No. 1*, 160 Wn. App. 765, 781, 249 P.3d 1044 (2011); *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 443, 45 P.3d 589 (2002). An employee is entitled to a reasonable accommodation, not a specific one. *Griffith*, 111 Wn. App. at 443-44 (employee not entitled to precise accommodation she requested).

The accommodation of an alternative full-time schedule was not removed from or denied to Ms. Gamble. She received an alternative full-time schedule accommodation at all times. As a result of a change in policy, the form of her alternative schedule shifted from 4 x 10 to nine eighty, but she was not denied an alternative schedule, nor was it removed. The City satisfied its duty to provide a reasonable accommodation. *Frisino*, 160 Wn. App. at 781; *Griffith*, 111 Wn. App. at 443-44.

3. The Duty of an Employer When Removing an Accommodation Is Not Presented.

Because the City did not remove any of Ms. Gamble's accommodations, the Petition crumbles. It purports to present the issue of the employer's duty to an employee when reevaluating or removing an employee's accommodations. *See* Petn. at 1-2. But this case does not present that issue.

Ms. Gamble got the two accommodations she asked for (a standing workstation and an alternative full-time schedule). She abandoned her request for another (a part-time schedule, regarding which the City stated it was willing to work with her to meet her needs). And she simply did not ask for the other accommodations at issue as accommodations for her back injury (the floor mat, which she provided herself; working from home; and a one-time, one-day schedule change).

The trial court and, on *de novo* review, the Court of Appeals each reviewed the record and concluded that, on these facts and as a matter of law, Ms. Gamble could not establish that the City denied or took away accommodations for her back injury. This case therefore does not present the issue of the duty of an employer when removing an accommodation.

B. The Duties of Employers and Employees Are Already Established.

Even if this case did raise a question about the duties of employers relating to the removal of reasonable accommodations, the relevant duties of employers and employees have already been established by this Court. And the Court of Appeals straightforwardly applied those standards here.

The Court of Appeals analyzed Ms. Gamble's failure to accommodate claim as if her specific 4 x 10 schedule, rather than an alternative full-time schedule viewed more generally, had been an accommodation and had been removed. *See* 431 P.3d at 1097 (Ms. Gamble's 4 x 10 schedule "was the only accommodation that was at least arguably removed"). It did so even though, as it noted, the record does not establish that the 4 x 10 schedule was an accommodation for Ms. Gamble's back injury—because City Light allowed all employees to work a 4 x 10 when she followed that schedule. *See* 431 P.3d at 1093 n.1.

Providing reasonable accommodation for a disability requires an ongoing mutual exchange or interactive process between employer and employee. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408-09, 899 P.2d 1265 (1995); *Frisino*, 160 Wn. App. at 779-80. The duty falls on both parties: "Reasonable accommodation … envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions." *Goodman*, 127 Wn.2d at 408-09.

The Court of Appeals decision that is the subject of the Petition relies heavily on *Frisino*, 160 Wn. App. 765. *Frisino* in turn relies on *Goodman* and its requirement of a mutual exchange or interactive process. *Frisino* elaborates as follows on the duties of employers and employees in this process:

> Generally, the best way for the employer and employee to determine a reasonable accommodation is through a flexible, interactive process. RCW 49.60.040(7)(d); *MacSuga v. Spokane Cnty.*, 97 Wash. App. 435, 443, 983 P.2d 1167 (1999). A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee's capabilities and available positions. *See Goodman,* 127 Wash.2d at 408-09, 899 P.2d 1265; RCW 49.60.040(7)(d) ("[A]n impairment must be known or shown through an interactive process to exist in fact."). *The employer has a duty to determine the nature and extent of the disability, but only after the employee has initiated the process by notice*. *Goodman,* 127 Wash.2d at 409, 899 P.2d 1265. *In addition, the employee retains a*

> *duty to cooperate with the employer's efforts* by explaining the disability and the employee's qualifications. *Id.* at 408, 899 P.2d 1265.

160 Wn. App. at 779-80 (emphasis added), *cited in Gamble*, 431 P.3d at 1096. Again, the employer's duty and the employee's duty are intertwined and ongoing.

Frisino (again citing *Goodman*) addressed still further the employer's duty and its dependence on information and feedback provided by the employee:

> An employer must be able to ascertain whether its efforts at accommodation have been effective in order to determine whether more is required to discharge its duty. The employee therefore has a duty to communicate to the employer whether the accommodation was effective. This duty flows from the mutual obligations of the interactive process. *Goodman,* 127 Wash.2d at 408-09, 899 P.2d 1265. To hold otherwise would be inequitable to the employer and would undercut the statute's goal of keeping the employee with the impairment on the job.

160 Wn. App. 783, *cited in Gamble*, 431 P.3d at 1095-96.

The Court of Appeals applied this standard here, and concluded that, if the nine eighty schedule in fact negatively impacted Ms. Gamble's back injury, she did not participate in the interactive process required by *Goodman* and *Frisino*: Upon her return from leave, she specifically requested the nine eighty schedule. The City responded by engaging in the interactive process; Ms. Gamble's manager met with her after her

request, discussed her work schedule plan with her, and summarized their discussion in an email; and Ms. Gamble and her manager signed her "Alternative Work Schedule Agreement." CP 306:1-18; CP 518, 522, 524. Ms. Gamble never advised City Light that the new schedule did not accommodate her back injury. "Therefore, as far as City Light knew, Gamble's new schedule was precisely the accommodation that she desired. Had this been insufficient that information was solely in Gamble's control." 431 P.3d at 1097. Because Ms. Gamble requested the new schedule, received it, and did not inform City Light of any insufficiency, City Light did not fail to accommodate her disability. *Id.* As the Third Circuit stated in a case discussed by the Court of Appeals, "neither the law nor common sense can demand clairvoyance of an employer." *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 331 (3d Cir. 2003) (affirming trial court grant of summary judgment to defendant employer where, upon removal of accommodation, employee did not inform employer that disability remained or that the removed accommodation was still needed), *cited in Gamble*, 431 P.3d at 1097.

Ms. Gamble argued to the Court of Appeals that an employee discharges any duty she has, once and for all, upon advising her employer of a disability—no matter how many years pass, no matter whether circumstances change, and no matter whether she meets with her employer

again to discuss the accommodation. The Court of Appeals correctly rejected that argument as contrary to the standards of *Frisino* and *Goodman*. 431 P.3d at 1096. It also noted that Ms. Gamble provided no authority for her proposition. *Id.*

The Petition likewise argues that the interactive process "only applies before an accommodation is implemented," and that, thereafter, the employee has no duty to engage in any interactive process with the employer regarding her accommodation. *See* Petn. at 15. Ms. Gamble again ignores *Frisino* and *Goodman* and again provides no authority for this radical proposition. *See id.*

IV. CONCLUSION

The Petition pretends that Ms. Gamble had accommodations taken away from her. The undisputed record establishes that no accommodation was removed.

The Petition also pretends that the standards set forth in *Frisino*, derived from *Goodman*, do not exist. But they do. And even assuming Ms. Gamble's specific 4 x 10 schedule was an accommodation and was removed, the record establishes that the City met its obligation to participate in the interactive process required by established Washington law, but Ms. Gamble did not.

Finally, the Petition offers no reason why the standards set forth in *Goodman* and elaborated in *Frisino* should be overthrown, modified, or re-calibrated. It simply ignores them.

This case presents no issue of substantial public interest. The Petition should be denied.

DATED: February 21, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the foregoing document to be served via the Court's E-Service application on the attorneys of record listed below:

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 21st day of February, 2019 at Seattle, Washington.

Gabriella Sanders
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SAVITT BRUCE & WILLEY LLP

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