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No. 63994-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DENISE FRISINO, an individual,

Appellant,

v.

SEATTLE SCHOOL DISTRICT NO. 1, a municipal corporation,

Respondent.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

This is a disability discrimination and retaliation case that was inappropriately decided on summary judgment. Denise Frisino is a long-serving and acclaimed teacher who was dismissed because the Seattle School District (“District”) was unhappy with her requests for accommodation, and her activities with parents and the press regarding a severe mold problem at her school.

Far from demonstrating that this case has no genuine disputed issues of material fact, the District’s response brief demonstrates why this case must go to a jury. Both parties have presented competing theories about what transpired. Both theories have some evidentiary support. This case must go to the finder of fact to determine which evidence is the most persuasive.

B. REPLY ON STATEMENT OF THE CASE

The District’s statement of the case differs sharply from Frisino’s in many respects. Most of its factual contentions are disputed in Frisino’s opening brief. However, there are some assertions for which Frisino offers this statement of the case.

The District asserts that Frisino misrepresented the record regarding the District’s failure to assist her with her reassignment request between May and August of 2004. Br. of Resp’t at 3 n.2, 4. The District

cites a June 2004 email from risk loss manager Richard Staudt (CP 546) in support of this contention. *Id.*

However, two facts are quite clear from the cited evidence. First, Staudt was communicating with Frisino about her worker's compensation claim, not her request to be transferred. For example, Staudt refers to medical information gathered in connection with "Berkeley," the entity contracting with the District on its worker's compensation matters. CP 546. Second, the email in no way provides evidence of an attempt to accommodate Frisino's request. It is quite the opposite. Staudt repeatedly undermines the very basis for the request, suggesting that the source of Frisino's disability cannot be pinpointed, and therefore cannot be accommodated. *Id.*

Also, accommodations coordinator Rick Takeuchi, who was responsible for fulfilling 504 accommodation requests, *conceded* that he took no action in Frisino's case between May and August of 2004. CP 568-69. His declaration simply states that he received Frisino's request in May, and that she accepted the language arts position in August. *Id.* He does not recount a single action he undertook to assist Frisino during those three months. *Id.*

The District next avers that Frisino was "accommodated" at Hamilton when an air filter was placed in her room and staff members

were ordered to mop more frequently. Br. of Resp't at 6.

However, there is also evidence that the air filter was too small for the room, and that staff were not mopping more frequently as instructed. CP 1529, 1530. Moreover, there is no evidence that Staudt or Takeuchi verified that Denise's classroom at Hamilton was actually "clean" or that support staff were following orders. In fact, after the initial measures were taken in 2001, there is no record that the room was regularly mopped clean, or that the HEPA filter was replaced regularly, or even large enough to help. Also, no similar effort was made to clean Frisino's classroom at Hale; color photographs of Room 216 taken from February and March 2005 show dust, debris and the generally unclean condition of the room. CP 807.

The District states that an "individual" from the Seattle/King County Department of Health concluded that "there was no visible current mold growth" at Hale. Br. of Resp't at 7. However, this assertion is contradicted by other evidence. For example, the District's own GlobalTox report just one month later in November 2004 confirmed "visible mold." CP 529-32. Also, Dr. Anderson was present at Hale on November 4, 2004 and photographed visible mold. CP 806-07.

The District cites Dr. Smith's 2005 independent medical examination as evidence of its assertion that Frisino's disability is partly

psychological. Br. of Resp't at 13.¹ However, the District neglects to quote Dr. Smith's conclusion, that Frisino should be accommodated:

Patients with...multiple chemical sensitivity syndrome...require very diplomatic and delicate management.... [I]t is best to have them returned to a workplace where there is good ventilation and no evidence of any odors or strong chemical smells including cigarette smoke, perfume, cleaning agents, animal dander, or any dust in the workplace. *Patients with multiple chemical sensitivity syndrome (MCS) usually can be returned to the workplace after some type of accommodation is made for them and they continue to work with a psychiatrist or psychologist.*"

CP 601. Dr. Smith also opined that Frisino was in fact ". . . exposed to molds, dust, and a variety of other substances in the workplace . . ." CP 600.

The District next claims that the trial court found Dr. Anderson's sampling revealing massive mold present to be "inherently unreliable" and therefore "struck the following paragraphs of Dr. Anderson's deposition:² 15; 16; 24; 34-36; 38-42; and 45." Br. of Resp't at 19 n.18. As evidence, the District cites its own motion (CP 1469-77) and the trial court's order striking the enumerated paragraphs (CP 1824-25).

¹ It is unclear how this assertion, if true, is relevant to Frisino's accommodation request.

² Presumably, the District means that the trial court struck portions of Dr. Anderson's "declaration," not "deposition."

Nothing in the court's order states that it found Dr. Anderson's testing to be "inherently unreliable." CP 1824-25. In fact, the trial court *did not strike the test samples and results in the laboratory report*, nor did it strike Dr. Anderson's January 2005 letter outlining the serious mold problem at Hale. *Id.* The court merely struck some of Dr. Anderson's own conclusions about that report. *Id.*; CP 811-821. This evidence documented the presence of stachybotrys mold in February and March 2005 in Frisino's classroom – Room 216. *Id.*

The District suggests that it was not provided with specific conditions that would be suitable for Frisino's accommodation. Br. of Resp't at 21-22. It relies exclusively on Dr. Vega's testimony in support. *Id.*

The District ignores other evidence from Frisino, Dr. Cary, and others that provided more specific direction, including removal of all stachybotrys mold from Hale, not the partial and inadequate action taken by the District in the winter of 2004. CP 671, 904, 1193-94. Most critically, the District ignores the very specific recommendation of the independent medical examiner (upon which it now relies) that Frisino needed "a workplace where there is good ventilation and no evidence of any odors or strong chemical smells . . . or any dust in the workplace." CP 601. Frisino noted that Ballard High School had a suitable environment.

CP 676. She had been in that building several times, over an extended period of time, and she reacted positively. This was a week-long training in 2002 – during the same time period when Denise was experiencing environmental issues at Hamilton. CP 648, 676. Frisino testified that she knew Ballard to be an environment in which she could work. CP 648. She also listed the downtown administrative building as being accommodating and communicated this to Takeuchi. *Id.* Dr. Cary agreed with this suggestion. CP 1574.

C. SUMMARY OF ARGUMENT IN REPLY

This case simply has too many material facts in dispute to be appropriate for summary judgment. The weakness of the District's case on appeal is belied by its inappropriate and contradictory arguments.

First, it hints and suggests without argument or evidence that Frisino is not actually disabled. The record is clear that Frisino is disabled, and that the District granted her disabled status.

Next, the District tries to argue simultaneously that Frisino was in fact accommodated, and also that it was *impossible* to accommodate her. It makes no attempt to respond to Frisino's arguments that because it fired her instead of accommodating her, the burden is on the District to prove that any alternate accommodations were an undue burden.

The District cannot cite to a single case with similar facts where summary judgment was appropriately granted. In fact, most of the cases upon which it relies went to the jury or had summary judgment for the defendant reversed. As such, the District fails to show that summary judgment was appropriate here.

Finally, the District shows this Court no basis to affirm summary judgment on Frisino's retaliation claim. Rather than demonstrating that no material facts are in dispute, the District merely tells its side of the factual story. The District has not demonstrated that there are no genuine issues of material fact for the jury.

D. ARGUMENT IN REPLY

The District's detailed factual response to Frisino's detailed statement of the case amply demonstrates why this case was inappropriate for summary judgment. Each party presents two versions of the events in question, both supported by evidence in the record. Nowhere in the District's brief does it cite a case on point where summary judgment was granted with so many material facts in dispute. While the District is entitled to make its factual case that it did not discriminate or retaliate against Frisino, it must do so to a jury. Judgment as a matter of law in this case was inappropriate.

(1) Frisino Is Disabled; the District's Suggestions to the Contrary Are Unsupported by Evidence or Argument

In her opening brief, Frisino argued that the District's purported accommodation attempts – reassigning her from a dirty classroom to one ridden with mold and then refusing to perform full mold remediation—were not reasonable accommodations under WLAD. Br. of Appellant at 23-25. Frisino also pointed to evidence in the record that the District failed to assist her in her repeated requests for reassignment to a suitable environment. *Id.* In support, Frisino cited *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003). In *Davis*, our Supreme Court held that summary judgment was inappropriate when a WLAD plaintiff presented evidence that his employer did make some effort at accommodation, but that the jury would have to decide whether those efforts were reasonably calculated to assist him in finding a suitable position. 149 Wn.2d at 538.

The District's response is contradictory: it argues that it made “exhaustive” attempts to reasonably accommodate her disability, while simultaneously arguing that she was not actually disabled. Br. of Resp't at 29-45. Sprinkled throughout its argument section on reasonable accommodation, the District makes repeated references to her “alleged” or “apparent” disability. Br. of Resp't at 31, 33, 36, 43, 44, 48.

Frisino's disabled status is not at issue in this appeal because *the District has conceded it*. Despite semantic attempts to call her status into question by referring to it as "alleged," the District has made no argument in its response brief challenging her status as a matter of law under WLAD. The District also granted her 504 status as a disabled employee. CP 567. The District claims that it attempted to accommodate her disability. Br. of Resp't at 31-41.

Because the District has failed to challenge Frisino's status as disabled in this appeal, this Court should disregard its inappropriate suggestions to the contrary.

(2) The District Cannot Simultaneously Argue that It Accommodated Frisino and that It Could Not Accommodate Her Due to Alleged Obstruction of the Interactive Process

Frisino argued in her opening brief that summary judgment was inappropriate because whether a full mold remediation of Hale or a transfer to a clean environment would cause undue hardship were fact questions for the jury. Br. of Appellant at 29-33.

The District responds that undue hardship is not an issue because it accommodated Frisino's disability by conducting a limited mold remediation that, in the District's view, ends the inquiry. Br. of Resp't at 31, 36, 45. The District also responds that Frisino obstructed the

interactive process, which prevented the District from accommodating her disability at all. Br. of Resp't at 35-44.

The District's two arguments are incompatible; both contentions cannot be sustained. Either the District accommodated Frisino, or it was unable to accommodate her. Regardless of which contention is true, this case should not have been decided on summary judgment.

(a) The District Did Not Accommodate Frisino

Turning to the District's first argument, that it accommodated Frisino, such an accommodation must be reasonable as a matter of law in order to sustain summary judgment. The District argues that by engaging in the interactive process and attempting to remove some mold, it "accommodated" Frisino as a matter of law. Br. of Resp't at 36. It also claims that she was able to perform the essential functions of her job. *Id.* at 29, 41 n.35. However, the District makes no attempt to counter Frisino's evidence that her disability prevented her from returning to her classroom at Hale until all mold was removed. CP 671, 904, 1193-94. It does not explain how a schoolteacher can perform the essential functions of the job without being in the classroom. This argument also assumes that the only reason the District performed mold remediation at Hale was because of Frisino's disability. To the contrary, mold remediation was performed at Hale in response to parent complaints – not Frisino's

accommodation requests. CP 920.

The District appears to confuse “accommodation” with an “attempt to accommodate.” “Accommodation” in the WLAD context means “offering [the employee] a position compatible with [the employee’s] physical limitations.” *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 444, 45 P.3d 589 (2002). The employer must identify the limitations, find a position that matches the restrictions, and offer a position that matches the limitations. *Id.* Only if the employer does the foregoing has it accommodated the disabled employee. *Id.* An attempt to accommodate is insufficient, especially if the purported accommodation is really an effort to assist others—such as students and parents.

The District admits that it was unable to meet any prong of the *Griffith* test. Br. of Resp’t at 35-45. In his April 25, 2005 letter to Frisino, Takeuchi admits that the District could not accommodate her. CP 310. It admits that it could not understand Frisino’s medical needs, and that it did not identify and offer her a suitable position. It further admits that her doctor recommended transfer to another worksite. Br. of Resp. at 40. Therefore, as a matter of law, it could not possibly have accommodated her without transferring her to another worksite. *Griffith*, 111 Wn. App. at 444.

Having conceded that it could not reasonably accommodate Frisino as a matter of law, the District cannot now argue that it did. It must instead demonstrate that Frisino's requested accommodations were an undue burden. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000).

(b) Because the District Did Not Accommodate Frisino, Summary Judgment on the Issue of Undue Burden Was Inappropriate

Apparently aware of the weakness in its contention that it actually accommodated Frisino, the District follows with the contrary argument that it *could not* accommodate her due to insufficient medical information. Br. of Resp't at 38-41. By arguing that Frisino failed to provide enough information regarding her disability in the interactive process, the District, in effect, concedes that it failed to accommodate her. *Griffith*, 111 Wn. App. at 444.

Having thus conceded that it could not accommodate Frisino, the District maintains that it need not provide evidence that granting Frisino's alternate accommodation requests would have caused it undue hardship. Br. of Resp't at 30. The District claims that it was not required to provide Frisino with any of the specific accommodations she requested. Br. of Resp't at 30.

However, the District ignores the very authority it cites, which holds that this rule only applies if the employer *actually provides* accommodation. *Id.*, citing *Sharpe v. Am. Tel. & Tel. Co.*, 66 F.3d 1045, 1050 (9th Cir. 1995). There is no evidence in the record that the District offered Frisino a position at Ballard or another school.

If, on the other hand, an employer fails to accommodate an employee, and the employee proposed accommodations that were not implemented, the employer has the burden of demonstrating that the requested accommodation would have caused undue hardship. *Easley v. Sea-Land Serv., Inc.*, 99 Wn. App. 459, 467, 994 P.2d 271, *review denied*, 141 Wn.2d 1007, 16 P.3d 1263 (2000). In *Easley*, the court decided whether the jury should have been instructed that the employer must prove a proposed “reasonable” accommodation constituted an undue hardship for the employer. *Easley*, 99 Wn. App. at 469. The court noted a close relationship between reasonable accommodation and undue hardship. *Id.* at 469-70. The Supreme Court has viewed the inquiry as an “either/or” proposition--a reasonable accommodation or an undue burden. *See Phillips v. City of Seattle*, 111 Wn.2d 903, 911, 766 P.2d 1099 (1989). The District has not met its burden on this issue.

Limited or temporary attempts at accommodation do not excuse an employer from demonstrating that alternate proposed accommodations

were an undue burden. *Erwin v. Roundup Corp.*, 110 Wn. App. 308, 40 P.3d 675 (2002). In *Erwin*, an employee had an injury that prevented her from lifting heavier items, as her position demanded. After several attempts at accommodation, including temporary light duty, and hiring a vocational counselor, the employer terminated the employee. *Id.* at 311-12. A jury concluded that the employer's attempts to accommodate the employee were reasonable, and returned a verdict for the employer. *Id.* at 313. This Court reversed and ordered a new trial, noting that if the employer attempts to accommodate a disability, and the employee had proposed an alternate accommodation that was not attempted, the jury must consider whether the alternate accommodation posed an undue hardship before it can properly conclude that the employee was accommodated. *Id.* at 315-16.

The District has not responded to Frisino's arguments on appeal that it failed to provide evidence that her alternate accommodation requests were an undue burden to the District. Therefore, it apparently concedes the issue. *See In re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it.").

However, at the very least, this is a question for the jury.

(3) The District Ignores Ample Authority Holding that the Issue of Reasonable Accommodation Is for the Jury

In her opening brief, Frisino noted that issues of reasonable accommodation and undue burden are almost always fact questions for the jury. Br. of Appellant at 33. Because the parties dispute several issues of material fact, Frisino argued, summary judgment was inappropriate. *Id.*

The District does not respond to this contention, but instead walks the Court through its version of events based on its reading of the record, which naturally conflicts with Frisino's version. Br. of Resp't at 31-44.

In fact, most of the authority the District cites either involved reversals of summary judgments with remands for trial, or were post-trial appeals. *Pulcino*, 141 Wn.2d at 645 (summary judgment for employer reversed, case remanded for jury trial); *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 436-37, 70 P.3d 126 (2003) (went to jury, judgment as a matter of law denied on whether employer's approach to accommodation was reasonable); *MacSuga v. County of Spokane*, 97 Wn. App. 435, 441, 983 P.2d 1167 (1999), *review denied*, 140 Wn.2d 1008 (2000) (went to jury).

The one case that the District cites in which summary judgment was affirmed is *Griffith*. 111 Wn. App. at 444. In *Griffith*, the employer identified the disability (physical limitation), helped the employee find a

suitable position, and offered that position to the employee. *Id.* The employee refused that accommodation, not because it did not meet her physical requirements, but because she wanted to stay in her original position with modifications. *Id.* Because the offered position accommodated her disability, her claim failed as a matter of law. *Id.*

Here, Frisino maintains, supported by medical evidence, that the District's offer to remove some of the mold in a classroom did not accommodate her. This case is not like *Griffith*, because Frisino was not offered a position or other modification that actually met her physical requirements.

The District has not demonstrated why this case is like *Griffith* and not like *Pulcino*, *Davis*, *Doe v. Boeing*, 121 Wn.2d 8, 842 P.2d 531 (1993), *MacSuga*, or any of the other cases in which the parties disagreed about reasonable accommodation or undue burden. The District's response is an attempt to convince this Court that its version of events is correct, not to convince this Court that summary judgment was warranted.

Whether the District's actions constituted a reasonable accommodation or whether Frisino's requests posed an undue hardship is a question for the jury. *Easley*, 99 Wn. App at 470 (citing *Phillips*, 111 Wn.2d at 911). Because the District neither proved that it accommodated Frisino as a matter of law, nor proved that alternate accommodations were

an undue burden, summary judgment was improperly granted.

(4) Summary Judgment on Frisino's Retaliation Claim Was Also Inappropriate

Frisino demonstrated in her opening brief that there is evidence to support her theory that the District terminated her because it grew weary of dealing with her disability. Br. of Appellant at 36-39. She also pointed to evidence that the District's claim that it terminated her for job abandonment is not credible. *Id.*

The District responds that Frisino actually offers no evidence, and that her evidence is nothing more than conclusory statements or matters of opinion. Br. of Resp't at 48-49. The District concedes that Frisino has made out a prima facie case and that her legal arguments are sound. *Id.* at 45-47. It only contests whether she has provided sufficient evidence of pretext, and that the District's true motive was her attempts to seek accommodation. *Id.*

To show discriminatory motive requires adducing sufficient evidence that the District's proffered reason for dismissing the employee is pretextual and unworthy of credence. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2001). Of the many types of evidence that can demonstrate pretext, two are relevant

here: suspicious timing, and evidence which contradicts the employer's proffered explanation. *Campbell v. State*, 129 Wn. App. 10, 23, 118 P.3d 888 (2005), *review denied*, 157 Wn.2d 1002 (2006) (court takes into account the timing of dismissal in pretext cases); *Hill*, 144 Wn.2d at 186 n.8 (“the ultimate question of liability *ordinarily* should not be taken from the jury once the plaintiff has introduced evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false”).

If an employee does not come to work because it jeopardizes his or her health, or because the employer is committing violations of the law, the employee has not abandoned the job. Instead, he or she has been constructively discharged. *See Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 180, 125 P.3d 119 (2005); *Martini v. State, Employment Sec. Dep't*, 98 Wn. App. 791, 990 P.2d 981 (2000).

Frisino has offered evidence of pretext, because she has provided evidence that she did not abandon her position, but was constructively discharged. As the District concedes, Frisino was still in need of accommodation in the spring of 2005, and was communicating that fact to the District. Br. of Resp't at 48; CP 586, 902, 909, 981, 1193, 1196, 1198, 1548, 1552. Frisino made clear that she had not abandoned her position, and expressed concern that the threatened termination was related to her

disability status. CP 1552.

The District makes contradictory statements in response, claiming that Frisino abandoned her job, and that her dismissal had nothing to do with her disability. Br. of Resp't at 47-48. In the same breath, it voices its frustration about what it contends was an unclear accommodation request that it could not fulfill. *Id.* It also expresses its opinion that Room 216 was safe for Frisino to work in, despite much medical and scientific evidence to the contrary. *Id.* Specifically, it is undisputed that in the summer of 2005, after Frisino was fired, mold was removed from Room 216. CP 1337.

Frisino also presented evidence of suspicious timing: that the District's sudden doubts about her disability status coincided with Frisino's involvement in publicizing the severe mold problems at Hale in the fall of 2004. The District was unhappy about Frisino's attempts to bring the mold problem at Hale to the media. CP 515, 529, 926, 934. Despite years of categorizing her as a 504 status disabled employee, Staudt began to question Frisino's illness and complained that the KOMO reporter who wrote the story about Frisino did not question her about it also:

I am struggling to see how the mold in a ceiling at Hale caused these symptoms which have existed since last spring. It appears that was not a question the KOMO

reporter asked, though.

CP 515. This “media attention” generated concern among parents, which apparently prompted Staudt to ask for the GlobalTox inspection pronouncing Hale to be a safe environment. CP 529. Again, it was not Frisino’s request for accommodation that led to any testing or remediation, but community outcry. CP 920. When Frisino and Dr. Anderson pointed out the flaws in the GlobalTox report in January 2005, the District decided that her room was suitable for her and ordered her to return.

In short, there is ample evidence, far beyond conclusory allegations, to support Frisino’s theory that the District’s claim that it terminated her for job abandonment was pretextual.

E. CONCLUSION

As Frisino and the District’s briefs amply demonstrate, this case is rife with competing evidence and contradictory theories about whether the District accommodated Frisino, and whether it retaliated against her for her protected activity. This case was not appropriately dismissed as a matter of law; the trial court erred.

This Court should reverse summary judgment on both claims, and remand the case for trial. Costs on appeal, including reasonable attorney fees should be awarded to Frisino.

DATED this 22^d day of April, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited in the US Postal Service a true and accurate copy of: Reply Brief of Appellant in Court of Appeals Cause No. 63994-3-I to the following parties:

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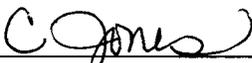
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 23, 2010, at Tukwila, Washington.



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