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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DEBORAH COLE,

Respondent,

v.

HARVEYLAND LLC, d/b/a The Harvey Apartments Group, a
Washington corporation; MARWOOD LLC, a Washington
corporation, and DONALD HARVEY, a single man, and MICHELLE
JEROME and JOHN DOE JEROME and their marital community,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Plaintiff Deborah Cole claimed that she was denied reasonable accommodations and unfairly discharged as an apartment manager because of a disability. The jury awarded her \$385,000 in damages for violations of RCW 49.60.180, the section of the Washington Law Against Discrimination (WLAD) prohibiting unfair practices of employers. However, Ms. Cole failed to prove that her employers were subject to the WLAD. An employer is exempt from the law if it has fewer than eight employees, not counting the employer's parents, children or spouses, at the time of the alleged discrimination. Ms. Cole made no showing as to whether her employers - small, family-owned businesses – met the eight-employee threshold at the relevant time. The evidence at trial shows her primary employer could not have had more than five employees. Therefore, the judgment must be reversed for failure to establish facts upon which relief can be granted.

Washington courts have yet to squarely address whether the eight-employee threshold for an employer to be subject to the WLAD is a limit on court jurisdiction. But the Washington Human Rights Commission has always viewed it as jurisdictional. In Griffin v. Eller, in which the Washington Supreme Court held that

employers of fewer than eight employees are exempt from the WLAD, the majority did not rebut the dissenting opinion's assertion that it was depriving courts of jurisdiction over discrimination by smaller employers. Also, there is a long history of courts equating statutory definitions of covered persons with limits on jurisdiction, such as in a recent decision by Division 3 in Neilson ex. rel. Crump v. Blanchette. For these reasons, and because the WLAD differs in important respects from the federal employment discrimination statute for which employee numerosity is no longer interpreted as jurisdictional, this Court should find that Ms. Cole's failure to prove her employers were subject to the WLAD was also a failure to establish subject matter jurisdiction, and declare the judgment void.

Even if the defendant employers were subject to the WLAD, the judgment should be reversed because they were not allowed to present critical evidence showing absence of discriminatory intent. Specifically, the court would not allow Michelle Jerome to testify that, before firing Ms. Cole, she asked the state Department of Labor and Industries ("L & I") if it is permissible to terminate an employee who has a pending worker's compensation claim if the employee's disability prevents her from performing the job. The trial court was willing to admit evidence of the L & I conversation

when Ms. Cole believed it would benefit her, but after Ms. Cole changed her mind the court excluded the evidence, unfairly precluding a key defense argument. Had the jury known that Ms. Jerome attempted to determine Ms. Cole's legal rights before firing her, and that Ms. Jerome justifiably believed she was acting in a lawful and non-discriminatory manner, the jury probably would not have found the discriminatory intent necessary for the verdict.

In sum, the case should be dismissed because it is based on a law that doesn't even apply to the defendants. But if it is not dismissed it should be remanded for a fair trial based on all relevant facts.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court lacked subject matter jurisdiction.
2. The verdict is not supported by substantial evidence.
3. The plaintiff failed to establish facts upon which relief can be granted.
4. The trial court erred when it granted the plaintiff's motion to exclude evidence regarding defendant Michelle Jerome's state of mind relevant to the alleged discrimination. RP (February 11, 2010) at 3-13. The trial court also erred when it denied the

defendants' motion to reconsider that exclusion. RP (February 16, 2010) at 6-11. The trial court similarly erred when it denied a mistrial related to the exclusion. RP (February 18, 2010) at 72.

Issues Pertaining to Error

1. Does a trial court lack subject matter jurisdiction to decide claims under the Washington Law Against Discrimination, Chapter 49.60 RCW, when the law applies only to employers with eight or more employees, and when the employer whose actions are at issue is a corporation with fewer than eight employees?

2. Should a judgment under the WLAD be reversed if it is entered against an employer without proof that such employer had eight or more employees when the discrimination allegedly occurred?

3. Does a court abuse its discretion by excluding evidence that a WLAD defendant sought advice about the lawfulness of terminating a disabled employee, when all parties agree the evidence is relevant to whether the defendant intended to discriminate against the employee, and when discriminatory intent is an element of liability?

4. Does a court abuse its discretion and commit prejudicial error when it excludes evidence that a WLAD defendant attempted to determine a disabled employee's legal rights, but allows the plaintiff's counsel to assert in closing arguments that the defendant "made no effort to figure out" what disability accommodations were required?

III. RELEVANT FACTS

A. Background.

Defendant Donald Harvey, 78, is a retired apartment manager. RP (February 17, 2010) at 58-59. Over the years he purchased and renovated five apartment buildings in Seattle. *Id.* at 59. Originally, Mr. Harvey's apartment business was a sole proprietorship. *Id.* at 60. However, at some point before the events giving rise to this action occurred, Mr. Harvey changed the organizational form of his business so that each apartment building is a separate limited-liability corporation. *Id.* at 68-70. One of these separate corporations is Marwood LLC, doing business as the Marwood Apartments. *Id.* at 71.

Plaintiff Deborah Cole began working as the resident manager of the Marwood Apartments in 1991. RP (February 16, 2010) at 126-127. Around 1994, when Mr. Harvey was caring for

his ill wife, he gave Ms. Cole a second job handling bookkeeping duties at all five of the apartment buildings which he then owned. Id. at 127-129; RP (February 17, 2010) at 64, 66. Thus, Ms. Cole had two separate jobs with two different salaries.¹

After Mr. Harvey's wife died, the Marwood's ownership was transferred to a trust benefitting Mr. Harvey's two daughters, Michelle Jerome and Cristy Harvey. Id. at 72, 80. Since 1994, all proceeds from the Marwood have gone "to the girls, who owned the building." Id. at 80. Mr. Harvey is merely the trustee, and wrote checks from the Marwood account in that capacity. Id. at 80-81. Mr. Harvey has not owned the Marwood, nor earned any personal income from it, since his wife died in 1994. Id. at 72, 80.²

Mr. Harvey stopped managing the Marwood in April 2008, shortly before the events giving rise to this lawsuit occurred. RP (February 17, 2010) at 71-72. At that time he gave to his daughters:

Complete control over the building, the management, hiring and firing rights, you know, it basically was her

¹ Asked if Ms. Cole "had, really, two different jobs," Mr. Harvey testified: "Correct." RP (February 16, 2010) at 132. Ms. Cole earned \$15 an hour for work at Mr. Harvey's buildings. Id. For Marwood work, she was paid \$10 an hour, a \$500 monthly stipend and benefits including a rent-free apartment. Id.

² See also RP (February 16, 2010) at 123 ("I don't own that building").

– their building, my daughters’ building, and it was theirs to do with. They were in their 40s, old enough to do it better than I could do it, as the trustee.

Id. at 72.

Because Cristy Harvey lives in Oregon, the management duties fell to her sister, Ms. Jerome, who took operational control of the Marwood on April 11, 2008. Id. at 71-72, 129. Mr. Harvey continued to supervise Ms. Cole only in her second job dealing with the other apartment buildings. RP (February 16, 2010) at 22, 140.

Ms. Cole testified that Ms. Jerome became her boss at the Marwood as of April 26, 2008. RP (February 16, 2010) at 22. On that day, Ms. Jerome gave her a detailed written description of new job expectations including a lengthy “to do” list and tighter controls on her compensation. Id. at 23; Exhibit 14.³ For example, Ms. Jerome wanted a better occupancy rate – setting a goal to keep 27 of the 28 units rented, on average, throughout the year - and spelled out steps for addressing the “current non-rented units problem.” Exhibit 14, p. 3; RP (February 17, 2010) at 135. Also, one of Ms. Jerome’s explicit instructions was to control the

³ Ms. Cole’s instructions included notifying Marwood renters that Ms. Jerome was the new landlord, and collecting Marwood laundry coins separately from other buildings’ coins and giving them directly to Ms. Jerome. Exhibit 14, p. 2.

Marwood's "wage expenses" by making sure that no more than four people – Ms. Cole, Terrace Jerome, maintenance worker Robert Lynn and a flooring installer ("David") - worked at the Marwood from that point on. Exhibit 14, p. 2.

B. Disability

On April 27, 2008, just one day after meeting her new boss for the first time and learning of Ms. Jerome's higher expectations, Ms. Cole injured her knee while working. *Id.* at 31-32. Two days later Ms. Jerome saw that Ms. Cole had a new injury and spoke to her informally about taking it easy, but did not yet know if the injury would have lasting effects. RP (February 17, 2010) at 152-153.

Ms. Cole testified that, entering the month of May 2008, she could not do lifting or "heavy cleaning." RP (February 16, 2010) at 37. However, she was physically able to do the following duties: show apartments, advertise apartments, check credit references, get leases signed, and "do all the paperwork." *Id.* at 37-38.

The jury was instructed "that Plaintiff was disabled within the meaning of the Washington Law Against Discrimination." CP 151.

C. Accommodations

On May 1, 2008, Ms. Cole's doctor wrote a note recommending a short medical leave followed by "light duty" and

“no lifting” on the job. RP (February 16, 2010) at 37; Exhibit 3. Ms. Cole testified that she gave the doctor’s note to Ms. Jerome on May 2, 2008, and that Ms. Jerome did not say anything about it. *Id.* at 39. However, Ms. Jerome testified that Ms. Cole did not give her the note or even mention it, and that she independently found the doctor’s note on May 3, 2008, when reviewing Ms. Cole’s timesheet. RP (February 17, 2010) at 153.

Two days after finding the doctor’s note, Ms. Jerome sent an e-mail to Ms. Cole saying that “for now you are restricted to work that is paperwork or showing apartment units.” *Id.* at 167; Exhibit 18. That same day, Ms. Cole’s doctor wrote another note recommending a medical leave until May 19, 2008, followed by more light duty. Exhibit 4. Ms. Jerome testified that, after the second doctor’s note, she continued the same light-duty accommodations she had stated in the May 5, 2008 email. RP (February 16, 2010) at 42.

In her May 5, 2008 e-mail discussing accommodations, Ms. Jerome also informed Ms. Cole that “having the Marwood 100 percent rented for June is going to be a prerequisite for keeping your job with us.” Exhibit 18. Ms. Jerome testified that, because she was raising rents and expecting turnover as a result, a zero

vacancy rate in June was needed to achieve the annual average of only one vacancy which she had discussed with Ms. Cole prior to her knee injury. RP (February 17, 2010) at 157.

On May 13, 2008, Ms. Cole received new medical test results and told Ms. Jerome that her doctors instructed her to not “go up and down stairs.” Id. at 167-168. Because there was no elevator in the Marwood, climbing stairs was necessary for Ms. Cole to show apartments to prospective renters. CP 70 (Plaintiff’s Trial Brief). Her injury made her unable to do that. Id.

Instead of giving Ms. Cole a leave of absence until her knee healed, Ms. Jerome fired her. RP (February 16, 2010) at 49-50. Before doing so, Ms. Jerome contacted the state Department of Labor and Industries for advice about whether it is permissible to fire someone with a pending workmen’s compensation claim if the person is unable to perform the job. CP 33; CP 70; RP (February 10, 2010) at 26-33. An L & I employee told her it is permissible, and on the same day, May 16, 2008, Ms. Jerome fired Ms. Cole. CP 70. She called Ms. Cole and told her that she was terminated from the Marwood job and that she must vacate her rent-free apartment within two weeks. RP (February 16, 2010) at 49-50.

Ms. Cole testified that, after Ms. Jerome fired her from the Marwood job, she asked Mr. Harvey why it happened. Id. at 51.

According to Ms. Cole's testimony, Mr. Harvey told her that

it was Michelle [Jerome]'s building, it was Michelle's decision, and there was basically nothing he could do about it.

Id. This is consistent with Mr. Harvey's testimony that he had nothing to do with the firing. RP (February 17, 2010) at 86.

Ms. Cole testified that, when fired from the Marwood, she still had her other job, and "was still working for Mr. Harvey and Harveyland at that time." RP (February 16, 2010) at 50. Mr. Harvey testified that he did not fire Ms. Cole from her second job, and that she voluntarily "quit." Id. at 147, 157.⁴

D. Discrimination allegations

Ms. Cole brought a discrimination suit against Ms. Jerome and Mr. Harvey as individuals, as well as Harveyland LLC, the parent company for the five apartment buildings associated with the Harvey family, and Marwood LLC, a separate corporation doing business as Marwood Apartments. CP 1-15. However, the verdict

⁴ When Ms. Jerome was asked if she terminated Ms. Cole not only from Marwood but from "her employment for Donald Harvey as well," she testified, "As it turns out, yes." RP (February 16, 2010) at 189. But Ms. Jerome also testified that she had no management responsibilities at Harveyland or her father's buildings. RP (February 17, 2010) at 129, 139. Thus, it is not clear what she meant.

form omitted Marwood LLC, and asked the jury to award damages only against the other three defendants. CP 99, 117-118.

Ms. Cole originally claimed that the defendants fired her in retaliation for filing a worker's compensation claim, but she dropped that part of her suit. CP 59. The jury was not instructed to decide any retaliation claims. CP 145-163. Nor did Ms. Cole ask the jury to decide a tort claim of wrongful discharge in violation of public policy, although that common-law claim was pleaded. *Id.*; CP 91-118, 139-141. At trial, she pursued only those claims based on RCW 49.60.180, which prohibits certain employers from discriminating based on disability. CP 65, 71, 150, 153, 171.⁵

In general, Ms. Cole alleged that Ms. Jerome treated her differently, requiring her to achieve zero vacancies as a condition of employment and ultimately firing her, because of her disability. RP (February 18, 2010) at 45-46. She also alleged that the defendants had a duty to provide a leave of absence, and to have other people fill in for her, until her knee healed. *Id.* at 54. Without objection from defendants, the jury was instructed that "a leave of absence is

⁵ See also RP(February 18, 2010) at 34-35 ("the rule of law that we're asking you to...enforce is the Washington law against discrimination").

a reasonable accommodation under the Washington Law Against Discrimination.” CP 157.

Ms. Cole made no assertions about subject matter jurisdiction of the court. CP 1-15 (Complaint).

E. Defenses Presented

In general, the defendants argued that Ms. Cole was terminated for a legitimate business reason – her poor performance at the Marwood, including a history of too many vacancies and not enough income – rather than due to discrimination. CP 124-125. At trial, Ms. Jerome testified that she fired Ms. Cole because she had resisted raising rents as needed to make the Marwood profitable, and because it appeared that Ms. Cole was going to quit the Marwood at a critical time when rent increases would create renter turnover. RP (February 17, 2010) at 168-171.⁶ She said another factor was that Ms. Cole was physically unable to do the job – i.e., to clean and show apartments - at the time of firing. *Id.* at

⁶ “[T]he deciding factor in why I fired her was because she had this letter of recommendation signed and she was clearly going to find a new job and leave me with a building of vacancies anyway.” *Id.* at 171. “You know, she created this huge mess by not taking care of maintaining the rents over time and so now we’re expecting to have all these tenants move out of the building and she was bailing out on me, she was taking off...” *Id.* at 168. Ms. Jerome said another factor was that “at that point when [Ms. Cole] was fired, she couldn’t do any parts of her job” because of her injury. *Id.* at 171.

171. In closing arguments, defense counsel Timothy McGarry emphasized that the stricter job expectations which began in late April and early May of 2008 were simply the result of a new boss taking over, and the fact that Ms. Jerome expressed them before Ms. Cole was injured illustrated they were not rooted in discrimination. RP (February 18, 2010) at 80-83.

F. Employee numerosity

At trial, the plaintiff rested her case without asking any witness whether Marwood LLC, the company that employed her as resident manager at the Marwood Apartments, had eight or more employees. RP (February 11, 2010) at 58-72; RP (February 16, 2010) at 14-197; RP (February 17, 2010) at 8-49. Nor did she offer exhibits, such as payroll records, establishing how many people were employed by Marwood LLC or Harveyland LLC in May 2008 when the alleged discrimination occurred. Id.; CP 80-88 (Jt. Statement of Evidence.)

1. Employees at all buildings.

The only testimony directly addressing employment numbers was elicited in the cross-examination of Mr. Harvey after the plaintiff rested her case. RP (February 17, 2010) at 49, 100.

Counsel: Mr. Harvey, during the period of time when Ms. Cole worked for you, it's true that you had approximately 10 employees? Isn't that right, Mr. Harvey?

Harvey: It varied, but about that.

Counsel: ...I believe you testified she started in 1994. Could she have started in 1991?

Harvey: Possibly.

Id. Mr. Harvey was not asked, nor did he say, how many people were employed at the actual time when the alleged discrimination occurred. Id. at 100-101. Rather, he only confirmed plaintiff's estimate of a typical number of employees over a 17-year period from 1991 to 2008. Id. Also, there was no evidence indicating precisely which entities employed which people after Mr. Harvey changed his apartment business from a single, sole proprietorship to five separate corporations under the Harveyland umbrella.

2. Marwood employees.

The only direct evidence of wages actually paid during the relevant period is Exhibit 22 – a copy of Ms. Cole's final paycheck – attached to this brief as an appendix. The check says "Marwood Apartments," not "Harveyland." There was no evidence that Ms. Cole received wages from any entity other than the Marwood during the period of alleged discrimination.

Exhibit 14, the April 26, 2008 document in which Ms. Jerome spelled out new job expectations for Ms. Cole, specified exactly who could be paid by the Marwood from that time forward:

Wage expenses have been exceptionally high and I need to keep tight control over them. So, *from now on*, I expect that all work will be done by her [Ms. Cole], Terrace [Jerome] and [Robert] Lynn. Don't use David or any of the other 'crew' with the exception of floors as follows...We will look at units 308 or 306 and pick which one to have David do for May.

Exhibit 14, p. 2 (italics added). Thus, Ms. Jerome limited the number of people on the Marwood payroll in May 2008 to no more than four specified individuals. One of those individuals was her spouse, Terrace Jerome. RP (February 17, 2010) at 114.

Mr. Harvey testified that his two daughters had received income from the Marwood as owners or trust beneficiaries at unspecified times. RP (February 17, 2010) at 80. However, he was not asked at trial whether they were paid as employees of the Marwood in May 2008. *Id.*

G. Excluded Evidence.

In a pre-trial motion in limine, Ms. Cole argued as follows:

During her deposition Ms. Jerome insists that she contacted the Department of Labor and Industries to determine if it were illegal to terminate from employment an injured worker who was unable to perform all aspects of her job. Although Ms. Jerome

cannot recall the name of the person who allegedly gave her the misinformation, she insists she was informed that it was not illegal and that she thereafter acted on this information. This testimony is hearsay. It is admissible to show Ms. Jerome's discriminatory intent, and will be offered for that *limited purpose*. It should not be admissible for the truth of the fact contained in the assertion. Indeed, Plaintiff will ask the Court to instruct the jury that information Ms. Jerome allegedly received was incorrect.

CP 31 (*italics in original*).⁷ At the hearing, Ms. Cole's attorney,

Jeffrey Needle, explained the motion as follows:

[S]he asked them about whether or not if there were an injured worker who couldn't do all the functions of the job, could she fire her, and supposedly they told her that she could and she did. And she'll admit that she fired my client because she was injured and couldn't do all the functions of the job. And that is an admission, we believe that's an admission of discriminatory intent.

RP (February 10, 2010) at 26.

Later at the hearing, the defendants' trial counsel, Mr. McGarry, said he, too, wanted the evidence admitted in order to show Ms. Jerome's intent. *Id.* at 27-28. However, the defendants posited that the L&I phone conversation showed a *proper* intent – a

⁷ Ms. Cole proposed a jury instruction stating that evidence about Ms. Jerome's talk with L & I "may be considered by you only for the purpose of showing Ms. Jerome's intention to terminate Ms. Cole's employment. It may not be considered by you for the purpose of determining whether an injured employee could be terminated from employment if she were unable to do the job." CP 92.

concern for Ms. Cole's rights – rather than a discriminatory intent.

Id. at 33.

The trial court initially granted the plaintiff's motion to permit Ms. Jerome's L & I testimony for the limited purpose of showing her intent, stating "it sounds like counsel are in agreement that this testimony is relevant to both your theories of the case." Id. at 25-26, 28, 30. The next day, however, Ms. Cole changed her position and moved to exclude as hearsay "any testimony by Ms. Jerome concerning what the Department of Labor & Industries may have told her on the phone." RP (February 11, 2010) at 3.

Defendants' counsel responded as follows:

[A]t the very core of this case is the allegation that my clients discriminated against the plaintiff in this case. I can't think of anything that goes more to the heart of that than Ms. Jerome's state of mind. As the limine instructions suggest, we're not offering it for the truth of the matter; we're offering it to show that Ms. Jerome was concerned about the pendency of the [worker's compensation] claim and wanted to make sure that she was operating within the boundaries of the law, so that it would not appear that there would be any retaliation.... I mean, it shows, first of all, that she was trying to be careful, trying to observe the law, and secondly, it shows what was in her state of mind... We recognize that the limiting instruction ... should be given, but to excise this from the case is to excise one of the central parts of this case, which is her state of mind. Was she discriminating against this woman because of her disability?

Id. at 5-6.

...We're not asserting that she had legal authority from the Department of Labor and Industries to fire her...But she should be allowed to say what ...knowledge she had in terms of making the termination decision, and central to that, first of all, it was job performance, but out of an abundance of caution she wanted to make sure that she didn't violate any of Ms. Cole's rights and... the jury has a right to know...that she was trying not to discriminate.

Id. at 10-11.

The trial court noted that "proof of intent doesn't require proof of animus or, you know, bad feelings toward an individual."

Id. at 7. The court said that the L&I advice was irrelevant because Ms. Cole had dropped her allegation that she was fired in retaliation for filing a workmen's compensation claim, after an L&I investigation concluded no such retaliation occurred. Id. at 11.

The court granted the motion to exclude the evidence on grounds that it would confuse the jury, and that prejudice to the plaintiff would outweigh the probative value of the evidence. Id. at 11-13.⁸

Thus, Ms. Jerome was prevented from telling the jury that L&I advised her that she could lawfully fire an employee who is physically unable to perform the job.

⁸ On a motion for reconsideration, the court maintained its position. RP (February 16, 2010) at 11.

The issue came up again after Mr. Needle's closing arguments. He told the jury:

Even if you assume for the sake of discussion...that she [Ms. Cole] couldn't do any parts of her job, so what? That just changes the nature of the accommodation that becomes required. It means she needs a leave of absence. That's all. It doesn't get them off the hook.

RP (February 18, 2010) at 51. He also argued that defendants "made no effort to figure out what was a reasonable accommodation for my client." Id. at 50. Defendants' attorney Mr. McGarry moved for a mistrial based on that comment, arguing:

I think it absolutely not only mischaracterized the evidence, but it is a conscious misstatement, because we were simply not allowed to present that evidence and now Mr. Needle is saying she [Ms. Jerome] did nothing, when in fact she did several things. She talked to L&I twice, tried to get information, and now the jury has been told that she did nothing and that's just simply not the case and I think it's inappropriate, it's inflammatory...

Id. at 71-72. The court denied the motion for mistrial, stating that Ms. Jerome's call to L&I to determine if she could fire a person physically incapable of doing her job was unrelated to Mr. Needle's comment that Ms. Jerome did not investigate reasonable accommodations. Id. at 72-73.

IV. ARGUMENT

A. The WLAD, Chapter 49.60 RCW, governs this case.

The Washington Law Against Discrimination is designed to prevent discrimination in employment, transactions and public accommodations based on disability, race, national origin, gender, family or marital status, age, sexual orientation, or veteran or military status. RCW 49.60.010. It establishes, among other civil rights, a right to “obtain and hold employment without discrimination.” RCW 49.60.030(1)(b). And it creates a private right of action in addition to administrative remedies available through the Washington Human Rights Commission. RCW 49.60.030(2) and .120.

Under RCW 49.60.030(2): “Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees...” Employment discrimination is one such “act in violation of this chapter” for which damages may be recovered.

The section dealing with employment proscribes in relevant part:

It is an unfair practice for any employer...

(2) To discharge or bar any person from employment because of... the presence of any sensory, mental, or

physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of... the presence of any sensory, mental, or physical disability...

RCW 49.60.180. The jury found violations of this section in awarding damages to Ms. Cole.

The statute defines “employer” as “any person acting in the interest of any employer, directly or indirectly, *who employs eight or more persons*, and does not include any religious or sectarian organization not organized for private profit. RCW 49.60.040(11) (italics added). Based on that definition, the Washington Supreme Court has held that “employers of fewer than eight employees are statutorily exempt from these remedies provided under RCW 49.60.” Griffin v. Eller, 130 Wn.2d 58, 61 (1996). See also, Roberts v. Dudley, 40 Wn.2d 58, 74-75 (2000) (recognizing the statutory exemption and declining to extend it to common-law actions); Anaya v. Graham, 89 Wn.App. 588, 591 (1998); Bennett v. Hardy, 113 Wash.2d 912, 915 (1990). The WLAD simply “does not support a private cause of action against an exempt employer.” Griffin, 130 Wn.2d at 64.

B. The Exemption Issue May Be Reviewed in This Case For the First Time On Appeal.

Under RAP 2.5(a), “a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.” Here, defendants raise the first two of these issues. The trial court lacked subject matter jurisdiction because, for reasons explained below, the eight-employee threshold is a limitation on jurisdiction as well as a substantive element that the plaintiff must prove. It is well-established that lack of subject matter jurisdiction may be raised at any time, even after trial. ZDI Gaming Inc. v. State, 151 Wn.App. 788, 801 (2009). Also, because Ms. Cole failed to prove that an employer with at least eight employees discriminated against her, the facts necessary for relief were absent.⁹ Therefore, RAP 2.5(a)(1) and (2) both apply.

Moreover, Washington courts will consider an issue not raised below “when the question raised affects the right to maintain the action.” Roberts, 40 Wn.2d at 918, citing Maynard Inv. Co. Inc.

⁹ Sufficiency of evidence may be raised first on appeal, which is the first time it “may realistically be raised.” State v. Hickman, 135 Wn.2d 97, 103, FN 3(1998).

v. McCann, 77 Wash.2d 616, 621 (1970); New Meadows Holding Co. v. Washington Water Power Co., 102 Wash.2d 495, 498 (1984). That is the case here, where Ms. Cole has no right to maintain an action under a law that did not apply, or to enforce a judgment that is void.¹⁰

C. Ms. Cole Failed to Prove Her Rights Were Violated by an Employer with Eight or More Employees.

1. Standard of review

This Court may overturn the verdict if it was not supported by substantial evidence. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08 (1994). The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question. Bering v. Share, 106 Wn.2d 212, 220 (1986).

2. Applying the payroll method of counting employees, Ms. Cole's evidence is wholly insufficient.

In Anaya v. Graham, 89 Wn.App. 588, 590 (1998), this Court adopted the "payroll method" of determining how many people are employed for WLAD purposes. The U.S. Supreme Court established the payroll method in applying Title VII's similar 15-

¹⁰ In any case, RAP 2.5(a) is discretionary and not an absolute bar to new issues. State v. Ford, 127 Wn.2d 472, 477 (1999) (reversing sentence where state introduced no evidence to support classification of convictions).

employee threshold for federal employment discrimination suits. Walters v. Metropolitan Educational Enterprises Inc., 519 U.S. 202, 117 S. Ct. 660, 664, 136 L.Ed.2d 644 (1997). Under the payroll method, “the key inquiry is whether an individual has an employment relationship with the employer on the date in question.” Anaya, 89 Wn.App. at 589-90. “The individual’s name on the employer’s payroll for the period covering the pertinent dates will ordinarily demonstrate an employment relationship, whether or not the person actually performed work on that day.” Id. at 593. Examining pay records thus is “an effective means of demonstrating whether a person has an employment relationship on the day an alleged unfair employment practice is alleged to have occurred.” Id.

In Anaya, the parties stipulated that eight persons received payroll checks from the defendant corporation, Point Roberts Gas Barn, on the two dates when alleged unfair practices occurred. Id. at 591. The trial court dismissed the WLAD claims, however, because two of the eight people were not actually present at work on the dates in question. Id. Noting that the trial court acted before Walters was decided, this Court held that the Walters payroll method was a simpler way to count employees than determining

who actually worked on the dates of discrimination. The Court reversed the dismissal because the record showed that eight people were “on the payroll” on the dates in question, even if they did not all work on those dates. Id. at 594-595.

The Court counted toward the eight-employee threshold full-time employees as well as a part-time cashier and a person who did “odd jobs” for the corporation. Id. But the Court did not count a person who was merely “on call,” because the plaintiff had not affirmatively demonstrated that person had an employment relationship with her employer at the relevant time. Id.

Here, Ms. Cole did not introduce *any* payroll records at all. Nor did she attempt to prove who was employed by either of her two employers on the particular dates when she believes discrimination occurred. She merely elicited testimony from Mr. Harvey that over a 17-year period, the number of people he employed “varied” but was typically around 10. Such evidence is insufficient to bring either employer – Marwood LLC or Harveyland LLC – within the reach of WLAD. RCW 49.60.040(11); Griffin, 130 Wn.2d at 61; Anoya, 89 Wn.App. at 593-595. Therefore, the judgment should be reversed due to failure to prove facts upon which relief can be granted.

3. Mr. Harvey is not the “employer” for WLAD purposes.

It is the *corporation*, not its owner, that is the “employer” for WLAD purposes. Patten v. Ackerman, 68 Wn.App. 831, 835 (1993). In Patten, two women sued a corporation, A Rentals, Inc., doing business as Budget Rent-A-Car, as well as its sole shareholder, Myrlin Ackerman, for damages under the WLAD. Id. at 833. Similar to this case, the defendant company was a small family business. The trial court first found that Mr. Ackerman was the “employer” because he was the sole owner of A Rentals, and then found that his wife and two sons should not be counted toward the eight-employee threshold because RCW 49.60.040(10) excludes an employer’s spouses and children from the definition of “employees.” Id. at 834.¹¹ Finding that Mr. Ackerman did not employ eight or more persons who were not his family members, the trial court dismissed the WLAD claims. Id.

Division 3 of this Court reversed and held that it was error to treat the owner of the corporation, rather than the corporation itself, as the employer. Id. at 834. The Court noted that the Legislature did not exclude closely held corporations from the WLAD. The

¹¹ Any “individual employed by his or parents, spouse or child” is excluded from the employee count. RCW 49.60.040(10).

Court said: “Disregarding the corporate status of A Rentals, Inc., would also be contrary to established principles of corporate law.” Id. at 834-35. “We hold that A Rentals, Inc., not Myrlin Ackerman, was the employer” in the case. Id. at 835.

Applying the Patten rule here, Marwood LLC was Ms. Cole’s employer at the Marwood job, and Harveyland LLC was her employer when she handled bookkeeping for the other four apartment buildings. Just because Mr. Harvey presumably owns Harveyland, a parent company for five separate corporations, that does not make him Ms. Cole’s employer for WLAD purposes. Patten, 68 Wn.App. at 835. This is especially true for the Marwood job because Mr. Harvey did not own, manage or receive income from the Marwood Apartments when the alleged discrimination took place. Rather, Marwood LLC is held in trust for his daughters, who manage it.

Under the Human Rights Commission’s WLAD regulations, corporations in a parent-subsidary relationship – such as the Marwood and Harveyland – “will be treated as separate employers unless the entities are managed in common in the area of employment policy and personnel management.” WAC 162-16-220(6). Here, the Marwood must be treated as separate from

Harveyland because of the undisputed testimony that Ms. Jerome and her sister had full control of the Marwood and no control at all at the other buildings. Ms. Cole admits that when she asked Mr. Harvey why she was fired from Marwood, he said it was entirely up to his daughters. Ms. Jerome testified that she had no management duties at any of her father's buildings. In short, the personnel was *not* managed in common and two employers exist.

In sum, to uphold the verdict under the WLAD, Ms. Cole needed to establish that an employer with eight or more employees discriminated against her. Because she failed to make that showing for either of her two employers, the verdict was not supported by substantial evidence and must be overturned.

4. The Marwood had no more than five employees.

The alleged discrimination happened at the Marwood on May 5, 2008, when Ms. Jerome set a new performance condition for Ms. Cole to keep her job, and on May 16, 2008, when Ms. Jerome fired Ms. Cole. Thus, the Marwood, acting through its agent Ms. Jerome, was the employer that allegedly violated the WLAD. But the Marwood was exempt from the law. Even without payroll records, it is clear that the corporation had no more than five employees at the relevant time. Anaya, 89 Wn.App. at 593.

The *only* evidence of anyone being paid during that early May 2008 timeframe was Ms. Cole's own final paycheck from the Marwood Apartments. That means the Marwood could have had just one employee, Ms. Cole, on the relevant dates. Or conceivably it could have had two more, if Ms. Jerome and her sister were paid that month. Or it could have had another two, if Mr. Lynn did maintenance work and "David" did flooring as Ms. Jerome authorized in her April 26, 2008 instructions. But *that's all*. Ms. Jerome expressly prohibited anyone else except her husband to earn Marwood wages at that time, and spouses are not counted. RCW 49.60.040(10). In sum, the record shows that at *most* the Marwood employed five people, too few for the WLAD to apply. Therefore the verdict must be overturned for failure to establish facts upon which relief can be granted.

D. The Trial Court Lacked Subject Matter Jurisdiction.

1. Standard of review.

Courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999). Subject matter jurisdiction is "the authority to hear and determine the class

of action to which a case belongs.” Bour v. Johnson, 80 Wn.App. 643, 647 (1996). Whether a court has subject matter jurisdiction is a question of law reviewed de novo. Id.

2. Washington courts have treated statutory definitions of protected groups as jurisdictional limits.

It appears that Washington courts have not squarely addressed whether the eight-employee threshold in the WLAD operates as a limit on the subject matter jurisdiction of courts. However, in Griffin, which held that employers with fewer than eight employees are exempt from WLAD suits, Justice Talmadge, writing in dissent, characterized the majority opinion as limiting jurisdiction of courts. Griffin, 130 Wn.2d at 96 (“I do not believe the Legislature intended to deprive the courts of jurisdiction over cases of invidious discrimination by small employers”). The majority did not rebut that characterization of its opinion.

A more recent case, while not involving the WLAD, is highly instructive. In Neilson ex rel. Crump v. Blanchette, 149 Wn.App. 111 (2009), the defendant alleged for the first time on appeal that the trial court lacked subject matter jurisdiction to issue a protection order under the Domestic Violence Protection Act, Chap. 26.50 RCW. That act authorizes courts to issue protection orders to

victims of domestic violence, and defines “domestic violence” as physical harm or threats “between family or household members.” RCW 26.50.030 and .010(1)(b)(c). “Family or household members,” in turn, are defined as persons 16 years or older who have had a dating relationship with other persons 16 years or older. RCW 26.50.010(2).

The Court said:

Plainly, the statutory definition of ‘family or household members’ does not apply here, as Ms. Crump was not a ‘person sixteen years of age or older...’ RCW 26.50.010(2). At the time the protection order was entered, Ms. Crump was 14 years old...Accordingly, the acts committed by Mr. Blanchette against Ms. Crump were not ‘domestic violence,’ because they were not committed ‘between family or household members.’ ...RCW 26.50.010(1)(a)(b). The trial court lacked authority to issue the domestic violence protection order.

Blanchette, 149 Wn.App. at 116-117. The Court said “we cannot modify the Act to encompass the incidents between Mr. Blanchette and Ms. Crump.” Id. at 118.

This is easily analogized to the present case. The act in question, like the WLAD, defines a violation with reference to a limited class of persons. In Blanchette, the relevant statute applies only between family or household members, who must be at least 16 years old. Here, the relevant statute applies only to employers,

who must have at least eight employees. Just as the court in Blanchette had no jurisdiction over an action involving persons outside the statutorily defined class, here the trial court had no jurisdiction because Ms. Cole sued employers outside the class which the WLAD reaches.

3. The agency regulations are instructive.

A court must give great weight to a statute's interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent. Marquis v. City of Spokane, 130 Wn.2d 97, 111 (1996). Courts look to the Human Rights Commission's interpretation of the WLAD as an aid in construing it. Id. Here, the Human Rights Commission has always treated the definition of "employer" as limiting its "jurisdiction" to complaints against small businesses. The relevant Commission regulation is entitled: "**Jurisdiction** – Counting the number of persons employed." WAC 162-16-220 (emphasis added). And while the Commission's jurisdiction is governed by RCW 49.60.120, which is not applicable to courts' jurisdiction, the point is that the Commission treats the definition of "employer" as jurisdictional, as opposed to just an element of an unfair practices violation.

There is no conceptual reason for courts to treat the “employer” definition any differently. The WLAD authorizes the Commission “[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices *as defined in this chapter.*” RCW 49.60.120(4) (emphasis added). The Commission is authorized to investigate complaints “*only if* the investigations are designed to reveal, or the complaint deals only with, allegations which, if proven, would constitute unfair practices *under this chapter.*” RCW 49.60.120(7) (emphasis added). The language authorizing courts to determine WLAD claims is similar:

Any person deeming himself or herself injured by any act *in violation of this chapter* shall have a civil action in a court of competent jurisdiction ...

RCW 49.60.030(2) (italics added). An act cannot be “in violation of this chapter” unless it is committed by an “employer” as defined in the statute. RCW 49.60.180 (“it is an unfair practice for any *employer to...*”); RCW 49.60.040(11) (an “employer” has eight or more employees); Griffin, 130 Wn.2d at 61 (employers with fewer than eight employees are exempt from WLAD remedies). Because the Legislature used similar language in authorizing WLAD enforcement by both the Commission and the courts, and because the Commission views the language as imposing a jurisdictional

limitation, the courts should do the same. Marquis, 130 Wn.2d at 111 (the Commission's interpretation is entitled to "great weight").¹²

4. Arbaugh v. Y&H Corp. is distinguished because the WLAD differs from its federal counterpart, Title VII.

For many years, federal courts treated the 15-employee threshold for application of Title VII of the Civil Rights Act of 1964 (42 USC 2000e(b)) as a limitation on court jurisdiction rather than just an element of a claim for relief. See, e.g., Armbruster v. Quinn, 711 F.2d 1332, 1334 (6th Cir. 1983); Childs v. Electrical Workers, 719 F.2d 1379, 1382 (9th Cir. 1983) (affirming district court's decision that it lacked subject matter jurisdiction over the defendant because it did not have enough employees to meet the statutory definition of employer). In 2006, resolving a conflict among the circuits, the U.S. Supreme Court held that the Title VII employee numerosity requirement is *not* jurisdictional. Armbaugh v. Y&H Corp., 546 U.S. 500, 126 S.Ct. 1235, 1238, 163 L.Ed.2d 1097 (2006). However, the Court's reasoning requires a different finding here because Title VII and the WLAD differ in important respects.

¹² In 1999, the Commission rewrote WAC 162-16-220 (formerly WAC 162-16-160) stating that the Anaya decision required a change in its "jurisdiction" rule. Wash. State Register 99-04-108. This supports an analogous approach to court and Commission jurisdiction.

Title VII makes it unlawful for an “employer” to discriminate, and defines an employer as having “fifteen or more employees.” 42 USC 2000e-2(a) and 2000e(b). Under 28 USC 1331, federal courts may exercise subject matter jurisdiction over all civil actions “arising under” federal laws, of which Title VII is one. When Title VII was enacted, 28 USC 1331 limited federal-question jurisdiction to cases where the amount in controversy exceeded \$10,000. Arbaugh, 546 U.S. at 505. To ensure that the \$10,000 limit would not impede protection against employment discrimination, the Act “contains its own jurisdiction-conferring provision,” which reads: “Each United States district court... shall have jurisdiction of actions brought under this subchapter.” Arbaugh at 505-06, quoting 42 USC 2000e-5(f)(3). That jurisdictional provision has remained in place although Congress in 1980 removed the \$10,000 amount-in-controversy requirement for federal-question jurisdiction. Id. at 506.

The Arbaugh court reasoned that the 15-employee threshold is not jurisdictional because it “appears in a separate provision” from the jurisdictional provision, 42 USC 2000e-5(f)(3), and because the latter provision embraces any case “brought under” Title VII without referencing the 15-employee threshold. Id. at 515. The WLAD jurisdictional provision, by contrast, hinges on whether a

“violation of this chapter” is alleged. RCW 49.60.030(2). This is an important distinction. In referring to a “violation of this chapter” when delineating courts’ jurisdiction, the Legislature intended to limit such jurisdiction to claims against employers with eight or more employees. No other interpretation makes sense because a claim against an exempt employer does not allege a “violation” - a person cannot violate a law that doesn’t even apply. In sum, because WLAD’s jurisdictional provision is linked by the term “violation” to the employee numerosity requirement, unlike the Title VII provision at issue in Arbaugh, the reasoning of Arbaugh requires a different rule here that numerosity *is* jurisdictional.

5. Burnside also is distinguished.

In Burnside, the Washington Supreme Court addressed whether the reference to Washington “inhabitants” in the “purpose” section of the WLAD, RCW 49.60.010, was intended to limit court jurisdiction to claims brought by Washington residents. Burnside, 123 Wn.2d at 98. In holding that it was not, the court noted that Simpson cited no authority supporting the proposition that RCW 49.60.010 was jurisdictional, and concluded that limiting WLAD application to residents would frustrate the purpose of the statute

by allowing Washington employers to freely discriminate against non-residents. Id. at 98-99.

But that concern does not exist here because, two years after deciding Burnside, the Washington Supreme Court rejected the notion that exempting small businesses based on the eight-employee threshold would frustrate the purpose of the WLAD. Griffin, 130 Wn.2d at 66-69. The Court reasoned that protecting small businesses from the high cost of litigation was part of the overall policy of the WLAD. Id. Noting the eight-employee threshold was part of the original WLAD enacted in 1949, when only administrative remedies were authorized, the Court said “there is no legislative history suggesting” that the purpose of later authorizing private suits under the WLAD “was to permit a statutory cause of action against small, otherwise exempt, employers.” Id. In sum, because the Legislature intended to restrict WLAD suits to larger employers for economic reasons, the issue presented here is much different than in Burnside, where there is no indication that the Legislature used the word “inhabitants” to reflect a similar policy of restriction.

6. Because there was no jurisdiction, the judgment is void.

“Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power.” Bour, 80 Wn.App. at 646, quoting In re Adoption of Buehl, 87 Wn.2d 649, 655 (1976). “When a court lacks subject matter jurisdiction, the only permissible action it may take is to dismiss the action.” ZDI Gaming, 151 Wn.App. at 801.¹³ A judgment entered by a court lacking jurisdiction is void. Id.; Bour, 80 Wn.App. at 646.

Here, the trial court had no subject matter jurisdiction because Ms. Cole failed to prove her employers were subject to the WLAD, and because the Marwood had no more than five employees and therefore is exempt. Because jurisdiction was lacking, this Court should dismiss the suit and declare the judgment void. ZDI Gaming, 151 Wn.App. at 801.

E. Exclusion of Crucial Evidence Prejudiced Defendants.

Under ER 403, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” The trial court invoked that rule in preventing Ms. Jerome from testifying that before she fired Ms. Cole, she obtained advice from L&I that it’s

¹³ See also CR 12(h)(3): “Whenever it appears...that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”

permissible to fire an injured employee who cannot perform the job.

The court's decision was reversible, prejudicial error.

1. Standard of review.

Decisions regarding admissibility of evidence are reviewed for abuse of discretion. Martini v. Boeing Co., 88 Wn.App. 442, 466 (1997). Discretion is abused if its use was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Id.

2. The trial court unreasonably failed to recognize the high probative value of the excluded evidence.

ER 403 cannot be used to exclude "crucial evidence relevant to the central contention of a valid defense." In re Detention of Ross, 102 Wn.App. 108, 116 (2000), rev'd on other grounds, 149 Wn.2d 724, quoting State v. Young, 48 Wn.App. 406, 413 (1987). But that is precisely what happened here. The jury was not allowed to hear that Ms. Jerome consciously sought to avoid violating Ms. Cole's rights and that she relied on a labor regulator's advice in firing her. Because the absence of discriminatory intent precludes liability, the court's decision effectively stripped defendants of a valid defense. Such exclusion of crucial evidence was manifestly unreasonable. Ross, 102 Wn.App. at 116.

Discriminatory intent was a key element of Ms. Cole's wrongful firing claim under RCW 49.60.180. "In a discrimination case, the ultimate issue is the employer's motive." Cluff v. CMX Corp. Inc., 84 Wn.App. 634, 638 (1997). The plaintiff must provide direct evidence that the defendant "acted with a discriminatory motive, and that the discriminatory motivation was a significant or substantial factor in an employment decision." Mackay v. Acorn Custom Cabinetry Inc., 127 Wn.2d 302, 311 (1995) (citation omitted). Here, all parties agreed that the excluded evidence about Ms. Jerome's conversation with L&I could have helped the jury determine if her motive was discriminatory. Thus, it cannot be disputed that the probative value of the evidence was high.

The trial court, however, missed the point. The trial court called the evidence "irrelevant" because of the way Ms. Jerome framed her question to L&I – whether someone with a pending worker's compensation claim can be fired if the person can't perform the job. RP (February 16, 2010) at 11. The court opined that L&I's answer did not matter because Ms. Cole did not allege retaliation for filing a worker's compensation claim. This is confused thinking. The point of the evidence was not to establish

the law concerning retaliation. The point was to illustrate Ms. Jerome's state of mind.

The evidence would have done so in several ways. First, Ms. Jerome's phone call to L&I illustrated that she was concerned about Ms. Cole's rights. It supports an inference that, if L&I had given her a different answer, she would have retained Ms. Cole because she wanted to respect Ms. Cole's legal rights. Also, the L&I conversation shows that Ms. Jerome truly believed that Ms. Cole was unable to do her job. Such belief is inconsistent with discriminatory intent because inability to perform essential functions of a job is a legitimate reason for firing, not a pretext for discrimination based on disability. Finally, the L&I evidence would have cast in a more sympathetic light Ms. Jerome's testimony that disability was a factor in the firing. In Ms. Jerome's mind, it was a factor because L&I told her it could be, not because she set out to discriminate against Ms. Cole. In sum, the trial court excluded the evidence for an untenable reason, failing to recognize that its main value was to illustrate Ms. Jerome's state of mind rather than to inform the jury about the rights of worker's compensation claimants.

3. The jury could have judged the evidence fairly.

It is not enough, under ER 403, that evidence could be prejudicial. The prejudice must be “unfair,” and the harm from admitting it must “substantially” outweigh the probative value. ER 403. Here, nothing *unfair* could result from informing the jury that an L&I regulator said Ms. Jerome could fire someone who couldn’t do her job. The jury needed to know why Ms. Jerome fired Ms. Cole in order to determine if disability was a substantial factor. Just because the explanation *might* have helped the defendants, by suggesting that Ms. Jerome’s actions were lawful, does not mean it was unfair to present it. On the contrary, telling the whole story ensures fairness by illuminating what really happened.

Moreover, it was just as likely that this particular evidence would have helped *Ms. Cole*, instead of the defendants. Originally the trial court was willing to admit the evidence when Ms. Cole argued that asking L&I for permission to fire an injured worker is an admission of discriminatory intent. It is untenable to find that evidence is admissible when the plaintiff favors it, but suddenly takes on a highly dangerous character when the plaintiff no longer likes her odds of benefiting from it. In sum, the trial court’s exclusion of evidence based on prejudice to Ms. Cole was

unreasonable because even Ms. Cole believed the evidence could have favored her, and no unfair prejudice would have resulted.

4. A limiting instruction could have eliminated any risk of confusing or misleading the jury.

The trial court also mentioned danger of confusion as a reason for excluding the evidence. There was concern that the jury would find L&I's advice conclusive as to whether the firing was legal. But Ms. Cole was free to argue, and in fact *did* argue, an interpretation of the law differing from that of the L&I regulator. Besides, the jury could have been told to consider the evidence only for the purpose of illustrating Ms. Jerome's state of mind, and not for the truth of the L&I advisor's statement about the law, as the parties originally agreed to do. With such a limiting instruction, any danger of confusion could have been erased.

5. The harmful effect of the court's decision was compounded by closing arguments.

In reality, the L&I advisor was absolutely correct about the law. The WLAD prohibition against firing based on disability "does not apply if the disability prevents the employee from properly performing his job." Havlina v. Wash. State Department of Transportation, 142 Wn.App. 510, 517 (2008), citing Dedman v. Personnel Appeals Board, 98 Wn.App. 471, 486 (1999). The duty

to accommodate an employee's disability "does not include elimination of an essential job function." Davis v. Microsoft Corp., 109 Wn.App. 884, 890 (2002). Accord, Griffith v. Boise Cascade Inc., 111 Wn.App. 436, 444 (2002). Thus, Ms. Jerome correctly understood that she was acting lawfully when she fired Ms. Cole because she could not show apartments - an essential job function.

But after preventing Ms. Jerome from explaining that she acted pursuant to L&I's advice, the court allowed Ms. Cole's attorney to present an *inaccurate* statement of the law and the facts regarding the matter. Mr. Needle told the jury in closing arguments that even if Ms. Cole truly could not perform her job, the defendants still were legally required to accommodate her, but made no effort to investigate what accommodations would be reasonable. As Mr. McGarry pointed out in his motion for mistrial, that argument was materially untrue because Ms. Jerome *did* investigate her obligations as an employer and was told she could fire Ms. Cole instead of accommodating her. In sum, the exclusion of evidence unfairly stripped defendants of a potent argument that Ms. Jerome lacked the necessary discriminatory intent, and this harm was compounded when the jury was misinformed about the relevant law

and facts. If the jury had known the truth, the verdict likely would have been different.

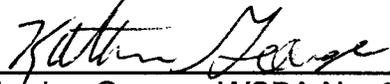
III. CONCLUSION

For the foregoing reasons, the Court should declare the judgment void for lack of jurisdiction. If the judgment is not declared void, the Court should overturn the verdict and order dismissal. If dismissal is not ordered the Court should remand the case for a fair trial.

Dated this 13th day of August, 2010.

RESPECTFULLY SUBMITTED,

HARRISON, BENIS & SPENCE LLP

By: 
Katherine George, WSBA No. 36288
Attorney for Appellants

APPENDIX

Marwood Apartments Donald Harvey 2411 - 60th SE 232-6833 Mercer Island, WA 98040	5338 19-2/1260 WA 42706
Pay to the Order of <u>Deborah Cole</u> \$ <u>1,785.43</u> One Thousand Seven Hundred Eighty Five and 43/100 Dollars	
Bank of America  Mercer Island 042706 Washington	
For <u>mgr pay 5/08</u> <u>Donald Harvey</u>	
⑆ 25000024 ⑆ 5384 3001 ⑆ 5338	

Marwood Manager pay
for 5/08

Deborah Cole
531 Bellevue AVE
#305
Seattle WA 98102
206-719-2043

2
Ex: D. Harvey
Wit: 6.16.09
Date: 6.16.09
MILLS & LESSARD
(206) 292-9068

copy of 125th pay check for
May 2008 as Resident Manager
of Marwood

000067

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on August 14, 2010, I caused delivery of a copy of the Brief of Appellant, Verbatim Report of Proceedings, and Supplemental Designation of Exhibits by United States mail, to:

Jeffrey L. Needle
200 Maynard Building
119 First Avenue South
Seattle, WA 98104
Attorney for Respondent

Dated this 14th day of August, 2010, at Seattle, Washington.



KATHERINE GEORGE

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2010 AUG 16 AM 10:40