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

CHRISTINE E. GALBRAITH, Appellant

vs.

MICROSOFT CORPORATION, a Washington Corporation, Respondent

Case No. 70932-1-1

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE KENNETH SCHUBERT

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

This is an appeal by Christine Galbraith (“Galbraith”) from a summary judgment order entered by the Hon. Kenneth Schubert dismissing all of Galbraith’s claims against Respondent Microsoft Corporation (“Microsoft”), including age discrimination, gender discrimination and disability discrimination under the Washington Law Against Discrimination, violation of the Washington Equal Pay Act, and retaliation.

Galbraith is 65 years old and worked at Microsoft for 20 years. CP 389-390. She was forced to retire early due to the impact of her excessive workload on her health, and her manager’s discrimination and retaliation against her. CP 391-394.

Galbraith managed the payroll software applications for over 53,000 domestic Microsoft employees. CP 390. Her prior managers, Jeff Ward and Angela Graves, lobbied their superiors for a promotion for Ms. Galbraith starting in 2006. Mr. Ward's request for a promotion for Galbraith was turned down, leaving Mr. Ward "embarrassed and ashamed." CP 177.

When Ms. Graves’ request for Galbraith’s promotion to Pay Level 60 was finally granted in 2008, she was told by her manager, Salvador
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Segura, not to request further promotions for Galbraith because “they were saving promotions for the other employees who were not close to retirement.” CP 329:19-330:4. Galbraith had not notified her managers of any plans to retire. CP 330:10-12. Galbraith never received another promotion or pay level increase.

After Galbraith began reporting to Salvador Segura in 2009, she complained regularly in meetings with Segura about not receiving the same promotions and salary as others on her team, and about her excessive workload which was affecting her health. CP 392. Mr. Segura ignored Galbraith's complaints and eventually retaliated by giving her the lowest contribution ranking for her 2010 performance review because of her "attitude." CP 392-393; CP 316:6-25. Shortly after her meeting with Mr. Segura to discuss her performance rating, Galbraith decided her only option was to resign and take early retirement so she could receive social security benefits. Her health had deteriorated and she knew she would not get the help she had requested with her excessive workload. CP 393-394.

Galbraith was replaced by a 34-year old male at Pay Level 63, three levels higher than her pay level. CP 593-596; CP 640:12-18. Her replacement did not have any prior experience with SAP payroll applications, which was an important requirement for the position. CP 590-592.

Galbraith's Second Amended Complaint alleges claims for (1) disparate treatment age discrimination under the Washington Law Against Discrimination (WLAD); RCW 49.60.180;(2) disparate impact age discrimination under the WLAD, (3) sex discrimination under the WLAD, (4) retaliation under the WLAD, RCW 49.60.210, (5) disability discrimination under the WLAD, and (6) violation of the Washington Equal Pay Act.

The trial court entered summary judgment despite undisputed evidence Galbraith was paid substantially less the other employees on her team who were male or younger, CP Sub. 147B-Exhibit G¹, and testimony from Galbraith's former manager that Galbraith performed more work than the other employees and her pay level was not commensurate with her job responsibilities. CP 328:8-21. In addition, there is undisputed evidence Galbraith had a heart condition diagnosed in 2006 and Galbraith requested help with her workload due to the negative impact on her health beginning in 2007. CP 177.

The ruling of the trial court, issued at the summary judgment hearing without any written findings of fact or conclusions of law, indicates the court did not follow the proper standard of review for

¹ Exhibit G is a disk containing the age, sex, compensation and promotion history for the employees working in Microsoft's Solutions Delivery Group.

summary judgment motions, and erred in interpreting applicable law. The trial court did not view the evidence in the light most favorable to Galbraith, and decided disputed issues of material fact which are for the jury to resolve.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting summary judgment by not viewing the evidence in the light most favorable to Galbraith and resolving disputed issues of material fact which is improper on summary judgment.
2. The trial court erred in granting summary judgment dismissing Galbraith's claims for disparate treatment age discrimination and sex discrimination based on the court's mistaken belief Galbraith failed to identify other employees who were younger, or male, who were treated more favorably than Galbraith.
3. The trial court erred in granting summary judgment dismissing Galbraith's claim for age discrimination based on the court's belief the statement made by Galbraith's supervisor, that Galbraith would

not receive further promotions because she was close to retirement, is not evidence of possible age discrimination.

4. The trial court erred in granting summary judgment dismissing Galbraith's claim for violation of the Washington Equal Pay Act and not granting partial summary judgment in favor of Galbraith as to this claim.
5. The trial court erred in granting summary judgment dismissing Galbraith's claim for retaliation by her supervisor for complaining about her excessive workload and lack of promotions.
6. The trial court erred in granting summary judgment dismissing Galbraith's claim for disability discrimination as barred by the statute of limitations and the court's belief Microsoft had no continuing duty to accommodate Galbraith's disability.
7. The trial court erred in denying Galbraith's request for a continuance of the summary judgment hearing to provide additional evidence of Galbraith's medical condition which the trial court considered necessary to establish Galbraith's disability discrimination claim.

(2) Issues Pertaining To The Assignments of Error

1. Did the trial court follow the proper standard of review on summary judgment which requires the court view the evidence in the light most favorable to Galbraith and not grant summary judgment where there are genuine issues of material fact which should be resolved by a jury?
2. Are there issues of material fact regarding Galbraith's claim that she was paid less, and promoted less often, than the other employees in her group who were younger or male?
3. Is the testimony of Galbraith's former manager that Galbraith would not receive further promotions because she is "close to retirement" direct evidence of age discrimination, as well as evidence indicating the purported reasons offered by Microsoft for not promoting Galbraith are pretext?
4. Does the undisputed evidence that the much younger male employee hired to replace Galbraith was paid substantially more than Galbraith, and the evidence that Galbraith was paid less than the other male employees performing similar work establish that Microsoft violated the Equal Pay Act?

5. Does the evidence of Galbraith's repeated complaints to her manager about her lack of promotions and her excessive workload raise issues of material fact regarding Galbraith's claim that her manager retaliated against her by giving her a much lower performance rating due to her "attitude?"
6. Is Galbraith's disability discrimination claim barred by the statute of limitations where it is based on Microsoft's continuing failure to accommodate Galbraith's disability up to the time she resigned?
7. Did the trial court err in denying Galbraith's request to continue the summary judgment motion to allow Galbraith to present medical records regarding her disability produced during discovery?

C. STATEMENT OF CASE

1. Galbraith's Position At Microsoft

Galbraith is 65 years old and was employed at Microsoft for 20 years. CP 389-390. She began as a Human Resources Assistant and her last position was Solution Manager in the Solutions Delivery Group. CP 277:4-7, CP 389-390. Galbraith was a hard worker, very smart, and received numerous awards and excellent performance reviews until she began reporting to Salvador Segura. CP 396-397; CP 216; CP 218; CP 214-222; CP 265-267. Her position as Solution Manager involved managing software applications (also referred to as "Tools") and required the knowledge and skill to interface with both the Business and IT partners in the company. CP 277:6-17; CP 323:15-19. Galbraith's job responsibilities included the following five Payroll Tools for the approximately 53,000 domestic employees of Microsoft: (1) SAP/Payroll, (2) Employee Time and Absence (TAR), (3) Paystub, (4) Direct Deposit, and (5) W-4. CP 390; CP 322:17-24; CP 605:14-606:8.

The other Solution Managers had responsibility for only one, or in some cases, two Tools. CP 610:13-611:1. The Tools Galbraith managed were of critical importance as these software programs were necessary to pay all Microsoft domestic employees timely and in accordance with applicable state and federal laws. CP 390; CP 183-184; CP 218; CP

327:17-25; CP 611:14-612:5; CP 642:12-643:24. There were very high expectations placed on Galbraith that these programs function properly because the consequences to Microsoft could be substantial if they did not. CP 327:17-25.

In addition to these responsibilities, Galbraith was the SAP support person for the Employee Benefits Team and had many additional Human Resource-related projects. CP 390-391; CP 323:5-324:2. Galbraith also had significant responsibilities for Microsoft's Disaster Recovery Operations for U.S. payroll. CP 390-391. In the event of a disaster which prevented normal processing of U.S. employees' payroll, Galbraith was the designated person to process the payroll for all U.S. employees manually. CP 390-391; CP 218. These responsibilities were far greater than the other employees working as Solution Managers. CP 327:5-25; CP 348:14-23; CP 351:7-16. Galbraith routinely interacted directly with senior managers of Microsoft outside of the Solutions Delivery Group. CP 390-391; CP 323:11-22.

2. Galbraith's Disability and Excessive Workload

Galbraith was diagnosed with an irregular heartbeat in 2006 and also suffered from high blood pressure and asthma. CP 391-393.

Galbraith's excessive workload was impairing her health. CP 391-393.

She notified her manager, Jeff Ward, in 2007 of the impact of her workload on her health and asked for assistance. CP 177-178. Mr. Ward notified his superiors, Wasif Rasheed and Salvador Segura, and expressed concern with Galbraith's "crippling workload." And her heart condition CP 177-178. Microsoft Human Resources Department was notified and Galbraith was provided with some temporary assistance by outside vendors. CP 391-392; CP 657:8-658:20.

However, Galbraith's job responsibilities were not reduced and her workload increased substantially more when Microsoft began employing retail workers. CP 286:22-288:18; CP 289:8-292:1. Galbraith repeatedly asked her manager, Salvador Segura, to assign some of her job responsibilities to another Solution Manager. CP 392; CP 657:8-659:14; CP 303:20-304:3. Mr. Segura refused these requests and told Galbraith her workload was not excessive. CP 392; CP 303:20-304:1. Galbraith's blood pressure became more elevated and she had to take additional medication. CP 317:11-318:1; CP 391-392.

3. Failure to Promote

Despite her responsibilities and excellent job performance, Galbraith did not receive regular promotions and pay level raises similar to the other employees in her group who were male and/or younger. CP
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Sub 147B-Exhibit G; CP 492-500²; CP 394; CP 328:8-21; CP 330:10-25;
CP 332:9-12; CP 343:7-10.

In 2006, Galbraith's manager Jeff Ward went to Human Resources to get assistance in determining the appropriate pay level for her position³. CP 391; CP 608:14-609:17. Mr. Ward had held Galbraith's job before her and was the person most familiar with the responsibilities of Galbraith's position. CP 606:6-8, CP 607:1-13. Mr. Ward told Galbraith HR determined her position should be at Pay Level 62. CP 391; CP 307:21-308:12; CP 309:9-12. Galbraith at that time was only at Pay Level 59. CP 391.

In 2007, Jeff Ward sought a promotion for Galbraith to a higher pay level but his managers turned down this promotion request. CP 391. Mr. Ward wrote to his manager, Salvador Segura, regarding the refusal of a promotion:

“[T]he workload she has is crippling and if I can fault her for anything, it is not quitting years ago. . . She does have health issues, and has regular heart check-ups. . . the lack of a promotion for her leaves me embarrassed and ashamed.” (CP 177).

² CP 492-500 is a report prepared by Galbraith's expert, Christina Tapia, Ph.D., analyzing the compensation and promotion data of employees in the Solution Delivery Group. This report was submitted for filing under seal together with the other sealed documents. Microsoft notified the court after the summary judgment hearing that it did not require this report to be filed under seal and Galbraith filed it unsealed after the hearing.

³ Mr. Ward claimed at his deposition that he did not contact Microsoft's HR directly but asked his manager to do so.

In 2008 Galbraith reported to Angela Graves in the Solutions Delivery Group. CP 321:20-322:4. Ms. Graves testified at her deposition that Galbraith had more work than the other employees in the Solutions Delivery Group. CP 328:8-21. Galbraith was still at Level 59 and Ms. Graves also requested a promotion for Galbraith. CP 328:8-329:1. Mr. Segura, who was Ms. Graves' immediate supervisor, informed Ms. Graves a promotion (to Level 60) had been granted for Galbraith. CP 329:19-23. When he notified Ms. Graves of this promotion, Mr. Segura told Ms. Graves no further promotions would be granted to Galbraith because "they wanted to save promotions for the other employees who were not close to retirement." CP 329:19-330:4; CP 346:7-16. All of the other employees in the Group were substantially younger than Galbraith. CP 394; CP 346:7-16; CP Sub 147B Exhibit G. Ms. Graves was shocked to learn no further promotions would be granted to Galbraith because she was older. CP 329:24-330:25; CP 346:7-16.

Ms. Graves resigned from her position with Microsoft in the fall of 2010. CP 332:19-25. Ms. Graves testified that she experienced discrimination as a female while working at Microsoft. CP 331:1-332:12; CP 339:4-7; CP 337:14-338:6. She was told by a manager that a project was being removed from her responsibility "because a man would be

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better for the job.” CP 331:23-332:12. She was advised by another manager that she should wait to pursue advancement in her career at Microsoft until her children were older. CP 331:1-15. Her mentor, a female manager, advised her to not mention her children at all and not keep any pictures of her children in her office. CP 337:14-338:6. Ms. Graves also testified women in the Solutions Delivery Group including Galbraith were not being promoted to the higher-level positions compared with the men. CP 331:1-332:12; CP 329: 24-330:25; CP 339:4-7; CP 343:7-10; CP 345:7-12.

4. **Retaliation By Manager**

Galbraith began reporting directly to Salvador Segura in 2009. CP 392. In numerous 1:1 meetings with Mr. Segura, Galbraith complained about her excessive workload and that others were receiving promotions in her group but not her. CP 392; CP 314:4-13; CP 659:2-660:4. Mr. Segura told Galbraith she did not have too much work and that she had a bad attitude. CP 392; CP 316:6-25.

This continued until Galbraith’s last 1:1 meeting with Segura in June 2011 to discuss her upcoming FY2011 annual performance review. CP 392. Mr. Segura told Galbraith he was giving her a 10% Contribution Rating, the lowest contribution rating an employee can receive. CP 393;

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CP 313:2-24; CP 662:9-23. This meant she would not be eligible for any further promotions and could eventually be terminated. CP 393. Galbraith had always received 70% contribution rankings and exceeded her job requirements. CP 325:24-326:18; CP 214-222; CP 189; CP 194; CP 202; CP 211; CP 222. Galbraith questioned this lower ranking by Mr. Segura and he began yelling at her, saying she was “only a 60”, that she was the problem, not him or his superiors, and that he gave her the low contribution ranking due to her attitude. CP 284:10-285:23. Ms. Galbraith walked out of this meeting extremely upset. CP 285:14-21; CP 393; CP 663:4-664:1; CP 398-400.

Galbraith's health had deteriorated even more due to the stress of the excessive workload and Mr. Segura's discrimination. CP 393; CP 365:4-11; CP 400. With her heart condition and high blood pressure, she believed she might die if she continued to work at Microsoft. CP 394. She could not afford to go without any income, so Galbraith made the decision to resign and take early retirement effective July 1, 2011. CP 394; CP 365:4-15. Galbraith's financial advisor advised against retiring at 63 because Galbraith's social security benefits would be substantially lower than if she waited until age 65 as she originally planned. CP 363:11-20; CP 364:12-365:2. Galbraith felt she had no choice but to take early retirement. CP 394; CP 373:19-1

5. **Galbraith's Replacement Paid Substantially More**

When Galbraith resigned, Microsoft targeted to replace her with someone at Level 63, three pay levels higher than Galbraith. CP 245-247; CP 247-252; CP 652:5-17. Microsoft hired a 34-year old man, Ramana Kotapati, for Galbraith's position at Level 63, earning over \$40,000 more than Galbraith in salary. CP 593-596; CP 651:22-656:17; CP 640:12-18. The managers who interviewed Mr. Kotapati noted he did not possess any direct experience in SAP, Payroll or SD applications, and a very large ramp-up would be required for SAP, Payroll and Headcount. CP 590-592; CP 655:24-656:17; CP 621:4-622:20; CP 641:17-22.

Mr. Kotapati had the same job responsibilities as Galbraith when he was hired. CP 633:2-636:4; CP 652:5-17. Microsoft sought to expand Mr. Kotapati's job responsibilities after Galbraith commenced this lawsuit. CP 636:10-637:6.

When Mr. Kotapati was later moved to another position, another male employee assumed Galbraith's former position. CP 637:8-639:10. This employee was also paid substantially more than Galbraith. CP 597-601.

6. **Male and Younger Employees Treated More Favorably Than Galbraith**

All of the employees on Galbraith's team (reporting to Salvador Segura) who were younger than Galbraith, or male, were paid more than her. CP Sub 147B-Exhibit G; CP 492-500; CP 394. Of the employees reporting to Mr. Segura, no females have been promoted above Level 62. CP Sub 147B- Exhibit G; CP 492-500. Other employees in her group received promotions or were paid more without taking on new positions or responsibilities. CP 299:12-301:18; CP 394; CP 613:20-614:24.

The promotion given to Galbraith in 2008 was discussed by Mr. Segura with his boss, Wasif Rasheed, and had to be approved by Mr. Rasheed. CP 648:18-650:16.

7. **Microsoft's Summary Judgment Motion**

At the hearing on Microsoft's Motion for Summary Judgment on September 13, 2013, the trial court granted Microsoft's motion dismissing all of Galbraith's claims.⁴ Judge Schubert made his ruling orally without any written findings of fact or conclusions of law.⁵ CP 485-486.

⁴ Galbraith had noted for the same day as the summary judgment motion a motion to seal confidential documents submitted in opposition to the motion in accordance with the stipulated protective order entered in the case. CP 410-431. After filing the motion to seal, Galbraith submitted a report of her expert, Christina Tapia, Ph.D, CP 492-500, which analyzed the compensation and promotion history of the
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With respect to the claims for discrimination in pay and promotions, Judge Schubert stated since Galbraith had received a promotion in 2008, he focused on the time period after this promotion. RP 51:22-52:1⁶. He found that:

“[W]e don’t have any proof, in my view, of someone similarly situated doing the same work that is either younger or a male that is getting paid more or treated better in some way. I simply think that the record is silent on any of that.” RP 52:1-5.

With respect to the testimony of Galbraith’s former manager that Galbraith was not going to receive any further promotions because she was close to retirement, Judge Schubert concluded this was not evidence of age or sex discrimination because it was “an essentially age and gender neutral reason for not giving her a promotion.” RP 52:9-11. The trial

Solution Delivery Group employees, to Judge Schubert’s chambers before the summary judgment hearing to be included with the sealed documents. CP 437-438. This was a different report than the report prepared by Dr. Tapia filed initially as Exhibit B by mistake to her Declaration in Opposition to the Summary Judgment Motion. Judge Schubert did not consider the motion to seal at the summary judgment hearing. As a result, it is unclear if this report of Dr. Tapia was reviewed by Judge Schubert before the summary judgment hearing.

⁵ Judge Schubert’s comments indicate he believed the trial was scheduled to begin ten days after the hearing, which is incorrect. RP 49:4-6. The trial date was October 14, 2013, more than thirty days from the date of the summary judgment hearing.

⁶ Judge Schubert appears to have ignored Galbraith’s claim that she should have received promotions prior to 2008 and was still one of the lowest paid in her group after this promotion.

court was persuaded by several federal court decisions Microsoft discussed in its reply brief which were based solely on federal law. RP 31:23-34:2.

Judge Schubert also found there was no retaliation claim “because I don’t think she alerted them to anything that she could be retaliated against, or that there is proof of retaliation.” RP 52:6-9. With respect to the evidence that the younger male hired to replace Galbraith was paid substantially more than Galbraith, Judge Schubert stated:

“I agree with Mr. Shapero [Microsoft’s counsel], that it seems to me that this wasn’t a backfill attempt by Microsoft to say, oh geez, let’s find this guy more responsibility. . . I don’t think he was going to have the same job as her.” RP 52:21-53:7.

Judge Schubert found there was no evidence that Galbraith’s heart condition, or high blood pressure and hypertension, either substantially impaired her ability to perform her job, or that engaging in her job functions without accommodation would aggravate these impairments to the extent it would be substantially limiting. RP 50:4-20. When Judge Schubert asked if there were any medical records to support these claims, counsel for Galbraith indicated there were medical records which had been produced during discovery and asked for permission to submit these records. CP 18:3-15. Judge Schubert did not grant this request. RP 22:6-25.

The trial court also concluded Galbraith's disability claim is barred by the statute of limitations, finding that it is based on a discrete act involving the request for accommodation made by Galbraith in 2007. RP 50:21-51:21⁷.

D. ARGUMENT

1. The Trial Court Did Not Use the Proper Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wash.2d 16, 26 (2005); CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* at 26.

In discrimination cases, summary judgment is often inappropriate because the WLAD "mandates liberal construction" and evidence "will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury."

⁷ Judge Schubert acknowledged he had no prior experience with this area of law. RP 48:20-23.

Martini v. Boeing Co., 137 Wash.2d 357, 364 (1999); RCW 49.60.020;
Davis v. West One Automotive Group, 140 Wash.App. 449, 456 (2007).

The trial court did not apply this standard of review in considering Microsoft's summary judgment motion. The trial court appears to have done the exact opposite, viewing all of the evidence in the light most favorable to Microsoft. The trial court concluded Galbraith had not identified other employees who were male or younger who were treated more favorably than Galbraith, despite considerable evidence that Galbraith was paid less, and promoted less often, than the other Solution Managers on her team who were male or younger, and the testimony of Galbraith's former manager that she should have been at a higher pay level.

The trial court concluded there was no evidence Galbraith was paid less than male employees performing comparable work, even though there was evidence Microsoft hired a male to replace her at three pay levels higher than Galbraith, and did not purportedly expand this replacement's job responsibilities until after this lawsuit was commenced.

The trial court not only considered the evidence in the light most favorable to Microsoft, it resolved disputed issues of material fact which were for the jury to decide. For example, it was for the jury to decide if there were non-discriminatory reasons which justified the higher pay and

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more frequent promotions the male and younger Solution Managers received. It was for the jury to decide if the statement by Mr. Segura in 2008 that Galbraith would not receive further promotions because she was close to retiring was evidence of age discrimination, or evidence that the reasons asserted by Microsoft for not promoting Galbraith after 2008 were pretext.

2. **Summary Judgment was improper as to Galbraith's age and sex discrimination claims where there is undisputed evidence Galbraith was paid less, and not promoted as often, as the other Solution Managers who were younger or male.**

The undisputed facts show Galbraith is a female substantially older than the others in her group. CP Sub 147B-Exhibit G. After the reorganization of the Solution Delivery Group in 2009-2010, all of her managers were male. CP Sub 147B-Exhibit G; CP 389-390; CP 394; CP 492-500. The evidence shows Galbraith was treated less favorably than the other Solution Managers who reported to Salvador Segura who were either younger and/or male. CP Sub 147B-Exhibit G; CP 327:5-25; CP 348:14-23; CP 351:7-16; CP 394; CP 492-500; CP 610-611. As shown in the salary and promotion data provided by Microsoft, Galbraith was at the lowest pay level of everyone who reported to Salvador Segura. CP Sub 147B-Exhibit G; CP 492-500. The females who reported to Segura were

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all at lower pay levels than the males, and there were no females promoted to the higher pay levels 63 and 64. CP Sub 147B-Exhibit G; CP 492-500.

A similar fact pattern was present in another Washington case brought by two female employees against their employer for failure to promote them and pay them comparable to the male employees. In Hemmings v. Tidyman's Inc., 285 F.3d 1174 (9th Cir. 2002), the Ninth Circuit Court of Appeals upheld the jury verdicts against the employer for violation of the WLAD and federal anti-discrimination laws. Plaintiff Hemming began working for the defendant employer as an accounts payable clerk and was promoted to office manager and then later to controller. She received outstanding job performance evaluations. Despite her job performance, she was denied further promotions and her salary was frozen for a period of four years. *Id.* at 1179.

In order to recover under a disparate treatment theory of employment discrimination, a plaintiff in Washington has the burden of proving that his or her protected status was a “substantial factor” in the defendant employer's decision to terminate, not to promote, not to hire, layoff or otherwise discriminate against the plaintiff. Crownover v. State ex rel. Dept. of Transp., 165 Wash. App. 131, 265 P.3d 971 (Div. 3 2011), review denied, 173 Wash. 2d 1030, 274 P.3d 374 (2012).

In the present case, there is direct evidence of discrimination against Galbraith due to her age. Mr. Segura told Ms. Graves no more promotions would be given to Galbraith solely because she would be retiring soon and they wanted to save the promotions for the other employees. CP 329:24-330:25; 346:7-16. All of the other employees were substantially younger than Galbraith. CP Sub 147B-Exhibit G; CP 394; CP 492-500. Galbraith was being denied promotions simply because she was older and closer to retirement.

There is also direct evidence of discrimination based on gender. Ms. Graves testified about discrimination she encountered as a woman working under the same managers as Galbraith. CP 331:1-332:12; CP 339:4-7; CP 337:14-338:6. She also testified the other women in her department, *including Ms. Galbraith*, were treated less favorably in terms of salary and promotions. CP 332:9-12; CP 339:4-7; CP 343:7-10; CP 345:7-12.

The trial court appears to have been persuaded by Microsoft's assertion that Galbraith had not identified any male or younger employees similarly situated to Galbraith who were treated more favorably. This assertion is based on the false premise that Galbraith did not know precisely what all of the other Solution Managers did, and therefore could not know if they were performing similar work. Galbraith provided

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evidence that she had greater responsibilities than the other Solution Managers who reported to Mr. Segura. CP 328:8-21. Galbraith provided evidence she was the oldest of the Solution Managers who reported to Mr. Segura, and all of the male or younger Solution Managers were paid more and promoted more often than her. CP Sub 147B-Exhibit G; CP 394; CP 492-500. All of these employees were Solution Managers performing similar functions and were ranked against each other for job performance. It is Microsoft who has the burden to show these other Solution Managers' job responsibilities were sufficiently different from Galbraith's to justify their higher pay and more frequent promotions.

3. **Summary Judgment should be entered in favor of Galbraith on her Equal Pay Act claim where there is undisputed evidence Galbraith was paid less than males performing similar work, including the male hired to replace her at three pay levels higher than Galbraith.**

Washington's Equal Pay Act prohibits employers from paying female employees less than male employees for comparable work. RCW 49.12.175. The Act is broadly remedial and the courts construe it to fulfill the underlying purpose of the Legislature, which is to sweep away outmoded inequities and assure women equal pay for equal work. Hudon v. West Valley School Dist. No. 208, 123 Wash.App. 116, 124 (2004).

A plaintiff states a prima facie case under the Equal Pay Act by proving that men and women received different pay for equal work. Adams v. Univ. of Wash., 106 Wash.2d 312, 318 (1986). Once the prima facie case is established, the burden shifts to the employer to prove the wage differential is justified under a statutory exception. Hudon at 124.

In Washington, the sole defense is that the wage disparity is based in good faith on a factor or factors other than sex. RCW 49.12.175; Hudon at 124. This is an affirmative defense which the employer must plead and prove. *Id.* Although Washington's Equal Pay Act is based on the Federal Equal Pay Act, it is less stringent than the federal law and a plaintiff need only prove that the employer paid a different wage to men and women who performed similar work. Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1191 (9th Cir. 2002).

In the Hemmings case, the Ninth Circuit Court of Appeals upheld a jury verdict for violation of Washington's Equal Pay Act based on evidence the plaintiff assumed the central responsibilities of the job previously held by a male employee who was paid more. In the present case, the evidence establishes that Galbraith was replaced by a male at three pay levels higher than her, and that her replacement was performing the same central job duties when he was hired. CP 247-249; CP 652:5-17. They managed the same software applications and reported to the same

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manager. It is noteworthy that Microsoft decided on the higher pay level for the position Galbraith vacated before interviewing for the position, and the replacement did not have any experience with SAP, a critical part of the job responsibilities. CP 245-246; CP 593-596; CP 629:13-16; CP 640:12-18; CP 651:22-656:17.

Microsoft has not presented any good faith factor other than sex to justify such a large disparity in salary between Galbraith and her male replacement. Her replacement had only a bachelor's degree and no prior experience with SAP payroll applications. CP 590-592; CP 621:4-622:20; CP 641:17-22. The job description did not require a college degree if the applicant had relevant prior work experience such as Galbraith. CP 247-249. Jeff Ward, the employee who held the job before Galbraith, does not have a college degree and he is also at a substantially higher pay level than Galbraith. CP 604:14-17; CP Sub 147B-Exhibit G.

Equal Pay Act claims are considered continually recurring violations which occur each time compensation is paid, so the statute of limitations is normally no bar to recovery for time periods beyond the normal limitations period. See Lilly Ledbetter Fair Pay Act of 2009, 42 USC Sec. 2000e-5(e)(3)(A),(B); McReynolds v. Merrill Lynch & Co., Inc., 694 F.3d 873, 887 (7th Cir. 2012).

There is no genuine issue of material fact regarding Microsoft's violation of the Equal Pay Act. The trial court should have entered partial summary judgment in favor of Galbraith on this claim of law as requested by Galbraith in her opposition papers. CP 155. Summary judgment can be entered in favor of the nonmoving party if it becomes clear she is entitled thereto. Rubsenser v. Felice, 58 Wash. 2d 862, 868 (1961); Impecoven v. Department of Revenue, 120 Wash. 2d 357 (1992); 14 A Wash. Prac., Civil Procedure 25:13(2d ed.).

4. **Summary Judgment was improper as to Galbraith's retaliation claim where there is evidence Galbraith's manager gave Galbraith a lower performance rating because she complained about her lack of promotions and requested her workload be decreased.**

It is an unfair practice under the WLAD for an employer to discriminate against any person because he or she has opposed any practices forbidden by the WLAD. RCW 49.60.210 (1). In this case, there is evidence Galbraith complained to her manager, Mr. Segura, that she was not being promoted and being paid similarly to the male employees and younger employees. CP 314:4-13; CP 392; CP 659:2-660:4. She also complained that her workload was excessive and more than the other employees on her team who were all either younger than her

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or male. CP 392. She asked for accommodation for her disabilities by having some of her job responsibilities transferred to another employee. CP 303:20-304:3; CP 392. She believed that she was being discriminated against due to her age and gender. CP 392; CP 313:2-315:14.

There is clear evidence of retaliation by Mr. Segura in response to this protected activity. Galbraith had consistently received excellent performance ratings until she began reporting directly to Mr. Segura in 2009. CP 325:24-326:18; CP 183; CP 189; CP 194; CP 202; CP 211; CP 222. In her 2010 performance review, Mr. Segura criticized Galbraith's attitude and gave Galbraith the lowest contribution ranking of 10%. CP 393; CP 313:2-24; 662:9-23; CP 284:10-285:23. Mr. Segura also gave Galbraith a lower performance rating of Achieved even though she had consistently earned performance ratings of Exceeded in her position. CP 183; CP 189; CP 194; CP 202; CP 211; CP 214-222; CP 325:24-326:18. As a result of these lower performance ratings, Galbraith would not be entitled to any further promotions and she could be terminated. CP 393.

To make out a prima facie case of retaliation, the plaintiff must prove (1) a statutorily protected activity, (2) an adverse employment action, and (3) a causal link between the activity and the adverse action. Hudon v. West Valley School Dist. No. 208, 123 Wash.App. 116, 130 (2004). The evidentiary burden then shifts to the employer to produce

admissible evidence of a plausible non-retaliatory reason for the adverse action. If the employer produces such evidence, the employee can show the reason(s) asserted by the employer are pretextual. Renz v. Spokane Eye Clinic, 114 Wash.App. 611, 624 (2002). Summary judgment should not be granted where there are conflicting reasons or contrary evidence sufficient to create competing inferences. *Id.* at 624.

In the Hudon case, the plaintiff's demands for equal pay were held to be protected activity and her subsequent poor job evaluation by her manager was sufficient evidence to defeat summary judgment. Hudon, *supra* at 131. Galbraith has produced similar evidence of retaliation by Mr. Segura.

5. **Summary Judgment was improper as to Galbraith's disability discrimination claim where there is evidence Microsoft was aware of Galbraith's heart condition and "crippling workload" as early as 2007 and Microsoft refused Galbraith's later requests for accommodation by reducing her workload.**

It is an unfair practice for an employer to refuse to hire, discharge, or discriminate based on a person's sensory, mental or physical disability. RCW 49.60.180. The statute gives rise to a cause of action for at least two different claims: for failure to accommodate, when the employer fails to take steps "reasonably necessary to accommodate an employee's

condition,” and for disparate treatment, when an employer discriminates against an employee because of the employee’s condition. Reihl v. Foodmaker, Inc., 152 Wash.2d 138, 145 (2004); Johnson v. Chevron U.S.A., Inc., 159 Wash.App. 18, 27-28 (2010).

In 2007, the Legislature amended the WLAD to adopt a definition of “disability,” and to specify when an employee is eligible for accommodation for a disability. Under RCW 49.60.040(25)(a), a “disability” is “the presence of a sensory, mental, or physical impairment that (i) is medically cognizable or diagnosable; or (ii) exists as a record or history; or (iii) is perceived to exist whether or not it exists in fact.”

An employee qualifies for reasonable accommodation if he or she has an impairment that substantially limits his or her ability to perform the job, or the employer has notice of the impairment and medical documentation establishes “a reasonable likelihood that engaging in the job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect. Johnson v. Chevron, supra at 28.

Failure to reasonably accommodate the sensory, mental or physical limitations of a disabled employee constitutes discrimination unless the employer can demonstrate that such accommodation would result in an

undue hardship to the employer's business. Pulcino v. Federal Express Corp., 141 Wash.2d 629,639 (2000).

Microsoft contends that because Ms. Galbraith was able to perform her job despite her disabilities, she did not have any "substantially limiting" disability and therefore no condition for which an accommodation was necessary. However, the facts reveal Microsoft did provide some temporary help for Ms. Galbraith in 2007 after she notified her manager at the time, Jeff Ward, that her excessive workload was impacting her health. CP 176-178; CP 391-392. Microsoft presumably believed accommodation was necessary at that point. CP 657:8-658:20.

In addition, Microsoft's argument is based on definitions adopted by cases decided before the Legislature amended the statute in 2007. Under the new statute, either the impairment must be a substantial limitation *or* there must be medical documentation indicating a reasonable likelihood that engaging in the job duties without accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect. Johnson v. Chevron, *supra* at 28-29. As this court in the Johnson case explained:

"Under the new statute, the question is not whether the accommodation was "medically necessary" in order for Johnson to do his job, such as hearing enhancements or a wheelchair might be. Instead, it is whether Johnson's impairment had a substantially limiting effect upon his ability to perform

the job such that the accommodation was reasonably necessary, or doing the job without accommodation was likely to aggravate the impairment such that it became substantially limiting.”

Johnson, 159 Wash.App. at 30.

Whether an employer has made a reasonable accommodation is generally a question of fact for the jury. Pulcino, 141 Wash.2d at 644.

It is undisputed Galbraith had a heart condition which was diagnosed in 2006, as well as high blood pressure and asthma. CP 391-392. There is evidence Galbraith's manager, Salvador Segura, and Microsoft Human Resources Department were aware of her heart condition and the effect Galbraith's "crippling workload" was having on her health in 2007. CP 176-178; CP 391-392; CP 317:11-318:1; CP 657:8-658:20. Despite this knowledge, Galbraith's workload increased even more, particularly with the addition of retail employees which Microsoft previously did not employ. CP 286:22-288:18; CP 289:8-292:1. Other than some temporary help from outside vendors, Microsoft did not take any further action to reasonably accommodate Galbraith's disability. CP 286:22-288:18; CP 289:8-292:1; CP 303:20-304:1; CP 392.

Galbraith repeatedly complained to Mr. Segura about her workload and requested that some of her job duties be assigned to others. CP 303:20-304:1; CP 392. There is evidence the excessive workload was in fact aggravating her disabilities and Galbraith was having difficulty

continuing to meet the excessive demands being placed on her at work. CP 176-178; CP 391-392. This was a substantial factor in her decision to resign. CP 393-394; CP 365:4-11; CP 373:9-11. Her health had deteriorated to such an extent that she honestly feared she might die if she continued working at Microsoft. CP 391-394.

6. **Galbraith's discrimination claims are not barred by the Statute of Limitations**

The trial court ruled that Galbraith's disability discrimination claim was barred by the statute of limitations. RP 50:21-51:21. The court found that Galbraith's disability claim was a single discrete act which occurred in 2007, more than three years before Galbraith commenced this action. RP 50:21-51:21. The trial court misinterpreted the nature of Galbraith's disability accommodation claim and the appropriate law regarding tolling of the statute of limitation in cases brought under the WLAD.

The statute of limitations is tolled in employment discrimination cases where equitable grounds exist. Douchette v. Bethel School Dist. No. 403, 117 Wash.2d 817, 818 (1991). One such exception is the "continuing violation" doctrine, which allows a plaintiff to allege otherwise time-barred discriminatory acts and recover damages based on those acts.

Washington v. Boeing Co., 105 Wash.App.; 1, 19 (2000); Cox v. Oasis Physical Therapy, PLLC, 153 Wash.App. 176 (2009).

Continuing violations consist of two types – the serial and the systemic. A serial violation occurs where a chain of similar discriminatory acts emanating from the same discriminatory animus exists and where there has been some violation within the statute of limitations period that anchors the earlier claims. Washington v. Boeing Co., *Id.* at 8. A serial violation claim fails if the employee knew or should have known that the earlier acts, which are untimely at the time of asserting the claim, were discriminatory at the time that they were taking place. The evaluation of a serial violation claim involves a consideration of three factors: (1) did the alleged acts involve the same type of discrimination tending to connect them in a continuing violation, (2) were the alleged acts recurring, and (3) most important, did the untimely acts have the degree of permanence that should have triggered the employee's awareness of discrimination and duty to assert her rights. *Id.* at 19.

A systemic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. Goodman v. Boeing Co., 75 Wash.App. 60, 76-77 (1994) [quoting from E.E.O.C. v. Local 350, Plumbers and Pipefitters, 982 F.2d 1305, 1308 (9th Cir. 1993)]. The doctrine is applied because the continuing

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system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. When the doctrine is applicable, no part of a continuing violation which persists into the period within which suit is allowed is time-barred. *Id.* at 77.

The Goodman case presented similar claims of discrimination to this case. The plaintiff claimed disability discrimination based on Boeing's failure to assign her to less strenuous tasks. The series of related discriminatory acts were Boeing's continued assignment of plaintiff to exacting tasks and not rotating Goodman to other job duties as was done with other coworkers. The court held the plaintiff alleged sufficient facts constituting a series of acts against her manifesting handicap discrimination. *Id.* at 78.

The claim for disability discrimination in this case is based on the failure of Microsoft to reduce Galbraith's excessive workload even when it was aware of the impact this was having on Galbraith's disability. CP 176-178; CP 391. In Martini v. Boeing Co., 88 Wash.App. 442 (1997); *affirmed*, 137 Wash.2d 357, 378 (1999), plaintiff suffered from sleep apnea and depression. He alleged disability discrimination based on Boeing's failure to accommodate his disabilities, including Boeing's failure to transfer him to another job. The court held there was sufficient

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evidence that the alleged discriminatory acts which started before and continued into the limitations period were related enough to constitute a continuing violation, citing its decision in the Goodman case. *Id.* at 451-452. Whether there was a continuing violation by Boeing of its duty to accommodate the employee's disability was a question for the jury. *Id.* at 452-453.

Microsoft argued in its summary judgment motion that all of Galbraith's discrimination claims were barred by the statute of limitations because they involved "discrete acts" which occurred more than three years before the lawsuit was commenced. However, the Crownover case relied on by Microsoft is not applicable because it involves a *hostile work environment* claim. Washington courts have established separate rules for applying the statute of limitations in such cases and have distinguished them from other discrimination claims under the WLAD. Antonius v. King County, 153 Wash.2d 256, 268 (2004).

In Antonius, the Supreme Court rejected the continuing violation rule for hostile environment claims because doing so was consistent with the rule of liberal construction mandated by the WLAD and its purpose of eradicating unlawful discrimination is a public policy of the highest priority. *Id.* at 267-268. The court rejected application of the discovery rule for statutes of limitation and noted it declined to apply a discovery

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rule to an age discrimination claim under the WLAD in the Douchette case. The court also discussed the nature of systemic violations as being rooted in a discriminatory policy or practice, and if the policy or practice continued into the limitations period, a plaintiff could be deemed to have filed a timely complaint. This was found to be true with regard to general policies or practices in hiring, *promotion* and *compensation*. *Id.* at 262 (Emphasis added).

In this case, there are ongoing discriminatory acts alleged which were both recurring and systemic. The age and sex discrimination claims are based on the continuing failure to promote Galbraith, and pay her compensation similar to the other employees who are male or younger, which continued up to her resignation on July 1, 2011. CP Sub 147B-Exhibit G; CP 328:8-21; CP 330:10-25; CP 332:9-12; CP 343:7-10; CP 394; CP 492-500. This discrimination was systemic in that she was not promoted due to Microsoft's policy of not promoting employees who were close to retirement, and Microsoft's policy of not promoting the females to the higher Solution Manager positions.

Angela Graves testified about being discriminated against as a female and that she believes the entire Solutions Delivery department engaged in discrimination against women with most women in the lower

level positions. CP 331:1-332:12; CP 339:4-7; CP 337:14-338:6; CP 343:7-10; CP 345:7-12.

7. **The trial court's denial of Galbraith's request for a continuance of the summary judgment motion to allow Galbraith to submit additional evidence of her medical condition produced during discovery was an abuse of discretion.**

The trial court also dismissed Galbraith's disability discrimination claim on the grounds there were no medical records which showed continuing to engage in her job functions without accommodation would impair her disability. RP 22:6-25. Galbraith's counsel told the trial court there were such medical records which had been produced during discovery, and requested permission to offer these records in support of Galbraith's disability claim. RP 22:6-25. The trial court denied this request. RP 22:6-25.

Microsoft does not dispute Galbraith was diagnosed with an irregular heartbeat in approximately 2006 and also suffered from high blood pressure and asthma. Microsoft was aware of the negative impact Galbraith's workload was having on her health as early as 2007 when her managers notified Human Resources about her condition. Microsoft was provided all of Galbraith's medical records documenting her health issues

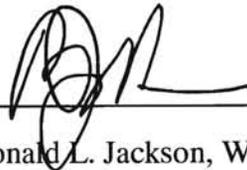
during discovery. As a result, the prejudice to Galbraith in not allowing her to present these medical records far outweighed any prejudice to Microsoft as a result of a slight delay in having its summary judgment motion decided. In view of the importance the trial court placed on the lack of medical records in its ruling, it was an abuse of discretion for the trial court to not grant a short continuance of the motion to allow these records to be submitted.

E. CONCLUSION

Galbraith respectfully requests that the court reverse the trial court's order granting summary judgment as to all of Galbraith's claims; and issue instructions to the trial court to enter summary judgment in favor of Galbraith on her claim for violation of the Equal Pay Act.

Dated this day of 5th March, 2014.

Respectfully Submitted,



Ronald L. Jackson, WSBA #14903
Attorney for Appellant

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

CHRISTINE GALBRAITH

Appellant,

v.

MICROSOFT CORPORATION, a
Washington Corporation

Respondents.

COA No. 70932-1-I

CERTIFICATE OF SERVICE

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I, Katie Sherwood, certify that at all times mentioned herein, I was and am a resident of the State of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Jackson Law Firm, 600 108th Avenue NE, Suite 543, Bellevue, Washington 98004.

On March 5, 2014, I caused a copy of the following documents:

1. Appellant's Opening Brief;
2. and this Certificate of Service

to be served upon the following individuals in the manner indicated below:

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DATED: March 5, 2014, at Bellevue, Washington.


Katie Sherwood
Legal Assistant