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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SARA HARTMAN,

Appellant,

v.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF GREATER  
SEATTLE, D.B.A., DALE TURNER FAMILY YMCA,

Respondent.

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BRIEF OF APPELLANT

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## A. INTRODUCTION

When Sara Hartman (“Hartman”) worked at the YMCA as a preschool teacher, the building’s HVAC systems were contaminated with mold and other toxins resulting in Hartman, the preschool children, and other teachers becoming seriously ill. Specifically, Hartman became so ill as a result of the contamination that she suffered from headaches, sinus pressure, congestion, and red burning eyes.

Hartman’s working conditions affected her ability to do her job, and she requested a reasonable, but simple, accommodation from the YMCA for her resulting disability – to have someone remove the toxins in her work environment and restore proper ventilation. The YMCA refused to do this. In fact, the YMCA refused to even speak to Hartman about possible accommodations for her disability from her exposure to the toxins. The YMCA failed to take any of the steps required by Washington law to engage in the interactive process with Hartman.

To the contrary, instead of removing the toxins and restoring proper ventilation, thus creating a safe environment for the children and staff, the YMCA retaliated against Hartman for her asking that the YMCA fix the HVAC systems. After Hartman sought accommodation, the YMCA told her – in no uncertain terms – to never bring up the issue again. Then, the YMCA placed Hartman on a baseless performance improvement plan,

removed her job duties, singled her out by scrutinizing her hours, solicited negative feedback about her, and removed Hartman's child, Zoe, from the YMCA daycare where Hartman worked. Facing severe illness and an inability to find childcare for Zoe, Hartman resigned.

Hartman filed suit, alleging, among other claims: (1) failure to accommodate; (2) retaliation for requesting an accommodation; and (3) constructive discharge based on disability.<sup>1</sup> The trial court granted summary judgment for the YMCA. This was legal error.

**B. ASSIGNMENTS OF ERROR**

(1) Assignments of Error

1. The trial court erred in entering summary judgment against Hartman and in favor of the YMCA on Hartman's claim for disability discrimination in its order dated March 21, 2014.

2. The trial court erred in entering summary judgment against Hartman and in favor of the YMCA on Hartman's claim for retaliation in its order dated March 21, 2014.

3. The trial court erred in entering summary judgment against Hartman and in favor of the YMCA on Hartman's claim for constructive discharge in its order dated March 21, 2014.

4. The trial court erred in its oral ruling when it disregarded Hartman's medical records on March 21, 2014.<sup>2</sup>

(2) Issues Relating to Assignments of Error

1. Under the Washington Law Against Discrimination, when an employee provides sufficient evidence to show that (1) she has a disability that requires an accommodation, (2) the employer failed to provide the reasonable accommodations, and (3) the employer failed to engage in the interactive process with the employee, has the employee provided sufficient evidence to survive summary judgment? (Assignment of Error No. 1)

2. Under the Washington Law Against Discrimination, if there is sufficient evidence that an employee cannot return to a job site because it will cause illness, and instead requests a reasonable accommodation, and the employer refuses to take additional accommodation efforts but instead seeks to obtain the employee's resignation in lieu of accommodation, is there sufficient evidence to create a disputed issue of material fact on a retaliation claim? (Assignment of

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<sup>1</sup> Hartman also brought claims for disparate treatment and intentional and negligent torts. Those claims were dismissed by the trial court on summary judgment. Hartman does not appeal the dismissal of those claims. CP 649-51.

<sup>2</sup> While the trial court's oral ruling states that the court disregarded Hartman's medical records for purposes of diagnosis and causation (RP 11), the trial court's written ruling indicates only that the court disregarded Hartman's medical records for purposes of establishing causation. Hartman does not assign error to the court's written ruling. To

Error No. 2)

3. Under the Washington Law Against Discrimination, if there is evidence that an employee cannot return to a job site because the working conditions are objectively intolerable, and the employer refuses to undertake additional accommodation efforts when initial attempts have failed, is there sufficient evidence to create a disputed issue of material fact on a constructive discharge claim? (Assignment of Error No. 3)

4. At oral arguments, the trial court indicated that Hartman's medical records were inadmissible for all purposes. In its written order, however, the trial court ordered that the medical records were inadmissible only for the purposes of establishing causation. To the extent that this Court relies on the trial court's oral statements, those statements were legal error. (Assignment of Error No. 4)

#### C. STATEMENT OF THE CASE

1. Hartman's Disability and the YMCA's Superficial Repairs of the HVAC Units

In March 2012, Hartman started working as an assistant preschool teacher for the Dale Turner Family YMCA Child Development Center ("CDC"). CP 335-36, 588. By all accounts, she performed well: she had an excellent work record, received commendations and positive

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the extent this Court considers the trial court's oral ruling on this issue, Hartman assigns

performance reviews, and was a valued member of the YMCA team. CP 258-60, 157-59, 420-37.

When Hartman started her employment at the CDC, the HVAC systems were contaminated causing significant dust and environmental toxins to circulate throughout Hartman's classroom. These toxins triggered multiple respiratory and associated symptoms among Hartman, CDC staff, and the children, including congestion, cough, inflamed nasal cavities, headaches, and chest constriction. CP 453, 461-62. Hartman would suffer these effects upon entering the classroom, and the symptoms would increase throughout the course of her work day and week. CP 461-62.

Hartman requested assistance from the YMCA to alleviate her symptoms. At first, she asked that Peter Hartman, her husband and a licensed and trained HVAC specialist, be permitted to inspect the CDC's HVAC systems. CP 589. At that time, Hartman expressed concerns about the poor air quality in the CDC and the proliferation of unexplained illnesses reported by staff and parents of attending children. *Id.*

In June 2012, Peter Hartman and his colleague Eric Hecox ("Hecox"), another licensed heating and air conditioning technician, inspected the HVAC units. CP 429, 484. They confirmed that the units were

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error to that ruling.

in dire need of repair and maintenance. Specifically, the units contained dirty filters, worn belts, overflowing drip pans, and improperly set air dampers. CP 430-38, 478-87. The inspection also revealed what appeared to be mold on the interior portions of the units. CP 434-35, 484-85, 490-91. Peter Hartman informed the YMCA of his findings and recommendations for testing, cleaning, and repairing the units. CP 437. In response, the YMCA took no action. CP 524-525.

By August 2012, Hartman and her co-workers were complaining daily to the YMCA about the units and the proliferation of unexplained illnesses and sick children. CP 293, 589, 528, 529-38, 601, 609, 613. At the request of Hartman, Peter Hartman returned to the CDC to inspect the HVAC units for a second time. CP 441. On August 8, 2012, Peter Hartman discovered that the YMCA had not cleaned or repaired the units; they still contained dirty filters, worn belts, and mold. CP 442-45. Again, Peter Hartman provided the YMCA with his findings and recommendations for testing, cleaning, and repairing the units. CP 284, 445.

In response to the staff outcry about sick staff and children, the YMCA was finally forced to acknowledge that it had a very serious problem. On the same evening as Peter Hartman's second inspection, the YMCA attempted its first superficial repair of the HVAC units. The

YMCA sent an untrained and unlicensed maintenance employee, Adam Wegener (“Wegener”), to replace filters and vacuum the interior coils of the HVAC units.<sup>3</sup> CP 567-70. On his own initiative, Wegener merely sprayed a can of Lysol he found on the interior HVAC coils. CP 568, 570.

On the morning of August 10, 2012, the YMCA attempted its second superficial repair of the HVAC units at the CDC. The YMCA sent two untrained and unlicensed maintenance employees to inspect and repair the HVAC units.<sup>4</sup> The record contains conflicting accounts of what these employees accomplished. One employee, Jose Maldonado Gonzales (“Maldonado”), testified that he visually inspected the filters, replaced one belt, and replaced a bearing in one of the interior units. CP 507-09. According to the other employee, Hayder Hussein (“Hussein”), he cleaned the two outdoor units with coil cleaner. CP 495. Hussein worked with Maldonado while Maldonado worked on the indoor unit and testified that Maldonado never changed any belts. CP 497-98. Despite performing less than two hours of work on the units that day, the employees were credited with completing eight hours of cleaning and repair on the units. CP 311.

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<sup>3</sup> Wegener did not know where mold could grow in a HVAC unit or how to test for it. CP 566. The YMCA did not tell Wegener that the units might contain mold, so he did not bring safety gear. CP 567.

<sup>4</sup> Neither employee was a licensed heating and air conditioning technician. Further, the employee tasked with repairing the indoor units did not know where mold could be found in an indoor HVAC unit or how to remove it. CP 501-05. The YMCA failed to tell either employee that the HVAC units contained mold or a threat of mold. CP

On the morning of August 13, 2012, staff reported a loud noise coming from the unit that Maldonado and Hussein worked on. CP 289. Staff immediately reported the issue to the YMCA and reiterated the ongoing concerns about sickness, loud noises, and odor coming from the vents. CP 313-14. In response, the YMCA sent Maldonado and Hussein back to the CDC that day to screw in a bearing; however, there is no documentation establishing what, if anything, they actually did.

On that same day, Hartman sent an email to the YMCA entitled “toddler illness update.” CP 316. In that email, Hartman explained that parents were complaining about sick children even after the YMCA supposedly “fixed” the units. *Id.* She even provided a link to a website outlining mold symptoms. *Id.* Hartman asked that someone qualified be hired to clean and repair the units. *Id.* The YMCA never responded to Hartman’s email. *Id.*

Later that day, Hartman left a voicemail for Sarah Morris (“Morris”), Regional Senior Program Director of Childcare, explaining that she had been diagnosed with exposure to an environmental toxin at work. CP 318. Morris never returned Hartman’s call.

On August 14, 2012, Hartman sent another email to YMCA

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496, 506. As a result, neither employee took precautions to protect themselves or the employees and children in the building from mold exposure. *Id.*

management entitled “hvac issue.” CP 320. In that email, Hartman explained that her doctor had diagnosed her with exposure to an environmental toxin. *Id.*; CP 373-87. She further explained that her doctor told her that removing the contaminants from the air would bring quick and lasting relief from her symptoms. CP 320. She begged for permission to have her husband come out for a third time to inspect the units. *Id.* Again, the YMCA failed to respond. *Id.* No other employees sent emails to the YMCA about the units, sick children, or unexplained and chronic illnesses. CP 601, 605, 609, 613.

Later that day, three staff members drafted written complaints to the YMCA about the HVAC units, chronic illnesses, and lack of remedial efforts. CP 322-325. Their complaints included sores in their noses, sinus problems, headaches, and nausea. *Id.* They explained that even after YMCA maintenance employees reviewed the units, the children and staff still suffered symptoms and smelled mold in the air. *Id.* They similarly complained about the compromised health and safety of the children. *Id.* The YMCA did not respond to any of these complaints. CP 538-40.

2. YMCA’s Retaliatory Response to Hartman’s Multiple Requests for Accommodation

Immediately following Hartman’s requests for accommodation – fixing the HVAC units and removing the toxins – the YMCA (1) placed

Hartman on a performance improvement plan (“PIP”); (2) altered Hartman’s work schedule; (3) solicited negative feedback about Hartman from other YMCA employees; (4) revoked some of Hartman’s job duties; and (5) removed Hartman’s child, Zoe, from daycare. Throughout this period, the YMCA undertook no additional accommodation efforts in response to Hartman’s repeated requests for accommodation. After August 13, 2012, the YMCA did not test, clean, or repair the HVAC units.

*First*, the YMCA placed Hartman on a PIP. On August 14, 2012, the same day Hartman sent her email to the YMCA about toxins in her classroom, her illness, and her accommodation request, Hartman’s immediate supervisor, Andrea Mills (“Mills”), requested that Hartman and her co-worker, LaTisha Davis (“Davis”), attend an offsite meeting to discuss issues with the HVAC units. CP 399-400, 454-55. When Hartman and Davis arrived at the meeting Morris and Mills informed them that the meeting was called not to discuss the units, the contaminated classroom, or the sick children and staff. Instead, the meeting was called to discuss a PIP for Hartman. CP 407-08.

Morris accused Hartman of being disrespectful to Maldonado when he was at the CDC. CP 465-66. While Hartman acknowledged that she had spoken with Maldonado about the work he did on the HVAC units that day, she disputed the characterization of her conversation as

disrespectful. CP 458-59. Hartman explained that during their conversation, she asked Maldonado what work he had performed on the units. CP 458-59. Maldonado could not provide an explanation. Instead, he lied to Hartman, claiming that he had used a coil cleaner inside the units. CP 458-59, 493-94. While Hartman was concerned by Maldonado's explanation, witnesses to the conversation characterized Hartman's tone as one of concern and not disrespect. CP 398. Hartman was simply trying to get information about the status of cleaning and repairs on the units, information the YMCA was not providing her. *Id.*

After hearing Hartman's explanation, Mills told Hartman and Davis to stop bringing up the HVAC issues. CP 401-02. Hartman was further directed not to do anything disrespectful in the future or she would be immediately terminated. CP 465-66.

In issuing the PIP to Hartman, the YMCA failed to follow its own policies. According to YMCA policy, it is standard procedure to get both sides of every story before issuing a PIP. CP 572-73. However, of the four witnesses in the room the day Hartman and Maldonado discussed the unit repairs (Hartman, Davis, Maldonado, and Hussein), the YMCA spoke only with Maldonado before deciding to place Hartman on a PIP. Despite receiving similar information from Hartman and Davis about the Maldonado encounter after that decision had been made, the YMCA issued the PIP

without any further investigation. Text messages between high ranking YMCA managers link the decision to place Hartman on a PIP to Hartman's doctor's visit and subsequent diagnosis. CP 369-70.

**Second**, the YMCA altered Hartman's work schedule without notice. After the YMCA placed Hartman on a PIP, it began tracking Hartman's movements through TimeForce, a punch-clock system. On at least three separate occasions, Morris emailed Mills, Hartman's supervisor at the time, about (1) Hartman leaving work early; (2) Hartman logging her lunch; and (3) Hartman taking her breaks. CP 329-60. Morris instructed Mills to stop Hartman from taking her breaks at the end of her shifts, which Hartman did in order to attend her doctors' appointments, even though other employees were allowed to take breaks at the end of their shifts. CP 548-58. Mills acknowledged that she never had any concerns with Hartman's attendance or Hartman taking her breaks at the end of her shifts. *Id.* At Morris' request, Mills instructed Hartman not to take her breaks at the end of her shifts. *Id.*

**Third**, the YMCA solicited negative feedback about Hartman from its registrar employees. Mills appointed two employees as point of contact for CDC parents dropping children off in the mornings and afternoons. Mills appointed Hartman as the morning point person. CP 544-45. As point person, Hartman made sure that children were properly checked-in and checked-out of the CDC. *Id.* As part of that process, Hartman referenced several registrar documents, including sign-in sheets and the do-not-admit list – a list of

children who could not attend for lack of payment. *Id.* When the registrar documents were deficient, Hartman checked with Mills, Morris, or the registrar about missing information. CP 544-45, 547.

In August 2012, without informing Mills, Morris solicited negative feedback about Hartman from registrar employees Lindsey Miller (“Miller”) and Kimberly Young (“Young”). According to Miller and Young, Morris asked them to draft a formal email outlining concerns they had about Hartman’s role as the morning point person. CP 512-516, 583-86. Young followed Morris’ instructions and drafted the email, entitled “Employee Review” with Miller’s help. CP 333. In that email, Young accused Hartman of overstepping her role as an assistant teacher by making demands for information. *Id.* Neither Young nor Miller could point to any email or telephone conversations where Hartman made any disrespectful, rude, or inappropriate demands. *Id.*, CP 512-16, 583-86.

Instead, both employees testified that they thought that Hartman should not be privy to the information she requested; however, neither employee knew how the CDC worked or whether Hartman had been told to request the information by Mills. CP 512-16, 575, 583-86. Mills never expressed any concerns with Hartman’s performance as point person; she even provided Hartman with a favorable performance evaluation while Morris was soliciting negative feedback. CP 258-60, 541-43.

***Fourth,*** the YMCA removed job duties from Hartman. Morris

instructed Mills to prevent Hartman from contacting the registrar regarding any issues related to CDC children. CP 416-19. Mills conveyed this message to Davis, who then conveyed it to Hartman. *Id.* Despite Mills having no concerns about Hartman's performance, as the morning point person, Mills – at the instruction of Morris – divested Hartman of her duties. CP 546.

*Fifth*, the YMCA removed Hartman's only child, Zoe, from its daycare. On September 1, 2012, the YMCA placed Zoe on the do-not-admit list and informed Mills that Zoe was not allowed to attend. Mills asked Morris why Zoe was on the do-not-admit list; Morris never responded. CP 290. According to Young, the YMCA had failed to auto-debit one partial payment for Zoe's tuition in June 2012 – for July's tuition – and three partial payments for August 2012 – for September's tuition. CP 456-57, 576-78. Hartman was not informed of the YMCA's failure to properly pull any of these payments from her account until September 2012. At that time, Young gave Hartman one day to pay all four payments the YMCA failed to debit from her account. CP 463-64.

The YMCA, however, did not follow standard procedure when removing Zoe from daycare. Zoe was placed on the do-not-admit list out of spite for Hartman complaining about the HVAC units. CP 405-06. Other CDC employees, who had problems paying their childcare bills, worked collaboratively with the YMCA to create payment plans. CP 403-04. Indeed, prior to reporting HVAC concerns, the YMCA had similarly worked with

Hartman when she had problems paying Zoe's bill. CP 590. YMCA managerial employees privy to the removal of Zoe from daycare believe that the YMCA removed the child in retaliation for Hartman bringing forth numerous complaints about the HVAC units and requests for repairs. CP 416.

By September 2012, Hartman could not take it anymore. She was severely ill from the toxins, and the YMCA was not doing anything to solve this problem. Zoe was not allowed in daycare. Hartman was constantly monitored and scrutinized and her duties and responsibilities were being removed. On September 6, 2012, Hartman tendered her letter of resignation. CP 335-36. She explained that she had no choice but to leave her employment due to the YMCA's failure to properly repair the HVAC units. CP 336. She explained that she felt retaliated against for bringing forth concerns about the units. *Id.*

(3) Procedural Facts

Hartman filed a claim in King County Superior Court against the YMCA for employment discrimination and retaliation in violation of RCW 49.60, Washington's Law Against Discrimination ("WLAD"), along with other intentional tort claims for intentional harm and negligent supervision. CP 658-72. The case was assigned to the Honorable Joan E. Dubuque. On summary judgment, the trial court orally ruled that Hartman's medical records were inadmissible for purposes of establishing

diagnosis and causation and that Hartman had not presented sufficient evidence of any disputed issue of material fact regarding any of her claims. CP 649-51. Hartman timely appealed. CP 652-57.<sup>5</sup>

D. SUMMARY OF ARGUMENT

The YMCA did not meet its summary judgment burden to demonstrate that there were no genuine issues of material fact regarding Hartman's claims of (1) failure to accommodate; (2) retaliation; and (3) constructive discharge. On the contrary, the record is filled with evidence to support Hartman's theory that the YMCA did not provide her with any reasonable accommodation before constructively terminating her employment.

As to her failure to accommodate claim, Hartman provided evidence that she suffered from a disability, that the YMCA knew that she had a disability, and that the company failed to reasonably accommodate her or even engage in the interactive process. Hartman repeatedly requested accommodation, and the YMCA repeatedly refused to engage in any collaborative dialogue about Hartman's disability or proposed accommodations after its failed superficial repairs of the HVAC units. Hartman presented evidence that the YMCA simply did not want to

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<sup>5</sup> Hartman is not appealing her claims for disparate treatment based on disability or either of her two claims for intentional injury.

accommodate a disabled employee who had caused problems for administrators.

As to her retaliation claim, Hartman provided sufficient evidence to show that she requested a reasonable accommodation – repair of the HVAC units – and that the YMCA retaliated against her as a result of her request and disability.

As to her constructive discharge claim, Hartman presented significant evidence that the conditions at her work were so intolerable that she was forced to resign. Specifically, the evidence showed that (1) the YMCA failed to accommodate Hartman’s disability and she effectively could not work at the YMCA without accommodation; and (2) the conditions were so intolerable because the YMCA subjected Hartman to frivolous disciplinary reprisals as a result of her attempts to obtain accommodation – that is removal of the toxins and proper ventilation.

Accordingly, dismissal of all three claims were improper. As to the trial court’s oral ruling on Hartman’s medical records, it is superseded by the court’s written ruling. To the extent this Court considers the trial court’s oral statements on appeal, they are in error.

#### E. ARGUMENT

##### (1) Standard of Review

When reviewing the grant or denial of a motion for summary

judgment, the standard of review is *de novo*. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 776, 249 P.3d 1044 (2011). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 366, 112 P.3d 522 (2005).

A motion for summary judgment “should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment in favor of the employer in discrimination cases is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992).

(2) Disputed Issues of Material Fact Exist Regarding Whether the YMCA Undertook Reasonable Accommodation of Hartman’s Disability

(a) Controlling Law

The WLAD protects employees from employment discrimination based on a disability. RCW 49.60.030(1). The WLAD mandates a liberal construction of the Act to accomplish its purposes. RCW 49.60.020; *Phillips v. City of Seattle*, 111 Wn.2d 903, 907, 766 P.2d 1099 (1989).

Under the WLAD, it is unlawful for an employer to discharge any

employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(2). Employers must reasonably accommodate a disabled employee who is able to perform the essential functions of the job, unless to do so would impose undue hardship on the employer. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004).

To establish a prima facie case of failure to accommodate a disability, an aggrieved employee must show that (1) she had a sensory, mental, or physical abnormality; (2) the abnormality substantially limited her ability to perform the job; (3) she was qualified to perform the essential functions of the job with or without reasonable accommodation; (4) she gave the employer notice of the disability and its accompanying substantial limitations; and (5) upon notice, the employer failed to reasonably accommodate the employee. *Holland v. Am. W. Airlines*, 416 F. Supp. 2d 1028, 1033 (W.D. Wash. 2006).<sup>6</sup>

(b) Hartman Suffered From a Disability

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.” RCW 49.60.040(7)(a). A disability “exists whether it is temporary

or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.” RCW 49.60.040(7)(b). Whether an employee has a disability is generally a fact question for the jury. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 642-43, 9 P.3d 787 (2000).<sup>7</sup>

Hartman suffered from an impairment that was medically diagnosable. *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 137, 64 P.3d 691(2003) (noting that employee established disability with treatment records demonstrating that he suffered from migraine headaches). On August 13, 2012, Dr. Christopher Pamp (“Pamp”) examined Hartman. CP 373. Pamp diagnosed Hartman with “exposure to environmental toxic substances” and “upper respiratory tract hypersensitivity reaction, site unspecified.” *Id.*

On August 22, 2012, Dr. Debra Milek (“Milek”) examined Hartman. CP 374-78. Milek diagnosed Hartman with inflammation and conjunctivitis, erythema and hyperemia, and inflammation and lesions in

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<sup>6</sup> The YMCA conceded below that Hartman was qualified to perform the essential functions of her job (CP 17) and made no legal argument that she was not qualified so the third prong of the test is met.

<sup>7</sup> Six years after *Pulcino*, the Washington Supreme Court rejected the definition of “disability” it offered in that opinion. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). The Legislature superseded the *McClarty* definition by amending WLAD. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009).

her throat. CP 376. One week later, Milek examined Hartman again and confirmed that Hartman's medical conditions persisted. CP 386-87.<sup>8</sup> *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 778, 249 P.3d 1044 (2011) (holding that the plaintiff had a disability when she had "a physical impairment in the nature of respiratory sensitivity to molds, chemicals and other environmental toxins.").

Further, the YMCA regarded Hartman as disabled. A person is regarded as being disabled if (1) a covered employer mistakenly believes that a person has an impairment that substantially limits one or more major life activities, or (2) a covered employer mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Coons v. Secretary of U.S. Dep't. of Treasury*, 383 F.3d 879, 886 (9th Cir. 2004). To make this assessment, the court looks at the state of mind of the employer against whom a claim is made. *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2000). The determination of the employer's motive is one rarely susceptible to resolution at the summary judgment stage. *Id.* at 706. Here, the YMCA believed that Hartman had an impairment that substantially limited her ability to perform her job.

At summary judgment, Hartman provided sufficient evidence that

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However, *Pulcino's* discussion of summary judgment standards and holdings regarding what constitutes reasonable accommodation have not been overruled.

the YMCA regarded her as having an impairment – a work-related respiratory disability. The record is replete with evidence that (1) Hartman repeatedly complained to the YMCA about her work-related respiratory impairment (CP 40, 316, 318, 320, 356-58, 373-87, 453, 589); (2) Hartman repeatedly informed the YMCA about her medical diagnosis and need for accommodation (CP 316, 318, 320); (3) the YMCA repeatedly refused to respond to Hartman and, in fact, mocked her condition and accommodation requests (CP 369-71); and (4) the YMCA endeavored to retaliate against Hartman after she disclosed her condition and need for accommodation instead of working collaboratively with Hartman on a reasonable accommodation (CP 327, 290, 329-60). The YMCA's retaliatory response to Hartman's disclosure of her disability and multiple requests for accommodations negates any suggestions that the YMCA did not perceive Hartman as suffering from a work-related disability. This is especially true because the YMCA concedes that it was trying to accommodate Hartman's condition but was simply not given enough time to do so before Hartman resigned. CP 17-18.

Hartman also provided sufficient evidence that the YMCA believed that her impairment substantially limited her ability to perform her job. An employee is substantially limited in the major life activity of

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working if she is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. *Hall v. Fluor Hanford, Inc.*, CV-08-5029-EFS, 2010 WL 113074 (E.D. Wash. Jan. 11, 2010) *on reconsideration in part*, CV-08-5029-EFS, 2010 WL 424220 (E.D. Wash. Jan. 28, 2010). If the employee does not have direct evidence of the employer's subjective belief that the employee is substantially limited in a major life activity, the employee must further provide evidence that the impairment imputed to the employee is, objectively, a substantially limiting impairment. *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001).

Where an employer does nothing to understand an employee's work-related restrictions, an employee creates a triable issue of fact as to whether the employer believes the employee is substantially limited in a class of jobs. *Hall*, CV-08-5029-EFS at \* 6. In *Hall*, the employer failed to properly ascertain the employee's restrictions or whether the employee's restrictions limited his ability to perform as compared to the average person having comparable training, skills and abilities. *Id.* at \* 6-7. There, the court held that a triable issue of fact existed as to whether the employer believed that the employee was substantially limited in his ability to perform the job because it failed to take steps to ascertain the restrictions

when the employee was otherwise qualified to perform the essential functions of his job with accommodation. *Id.*<sup>9</sup>

In this case, as in *Hall*, the YMCA undertook no effort to ascertain Hartman's work-related restrictions or whether those restrictions would limit her ability to perform her job as compared to similarly situated employees. Because the YMCA does not dispute that Hartman was qualified to perform her job (CP 17), Hartman has created triable issues of fact as to whether the YMCA subjectively believed that she was disabled and unable to perform the essential functions of her job because of the presence of her disability.

Even in the absence of that evidence, Hartman can still demonstrate that her disability was objectively a substantially limiting impairment. Again, the record is replete with evidence that Hartman (and her colleagues) suffered from respiratory impairments related to the working conditions at the YMCA. CP 40, 316, 318, 320, 356-58, 373-87, 453, 589. Again, the YMCA does not credibly dispute this because it alleges it was in the process of trying to fix the source of the problem before Hartman resigned. CP 17-18.

(c) Hartman's Disability Required Accommodation.

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<sup>9</sup> *Hall*, CV-08-5029-EFS at \* 8 (noting that a liberal construction of the WLAD results in a conclusion that the WLAD requires an employer to reasonably accommodate

An employee qualifies for reasonable accommodation if she has an impairment that substantially limits her ability to perform the job, or the employer has notice of the impairment and medical documentation establishes “a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantial limiting effect.” RCW 49.60.040(7)(d)(i)-(ii). Hartman can establish both prongs of the test.

First, Hartman’s impairment substantially limited her ability to perform her job. The evidence shows that Hartman suffered chronic headaches, congestion, chest pain, and sinus pressure, and that each of these symptoms made it difficult for Hartman to perform her job duties. CP 40, 316, 356-58, 453, 589. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 778, 249 P.3d 1044 (2011) (noting that respiratory reaction to toxins significantly limited ability of the plaintiff to perform her job). Put simply, Hartman’s disability substantially limited her ability to take care of the children at the CDC.

In *Holland v. American West Airlines*, the plaintiff argued that he was substantially limited in his ability to perform his job because his overnight shift aggravated his anxiety disorder and depression to the point

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an individual it perceived to be disabled).

where he was forced to resign. 416 F. Supp. 2d 1028, 1033 (W.D. Wash. 2006). There, Holland presented evidence that he repeatedly complained to management about his overnight shift adversely impacting his impairment. *Id.* at 1031-32. He requested that he be removed from the overnight shift and emphasized that, absent removal from the shift, he would be forced to resign. *Id.* When his employer refused to accommodate his request for a transfer in shifts, Holland was forced to resign. *Id.* The Court held that the plaintiff had raised genuine issues of material fact concerning his impairment and his job's impact upon it. *Id.* at 1034. In explaining the substantially limited analysis, the court noted that the WLAD is to be interpreted broadly to reflect the Legislature's high priority of eliminating workplace discrimination by providing an incentive for employers to accommodate disabled employees into "safe positions." *Id.* at 1034. The court further noted that by requiring an employee to exacerbate his medical condition to the point that he was unable to perform his job before he is entitled to any accommodation is inconsistent with prior Washington cases and the purposes of the WLAD. *Id.*

Here, as in *Holland*, Hartman's impairment substantially limited her ability to perform her job to the point where she was forced to resign. Hartman repeatedly complained to YMCA management about her chronic headaches, congestion, chest pain, and sinus pressure, as well as the

impact her work environment was having on her impairment. CP 40, 316, 356-58, 453, 589. When the YMCA failed to respond, Hartman was forced to take days off work because she was too ill to perform the essential functions of her job. CP 356-60, 369. On other occasions, Hartman attended work only to leave early due to intensification of her symptoms. CP 359. She expressed feeling uncomfortable and fearing for her own safety at work. CP 320, 356. The YMCA never responded.

Second, the YMCA had notice of Hartman's impairment and medical documentation establishes a reasonable likelihood that engaging in job functions without an accommodation would aggravate her impairment to the extent that it would create a substantially limiting effect. CP 373-87. While the YMCA never asked Hartman to provide medical documentation outlining her impairment or her work environment's effect on creating a substantially limiting effect, the record is replete with evidence that Hartman notified the YMCA about her impairment as well as the effect it was having on her ability to perform her job absent accommodation. Medical documentation similarly establishes that absent accommodation, Hartman's impairment would be aggravated. CP 373-78, 386-87.

(d) The YMCA Had Notice of Hartman's Disability

Notice of an employee's disability and physical limitations triggers

the employer's burden to take positive steps to accommodate the employee's limitations. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995). However, the notice obligation under the WLAD is not onerous; it requires that an employee give simple notice of her disability. *Sommer v. Dep't of Soc. & Health Serv.*, 104 Wn. App. 160, 163-64, 174-75, 15 P.3d 664 (2001) (noting that an employee had given notice of a disability requiring accommodation by notifying his supervisor of his depression, informing him later that the stress of his current position was potentially very hazardous to his health, and requesting a reassignment).

The YMCA was on notice of Hartman's disability and its accompanying substantial limitations. On several occasions, beginning in June 2012, Hartman informed YMCA management that her work environment was causing her to suffer chronic headaches, congestion, chest pain, and sinus pressure, and that the effects were so serious that Hartman needed time off work, medical treatment, and accommodation in the form of toxin removal and proper ventilation. CP 40, 316, 318, 320, 356-58, 373-87, 453, 589. Although Hartman never provided the YMCA with medical documentation during her employment, the YMCA never requested it. Instead, the YMCA ignored Hartman's disclosures and requests for accommodation. Accordingly, Hartman has raised a genuine issue of material fact regarding whether she gave the YMCA notice of her

condition and its limitations. *Martini v. Boeing Co.*, 88 Wn. App. 442, 457, 945 P.2d 248 (1997) (finding that the employer had a duty to investigate further into the nature and impact of an employee's disability after it learned that he had symptoms of major depression).

(e) The YMCA Failed to Accommodate Hartman

The employee has the burden to show that a specific reasonable accommodation was available to the employer when it learned of the disability and that accommodation was medically necessary. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 643, 9 P.3d 787 (2000). If the employee meets this initial burden, the burden shifts to the employer to show that the proposed accommodation is not feasible. *Id.* An employer does not necessarily need to grant an employee's specific request for accommodation. *Id.* Rather, an employer must reasonably accommodate the disability. *Id.*

Reasonable accommodation envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 536, 70 P.3d 126 (2003). Where multiple potential modes of accommodation exist, the employer is entitled to select the mode. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 779, 249 P.3d 1044 (2011). The employer then has the

right to stand on its mode of accommodation – to the exclusion of other choices – if the accommodation is adequate. *Id.* If the attempted accommodation is not adequate, the employer may attempt another mode of accommodation, or assert that the remaining available modes of accommodation constitute an undue hardship. *Id.*

A *de minimis* effort to accommodate is insufficient. *Phillips v. City of Seattle*, 111 Wn.2d 903, 911, 766 P.2d 1099 (1989). An employer is *required* to make every reasonable accommodation that is not an undue burden. *Id.* Even when an employer has taken more than *de minimis* steps to accommodate the employee's disability, such as attempting to remove an aggravating work condition impacting the impairment, the employee can survive summary judgment if she adduces facts to show that the employer's efforts were not reasonable. *Frisino*, 160 Wn. App. at 784. For example, in *Frisino*, the employer took active steps to assist an employee suffering symptoms of respiratory distress, caused by her workplace exposure to mold and dust, including cleaning and removal of the contaminants from her classroom. *Id.* at 783. Despite those efforts, the Court concluded that *Frisino* had raised an issue of fact for the jury on whether the employer's proposed accommodation was reasonable where *Frisino* communicated ongoing symptoms and substantially limiting impairments following the cleaning of the classroom. *Id.* at 784.

The facts of this case weigh against summary judgment far more than the facts of *Frisino*. Hartman requested a reasonable accommodation of removing the toxins from her work environment. Nothing in the record reflects that removing the toxins in Hartman's work environment was an unreasonable mode of accommodation because it could not be achieved. Liability, thus, turns on whether that effort was effective in removing the cause of the substantially limiting symptoms. If it was not, the YMCA was entitled to undertake additional efforts at accommodation, such as a secondary attempt at removing the toxins, or to argue that additional accommodation efforts would have constituted an undue hardship.

Even if we assume that the YMCA's first attempt at accommodation was reasonable, the record is replete with evidence that it was ineffective at removing the cause of the substantially limiting symptoms. In cases where an objective standard is not available to measure whether an accommodation is effective, a good faith interactive process is especially important. *Frisino*, 160 Wn. App. at 781. During that process, the employer's duty to accommodate is continuing. *Id.* While an employer may choose to make only one attempt at accommodation, it risks statutory liability if that attempt is not effective, and it cannot show that additional efforts are an undue burden. *Id.* at 782.

Here, there is no dispute that the YMCA utterly failed to engage in

the interactive process. While the YMCA sent maintenance employees to work on the HVAC units in August 2012 (CP 308, 311, 495, 497-98, 507-09, 567-70), it failed to determine whether that work removed the cause of Hartman's substantially limiting symptoms.<sup>10</sup> In fact, the record reveals that the YMCA's attempt at removing the cause of the substantially limiting symptoms actually exacerbated those symptoms. Following the YMCA's superficial repairs of the units, Hartman made multiple complaints about experiencing substantially limiting symptoms caused by the units. CP 316, 320, 538-40.

On August 13, 2012, Hartman informed the YMCA that the children in her classroom had experienced an increase in fevers, runny noses, and hacking since the maintenance employees worked on the units. CP 316. Later that afternoon, Hartman left Morris a voicemail and explained that she had been diagnosed with mold exposure and that she needed to be removed from the situation. CP 318. The very next day, Hartman informed the YMCA that she was not comfortable coming to work until the units were properly cleaned and repaired. CP 320. There is no dispute that the YMCA utterly failed to respond to any of Hartman's disclosures or requests.

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<sup>10</sup> On August 13, 2012, the maintenance employees were dispatched to fix a bearing they had failed to properly fix on August 10, 2012. CP 289, 313, 318, 320.

Because no objective measure had been agreed to or recognized between Hartman and the YMCA that would permit the YMCA to determine whether its cleaning effort had reached a level at which Hartman would be free from substantially limiting symptoms, trial and error was appropriate to determine a reasonable accommodation. *Frisino*, 160 Wn. App. at 782. The YMCA, however, did not engage in the interactive process or try any further or additional accommodations following its first attempt at superficial and inadequate repairs.

Instead of alleging that further accommodation would have created an undue hardship, the YMCA maintains that it was not given enough time to attempt further accommodation before Hartman resigned in September 2012. CP 17-18. The YMCA, however, had an affirmative obligation to investigate whether a requested accommodation was reasonable, and if not, to explain why not. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001).<sup>11</sup> The YMCA and the trial court should not have relied upon pure speculation to determine, as a matter of law, that the available accommodation was unreasonable because it required more

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<sup>11</sup> When Washington State Courts have not addressed a particular issue, both the Ninth Circuit Court of Appeals and the Washington Supreme Court agree that federal case law interpreting the ADA and the Rehabilitation Act are instructive regarding claims of disability discrimination under the WLAD. *Duvall*, 260 F.3d at 1135-36; *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 118, 720 P.2d 793 (1986) (“[w]hen Washington statutes or regulations have the same purpose as their federal counterparts,

time to adopt. *Id.* This is especially true when Hartman produced evidence that the YMCA hired licensed and trained HVAC technicians, within weeks of her termination, to clean and repair the units. CP 338-45.<sup>12</sup>

Consequently, summary judgment on the reasonable accommodation claim was inappropriate. There are disputed issues of material fact as to whether reasonable accommodations were available. Taking all the facts in the light most favorable to Hartman, a jury could reasonably conclude that the reasonable accommodation of removing the contaminants and restoring proper air ventilation would not have been an undue burden during the three months in which Hartman repeatedly sought accommodation. Whether such accommodations were reasonable, or would have created an undue hardship for the YMCA, are questions of fact for the jury. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 644, 9 P.3d 787 (2000); *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 784, 249 P.3d 1044 (2011).

(3) The YMCA Retaliated Against Hartman

(a) Controlling Law

The WLAD prohibits employers from retaliating against

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[Washington courts] will look to federal decisions to determine the appropriate construction.”).

<sup>12</sup> *Frick v. Local 23 of Int'l, Longshore & Warehouse Union*, C12-2224 TSZ, 2014 WL 1047950 (W.D. Wash. 2014) (holding that unreasonable delay in providing an accommodation can provide evidence of discrimination).

employees for opposing acts violating its provisions. RCW 49.60.210; *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 618, 60 P.3d 106 (2002). To maintain her retaliation claim, Hartman must establish disputed issues of material fact that: (1) she participated in a statutorily protected activity; (2) an adverse employment action was taken against her; and (3) her activity and the adverse action were causally connected. *Estevez v. The Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005). The YMCA can rebut Hartman's prima face case with evidence of a legitimate nondiscriminatory reason for the adverse action, which Hartman can rebut by showing pretext. *Estevez*, 129 Wn. App. at 797.

(b) Hartman Engaged in Protected Activity

To prove a statutorily protected activity, an employee need not show that her employer's challenged conduct was unlawful under the WLAD. *Renz*, 114 Wn. App. at 619. On the contrary, an employee who opposes employment practices reasonably believed to be discriminatory is protected by the opposition clause whether or not the practice is actually discriminatory. *Id.*<sup>13</sup> Failure to reasonably accommodate an employee's disability is illegal under the WLAD and constitutes discrimination. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000).

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<sup>13</sup> Because this element requires only that an employee have an objectively reasonable belief that her employer's conduct was unlawful, Hartman can prevail on her

Seeking reasonable accommodation and opposing an employer's failure to accommodate are all protected activities under the WLAD. RCW 49.60.210(1).

Here, Hartman engaged in protected activity when she requested an accommodation for her disability. CP 40, 316, 318, 320, 356-58, 373-87, 453, 589. Even if Hartman did not have a disability, she reasonably believed that she had a disability worthy of accommodation. *Id.* Therefore, Hartman was engaging in protected activity for seeking accommodation even if accommodation was not appropriate.

Reasonable minds could believe that when Hartman opposed the YMCA's refusal to accommodate her, by removing the environmental toxins from her work environment, she engaged in a statutorily-protected activity. *Hansen v. Boeing Co.*, 903 F. Supp. 2d 1215, 1218 (W.D. Wash. 2012) (Taking adverse action against an employee for requesting a disability accommodation is itself a form of discrimination). Clearly, Hartman has met the first element of the test.

(c) The YMCA Took Adverse Employment Actions Against Hartman

In order to determine whether an employment action was "adverse" for purposes of a retaliation claim, the jury must evaluate the

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retaliation claim even if she cannot sustain her failure to accommodate claim at trial. *Id.*

specific conditions surrounding the employer's action to determine whether the change in employment conditions was more than a mere inconvenience or alteration of job responsibilities. *Tyner v. Dep't of Soc. & Health Servs.*, 137 Wn. App. 545, 564–65, 154 P.3d 920 (2007). In order to further the purposes of the anti-retaliation statutes, an action will be considered adverse if it is reasonably likely to deter employees from engaging in protected activity. *Daniel v. Boeing Co.*, 764 F. Supp. 2d 1233, 1246 (W.D. Wash. 2011); *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). The impact of the alteration should be judged from the perspective of a reasonable person in the employee's position.

Both the Ninth Circuit and Washington courts define adverse employment action broadly. The Ninth Circuit has held that the transfer of job duties and undeserved performance reviews constitute adverse employment actions, as well as soliciting negative feedback about an employee and changing an employee's schedule without notice. *Ray*, 217 F.3d at 1241-42. In comparison, Washington courts have held that unwarranted demotions, corrective action memos, performance improvement plans, and constructive terminations constitute adverse employment actions. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 483-84, 205 P.3d 145 (2009); *Coburn v. PN II, Inc.*, 372 Fed. Appx. 796, 800

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at 619.

(9th Cir. 2010); *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 785, 249 P.3d 1044 (2011).

Here, Hartman was subject to numerous adverse employment actions, including a frivolous PIP (CP 327), *Coburn*, 372 Fed. Appx. at 800 (noting that frivolous corrective action memos and PIPs constitute adverse employment actions), changes in scheduling (CP 329-60), *Ray*, 217 F.3d at 1242 (noting that changing an employee's schedule without notice may be an adverse employment action), solicitation of negative feedback (CP 329-31), *Ray*, 217 F.3d at 1242 (noting that soliciting negative feedback about an employee may be an adverse employment action), removal of job duties (CP 416-19), *Burchfiel*, 149 Wn. App. at 483-84 (noting that frivolous demotions constitute adverse employment actions), removal of Zoe from daycare (CP 290), and constructive discharge (CP 335-36), *Frisino*, 160 Wn. App. at 785 (noting that failing to accommodate an employee, and thereby forcing her resignation, may give rise to a claim for retaliatory discharge). Any one of these adverse employment actions was reasonably likely to deter employees from engaging in protected activity.

In response to Hartman's prima facie case, the YMCA has failed to offer legitimate reasons for its adverse employment actions. The YMCA conceded that it placed Hartman on a PIP and removed her daughter from

daycare, but speculated only that these actions did not impact the terms of Hartman's employment and were not an action of the employer's making. CP 18-19. The YMCA similarly acknowledged tracking Hartman's time, but alleged that other employees were similarly tracked. CP 622. The YMCA also admitted that it solicited negative feedback about Hartman and that it removed job duties from Hartman. CP 622-23. Instead of providing a legitimate reason for these adverse employment actions, the YMCA stated simply that no further "action" was taken against Hartman as a result of these actions. *Id.* Finally, as to Hartman's claim of constructive discharge, the YMCA argued nothing other than the claim independently fails. CP 18. Thus, of the six alleged adverse employment actions, the YMCA provided an explanation for just one, altering Hartman's schedule. The YMCA's explanation for altering Hartman's schedule is disputed in the record.

(d) Hartman's Conduct and the YMCA's Adverse Employment Actions Are Causally Connected

The only remaining question is whether there was a causal link between Hartman's protected activity and her discipline/dismissal. To show a causal connection, Hartman must provide evidence that the YMCA's motivation for the discipline/discharge was Hartman's exercise of her protected rights. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118

Wn.2d 46, 68, 821 P.2d 18 (1991). Hartman need not establish that retaliation was the sole reason for the adverse actions, but she must show that it was a substantial factor. *Allison v. Housing Auth. of City of Seattle*, 118 Wn.2d 79, 95-96, 821 P.2d 34 (1991). In recognition of the difficulty of proving motive, Washington courts have allowed an employee to establish a prima facie case of causation merely by showing that the employee participated in a protected activity, the employer had knowledge of the activity, and the employee suffered an adverse employment action. *Wilmot*, 118 Wn.2d 46 at 69-70.

Showing motive includes adducing sufficient evidence that the YMCA's reason for disciplining and dismissing Hartman is pretextual and unworthy of credence. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.3d 440 (2001). When a court inquires as to retaliatory motive, it will take into account the "[p]roximity in time between the adverse action and the protected activity, along with satisfactory work performance." *Campbell v. State*, 129 Wn. App. 10, 23, 118 P.3d 888 (2005).<sup>14</sup> The YMCA does not dispute that Hartman satisfactorily performed her job. CP 258-60.

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<sup>14</sup> There is no dispute that Hartman was an exceptional employee. Prior to reporting her disability and requesting an accommodation, Hartman was lauded by her peers and supervisors (CP 157-59, 258-60, 420-37); she similarly received an exemplary performance review less than a week before her constructive discharge. CP 258-60.

Hartman produced evidence that the YMCA was unhappy about her attempts to bring the HVAC problems to resolution. Proximity in time between a protected activity and an adverse employment action is a factor suggesting retaliation. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482, 205 P.3d 145 (2009). Far from showing concern about the effect that mold might be having on Hartman, the YMCA focused its efforts on quickly silencing Hartman. CP 401-02. One day after Hartman requested an accommodation, the YMCA placed Hartman on a PIP, with the threat of immediate termination. CP 327. Less than two weeks later, the YMCA altered Hartman's schedule (CP 329-31) and revoked her point of contact duties (CP 416-19). By the third week, the YMCA solicited negative feedback about Hartman from other YMCA employees (CP 333) and removed Zoe from its daycare (CP 290). These actions, coupled with the YMCA's refusal to engage in the interactive accommodation process, ultimately forced Hartman to resign. CP 335-36. There is ample evidence in the record to demonstrate that Hartman's protected activity of requesting accommodation was causally connected to the YMCA's many disciplinary reprisals and termination of her employment.

(e) The YMCA Failed to Rebut Hartman's Prima Facie Case

In response to Hartman's prima facie case, the YMCA claimed that

it had a legitimate reason for only two of its disciplinary actions – tracking Hartman’s time and for terminating Hartman. CP 14-16, 622. As to Hartman’s remaining allegations of adverse employment actions, the YMCA did not offer a legitimate, non-discriminatory explanation, consequently making Hartman’s retaliation claims unripe for adjudication on summary judgment. *Hotchkiss v. CSK Auto Inc.*, 918 F. Supp. 2d 1108, 1125-26 (E.D. Wash. 2013) (noting that summary judgment is inappropriate where employer offered no legitimate, non-discriminatory reason for adverse employment action).

As to the first disciplinary action, the YMCA admits that it tracked Hartman’s time and altered her shifts but contends that it similarly did so to other employees. CP 622. There is simply no evidence in the record to suggest that any other employees were tracked or that their schedules were altered. In fact, Mills could only recall two staff members ever having their time tracked, Hartman and Davis. CP 556-58. While Davis was tracked for failing to log in and out of the system, only Hartman was tracked for purposes of monitoring her movements throughout the CDC and for altering her work schedule. *Id.* The record is, thus, filled with contradictory evidence rebutting Morris’ testimony that she routinely tracked and altered the schedules of other employees.

As to the second disciplinary action – termination – the YMCA

asserts that it did not terminate Hartman but that she resigned. This is incorrect. Although voluntary resignation is seldom used as an employer defense in retaliation cases, it is frequently raised in the context of constructive discharge claims. Abandonment of employment in the constructive discharge context implies that the employee voluntarily left a job “because of a desire to leave, including such a desire motivated by dissatisfaction with working conditions.” *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 638, 700 P.2d 338 (1985). However, if an employee does not come to work because it jeopardizes her health, or because the employer is committing violations of the law, the employee has not abandoned the job. Instead, she has been constructively discharged. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 180, 125 P.3d 119 (2005).

Evidence that Hartman tried desperately to keep her job, but was unwilling to risk physical harm to do so, precludes judgment as a matter of law that the YMCA’s claim of voluntary resignation was not a pretext for dismissing her. Hartman presented evidence that, far from abandoning her position, she was actively trying to engage with the YMCA to obtain a reasonable accommodation. She contacted the YMCA numerous times, seeking information and assistance related to her disability. CP 316, 318, 320, 352-64, 369, 371, 589-90. The YMCA repeatedly refused to respond

and, instead, endeavored to retaliate against Hartman. As a result, Hartman was forced to resign. CP 335-36.

Moreover, the record is full of contradictions as to the YMCA's actions and motives related to overcoming the prima facie case, making summary judgment inappropriate. There is evidence in the record that the YMCA did not follow policy when issuing Hartman's PIP and when removing Zoe from daycare. CP 403-06, 559-61, 572-73. The record similarly indicates that no other employee's schedule was scrutinized or altered based on concerns about break times and coverage. CP 329-31, 549-58. Competing testimony about the job duties that Hartman's supervisor Mills expected her to perform and how those job duties suddenly varied from the YMCA's expectations following Hartman's disclosure of her disability and need for accommodation abound. CP 416-19, 546. The YMCA claimed that it was not given enough time to accommodate Hartman, but the record demonstrates that less than a month after Hartman tendered her resignation, the YMCA hired licensed and trained technicians to clean and repair the units. CP 338-47. The YMCA similarly claimed that no reasonable person would have felt compelled to resign, yet the record contains numerous complaints from staff about intolerable working conditions. CP 322-25.

Additionally, inconsistencies in the record raise an inference that

the YMCA was trying to terminate Hartman because she was asking for an accommodation. It does not matter which of the YMCA's explanations for Hartman's discipline or termination is more credible; it is not a suitable inquiry for summary judgment. These positions represent disputed issues of material fact that must be decided by a jury. They demonstrate why summary judgment on Hartman's retaliation claim should be reversed.

(4) The YMCA Illegally Constructively Terminated Hartman's Employment As a Result of Her Disability and in Retaliation of Her Disability

The YMCA constructively discharged Hartman in violation of the WLAD by failing to accommodate her and forcing her to resign. The YMCA also constructively discharged Hartman by making her work conditions so intolerable in retaliation for her seeking an accommodation for her disability.

(a) Controlling Law

Constructive discharge generally involves "deliberate acts by the employer that create intolerable conditions, thus forcing the employee to quit or resign." *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 179, 125 P.3d 119 (2005). To prove constructive discharge under Washington law, an employee must show that (1) the employer engaged in deliberate conduct which made the employee's working conditions intolerable; (2) that a reasonable person in the employee's position would

be forced to resign; and (3) that the employee resigned because of the intolerable conditions. *Allstot v. Edwards*, 116 Wn. App. 424, 433, 65 P.3d 696 (2003); *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188, 206, 279 P.3d 902 (2012). Intolerable working conditions exist where an employee is subjected to “aggravating circumstances or a continuous pattern of discriminatory treatment” on the part of the employer. *Allstot*, 116 Wn. App. at 433. The relevant question is whether a reasonable person would have felt compelled to resign. *Short*, 169 Wn. App. at 206.

(b) The YMCA Made Hartman’s Working Conditions Intolerable

A reasonable jury could conclude from the YMCA’s failure to take prompt remedial measures in response to Hartman’s request for accommodation, as well as its complete failure to communicate with Hartman about what measures were being taken, created intolerable working conditions. *Hotchkiss v. CSK Auto Inc.*, 918 F. Supp. 2d 1108, 1122-23 (E.D. Wash. 2013). The undisputed evidence demonstrates that Hartman repeatedly requested accommodation for her disability to no avail. CP 316, 318, 320, 352-64, 369, 371, 589-90. Not only did the YMCA refuse to communicate remedial measures to Hartman, but it similarly refused to attempt additional remedial efforts when its first attempt proved deficient. It was not until after Hartman left her

employment at the YMCA that it hired licensed and trained technicians to clean and repair the units. CP 338-47.

The YMCA similarly created intolerable working conditions by subjecting Hartman to numerous disciplinary reprisals after she requested accommodation. By punishing Hartman for requesting accommodation, the YMCA similarly forced Hartman's resignation. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 121 Wn. App. 295, 318, 88 P.3d 966 (2004). In *Korlund*, after reporting various safety and other concerns, the plaintiff was removed as the defendant's lead engineer. *Id.* After his reports provoked an investigation, of alleged abuses, the plaintiff became the target of the investigation and was accused of misconduct and threatened with termination. *Id.* There, the court held that these were deliberate acts by the defendant that a jury could find were aggravated circumstances or a continuous pattern of mistreatment. *Id.*

Like the defendant in *Korlund*, the YMCA engaged in an insidious pattern of disciplinary reprisals against Hartman for requesting accommodation. Hartman directs the Court to her analysis above regarding the disciplinary reprisals she suffered in retaliation for requesting accommodation. Like the YMCA's failure to accommodate her, the YMCA's targeted attempt at removing Hartman from her employment made Hartman's working conditions intolerable. Reasonable

minds could conclude that Hartman was forced out of her employment as a result of either the YMCA's failure to accommodate Hartman or its apparent attempt to forcibly remove her from employment.

(c) The YMCA Deliberately Created Intolerable Working Conditions That Forced Hartman to Quit

By deliberately creating conditions so intolerable as to make Hartman so ill that she had to leave work permanently is functionally the same as forcing her to quit. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 785, 249 P.3d 1044 (2011). If a jury concludes that Hartman experienced additional symptoms following the YMCA's first attempt at remedial efforts, and Hartman communicated those symptoms to the YMCA, then the YMCA's attempt at accommodation was ineffective. The YMCA was then required to undertake additional efforts at accommodation, which the record establishes it did not do.

Whether a reasonable person would have felt compelled to resign in Hartman's circumstance as a result of (1) the YMCA's failure to accommodate and/or (2) the YMCA's retaliation against her remains a question of fact. Evidence adduced at summary judgment weighs heavily in favor of Hartman as it establishes that many of Hartman's co-workers believed that the working conditions were, in fact, intolerable. CP 322-25.

(5) The Trial Court Incorrectly Excluded Hartman's Medical Records in its Oral Ruling on Defendant's Motion to Strike

The YMCA moved to strike portions of Hartman's medical records that related to causation. CP 621. The YMCA agreed that Hartman's medical records were admissible for diagnosis and treatment purposes, but it argued that the medical records were inadmissible for purposes of establishing causation. *Id.* Sua sponte, in its oral ruling on the YMCA's motion to strike, the trial court excluded the medical records in their entirety. RP 11. In its final order, however, the trial court ruled that the medical records were inadmissible only for purposes of establishing causation. CP 649-51.

Where the record includes both oral and written rulings on the same matter, the Court reviews the written opinion and not the oral statements. *U.S. v. Robinson*, 20 F.3d 1030, 1033 (9th Cir. 1994); *Ellison v. Shell Oil Co.*, 882 F.2d 349, 352 (9th Cir. 1989). An oral opinion is a tentative ruling and may be used to clarify, but not to contradict, a court's written decision. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211 (2000). The trial court's oral ruling contradicts its written opinion on the YMCA's motion to strike. The court's written opinion, therefore, controls.

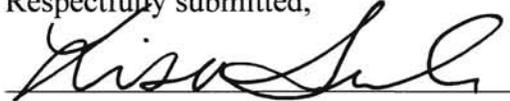
#### F. CONCLUSION

The YMCA did not meet its summary judgment burden to show that there are no disputed issues of material fact regarding Hartman's

claims. Conversely, there is ample evidence in the record from which a reasonable juror could conclude that the YMCA failed in its accommodation duties, retaliated against Hartman, and constrictively discharged Hartman. Therefore, the trial court erred in granting summary judgment in favor of the YMCA on this record. The order should be reversed, and this case remanded for trial on Hartman's claims.<sup>15</sup>

DATED this 4<sup>th</sup> day of September, 2014.

Respectfully submitted,



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<sup>15</sup> If Hartman is the prevailing party on this appeal, and she is ultimately successful at the trial court, the trial court should be directed to determine the award of fees for this appeal as part of the cost of the suit. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 786, 249 P.3d 1044 (2011).