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No. 71765-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SARA HARTMAN,
(Plaintiff/Appellant)

v.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF GREATER
SEATTLE, D.B.A. DALE TURNER FAMILY YMCA,
(Defendant/Respondent).

Appeal from Superior Court of King County

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant's appeal arises from a motion for summary judgment on numerous causes of action including negligence and intentional conduct as well as employment claims. Appellant's appeal limits the issues to only the employment claims, reflecting the frivolous nature of her claims including allegations that the YMCA intentionally harmed her. Appellant's baseless claims that the Respondent (hereinafter the "YMCA") had mold and toxins at its daycare are unsupported by any evidence or competent expert testimony. In spite of the lack of evidence showing any toxins or mold in the environment, the Appellant continues to throw around these allegations knowing that she has absolutely no proof in spite of a lengthy discovery period and opportunities to run her own tests. The YMCA's efforts to investigate and try to diagnose air quality issues was never good enough for the Appellant. Her claim of retaliation, constructive discharge and discrimination are without merit. The trial court's dismissal of this case was not legal error.

II. STATEMENT OF THE CASE

A. The Parties.

The YMCA of Greater Seattle is an organization that has numerous programs and branches in the Seattle/King County area. The Dale Turner Family YMCA is located in North Seattle and is one of several branches at

the YMCA. The Dale Turner Family YMCA operates a facility known as the Child Development Center or "CDC." The CDC is a daycare/pre-school operating out of commercial, ground floor space in the Tressa Apartment Complex. (CP 32). The YMCA leases this space from the developer of the project. (CP 32). The landlord, under the lease, is responsible for all maintenance of Heating and Cooling Equipment (HVAC) at the CDC. (CP 32-35). However, this was not clear to the two lead YMCA maintenance people, Mike Phillips and Bob Haskell, and the Executive Director of the Dale Turner Family YMCA, Courtney Whitaker. (CP 180:12-181:16). It was not until shortly after Appellant resigned that the landlord realized it had not been following through on its obligations and took on the responsibility of maintenance. Appellant and her husband, Peter Hartman, along with their daughter were members of the YMCA and their daughter, Zoe, attended the CDC. (CP 56:8-20). Zoe's tuition was authorized by Mr. Hartman, to be paid in three monthly payments, automatically withdrawn from his account, to be paid in full by the 25th of each month. (CP 37-38) When Mr. Hartman agreed to this payment plan on February 6, 2012, he agreed that if payment was not paid in full by the due date, then the child would not be permitted to attend the program until all fees were paid. (*Id.*) In March 2012, after Appellant's daughter had attended the CDC for a year, Appellant was hired as an

assistant teacher at the CDC. (CP 57:25-58:16; 59:25-60:1) In this role, she was hired to work alongside lead teacher, LaTisha Davis, in the “Toddler” room. (CP 61:11-13). Appellant resigned from her job on September 6, 2012, by writing a letter and giving it to her supervisor. (CP 40).

B. HVAC Maintenance.

One of Appellant’s reasons for resigning, and one of her primary claims in this case, is that the YMCA did not properly maintain the HVAC system at the CDC. (*Id.*)¹The first date that an HVAC issue was raised by Appellant was on June 5, 2012.

On June 5, 2012, Appellant asked her supervisor at the time, Sarah Morris, if her husband, Peter Hartman, an HVAC technician, could look at the HVAC units at the CDC because it was suspected by Appellant that they were in need of repair. (CP 62:10-63:6). Ms. Morris gave Appellant permission. (*Id.*) On June 5, 2012, Mr. Hartman inspected the HVAC equipment at the CDC. (CP 89:10-14). He also spoke to four teachers about what issues, if any, they were experiencing. (CP 79:7-12). He replaced some of the filters, but not all of them, as he did not have the right size replacements. (CP 81:5-18). None of the teachers that Mr.

¹ Appellant’s brief is full of references to inspections and repairs as inadequate or superficial. She also references staff members being untrained, uncertified and failing to wear protective gear. There is no competent evidence supporting the standard of care and Appellant’s speculative arguments in the statement of the case should be disregarded.

Hartman spoke to reported illnesses on the part of themselves or the kids. (CP 79:19-23). During his inspection, Mr. Hartman took four pictures of the inside of the HVAC unit. (CP 86:5-7 and 42). Although Mr. Hartman now claims he observed mold on June 5, 2012, he did not take any pictures of mold on June 5, 2012, because it was his opinion that other issues such as a frayed belt, air circulation, and the filter situation were of a more immediate concern. (CP 86:8-87:12). In addition to replacing some filters, he also opened the air dampers to an industry standard 10% so that additional outside air would increase the air circulation. (CP 82:7-24). According to Mr. Hartman, the reason the mold was not an immediate concern was because, with correct air movement, the mold could not survive and would just die out. (CP 87:11-12).

On June 21, 2012, more than two weeks after his inspection and maintenance of the HVAC units, Mr. Hartman sent an email with four photos taken on June 5, 2012, to Bob Haskell, a maintenance person at the YMCA. (CP 85:18-24 and 42).

Prior to receipt of the June 21, 2012, email from Mr. Hartman, and sometime in early June 2012, Mr. Haskell went to check out a complaint about a smell at the CDC. (CP 95:18-23). He went a second time in June to determine what parts he needed in response to the email received from Mr. Hartman on June 21, 2012. (CP 95:24-96:11). When he went out to

determine parts needed, Mr. Haskell did not see any mold or moisture in the HVAC unit. (CP 100:22-101:4). Filters and a belt were ordered on June 26, 2012. (CP 103). After Mr. Haskell returned from vacation he and another maintenance person, Adam Wegener, went out to the CDC in mid-to-late July 2012 to try and install the parts, but they were told not to do the work while the kids were in the class. (CP 97:3-22, 98:8-99:6). The parts were not installed until early August when Mr. Wegener went back out after hours.

On August 7, 2012, Ms. Morris sent an email to Mr. Haskell and Mr. Wegener in maintenance about getting the HVAC cleaned. (CP 105). Ms. Morris wrote that the staffs' and participants' health were at the top of her priority list. (*Id.*) In the email, Ms. Morris suggested that Appellant's husband could do the work if the maintenance staff was too busy. (*Id.*) This email was sent less than 20 minutes after Ms. Morris received a text message from the onsite director, Andrea Mills, reporting that a smell was noted and that she was getting headaches. (CP 107).

Peter Hartman returned on August 8, 2012, at the request of his wife. (CP 83:17-84:21 and 295). He took additional pictures and prepared a list of items for the YMCA to perform on the HVAC equipment. (CP 295). That same day, Mr. Wegener came out to do work on the HVAC at the CDC according to his journal. (CP 109). He testified he may have

done the work on August 9, 2012, but either way, he performed maintenance one of those evenings. (CP 115:25-116:3). Mr. Wegener testified that he replaced all of the filters that evening, vacuumed the area where the filters were placed, sprayed the coils with Lysol, and vacuumed the coils. (CP 112:1-114:1).

On the morning of August 9, 2012, Mr. Haskell forwarded Mr. Hartman's emails to Mike Phillips, who is in charge of maintenance for the entire Greater Puget Sound YMCA. (CP 179:5-20 and 295). Mr. Phillips is licensed to work on HVAC refrigeration equipment. (CP 174:24-175:10). No other licenses are required to work on HVAC equipment except for a low voltage electrical license for the electrical aspects of the equipment. (CP 176:25-177:4). This was the first time he was made aware of any problems at the CDC. (CP 178:22-24).

On Friday, August 10, 2012, Mr. Phillips, Mr. Maldonado-Gonzales, and Mr. Hussein went to the CDC to inspect the situation. (CP 123:11-16). Under Mr. Phillips' instruction, Mr. Maldonado-Gonzales and Mr. Hussein performed maintenance on the equipment inside the CDC, as well as the outside condenser units. (CP 123:18-129:21). This work involved inspecting the equipment, cleaning the outside units, and replacing bearings in one of the units in the CDC. (*Id.*) They did not end up replacing the filters, because the filters were brand new and they did

not know Mr. Wegener had been out in the previous two days. (CP 125:16-24). On Monday, August 13, 2012, a loud noise was reported. Ms. Morris sent an email to Mr. Phillips requesting that he follow up on the maintenance. (CP 154).

On September 20, 2012, Mr. Phillips was asked to create a service report by Ms. Morris so that she could share what work was performed with the State of Washington Licensor for the CDC. (CP 135-136 and 182:11-18). The form was dated August 10, 2012, to reflect the same date that Mr. Phillips, Mr. Maldonado-Gonzales, and Mr. Hussein went to the CDC. (CP 133). In response to the request for the report, Mr. Phillips asked in that same email if Mr. Wegener had been out to vacuum out the units. (CP 135-136). Mr. Wegener replied that he did get out there to vacuum the dust and clean out the condensation traps. (*Id.*) On September 20, 2012, Mr. Wegener also called Performance Mechanical to come out and do an evaluation of the equipment. (*Id.*) On September 21, 2012, Performance Mechanical performed an evaluation of the equipment – no mold or other problems were identified in the report. (CP 138). The professional who performed this inspection also confirmed in a declaration that he found no mold and made very few changes to the system. (CP 644-648). On October 18, 2012, Mr. Phillips stopped by the CDC to check on the ventilation. (CP 140). He wrote in this email that he talked

to staff and was informed that everyone was feeling fine and that no one was complaining of headaches or any of the symptoms experienced previously. (*Id.*) Finally, the YMCA hired URS Corporation to perform mold air sampling, which did not reveal problems. (CP 142-154).

C. The Conversation Between Appellant and Maintenance on August 13, 2012.

Appellant was at work on Monday morning, August 13, 2012. She sent a text to Ms. Morris reporting that the “unit” in the toddler room was making a different and loud noise. (CP 156). In response to the email from Ms. Morris (CP 154), Mr. Phillips sent Mr. Maldonado-Gonzales and Mr. Hussein to investigate the loud noise. (CP 130:9-131:20).

While Mr. Maldonado-Gonzales and Mr. Hussein were at the CDC, Appellant spoke to Mr. Maldonado-Gonzales; this was observed by LaTisha Davis and Mr. Hussein. Ms. Davis observed the interaction between Appellant and the two maintenance men. (CP 159:22-24). She recalled seeing that the men, Mr. Maldonado-Gonzales and Mr. Hussein, were uncomfortable. (CP 161:19-162:10). Ms. Davis felt bad about the interaction and went to apologize to the two men. (*Id.*) At some point, Ms. Davis felt the interaction was significant enough to report it to her supervisor, Ms. Mills. (CP 160:24-161:5). She told her boss that Appellant had questioned maintenance about what work had been done

and that Appellant was “pretty assertive and aggressive” in the way she talked to maintenance. (CP 161:10-15). Mr. Hussein also observed the conversation between Appellant and Mr. Maldonado-Gonzales. (CP 119:18-23). According to Mr. Hussein, Appellant called Mr. Maldonado-Gonzales a liar. (CP at 120:2-5). She also told them that she knew more than they did. (CP 120:6-7). Mr. Hussein observed Mr. Maldonado-Gonzales getting red and shaking; he was worried he was going to have a heart attack. (CP 122:1-4). Mr. Hussein found the manner in which Mr. Maldonado-Gonzales was being treated to be insulting and he was considering quitting his job. (CP 122:15-20). Mr. Maldonado-Gonzales said that Appellant was “screaming” at him. (CP 166:21-24). Mr. Maldonado-Gonzales did not even know who Appellant was at the time and did not know her name. (CP at 169:2-5). Mr. Maldonado-Gonzales reported the incident to his boss, Mr. Phillips, and explained what happened. (CP 168:20-23). Mr. Maldonado-Gonzales told Ms. Morris personally that he had never been treated so poorly in his career. (CP 189:21-190:2). In addition, while addressing Appellant’s summary judgment declarations from YMCA employees, it was discovered that Appellant’s inappropriate interaction with maintenance was overheard by Lauren Bridges, who described the interaction as rude and recalls that

Appellant said the maintenance men were lying about the work they had performed. (CP 641-643).

Following the interaction with maintenance, Appellant went to a doctor appointment; on her way back to work, she made a phone call to Ms. Morris. In her voicemail message, Appellant admitted saying to the maintenance men that they were lying to her and that their answers to her questions were “really angering.” (CP 185:21-187:19 and 192:8-19) Appellant agreed it was possible she used these words. (CP 71:27-72:8). Ms. Morris called Mr. Phillips and also spoke to Mr. Maldonado-Gonzales and her boss, Ms. Whitaker, about the incident. (CP 189:8-190:2; 191:8-192:17). It was decided by Ms. Whitaker and Ms. Morris that after documenting the incident, Appellant would be put on an improvement plan. (CP 191:10-17).

D. Appellant’s Performance Improvement Plan.

According to her letter, one of the reasons Appellant resigned her position was due to the Performance Improvement Plan, as she felt that it was used to retaliate against her for complaining about the HVAC system as opposed to her disability. (CP 40). The Appellant’s Performance Improvement Plan or “PIP” was dated August 15, 2012. (CP 171). The Performance Improvement Plan was written up based on the statements of three witnesses and the voicemail message from Appellant to Ms. Morris.

(CP 185:21-192:19).² Appellant met with Ms. Morris, Ms. Mills, and Ms. Davis at a Starbucks in Lynnwood. (CP 64:18-22). Appellant testified that she thought the meeting was to discuss HVAC issues and not a Performance Improvement Plan. (CP 64:24-65:1). The Performance Improvement Plan did not result in termination, suspension, or demotion. (CP 171). After receiving the document, Appellant told her side of the story. (CP 66:13-19).³ Although Appellant complained that she had not been asked her side of the story prior to the Performance Improvement Plan being drafted, the YMCA does not require that every employee involved be interviewed prior to being given a Performance Improvement Plan. (CP 194, at ¶2). There are many other employees within the agency who received Performance Improvement Plans in 2012, and these plans are meant to coach a staff member. (*Id.*) In this case, it was meant to prevent further disrespectful conversations. (CP 171). Furthermore, Appellant had an opportunity to include her response on the Performance Improvement Plan (CP 194 at ¶2 and 171).

² Appellant's brief asserts at p. 11 that the YMCA only spoke with Maldonado before deciding to place Appellant on a PIP. However, Appellant does not provide any cite to the record for this alleged fact. The opposite of this allegation is supported by the record.

³ Appellant wrote in her brief that she was told to stop bringing up the HVAC issues and Appellant cited CP 401-02. The cite is to the deposition of Tish Davis and the cite does not include testimony that Appellant was told to stop bringing up HVAC issues.

E. Appellant's Payment History for Her Childcare.

The second basis that Appellant gave for her resignation had to do with her daughter's tuition not being withdrawn from her account in August 2012 for her childcare in September 2012. (CP 40). Funds were not pulled from Appellant's account in August 2012 because of an administrative error at the YMCA – which meant that the September tuition was not paid. In February 2012, Appellant or Appellant's husband changed the timing of payments from once a month to three times per month. (CP 37-38). Appellant testified that she monitors their bank account and payments being withdrawn out of the account throughout the month. (CP 68:8-13). Appellant claimed in her resignation letter that the YMCA put her in a difficult position causing her to lose her childcare. (CP 40). Appellant testified that the funds that were not pulled from her account in August 2012 were no longer in her account because they had been spent on other things. (CP 70:4-11). Appellant agreed that the failure of the YMCA to pull the funds automatically at three different times during the month of August 2012 was not intentional, but rather it was a mistake. (CP 74:17-75:2).

Although Appellant infers in her resignation letter that she had no prior payment issues, she had previously had several instances where her payments for childcare were returned, and follow up letters regarding this

issue were mailed to her husband. (CP 196-199) In particular, payments did not go through on March 26, 2011; May 26, 2011; June 25, 2011; July 26, 2011; and January 25, 2012. (CP 197, at ¶¶1-5). In each instance, the payment was made in full by the Appellant (or her husband) within seven days, when the Appellant or her husband authorized a second attempt to charge the same card. (*Id.*)

Although Appellant felt the failure to automatically withdraw the payments was not intentional, she did feel like the failure to call her about the payments was personal. (CP 74:17-75:2). However, the registrar did call Mr. Hartman in August 2012 about the missing payment; Mr. Hartman told her that he would talk to his wife about the payment. (CP 92:3-11). However, Mr. Hartman did not talk to his wife; his wife found out about the past due payments on September 4, 2012. (CP 69:3-5). Appellant infers through her counsel's arguments that by calling Mr. Hartman instead of Appellant, that it was a form of retaliation. However, Appellant never told the YMCA registrar not to call her husband about past due payments. (CP 67:8-10). In fact, Mr. Hartman had received this type of phone call many times in the past and this phone call was no different than those prior phone calls. (CP 91:12-23).

Finally, the agreement entered into by Mr. Hartman states that if payment was not paid in full by the due date, then the child would not be permitted to attend the program until all fees were paid. (CP 37-38).

F. Appellant's Resignation.

Appellant submitted her letter of resignation on September 6, 2012. (CP 40). She claimed that her resignation was due to the failure to maintain the HVAC system and the failure to collect her daughter's tuition during the month of August. (*Id.*) Appellant brought this lawsuit alleging that the conduct of the YMCA was intentional in trying to injure the Appellant and discriminatory against her due to her disability. (CP 658-672). The facts do not support Appellant's claims.

III. ARGUMENT

A. Standard of Review.

A motion for summary judgment presents a question of law reviewed de novo. *Osborn v. Mason Cnty.*, 157 Wn. 2d 18, 22, 134 P.3d 197 (2006). An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); *McBride v. Walla Walla Cnty.*, 95 Wn.App. 33, 36, 975 P.2d 967 (1999).

B. The Appellant's Accommodation Was Ongoing at the Time She Chose to Quit and Therefore She Cannot Establish a Failure to Accommodate.

Appellant cannot establish a failure to accommodate for a variety of reasons. To establish a prima facie case for disability discrimination under a failure to reasonably accommodate theory, an employee must prove that: (1) she had a sensory, mental, or physical abnormality that substantially limited her ability to perform her job; (2) she was qualified to perform the essential functions of the job in question; (3) she gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality. *Anica v. Wal-Mart Stores, Inc.* 120 Wn.App. 481 (2004).

In 2007, the legislature amended the WLAD to adopt a definition of disability that supercedes the prior requirement that medical necessity was the sole basis for a right of accommodation. *Johnson v. Chevron U.S.A., Inc.*, 159 Wn.App. 18, 30 (2010). Under the statute, either the impairment must be the source of 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.” (*Id.*)

1. **Appellant did not have a substantially limiting impairment.**

First, Appellant must prove that she has a disability. Appellant's condition was comparable to cold and flu symptoms. While she attributed it to the HVAC system, the truth is that no one has ever proven it and it is all circumstantial absent an expert who can link Appellant's symptoms to the particular source of the problem. Under the current definition of disability, the impairment must be the source of 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 U.S.A., Inc.*, 159 Wn.App. 18, 30 (2010). Appellant cannot show that the impairment was the source of a "substantial limitation." Appellant had flu-like symptoms that were not severe enough to see a doctor until mid-August, and were not severe enough to keep her home sick more than any other employee suffering from the flu. In fact, Appellant has not supplied any evidence of excessive absences due to illness or medical treatment prior to August 13, 2012. The lack of facts in this regard show that Appellant's symptoms were not a substantial limitation as she continued to work.

Appellant argues in her brief that the YMCA regarded Appellant as disabled and therefore satisfying the first element. This claim was not raised in the underlying summary judgment argument. However, in support of this theory, Appellant cites to cases outside the jurisdiction, that did not consider RCW 49.060.040(7)(a) or any other Washington law in its analysis. Appellant claims that because she complained about the smells in the CDC that she therefore was regarded as disabled. She also appears to claim that because the YMCA made efforts to identify the source of a smell that the YMCA admitted that it believed Appellant was disabled. This leap in logic would essentially mean that anytime an employer made repairs to HVAC equipment due to a complaint, then it was an admission that an employee was disabled. Appellant's theory of this case would broaden the definition of disability unreasonably. Furthermore, even under the out of jurisdiction cases she relies upon, it is clear that the subjective belief of the employer is paramount to proving this theory. The fact that the YMCA engaged in a process to repair HVAC equipment does not mean that it regarded Appellant as disabled. No reasonable person could believe that theory. At most, Appellant was regarded as "disabled" on August 13, 2012 following her first doctor appointment and even on that date, Appellant continued to work while the YMCA continued to work on the HVAC equipment. Prior to that, not

even Appellant believed her health was an issue because she never sought out medical treatment for herself.

2. **Appellant's notice was insufficient to trigger a duty to accommodate.**

With respect to the third element, Appellant must prove she gave notice of the abnormality and its accompanying substantial limitations. *When* Appellant gave notice under the law is an element that she must establish. Appellant argues that June 2012, was when she gave notice.⁴ However, simply notifying the employer of a suspicion that there are problems with the HVAC does not put an employer on notice of “an abnormality and its substantial limitations.” At best, notice took place on August 13, 2012, when Appellant called Ms. Morris and told her that she had a condition that her doctor believed was related to mold. However, even then, Appellant did not put the employer on notice of the associated substantial limitations. Appellant admits she did not provide the medical records to her employer and yet infers that the YMCA was required to ask for these records for purposes of notice. Appellant does not cite to any legal authority for this proposition. The only legal authority is that

⁴ At p. 28 Appellant cites to CP 40, 316, 318, 320, 356-358, 373-87, 453, 589 to show notice as early as June 2012. However, none of these cites support notice in June 2012. At most, CP 453 shows that Appellant recalls having a headache in June but she did not testify that she gave notice.

Appellant had the duty to put the YMCA on notice of her substantial limitations and she did not.

3. **The YMCA did not fail to adopt measures to fix the HVAC and it is not proven that the HVAC measures were medically necessary to accommodate Appellant's abnormality.**

With respect to the fourth element, the Appellant must show that the YMCA failed to affirmatively adopt measures that were available to it and medically necessary to accommodate the abnormality. *Anica v. Wal-Mart Stores, Inc.* 120 Wn.App. 481 (2004). The evidence presented at summary judgment by Appellant was that sufficient notice, if provided at all, was not provided until August 13, 2012. By August 2012, the YMCA had made efforts to identify whether there was a problem with the HVAC or something else. Appellant's attempt to twist her perception of inadequate repairs of an HVAC system into a discrimination claim must be rejected.

Appellant's facts imply, without any basis, that YMCA employees were untrained and performed inadequate inspections. However, there is absolutely no competent evidence to support this ridiculous assertion. Attempting to discover the cause of a smell does not give rise to a failure to accommodate. Appellant did not give notice of her condition until

August 2012 as she readily admits in her brief. The YMCA did adopt measures that did eventually resolve the issue.

There is no evidence at all that the YMCA was notified by Appellant as to what her doctors said was medically necessary to resolve her condition. Appellant chose to go to work and there was nothing stopping her from staying home sick, going to a doctor earlier than she did, or taking other steps to protect herself. She knew that the YMCA was making efforts to figure out if the HVAC system had an issue. Appellant's brief recklessly uses terms like "toxins" and "mold" and yet Appellant made no effort in discovery to verify any of this was true. All of the evidence provided is that Appellant's complaints of mold and toxins were unfounded. Appellant's attempts to create a health hazard after the fact to support her disability claim is exactly the type of case that should not survive summary judgment. Some level of proof showing a problem existed and that the YMCA ignored is necessary. Here it is just the opposite, no problem was verified and yet the YMCA endeavored to try to determine if there was a problem.

The problem, whatever it was, was eventually resolved to a point where those few employees, who were experiencing symptoms, reported resolution by October 2012. The question here is whether the YMCA met its obligations under the statute to accommodate, even if we assume

Appellant gave notice of a disability. Here the YMCA was attempting to fix the problem. Appellant's husband even made efforts to resolve the problem. Since no mold was ever found, the nature of the problem was less obvious. The maintenance of the equipment and inclusion of outside fresh air appeared to clear up the situation. The problem is that Appellant quit before the YMCA had an opportunity to exhaust all efforts to try to fix the problem or "accommodate" the Appellant. The statute does not limit the employer to only one attempt at accommodation. *Frisino v. Seattle School District No. 1*, 160 Wn.App. 765 (2011). An employer's previously unsuccessful attempts at accommodation do not give rise to liability if the employer ultimately provides a reasonable accommodation. (*Id.*, citing *Sharpe v. Am. Tel. & Tel. Co.*, 66 F.3d 1045, 1051 (9th Cir. 1995)). This process is an interactive process between the employer and employee. (*Id.*) Although the *Frisino* case involved an environmental problem over a period of several years, the case is still instructive here. Like the *Frisino* case, the effectiveness of the accommodation provided by the employer depends solely on whether Appellant's subjective complaints are resolved by the accommodation. (*Id.*) When Appellant resigned, the opportunity to accommodate her condition was lost through no fault of the YMCA because the ability to determine if the accommodation was successful had been lost. Because other employees appeared to improve

and return to normal by October 2012, it is reasonable to expect that Appellant's condition could also have resolved in a similar fashion. When she resigned, the ability to fulfill the accommodation requirement was lost. As a result, the YMCA could not have violated the statute since it did not stop trying to accommodate the Appellant.

Appellant claims that the YMCA failed to engage in an interactive process. However, her only basis for this is that she believes the YMCA was required to keep her informed of all efforts to repair the HVAC system, even prior to her ever giving notice of a disability. Appellant's argument is a consistent theme throughout the case. Appellant believed that her level of authority was greater than the position of assistant teacher that she held. She felt it was in her purview to demean and belittle others like maintenance personnel in spite of her position. Appellant left the YMCA before any further interaction could take place. The only interaction that was necessary was whether she had ongoing symptoms. Other employees also complained about the HVAC and they did not leave nor were they discriminated against. Appellant's claim of discrimination is not unsupported by the evidence.

C. The YMCA Did Not Retaliate Against the Appellant.

Appellant's resignation was voluntary and does not rise to the level of a constructive discharge. Appellant also claims that she was retaliated

against. Assuming that she cannot prove a constructive discharge, in order to prove retaliation, the Appellant must use some other adverse employment action to prove retaliation. To establish a prima facie case of retaliation, Appellant must prove that: (1) she engaged in protected opposition to discrimination; (2) the YMCA took an adverse employment action against her; and (3) there is a causal link between the protected activity and the adverse employment action. *Tyner v. DSHS*, 137 Wn.App. 545, 563 (2007) (affirming summary judgment in favor of employer where employee failed to establish retaliation).

1. **Appellant did not engage in protected opposition to discrimination.**

First, Appellant's protected opposition to discrimination presumably is her claim that she asked to have repairs made to the HVAC. This does not constitute a protected activity on its own. Appellant must request accommodation which is not as simple as requesting repair to the HVAC. It requires that the employer have notice as discussed in the prior section. The earliest possible time this notice occurred was on August 13, 2012. Investigation and repairs of the HVAC had already taken place by August 13, 2012. Appellant's ongoing complaints were related to her unfounded claim that no repairs or investigation had taken place. The fact that Appellant did not know the details of what efforts had been made

after hours to investigate any HVAC issues does not create a cause of action.

2. **Appellant cannot establish an adverse employment action.**

Appellant's claim fails because she cannot prove the second element that the YMCA took an adverse employment action against her. Appellant claims that the constructive discharge was adverse, along with the Performance Improvement Plan, childcare payment problem, limitation on her schedule, solicitation of feedback from co-workers, and an alleged demotion. None of these give rise to an adverse employment action and each is addressed below. Appellant's constructive discharge claim is addressed in subpart D below.

Appellant's Performance Improvement Plan arose from her inappropriate interaction with maintenance personnel. Three witnesses believed that Appellant acted in a manner that at best was "aggressive" and at worst disrespectful. A fourth witness, Lauren Bridges was discovered during the drafting of the reply brief on summary judgment and she claimed that Appellant acted rudely and called the YMCA maintenance personnel "liars." Appellant's managers disciplined her by placing her on a Performance Improvement Plan. Appellant was not terminated, suspended, or demoted. She did not suffer any adverse

employment decision other than to have her mistake pointed out and placed in her personnel file. It did not impact the terms of Appellant's employment. The consequences suffered by Appellant were minimal and did not rise to the level of adverse employment action.

The childcare payment problem also does not constitute an adverse employment action since it was not an action that was of the employer's making. Appellant admitted during her deposition that the YMCA's failure to withdraw funds from her account on three occasions in the month of August was simply an administrative error and not a deliberate act. Appellant is speculating – without any evidence – that the demand to pay in full the entire childcare balance was a deliberate act by the YMCA. Appellant never made any attempt to make alternative arrangements for a payment plan. Furthermore, even if we assume that a full payment was demanded, the YMCA contract with Mr. Hartman certainly allows for this possibility. Claiming that enforcing a contract is a deliberate act in violation of the Washington Law Against Discrimination is ridiculous. The reality is that Appellant is blaming the YMCA for her failure to manage her own finances. The funds, if not withdrawn by the YMCA in August, should have been available on September 4, 2012. Instead, Appellant claims that she used these funds on something else. Appellant's failure to follow a budget cannot be a deliberate act on the part of the

YMCA. Given past history, it would not have been foreseeable by the YMCA that the Appellant would have spent the money. Furthermore, Appellant's husband admits that he was told about the payment problem the week before and he apparently failed to discuss this issue with his wife. The failure of Mr. Hartman to talk to Mrs. Hartman cannot be a deliberate act on the part of the YMCA. Appellant's husband signed a contract obligating him to these fees as long as his daughter attended the CDC. Enforcing such a contract does equate to a wrongful constructive discharge.

A contract that is independent of one's employment – like the childcare payment agreement – cannot constitute an adverse employment action. Appellant and her husband have an independent obligation to make payments pursuant to the contract, whether Appellant was employed by the YMCA or not.

Appellant asserted for the first time in her response brief three new alleged adverse employment actions. There is no evidence she ever claimed these were adverse employment actions in her deposition or in discovery responses. These three theories are nothing more than her counsel trying to create a case where none should exist. The three additional claims of adverse employment action are addressed below.

Appellant claims that YMCA scrutinized and regulated Appellant's shifts at work so that she could not take breaks at the end of her shift to accommodate doctor's appointments. This is allegedly supported by one email wherein Ms. Morris asked Ms. Mills about Appellant's time entries. However, Ms. Mills testified that she never told Appellant she could not take time off for doctor appointments or that her schedule could not be adjusted. (CP 637:6-12). Furthermore, there was nothing unusual about Ms. Morris reviewing an employee's time – she did it for everyone. (CP 640:2-7). Ms. Hartman's schedule was not limited in preventing her from going to her doctor appointments. There is no evidence from Appellant that enforcement of her schedule was an adverse employment action or that she was ever prevented from seeing her doctor. This was not an adverse employment action.

Second, Appellant claims that negative feedback was solicited. In order to support this theory, she relies on an email from September 4, 2012, written by the registrars, Kim Young and Lindsey Miller. However, this theory is completely void of any evidence that "action" was taken against the Appellant. In fact, Appellant resigned two days later calling into question the possible causal connection, which is addressed below. This alleged "adverse employment action" fails to support

Appellant's claims. The record is void of evidence that any action was taken or that Appellant suffered some repercussions.

Third, Appellant claims she was demoted. This allegation is supported by misrepresenting the testimony of Andrea Mills. Appellant's job never included contacting maintenance personnel in spite of the inference in Appellant's brief. Furthermore, Appellant's job never included contacting the registrar, as Ms. Mills filled that role. (CP 634:20-635:22). Contrary to Appellant's assertion, Ms. Mills never testified that Appellant's job as "point person" included making contact with the registrar; it was limited to being the contact person in the morning between parents and Andrea Mills. (CP 633:10-23). It was not Appellant's job to contact the registrar. (CP 642, at ¶5). No job duty assigned to Appellant was ever taken away. At best, duties Appellant tried to assume were taken away as the duty belonged to someone else – in this case, Ms. Mills. There is no evidence showing that Appellant was demoted or that she was divested of job duties. This alleged demotion is a creation of Appellant counsel's argument, unsupported by the evidence.

3. There is no evidence of a causal link supporting Appellant's claim of retaliation.

Appellant's claim also fails on the third element because she cannot establish a causal link between her adverse employment action

(Constructive Discharge, Performance Improvement Plan, childcare payment issue, limitation of schedule, negative feedback or demotion) and her protected opposition, nor has she presented any evidence of a retaliatory motive. Causation only exists if “the particular employee’s activity ... was a substantial factor ... in the particular employer’s decision ...” *Lins v. Children’s Discovery Center of America, Inc.*, 95 Wn.App. 486, 492, 976 P.2d 168 (1999); accord, *Havens v. C& D Plastics*, 124 Wn.2d 158, 178, 876 P.2d 435 (1994) (Appellant must establish sufficient nexus between the protected activity and the adverse action). Mere temporal proximity between her constructive discharge or discipline is not enough to establish causation. *Tyner*, 137 Wn.App. at 565 (without more, Appellant’s assertion of temporal proximity was “insufficient to defeat summary judgment”). Appellant cannot prove a causal link between the PIP and her protected opposition. There is no evidence proving Appellant’s claim that the PIP was fabricated. Her only evidence is that the PIP occurred one day after seeing a doctor. Appellant cited *Coburn v. PN II, Inc.*, 372 F.App’x 796, 800 (9th Cir. 2010), an unpublished opinion, for the proposition that causation can be inferred from timing alone. Unpublished opinions cannot be relied upon. Published Washington Law is clear that mere temporal proximity between a constructive discharged or discipline is not enough to establish causation. *Tyner v. DSHS*, 137

Wn.App. 545, 565 (2007). In particular, Appellant's theory of temporal proximity is her only evidence that the PIP was causally connected to some protected opposition. Absent some evidence of pretext, Appellant's claim cannot survive by relying on the PIP.

Appellant has presented zero evidence of a causal link between her protected activity – namely her request to have the HVAC system repaired and cleaned – and her alleged adverse employment actions. The requests for repair began in June 2012, but Appellant never endured any alleged retaliatory conduct until August 14, 2012, at the earliest. There is no evidence that the persons who disciplined Appellant were upset with Appellant for requesting repairs be made to the HVAC system. On the contrary, if this were the basis for retaliation, then other employees who reported similar symptoms as Appellant would have been a target for retaliation. It was just the opposite. The YMCA made efforts to identify the problems, if any, with the HVAC system. There is no evidence of a sufficient nexus between protected activity and some type of adverse employment action. Appellant fails in proving her retaliation claim.

D. Appellant's Claim for Constructive Discharge Is Not Supported by the Evidence and Was Properly Dismissed.

Appellant resigned her employment on September 4, 2012. She is now claiming she was constructively discharged in order to support her

claims of wrongful discharge and disability discrimination. Both claims should fail when Appellant's constructive discharge claim is dismissed. An employee's voluntary resignation is presumed voluntary, and the employee bears the burden of introducing evidence to rebut that presumption. *Molsness v. City of Walla Walla*, 84 Wn.App. 393, 398, 928 P.2d 1108 (1996) (citations omitted). An employee may rebut this presumption by showing the resignation was prompted by duress or an employer's oppressive actions. (*Id.*) But duress is not measured by an employee's subjective evaluation of a situation, and an undesirable work situation does not, in itself, obviate the voluntariness of a resignation. *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wash.App. 630, 638, 700 P.2d 338 (1985); *Molsness*, 84 Wash.App. at 399, 928 P.2d 1108.

To establish constructive discharge, Appellant must show that the YMCA deliberately created such intolerable conditions that a reasonable person would feel compelled to resign, and that Appellant resigned because of the intolerable conditions and not for some other reason. *Korlund v. DynCorp Tri-Cities Servs. Inc.*, 156 Wn.2d 168, 179, 125 P.3d 119 (2005) (citations omitted); *Allstot v. Edwards*, 116 Wn.App. 424, 433, 65 P.3d 696 (2003) (citing *Haubry v. Snow*, 106 Wn.App. 666, 677, 31 P.3d 1186 (2001)). An employee can show intolerable working conditions by showing aggravated circumstances or a continuous pattern

of discriminatory treatment. *Washington v. Boeing*, 105 Wn.App. at 16 (citing *Sneed v. Barna*, 80 Wn.App. 843, 850, 912 P.2d 1035 (1996)). Whether working conditions were intolerable is ordinarily a question of fact unless there is no competent evidence to establish the claim. *Allstot*, 116 Wn.App. at 433 (citing *Haubry*, 106 Wn.App. at 677–78).

In *Sneed v. Barna*, the Court of Appeals considered a constructive discharge case. *Sneed v. Barna*, 80 Wn.App. 843, 912 P.2d 1035. In *Sneed*, the court considered whether the facts, taken in the light most favorable to the Appellant, constituted “aggravating circumstances” or a “continuous pattern of discriminatory treatment” to support constructive discharge. (*Id.* at 850). In *Sneed*, the Appellant was a principal who was demoted. She removed from her position as principal to a position of “less stature”; the position had no budget or assistance and she was forced to borrow or share a secretary and supplies; the office was dusty, small and noisy; the District expected her to register students on opening day, which Appellant considered humiliating; and that she received no guidance as to budget, assistance, strategy or support. (*Id.*). The court held that these facts do not support “aggravating circumstances” or “continuous pattern of discriminatory treatment” as a matter of law. (*Id.*). The case was dismissed. Like in the *Sneed* case, Appellant’s facts also do not support

“aggravating circumstances” or “continuous pattern of discriminatory treatment” as discussed below.

Appellant’s assertion that working conditions were made intolerable by the employer stem from six different issues, some of which Appellant did not even know about at the time of her employment. First, her claim that the YMCA failed to fix the HVAC system which Appellant claims made her sick. Second, her claim that the YMCA put her on a Performance Improvement Plan arising out of her inappropriate treatment of YMCA maintenance person, Jose Maldonado-Gonzalez. Third, her claim that the YMCA took her childcare away from her so that she could no longer work at the CDC. Fourth, her claim that her schedule was modified. Fifth, that feedback was solicited about her. Sixth, that she was demoted. These claims by Appellant do not rise to the level of an intolerable situation, aggravating circumstances, or a continuous pattern of discriminatory treatment as contemplated by the case law.

With respect to the first issue, Appellant had dealt with the perceived impact of the HVAC system on her health since early June. She did not seek out medical treatment until mid-August. There is insufficient evidence to support a claim that the circumstances were intolerable surround the HVAC repairs. It is admitted that Appellant was not the only one experiencing symptoms. It is also clear that not everyone was ill. In

fact, on June 5, 2012, Mr. Hartman interviewed four teachers and at that time none of them reported any illnesses. The YMCA was trying to diagnose the problem as soon as it was aware of an issue. Appellant will point to five maintenance men at the YMCA not working in unison – this lack of perfection certainly does not rise to the level of a pattern of discriminatory treatment or aggravating circumstances. It is not reasonable to assume this is an “aggravating factor” when there is no evidence that the YMCA was failing to fix a problem that impacted other employees besides Appellant. The inquiry is whether “working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.” *Stork v. International Bazaar Inc.*, 54 Wash.App. 274, 287, 774 P.2d 22 (1989) (quoting *Nolan v. Cleland*, 686 F.2d 806, 813 (9th Cir.1982)). Contrary to Appellant’s belief, a reasonable person would not have felt compelled to resign when no other employee, complaining of similar symptoms, also resigned.⁵ This does not support a deliberate act against the Appellant. Appellant relies on the *Korlund* case to show that environmental factors can cause a constructive discharge. However, in *Korlund*, the employees were out on disability due to medical reasons or were missing days from

⁵ Appellant attaches significance in her brief to the fact that an outside professional inspected the HVAC equipment after Appellant left the YMCA. However, this outside agency found nothing wrong and only made one minor adjustment. (CP 644-648).

work. *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 175-176, 125 P.3d 119 (2005). Appellant however, does not have any evidence of going out on disability or excessive time away from work. There is no evidence to support her claim that her medical condition diagnosed on August 13, 2012, forced her to leave work two weeks later. Appellant does not have the evidence to support her claim.

The second issue pertains to Appellant's PIP. As explained in the prior section, Appellant's discipline arose from her inappropriate interaction with maintenance personnel. Three witnesses believed that Appellant acted in a manner that was inappropriate and a fourth witness, discovered during the drafting of the YMCA's reply brief, confirmed that Appellant was rude and called the maintenance personnel liars. Contrary to the assertion by Appellant, the PIP is supported by more than a statement of one witness, Mr. Maldonado-Gonzales. It is also supported by the report of LaTisha Davis who told her boss about the incident and described it as assertive and aggressive. (CP 161:10-15). It is also supported by Mr. Hussein, another maintenance employee. Finally, the YMCA relied on Appellant's own words regarding the events where she said that the maintenance men were lying to her and that their answers to her questions were really angering. (CP 185:21-187:19). The PIP was

supported and there is no basis to second guess the decision to discipline Appellant.

An employer's honest and good faith belief is sufficient to justify a personnel decision. *Kariotis v. Navistar International Transp. Corp.*, 131 F. 3d 672, 678 (7th Cir. 1997) (“court must observe its limitations and ‘not sit as a super-personnel department that re-examines an entity’s business decision.’”) The YMCA disciplined an employee for an outburst that was inappropriate and there is no connection to this discipline and the prior complaints about the HVAC system other than temporal proximity. Appellant’s belief that the disciplinary action taken was deliberate and intended to make her quit is utter speculation.

The third issue that Appellant contends supports her constructive discharge claim is that the YMCA took her childcare away from her. However, this argument fails to support her claim of deliberate action by the YMCA. Appellant failed to pay her childcare during the month of June and August. In spite of a letter in June and a phone call to Mr. Hartman in August, Appellant asserts that the demand for payment was retaliatory or discriminatory. Although Appellant counsel holds on to the theory that the failure to debit Appellant’s account in August was retaliation, Appellant herself conceded that the failure to debit the account in August was an administrative mistake, especially since the first failure took place

prior to Appellant's PIP or her report of an illness on August 13th. Appellant's only reason for not paying the childcare bill was that she claimed she did not have the money and had spent it between the end of August and September 4, 2012. Appellant's financial irresponsibility cannot be the fault of the YMCA or used as a means to establish an employment claim of retaliation or discrimination where none exists.

Appellant admitted during her deposition that the YMCA's failure to withdraw funds from her account on three occasions in the month of August was simply an administrative error and not a deliberate act. Appellant is speculating – without any evidence – that the demand to pay in full the entire childcare balance was a deliberate act by the YMCA. Appellant never made any attempt to make alternative arrangements for a payment plan. Furthermore, even if we assume that a full payment was demanded, the YMCA contract with Mr. Hartman certainly allows for this possibility. Claiming that enforcing a contract is a deliberate act in violation of the Washington Law Against Discrimination is ridiculous. The reality is that Appellant is blaming the YMCA for her failure to manage her own finances. The funds, if not withdrawn by the YMCA in August, should have been available on September 4, 2012. Instead, Appellant claims that she used these funds on something else. Appellant's failure to follow a budget cannot be a deliberate act on the part of the

YMCA. Given past history, it would not have been foreseeable by the YMCA that the Appellant would have spent the money. Furthermore, Appellant's husband admits that he was told about the payment problem the week before and he apparently failed to discuss this issue with his wife. The failure of Mr. Hartman to talk to Mrs. Hartman cannot be a deliberate act on the part of the YMCA. Appellant's husband signed a contract obligating him to these fees as long as his daughter attended the CDC. Enforcing such a contract does equate to a wrongful constructive discharge.

Finally, Appellant's additional claims that her demotion, her schedule limitation and the alleged negative feedback do not either individually or in their totality support "aggravating circumstances" or a "continuous patter of discriminatory treatment." There is no evidence that Appellant's schedule was changed or limited to prevent her from going to the Doctor. At most there is evidence of an email discussing Appellant's schedule. There is no evidence that Appellant was demoted because she remained the "point person" and there is no evidence that her role as "point person" required her to call the registrar. In fact the evidence is that the responsibility to call the registrar belonged to Andrea Mills all along and it was never Appellant's responsibility. Even if it

were, removing one task from the position of an Assistant Teacher can hardly be considered improper in light of the *Sneed* case. (*Sneed, supra*). Finally, the email regarding negative feedback from the registrar was not known by Appellant at the time she chose to leave the YMCA therefore it cannot be said that it was a factor in her decision to leave.

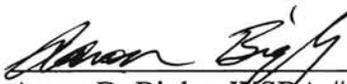
Appellant cannot prove she was constructively discharged and as a result, her claims for disability discrimination, and wrongful constructive discharge should be dismissed.

IV. CONCLUSION

Appellant's efforts to exaggerate the facts to support employment claims are motivated by monetary gain. Appellant was not discriminated or retaliated against. She was not constructively discharged. Her claims are speculative and embellished. The dismissal at summary judgment should be upheld by the Court of Appeals.

RESPECTFULLY SUBMITTED this 6th day of October, 2014.

NORTHCRAFT, BIGBY & BIGGS, P.C.



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