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NO. 72259-0-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CYMA G. TUPAS, a/k/a CYMA G. GREGORIOS

Plaintiff/Appellant

v.

STATE OF WASHINGTON d/b/a DEPARTMENT OF ECOLOGY

Defendant/Respondent

BRIEF OF PLAINTIFF CYMA TUPAS

King County Cause No. 12-2-36393-5 SEA

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by reducing Plaintiff's attorney's fees and costs by twenty-five percent without establishing the specific basis for the reduction.
2. The trial court erred in failing to assess risk at the outset of the litigation and in failing to account for other relevant factors such as the contingent nature of the representation and excellent results in setting and adjusting the lodestar.
3. The trial court erred by denying Plaintiff's motion for pre-judgment interest.

II. INTRODUCTION

Although trial court decisions regarding attorney fee awards merit significant deference, the parties and the reviewing court are entitled to a clear explanation of any reduction in fees and costs awarded under RCW 49.60. The explanation must be sufficient to permit the Court of Appeals to engage in a meaningful review of the trial court's decision. The ultimate goal of RCW 49.60 is to ensure that plaintiffs with meritorious claims, like Cyma Tupas, have access to counsel with the skills, experience, and resources necessary to pursue litigation against well-funded government and private employers. Here, Plaintiff challenges three post-trial rulings by the trial court that jeopardize the Washington Law Against

Discrimination's goal to provide complete relief to victims of discrimination and to compensate their attorneys' reasonable fees.

In the present case, Plaintiff Cyma Tupas received a favorable jury verdict finding that the Department of Ecology (referred to herein as "the Department" or "Ecology") failed to provide a reasonable accommodation for her disabling mental health impairments prior to terminating her employment. Ms. Tupas had submitted three claims to the jury—failure to accommodate, disability discrimination, and retaliation. All three claims (and the Department's defenses) focused primarily on Ms. Tupas's interactions with her colleagues during the period leading up to the Department placing Ms. Tupas on medical leave, requiring her to attend a psychiatric examination, concluding that she was not capable of responding to appropriate supervisory authority, and separating her employment without attempting any accommodations. Ms. Tupas sought her full back pay as well as whatever front pay and emotional distress damages the jury determined was appropriate. The jury found in Ms. Tupas's favor on her accommodation claim and awarded all three forms of damages she requested, including her full back pay, for a substantial total award of \$329,580.00.

Plaintiff then applied for an award of reasonable attorneys' fees and costs as well as prejudgment interest to compensate her for the

Department's delayed payment of her wages. It is undisputed that Ms. Tupas was unemployed and that her attorneys took the case on a contingency basis. The trial court found that Plaintiff's attorneys had provided her with excellent representation, that their hourly rates were reasonable, and that they had expended reasonable hours in pursuit of the litigation. Nonetheless, the court reduced the requested attorneys' fees by twenty-five percent and declined to apply a multiplier, noting that Plaintiff failed to prevail on two of three claims submitted to the jury.¹ The court did not specifically identify which claim or claims it concluded were wholly distinct in law and fact from the successful claim, how those claims were distinct, and why twenty-five percent was the appropriate reduction given its other conclusions. Without that detailed analysis, the trial court failed to provide adequate information to permit meaningful review of the fee order. The lack of clarity and explicit analysis is particularly problematic in the present case because the facts and law involved in each of Ms. Tupas's claims are intertwined and inseparable.

¹¹ Although the trial court's fee order described plaintiff as the prevailing party only with respect to her accommodation claim, the settled law in Washington establishes that the plaintiff is a prevailing party in a WLAD action if she "succeeds on any significant issue which achieves some benefit the party sought in bringing suit." *Blair v. Wash. St. Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987). Thus, Plaintiff was the prevailing party in this action, and the court's description is inaccurate.

Likewise, the trial court's failure to award the full lodestar or to apply a multiplier because the court concluded after trial that the case was "not particularly risky" is error. It places undue weight on a single component of the fee analysis and fails to provide any enhancement for the quality of the representation and result, the contingent nature of the case or the delay in receiving fees. The *post-hoc* conclusion also erroneously treats Ms. Tupas's victory as a foregone conclusion despite the facts that: the Department consistently declined to reinstate her employment; the Department moved for summary judgment on the victorious claim; Plaintiff speaks English as a second language and has a severe anxiety disorder, both of which impacted her ability to express herself to the jury; the Department's written report from a respected forensic psychiatrist opined that Ms. Tupas could not be accommodated; Plaintiff's own psychiatrist expressed concerns in writing about her ability to respond to appropriate supervisory authority; the Department's attorneys described the matter as a nuisance value case for purposes of settlement just weeks before trial; and the trial court denied Plaintiff's CR 50 motion on accommodation even *after* all of the evidence was heard in the case. Given these facts, it appears that the court placed undue emphasis on its post-verdict evaluation of risk, whereas Plaintiff's attorneys began representing her long prior to the verdict and in fact assisted her

throughout the mandatory psychiatric examination and accommodation process. Plaintiff therefore requests that the Court remand this matter to the trial court with instructions to recalculate Plaintiff's attorneys' fees and costs, as follows:

- (1) Reconsidering its downward adjustment of the lodestar for an unsuccessful claim or claims and its finding that the facts and law underlying each such claim were wholly distinct from the facts and legal theories at issue in Plaintiff's successful accommodation claim, such that the work in support of those claims did not contribute to her ultimate success;
- (2) Documenting the specific claim(s) upon which a fee reduction is based, the basis for concluding that the claim was wholly distinct from the successful claim, and the basis for selecting a particular percentage reduction in fees;
- (3) To the extent that the trial court again opts to reduce the award for litigation costs in addition to fees by a percentage, justifying the reason for reducing costs in that manner rather than considering the costs individually;
- (4) Factoring into the calculation of the lodestar or a potential multiplier the risk of the case at the outset of the representation rather than at the conclusion of the trial as well as additional

factors such as the excellent outcome, the quality of the representation and the contingent nature of the representation and resultant delay in payment for Plaintiff's attorneys.

In order to ensure that Plaintiff receives full compensation for her wages despite the delay in her payment, Plaintiff also asks that the Court instruct the trial court to award prejudgment interest on Plaintiff's back pay award.

III. STATEMENT OF THE CASE

Plaintiff Cyma Tupas is a Filipina scientist who suffers from a severe anxiety disorder and depression and who was employed by the State of Washington Department of Ecology for approximately twenty-four years prior to her involuntary disability separation in 2012. (Appendix A² ¶¶ 3-8; 28).

Plaintiff's original tort claim in this matter alleged national origin discrimination and retaliation. (CP 764 ¶ 36). Soon after the tort claim was filed, the Department placed Ms. Tupas on home assignment and ordered her to attend a psychiatric evaluation. (*Id.* ¶ 44). Plaintiff's original complaint identified facts related to her eventual disability discrimination and failure to accommodate claims, but did not formally assert causes of action related to those issues because a second tort claim related to those

² Plaintiff's amended complaint, attached to her successful motion to amend (CP 749-759), is attached as Appendix A for ease of reference.

allegations had not expired as of her original complaint filing date. (CP 746).

The Law Offices of Judith A. Lonquist represented Ms. Tupas from these early stages of her case through trial, including providing legal advice and support during the stressful psychiatric examination period, the accommodation process, and her involuntary separation from her employment after more than two decades. (Appendix A ¶ 46). Early in the case, after each party had completed one set of written discovery and before Plaintiff took any depositions, Plaintiff amended her complaint, abandoning her national origin discrimination claim and formally alleging claims of disability discrimination and failure to accommodate a disability. (*Id.*; CP 745).

Plaintiff's amended complaint reflects the relationship between Plaintiff's accommodation claim and her disability discrimination and retaliation claims. (Appendix A). After providing background regarding her employment and historical concerns, paragraphs 23-53 of the amended complaint address the heart of the events that Plaintiff detailed at trial. (*Id.*). These paragraphs demonstrate the interplay between the three claims that ultimately were submitted to the jury. (*Id.*). Plaintiff had a strained relationship with her supervisors that developed close in time to complaints that she raised against them alleging discrimination and

retaliation. (*Id.*). The relationship, her supervisors' hostility, and negative treatment such as disciplinary counseling directed solely at Ms. Tupas exacerbated her stress and contributed to multiple requests for medical leave. (*Id.*). Although these relationships and events were relevant to Ms. Tupas's retaliation claim, the evidence also was critical to assessing the Department's contention that Ms. Tupas was disqualified from her job because she could not respond to appropriate supervision. (CP 001, 006, 019, 022-023). In addition, such evidence provided background regarding how Ms. Tupas's disability and employment impacted one another and what actions the Department might have taken to permit Ms. Tupas to perform her duties despite her disability. (*E.g.* Appendix A ¶¶ 26-30, 39-42). Ms. Tupas's requests for medical leave following stressful events with her supervisors also provided notice of a disability for purposes of establishing the Department's failure to accommodate. (*Id.* ¶¶ 30-31, 36-37).

Plaintiff's amended complaint contains no factual averments that relate exclusively to her disability discrimination claim and not to her accommodation claim. (*See* Appendix A). Similarly, Plaintiff's response to Defendant's motion for summary judgment, like her amended complaint, frequently discussed her accommodation and other claims in relation to one another and/or cross-referenced the discussion of facts and

factors from other complaints in the context of discussing her accommodation claim. (CP 869-811).³

The Department never acknowledged that it had unlawfully failed to accommodate Ms. Tupas. (CP 001-023). It never offered to reinstate her. Its answer to Plaintiff's amended complaint alleged that her claims were frivolous, and the Department ultimately moved for summary judgment on all claims. (CP 001, 766). Through trial, the Department took no action to reflect that it felt it was at high risk of losing this case. Rather, it vigorously asserted that Ms. Tupas was not qualified for her position, emphasizing that the forensic psychiatrist who had completed Ms. Tupas's medical examination found that she was disabled and could not be accommodated and that Ms. Tupas's own psychiatrist had written prior to Ms. Tupas's termination that she was not certain whether Ms. Tupas could respond appropriately to supervisory instruction. (CP 006). Near in time to the trial, Defendants' counsel indicated in the course of settlement discussions that the Department considered Ms. Tupas's claims to be a "nuisance value" case. (CP 704; CP 632).

Three claims went to the jury following the ten-day trial—retaliation, disability discrimination, and failure to accommodate a

³ Sub. No. 38, dated 2/18/2014, Objection/Opposition Pltf is designated and it is assumed will be given the next available page numbers. *See*, Appendix D, § C, ¶ 2: "Ms. Tupas' Disability and Defendants' Perceptions Regarding Her Disability Were a Substantial Factor in Her Six-Month Home Assignment and Termination."

disability. (Appendix B⁴). The primary adverse action for which Ms. Tupas sought damages in connection with all three claims was the termination of her employment. She sought back pay and whatever front pay and emotional distress damages the jury evaluated were appropriate. (CP 150, 705). The jury found for Ms. Tupas on her failure to accommodate claim, awarding all three types of monetary damages she requested, including her full back pay request, for total damages of \$329,580.00. (CP 381-385).

Thereafter, Ms. Tupas filed post-trial motions seeking attorney's fees and costs as well as prejudgment interest on her past wages. (CP 386, 543). The trial court denied Ms. Tupas's motion for prejudgment interest and reduced her fees and costs by twenty-five percent, noting that she prevailed on only one of three claims that were submitted to the jury. (Appendix B, CP 737-738, 739-740)

The trial court's order reducing Plaintiff's fees and costs by twenty-five percent does not discuss Ms. Tupas's original claim alleging national origin discrimination.⁵ (Appendix B). Although the order does refer to Plaintiff's unsuccessful disability discrimination claim and retaliation claim, it does not specifically state whether one or both of these

⁴ The trial court's order on fees, CP 689-694, is reproduced as Appendix B.

⁵ Furthermore, the original inclusion of this claim could not justify a substantial reduction in fees, where Plaintiff voluntarily abandoned it early in the case, prior to motions practice and discovery.

claims provided the basis for its fee and cost reduction. (*Id.*). Further, it does not describe the basis for the court’s conclusion that one or both of these claims involved facts and legal issues that were wholly separable from her accommodation claim. (*Id.*).

IV. ARGUMENT

A. Applicable Legal Standards

Questions of law, such as the present issue regarding the availability of prejudgment interest on back pay, are reviewed *de novo*. *State Dept. of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 789, 161 P.3d 372 (2007). Courts also review legal issues underlying a fee award *de novo*. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008)⁶; *see also Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002) (“a conclusion of law is a conclusion of law wherever it appears” and will be subject to *de novo* review). In contrast, the Court of Appeals will not disturb a trial court's decision denying, granting, or calculating an award of attorney fees absent an abuse of discretion. *Roats*

⁶ The remedies provision of the WLAD authorizing the recovery of attorneys’ fees expressly incorporates the remedies available under federal civil rights laws, and Washington courts routinely cite federal civil rights cases in discussing attorneys’ fees under the WLAD. RCW 49.60.030(2); *see, e.g., Pham v. City of Seattle*, 159 Wn.2d 527, 540, 151 P.3d 976 (2007) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 431, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The Washington Supreme Court has acknowledged the liberal construction mandate of WLAD and the stronger legislative command to award damages in WLAD—applying the principles articulated in federal case law where those principles would further the broad remedial goals of the WLAD. *See Martini v. Boeing*, 137 Wn.2d 357, 372-75, 971 P.2d 45 (1999).

v. Blakely Island Maint. Comm'n, Inc., 169 Wn. App. 263, 283-84, 279 P.3d 943 (2012). Where a trial court's decision is clearly unreasonable or is based on unsound grounds, the court abuses its discretion. *Marina Condo. Homeowner's Ass'n v. Stratford at Marina, LLC*, 161 Wn. App. 249, 263, 254 P.3d 827 (2011). Where the trial court has failed to include sufficient detail to permit a meaningful review, the appellate court will remand to the trial court with instructions to engage in the appropriate analysis and to provide an order containing sufficient detail to permit review. *Moreno*, 534 F.3d at 1116; *Padgett v. Loventhal*, 706 F.3d 1205, 1209 (9th Cir. 2013); *Barnard v. Theobald*, 721 F.3d 1069, 1077-78 (9th Cir. 2013).

B. The Trial Court's Across-the-Board Twenty-Five Percent Reduction of Fees and Costs Was in Error

The trial court's June 30, 2014 Order on Attorneys' Fees and Costs in this case states: "The court finds and concludes that a 25% reduction in the hours of preparation and trial is appropriate to account for time spent on the unsuccessful claims that do not encompass a 'common core of facts and related theories' as the failure to accommodate claim." (Appendix B ¶ 10). However, the trial court failed to identify *which* unsuccessful claims it found did not encompass a "common core of facts and related theories" to the failure to accommodate claim and *how* the facts and theories

involved in those claims were wholly distinct from the successful failure to accommodate claim.⁷

The trial court's failure to detail the basis for its reduction inhibits meaningful review of the trial court's conclusions and constitutes reversible error. This error was compounded by the fact that the court made a sweeping twenty-five percent reduction in fees and costs without identifying specific entries for which it was denying compensation. Had the court denied specific fees rather than slashing a quarter of the requested fees and costs, it may have been possible to infer which claims the court concluded were discrete and why. Likewise, had the trial court addressed at least some specific portion of the fees and costs on an entry-by-entry or subject matter basis, it might have shed light on the reasoning for the percentage reduction the trial court selected.⁸ However, no such analysis occurred. This is particularly damaging because the claims in this case are closely related, and an order containing a detailed analysis likely would have established the error of any finding that the claims lacked a common core of facts or legal theories.

⁷ Although fees and costs incurred in pursuit of unsuccessful claims are not recoverable if those claims are wholly distinct from any successful claims in both law and fact, if they involve a common core of facts or legal issues, they are compensable *See Johnston v. State*, 177 Wn. App. 684, fn 6, 313 P.3d 1197 (Div. 1. 2013) and *Steele v. Lundgren*, Wn. App. 773, 783, 982 P.2d 619 (Div. 1. 1999).

⁸ *See, e.g., Pham*, 159 Wn.2d at 546, affirming a reduction in attorney fees that disallowed fees for specific pieces of work that the trial court expressly determined was unsuccessful and was readily segregated from other work product, such that the court was satisfied the work did not contribute to the overall success of the case.

Particularly given the consistent and emphatic legislative and judicial statements supporting full fees for “time reasonably expended in pursuit of the ultimate result achieved”⁹ in civil rights cases, trial courts must state clearly which of the plaintiff’s claims it found lacked a common core of facts or legal theories and explain the basis for its conclusions prior to engaging in an across-the-board fee and cost reduction. Further, given the liberal construction of the WLAD attorney fee remedy,¹⁰ where, as here, the same evidence that supported unsuccessful claims was relevant to and contributed to the success of another claim, the claims have a common core of facts or legal theories for purposes of a fee award, and any finding to the contrary would be clear error.

1. Washington Law Strongly Favors a Full Fee Award to Attorneys Who Successfully Represent WLAD Civil Rights Plaintiffs.

The Washington Law Against Discrimination (WLAD) entitles prevailing plaintiffs to “reasonable attorneys’ fees.” RCW 49.60.030(2). The overarching aim of the WLAD is to eliminate discrimination, and the provision authorizing prevailing plaintiffs to recover reasonable attorneys’ fees is critical to advancing that goal. *Pham v. City of Seattle*, 159 Wn.2d 527, 542, 151 P.3d 976 (2007); *see also Martinez v. City of Tacoma*, 81

⁹ *Hensley v. Eckerhart*, 461 U.S. 424, 431, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quoting *Davis v. County of Los Angeles*, 8 Ep.D. ¶ 9444 (C.D. Cal. 1974)).

¹⁰ *Martinez v. City of Tacoma*, 81 Wn. App. 228, 235, 914 P.2d 86 (1996).

Wn. App. 228, 235, 914 P.2d 86 (Div II. 1996), *rev. den'd*, 130 Wn.2d 1010, 928 P.2d 415 (1996). Similarly, the prospect of an upward adjustment in a contingency case is an important tool to encourage meritorious civil rights cases. *Wash. State Comm'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 221, 293 P.3d 413, *rev. den'd*, 178 Wn.2d 1010, 308 P.3d 643 (2013). Where the trial court's approach to fees "contravenes the purposes of the fee award authorized by the Washington Law Against Discrimination," the reviewing court may reverse and remand for a redetermination of reasonable fees and costs. *See Martinez*, 81 Wn. App. at 230. Plaintiff requests that remedy here, where the trial court failed to provide an adequate basis for its twenty-five percent reduction in fees and costs or fully to account for nature of the litigation in declining an upward adjustment to the lodestar.

In *Martinez*, the trial court had limited the attorney's fee award to 50 percent of the jury verdict in a WLAD action, citing the terms of the plaintiff's contingency fee agreement with his lawyer. *Martinez*, 81 Wn. App at 231. Division Two found an abuse of discretion and remanded. *Id.* The *Martinez* court cited the Washington Supreme Court's call for "liberal construction of the attorney fee entitlement" in order to encourage private enforcement of the WLAD and to make it financially feasible. *Id.* at 235. It also highlighted WLAD's statutory language stating that discrimination

is “a matter of state concern” that “threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” *Id.* at 234. Although the plaintiff in *Martinez* had recovered only \$8000 in damages, the Court of Appeals noted that monetary damages awards do not reflect the full public benefit of civil rights litigation and that the fee award therefore should not be tied to monetary damages. *Id.* at 235-36. Rather, counsel should be compensated “for all time reasonably expended on a matter” in the same manner as the attorney of a fee-paying client. *Id.* at 236; *Accord: Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (“Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised”).

The standard for attorneys’ fees in a WLAD action is the lodestar—which is calculated by multiplying the number of hours reasonably expended in pursuit of the litigation by the attorneys’ reasonable hourly rates. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593-94, 675 P.2d 193 (1983) (citing *Miles v. Sampson*, 675 F.2d 5, 8 (1st Cir. 1982)). Because the lodestar limits compensation to those hours reasonably expended, the trial court should “discount hours spent on unsuccessful claims, duplicated effort or otherwise unproductive time.” *Id.*

at 597. However, the liberal construction mandate of WLAD, coupled with the frequent interplay between claims in WLAD actions means that courts should not indiscriminately reduce fees, citing unsuccessful claims. *Cf. Brand v. Dep't of Labor and Industries*, 139 Wn.2d 659, 674-75, 989 P.2d 1111 (1999) (holding that workers' compensation recovery is governed by a unified statutory scheme, such that a plaintiff's multiple legal theories will not be construed as distinct for purposes of fee recovery). Rather, if a party has prevailed on some claims and not others, the trial court should evaluate whether the successful and unsuccessful claims constitute "distinctly different claims for relief that are based on different facts and legal theories' or 'involve a common core of facts or are based on related legal theories.'" *Herrington v. County of Sonoma*, 883 F.2d 739, 746 (9th Cir. 1989) (quoting *Hensley*, 461 U.S. at 434-35). If claims are related, "the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation" and should award fees accordingly. *Id.* (quoting *Hensley*, 461 U.S. at 435).

Private attorneys' ethical billing in successful litigation provides a benchmark for the lodestar fee in successful civil rights cases. *Hensley, Id. at 431*. Rather than penalizing successful plaintiffs for pursuing issues that in retrospect were not litigated or were unsuccessful, under the lodestar

method, where plaintiffs “prevailed on the merits and achieved excellent results,” “plaintiffs’ counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved *in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.*” *Id.* (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), *emphasis added*).

The trial court’s approach to Plaintiff’s fee petition here is antithetical to the analysis and reasoning in *Hensley* and WLAD fee cases. For example, if a fee-paying client/employee sought compensation for her termination in the form of past wages, future wages and emotional distress damages and received all three categories of damages, including all economic damages suffered as of the trial date, it is inconceivable that a law firm performing services on an hourly basis and receiving consistent monthly payments would be obligated to go back through its billing and to refund the client for work toward all claims that the jury’s verdict did not support. Yet, here, despite a substantial jury verdict that compensated all of Ms. Tupas’s economic damages, the court eliminated a quarter of Ms. Tupas’s fees and costs without a finding that any specific entries were the

type of duplicative, erroneous, wasteful charges that a fee-paying client would be entitled to dispute.¹¹

2. The Court Abused Its Discretion By Discounting Fees Without Clearly Identifying Which Claims It Concluded Were Wholly Distinct in Law and Fact from the Successful Accommodation Claim, the Basis for Its Conclusion, and the Justification for Its Specific Fee Reduction.

Although a trial court fee award is reviewed for abuse of discretion, the legal issues underlying the award are examined *de novo*, and the appellate court will remand if the trial court has not provided sufficient analysis of its decision to permit meaningful review. *Brand*, 139 Wn.2d at 674-75; *Moreno*, 534 F.3d at 1116; *Padgett v. Loventhal*, 706 F.3d 1205, 1209 (9th Cir. 2013); *Barnard v. Theobald*, 721 F.3d 1069, 1077-78 (9th Cir. 2013). Here, the trial court did not detail the specific basis for its twenty-five percent reduction in fees and costs. Although it referenced unsuccessful claims, it did not identify which claims justified the fee reduction, how those claims were wholly distinct from the successful accommodation claim, and why twenty-five percent of total fees was the appropriate reduction. (Appendix B). Accordingly, Plaintiff

¹¹ Had the trial court awarded the requested multiplier (discussed *infra* at pp. 36-41), it would have mitigated the concern regarding Plaintiff's counsel recovering less for her successful prosecution of a civil rights action than a private defense attorney guaranteed an hourly rate could bill for defending a similar action, regardless of success. However, the trial court awarded neither a fully compensatory fee nor a multiplier, despite the success of the action and the contingent nature of the representation here.

requests that this Court vacate the decision and remand for reconsideration of the fee award.

Attorney fee awards are critical components of WLAD and other remedial civil rights statutes, and the lodestar figure represents a presumptively reasonable fee. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (Div. 1 2000); *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Reductions to the lodestar must be sufficiently detailed to permit close scrutiny by the reviewing court. *Brand*, 139 Wn.2d at 674. The trial court cannot discharge its obligation simply by correctly citing legal principals in the course of ordering a fee award, because “identifying the legal rules that guide the calculation of fees, and then producing a number that is purportedly a result of that calculation, does not allow [courts] to review the decision for an abuse of discretion.” *Padgett*, 706 F.3d at 1208.

Rather, trial courts must “show their work” when calculating attorneys’ fees. *Id.* This includes detailing the basis for selecting a specific reduction percentage if fees are reduced based on partial success. *Id.* (citing *Chalmers v. City of Los Angeles*, 796 F.2d 1205 1213 (9th Cir. 1986), *amended by* 808 F.2d 1373 (9th Cir. 1987)); *see also Gates v. Deukmejian*, 987 F.2d 1392, 198-99 (9th Cir. 1992) (requiring the court to provide an indication of “how it arrived at the amount of compensable

hours for which fees were awarded to allow for meaningful appellate review”); *Tutor-Saliba Corp v. City of Hailey*, 452 F.3d 1055, 1065 (9th Cir. 2006) (criticizing the trial court’s failure to identify how it reached its conclusion that 20 percent of counsel’s time and costs were attributable to specific claims). The same principles apply where the trial court reduces costs based on a partial victory. *Padgett*, 706 F.3d at 1208 (citing *Ass’n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 591-93 (9th Cir. 2000) (*en banc*)).

In *Padgett*, the Ninth Circuit reversed and remanded a fee award order based on its determination that the trial court had not adequately explained and supported its calculations. *See also Brand*, 139 Wn.2d at 675 (reversing and remanding a fee award because the trial court failed to enter specific findings regarding the basis of its decision). The *Padgett* court noted that trial courts often neglect to detail in writing the bases for their fee conclusions, although the court already should be making the relevant calculations, which are critical to proper review. *Padgett*, 706 F.3d at 1208. In cases with overlapping claims and mixed results, the mandate for courts to show their work in reaching conclusions on fees is even more important because “failure on a claim does not automatically reduce the fee award.” *Id.* at 1209; *See also Brand*, 139 Wn.2d at 675 (“the trial court did not err by refusing to reduce Brand's attorney fees

award based upon her degree of success”). Rather, often an attorney’s work bears on multiple claims, and compensation for such work generally should be awarded in full if it is reasonable, even if it also supported an unsuccessful claim. *Padgett*, 706 F.3d at 1209.

In order to permit meaningful review, a trial court’s fee order must detail not only the reasons that the court believes a fee reduction is appropriate, but also the specific basis for the court’s selected percentage reduction. *See Barnard v. Theobald*, 721 F.3d 1069, 1077-78 (9th Cir. 2013). In *Barnard*, the trial court reduced the prevailing plaintiff’s attorney fees by forty percent, finding that the hours were not reasonable given that (1) the case was not particularly complicated, and (2) movant attorneys logged 800 hours despite taking on the case near in time to trial, when discovery was complete. *Id.* The Ninth Circuit vacated the fee order and remanded, noting that the trial judge explained why he believed the fee request was excessive, “but he failed to explain why he thought that a 40 percent reduction would be an appropriate remedy.” The *Barnard* court also suggested that the trial court may have overemphasized the low complexity of the case, while giving insufficient consideration to the plaintiff’s “degree of success”—the “most critical factor in determining an appropriate amount of attorney fees.” *Id.* (*quoting Hensley*, 461 U.S. at 436). In vacating the reduced fee award, the Ninth Circuit noted that the

fee clause in § 1988 (like in WLAD) was intended “to attract competent counsel to prosecute civil rights cases” and so “a court’s discretion to deny fees under § 1988 is very narrow and ... fee awards should be the rule rather than the exception.” *Id.* (quoting *Mendez v. Cty. of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008)).

The level of detail a fee award order requires will vary based on the degree of cut imposed, with anything over a ten percent reduction in requested fees meriting a “weightier” and “more specific articulation of the court’s reasoning.” *Moreno*, 534 F.3d at 1111 and 1113. In *Moreno*, the Ninth Circuit refused to sustain a twenty-five percent reduction in fees that was based on the trial court’s finding that the overall hours were excessive and some work was duplicative or overstaffed. Particularly relevant to the present instance, *Moreno* noted:

It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff’s lawyer engages in churning. By and large, the court should defer to the winning lawyer’s professional judgment as to how much time he [*sic*] was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

Id. at 1112. Although a trial court may make a “haircut” of no greater than ten percent to a fee request based on its exercise of discretion and without

more elaborate explanation, a greater cut will not be sustained without specific analysis. *Id.* Nor should references to duplicative work, excessive hours or limited success “become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much.” *See id.* at 1113. Ultimately, the *Moreno* court vacated the fee award and remanded, noting that, when reducing fees, “gut feelings are not enough” and that the court must provide sufficiently specific reasoning for its fee reduction to permit meaningful objection from the parties and meaningful review by the court. *Id.* at 1116.

As in *Padgett*, the trial court here made the “unfortunately common mistake” of “identify[ing] the correct rules” but “provid[ing] no explanation for how it applied those rules in calculating the costs and attorney’s fees.” *Padgett*, 706 F.3d at 1209. The court’s order established a lodestar of “\$543,695 for work on all claims.” (Appendix B ¶ 5). Although courts have consistently defined the lodestar as the presumptively reasonable fee¹², and despite Plaintiff’s substantial trial victory (which resulted in an award of each type of damages she requested, a fully compensatory back pay award, and damages totaling more than \$300,000 on what, just weeks before trial, the State had termed a “nuisance value case”), the trial court then reduced plaintiff’s requested

¹² *See, e.g., Pham*, 159 Wash.2d at 542; *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010).

fees and costs in the matter by twenty-five percent, citing unsuccessful claims. (Appendix B). The trial court's award went far beyond a discretionary "haircut," and matched the reduction the Ninth Circuit rejected in *Moreno*. See *Moreno*, 534 F.3d at 1112. As such, it required a detailed justification. *Id.*

Yet, although the court mentioned Plaintiff's unsuccessful claims in the context of reducing her fees, it did not establish which specific claims provided the basis for the reduction. (Appendix B). This inhibits review for two principal reasons. First, Plaintiff had three unsuccessful claims, two that went to trial and were mentioned in the fee order and a third that was abandoned early in discovery prior to any motions or trial and was never mentioned in the fee order. Neither the parties nor the reviewing court should be required to guess which claims the court relied upon to justify a fee reduction.¹³

Second, unsuccessful claims do not, in and of themselves, justify a fee reduction, so the court must both identify the claims upon which any reduction is based and analyze the relationship between those claims and the successful claim. Here, in addition to failing to identify the specific claims upon which it based its fee reduction, the court did not specify *how*

¹³ Although the most straightforward reading of the order suggests that the court relied upon the two claims that went to trial in reducing fees, that would create a new series of legal problems, as will be discussed in detail *infra*.

those claims were sufficiently distinct that the work in support of those claims did not contribute to the successful result on her accommodation claim. This is particularly problematic given that Plaintiff brought all of her claims under the WLAD statutory scheme and all involved overlapping claims and defenses. *Cf. Brand*, 139 Wn. at 673 (“Given the unitary nature of claims brought under the Industrial Insurance Act, we hold that workers' compensation claims are not unrelated, and should not be segregated in terms of successful and unsuccessful claims for the purpose of calculating attorney fees under RCW 51.52.130. This conclusion is in accordance with the purpose of RCW 51.52.130 and the Industrial Insurance Act as a whole.”). For example, neither the amended complaint nor the court’s order identify *any* facts that are relevant to Plaintiff’s disability discrimination claim but not her accommodation claim, yet the court’s order referenced unsuccessful “claims” as a basis for reducing her fees by a quarter. (Appendices A and B).

Furthermore, even if the court had established a justification for reducing fees based on a specific unsuccessful claim, its order still would be inadequate in that it did not provide any reasoned basis why twenty-five percent was the correct amount of reduction given the circumstances. *See e.g., Barnard*, 721 F.3d at 1077-78. It did not consider a sample of fees, discuss the fees charged in connection with a specific motion or legal

process, or otherwise attempt to articulate its reasoning in reaching the twenty-five percent figure. (Appendix B). Because the court was required to conduct a reasoned analysis rather than selecting the quarter reduction on “gut feelings,” the failure to articulate that analysis in the record inhibits review and warrants remand. *See, e.g. Moreno*, 534 F.3d at 1113; *Padgett*, 706 F.3d at 1208.

Here, as in *Moreno*, the court offered a conclusory basis for its fee reduction that prevents the reviewing court from evaluating whether “the court is applying its superior knowledge to trim an excessive request or if it is randomly lopping off chunks of the winning lawyer’s reasonably billed fees.” *Compare Moreno*, 534 F.3d at 1116 *with Pham*, 159 Wn.2d at 546-47 and fn. 2-6 (Upholding trial court’s reduction of specific dollar figures of fees toward specific categories of work, where the trial court offered an individual justification for each such reduction). Evaluating attorney fee requests may be a tedious task, but a sufficiently detailed explanation to permit review is nonetheless required. *Moreno* noted that the burden for identifying excessive billing typically can be placed on the losing parties’ shoulders, as they have the knowledge and the incentive to identify a “sufficiently cogent explanation” for a fee reduction. In contrast, “[i]f opposing counsel cannot come up with specific reasons for reducing the fee request that the district court finds persuasive, it should normally

grant the award in full, or with no more than a haircut.” *Moreno*, 534 F.3d at 1116. Here, the court’s order noted that many of the fees the Department challenged as alleged examples of “block billing” were in fact “fairly specific.” Yet, the court proceeded to disallow a quarter of Plaintiff’s attorney’s fees without identifying specific fees that were excessive, describing a sample of fees that warranted the reduction, or otherwise explaining how Plaintiff’s counsel were due only seventy-five percent of their fees for their months of work despite Plaintiff’s ultimate success. (Appendix B). Plaintiff therefore asks the Court to vacate the trial court’s order on fees and to remand to the trial court with instructions to reconsider the fees and issue an order that reflects appropriate detail and analysis.

3. The Court’s Apparent Conclusion that Plaintiff’s Unsuccessful Claims Did Not Share a Common Core of Facts and Legal Theories With Plaintiff’s Accommodation Claim Was Clearly Erroneous.

Although the trial court failed to provide sufficient detail to justify its twenty-five percent reduction in Plaintiff’s requested fees (as discussed *supra* at § 2), it appears to have relied on inappropriate bases for its reduction. Most significantly, the trial court seems to have reduced Plaintiff’s fee based in part on her unsuccessful disability discrimination

claim.¹⁴ This claim is factually and legally aligned with her successful accommodation claim as a matter of law and should not have contributed to a fee reduction. Plaintiff's retaliation claim also was closely related to her accommodation claim—sharing a statutory basis, central facts, challenged employment action and requested relief. On remand, Plaintiff therefore asks that this Court instruct the trial court as to the proper analysis to perform prior to reducing attorneys' fees based on unsuccessful claims. Furthermore, should the trial court determine that reduction is appropriate, Plaintiff asks that it be ordered to place its analysis of factual and legal similarity and difference on the record to permit meaningful review.

In evaluating what constitutes a reasonable fee, the Supreme Court in *Hensley* instructed courts to exclude fees for unsuccessful claims only if they are “*distinct in all respects*” from the plaintiff's successful claims. *Hensley*, 461 U.S. at 440 (emphasis added). Otherwise, the court should look to the “significance of the relief obtained” overall. If, as here, claims are related and the plaintiff secured “substantial relief” in her litigation, the holding in *Hensley* precludes across-the-board fee cutting “simply because the [] court did not adopt each contention raised.” *See Id.* at 440.

¹⁴ See Appendix B ¶ 10 “The court finds and concludes that a 25% reduction in the hours of preparation and trial is appropriate to account for time spent on the unsuccessful claims...” and ¶ 4 “plaintiff failed to prevail on two of the three claims presented to the jury.”

In *Hensley*, the Court noted that civil rights cases involving claims so distinct that they warrant fee exclusion “may well be” “unlikely to arise with great frequency,” noting:

Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. *Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.*

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049 (CD Cal.1974). Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Id. at 435 (*emphasis added*).

In the present case, the trial court stated that “[i]t is challenging to determine precisely how much time spent [*sic*] plaintiff’s counsel spent preparing and presenting evidence on the successful, as opposed, [*sic*] to non-successful claims.” (Appendix B ¶ 10). However, whereas the trial

court relied on the difficulty of “divid[ing] the hours expended on a claim-by-claim basis”¹⁵ as a reason to impose an across-the-board fee reduction, under *Hensley* this factor weighs against any reduction at all. *Hensley* noted that where substantial time in a civil rights action is devoted to pursuing the litigation as a whole, that litigation should not be viewed as a series of distinct claims. *Hensley*, 461 U.S. at 435. Rather, the court should view the case as unified and should award fees based on the significance of overall relief obtained. *Id.*

Here, the relief obtained represented an excellent result for Ms. Tupas secured through reasonable efforts by her attorneys. In fact, the court’s fee order specifically noted that “the quality of Plaintiff’s attorneys on this case was excellent” and that although she prevailed on only one claim, “the hours expended on this case by Plaintiff’s attorneys and their paralegal are appropriate and reasonable.” (Appendix B ¶¶ 4 and 9). Where results are excellent, *Hensley* advocates for “a fully compensatory fee.” *Hensley*, 461 U.S. at 435.

Although the trial court’s order cited *Steele v. Lundgren*, 96 Wn. App. 773, 982 P.2d 619 (Div. 1 1999), the twenty-five percent reduction in fees here does not conform to the holding in that case. *Steele* expressly rejected a request to “identify and eliminate or reduce hours spent on

¹⁵ *Hensley*, 461 U.S. at 435.

unsuccessful claims, even if they involve a common core of facts and legal theories related to those on which the plaintiff prevailed.” *Id.* at fn 19. In *Steele*, the court found that the following unsuccessful claims were sufficiently related to her successful sexual harassment hostile work environment claim to merit a full award of attorney’s fees: retaliation, sex discrimination, *quid pro quo* sexual harassment, negligent infliction of emotional distress and intentional infliction of emotional distress. *See id.* at 776. Of course, the fact that one court did not abuse its discretion in reaching a conclusion does not preclude another court from reaching a contrary conclusion without overstepping. However, the *Steele* ruling highlights that multiple employment-based claims can be sufficiently related to permit full fee recovery, even where not all of those claims were statutory actions under WLAD and where the factual and legal basis for the claims was sufficiently distinct that the court dismissed some of them on summary judgment while others prevailed at trial. *See id.* As such, *Steele* does not support the court’s analysis here and does not shed light on any underlying (but unstated) justification for the trial court’s determination that Plaintiff’s unsuccessful claims were unrelated to her accommodation claim and warranted a substantial reduction of Plaintiff’s fees.

To the contrary, Ms. Tupas's disability discrimination claim is so factually and legally aligned with her successful accommodation claim that, as a matter of law, they should not be segregated for purposes of determining attorneys' fees. *See Brand*, 139 Wn.2d at 673 (refusing to segregate claims based on different legal theories supporting workers' compensation relief). The two disability claims require substantial overlapping analysis of disability status and job qualification. *Compare* WPI 330.32 *with* 330.33.¹⁶ In fact, the accommodation inquiry is a component of the disability discrimination claim, as a plaintiff must establish that she can perform her job duties "with reasonable accommodation" in order to establish the second prong of her disability discrimination claim. WPI 330.32. Similarly, Ms. Tupas's amended complaint alleging disability discrimination and failure to accommodate does not cite any facts that are uniquely relevant to her disability discrimination claim, nor did the trial court identify any such facts in its order regarding fees. (Appendix A & B). In these circumstances, the claims are so intertwined that no reasonable jury could have found them to be factually and legally distinct.

¹⁶ Attached hereto for the Court's convenience as "Exhibit C."

Plaintiff's retaliation claim likewise involves the same statutory scheme (WLAD); overlapping central facts¹⁷ (e.g. the interactions between Plaintiff, her supervisors and Department HR personnel during the time period leading up to and during her placement on home assignment; her experience of and displays of stress at work; and her termination); the same primary negative employment action (involuntary disability separation)¹⁸; and the same forms of requested relief (back pay, front pay, and emotional distress damages). Unlike the relationship between the disability discrimination claim and the accommodation claim, the retaliation claim and accommodation claim do involve sufficient distinctions that the issue of whether they are unrelated for purposes of the *Hensley* analysis is a question for the trial court. However, (1) the trial court failed to detail how the retaliation claim and accommodation claim were "distinct in all respects" under *Hensley*, (2) the claims were closely

¹⁷ Furthermore, with respect to background facts, the trial court acknowledged that "both parties were entitled to present lay testimony as to incidents that ultimately resulted in Ms. Tupas's disability separation." (Appendix B ¶ 10).

¹⁸ Although the termination was the primary adverse action for purposes of the retaliation claim and was the primary basis on which Plaintiff sought damages in connection with both claims, other potential adverse employment actions also unified the two claims. For example, Defendant relied on counseling regarding Plaintiff's conduct and performance to argue that Plaintiff was not qualified for her position for purposes of a defense against her accommodation claim. (CP 004-005). Plaintiff argued that these same instances of counseling and the events underlying them supported her retaliation claim. (Appendix A ¶¶32-43). As the court noted in its fee award order, the question of whether Plaintiff was qualified to perform the essential functions of her job with or without an accommodation was the heart of her accommodation claim. (Appendix B ¶ 12).

related factually¹⁹ and legally, and sought relief for the same major negative employment action, and (3) the trial court grouped together the retaliation claim and disability discrimination claim in the course of reducing fees for unsuccessful claims²⁰, despite the fact that the disability discrimination claim *is* factually and legally related to the accommodation claim as a matter of law. These facts call into question whether the court properly considered the relationship between the accommodation claim and retaliation claim and applied the law correctly in the course of its fee award ruling. Direction on remand would therefore be appropriate. Furthermore, the trial court should be directed that the disability discrimination and accommodation claims are legally and factually similar as a matter of law and that no reduction is appropriate based on the lack of success of the former claim.

¹⁹ For example, in order to rebut the Department's argument that Ms. Tupas was not qualified for her position because of erratic, confrontational behavior, Ms. Tupas was entitled to introduce evidence to establish the unusual stress of the work environment unrelated to her core work duties as of the time of her separation. That evidence related to her recent complaints of discrimination and retaliation, the human resources department's delayed investigation of them, and her supervisor's hostile response to them. These facts, which were at the heart of Ms. Tupas's retaliation claim, were central to her accommodation claim as well, both because they exacerbated Ms. Tupas's long-term severe anxiety disorder and in that they supported that reasonable accommodations were available to permit Ms. Tupas to work effectively in her typical duties. Furthermore, her supervisor's hostile outbursts following Ms. Tupas's formal complaint supported Plaintiff's argument that infrequent disruptions or displays of anger did not disqualify individuals from employment at the Department. (Appendix A).

²⁰ *E.g.* "The hours expended on this case by Plaintiff's attorneys and their paralegal are appropriate and reasonable, however plaintiff failed to prevail on two of the three claims presented to the jury." (Appendix B ¶ 4).

4. The Court's Twenty-Five Percent Reduction in Litigation Costs Was an Abuse of Discretion.

In *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572-74, 740 P.2d 1379 (1987), the Washington Supreme Court “adopt[ed] the federal rule allowing more liberal recovery of costs by the prevailing party in civil rights litigation.” The Court noted that comprehensive cost recovery promotes the policies behind civil rights law, serving “to make it financially feasible to litigate civil rights violations ... to compensate fully attorneys whose service has benefited the public interest, and to encourage them to accept these cases where the litigants are often poor and the judicial remedies are often nonmonetary.” In addition to standard taxable costs, recoverable costs under WLAD may include “out-of-pocket expenses for transportation, lodging, parking, food and telephone expenses, photocopying, and paralegal expenses.” *Martinez v. City of Tacoma*, 81 Wn. App. at 244-45.

Here, the trial court cut Plaintiff's requested costs as well as her fees by twenty-five percent. As was discussed at length above, the trial court did not provide adequate justification for its fee reduction and appeared to reduce recovery based on impermissible considerations. Furthermore, with respect to costs, the court did not point to a burdensome number of costs or provide any other indication why it did not address the

costs on an item-by-item basis or by category. Since Plaintiff and/or her counsel paid these costs out-of-pocket, the admonition in *Moreno* that civil rights lawyers are unlikely to engage in churning and that the court should defer to their professional judgment regarding the necessity of work is particularly apt. Given the liberal approach to costs under WLAD, on remand, the trial court should be instructed to award Plaintiff's costs in full unless it can identify specific costs that do not warrant compensation.

C. The Trial Court's Basis For Failing to Award a Multiplier Was Clearly Erroneous

Upon calculating the lodestar, the court may adjust the fees upward or downward in order to account for: on the one hand, duplicated effort, unproductive time, or limited success or, on the other, excellent results, the high quality of the representation, the riskiness of the litigation, or the delay in compensation. *See Martinez* 81 Wn. App. at 239 (“The lodestar may be adjusted, if appropriate to reflect either the contingent nature of the representation or the quality of the representation, provided those factors have not already been factored into the lodestar amount.”) In the present case, the trial court abused its discretion in declining to award a fully compensatory fee and then denying a multiplier. The trial court's error was two-fold. First, the court placed undue weight on a single consideration (risk) in declining to adjust the lodestar upward to ensure a

full fee award. Second, the court's analysis of risk did not fully consider risk at the outset of the litigation.

Risk is one consideration relevant to a fee award. Other factors in this case strongly support awarding Ms. Tupas at least a fully compensatory fee, either in the calculation of the lodestar or through the application of a multiplier. It is undisputed that the Law Offices of Judith A. Lonquist represented Ms. Tupas on a contingency fee basis. Ms. Tupas was unemployed throughout most of this representation, and the State had concluded that she was unqualified by virtue of her disability from working in her chosen profession, greatly inhibiting her employment prospects and her ability to pay for representation. The trial court expressly found that Ms. Tupas received high quality representation. (Appendix B ¶4). Further, the State vigorously defended Ms. Tupas's action through trial, filing a motion for summary judgment and stating that it would not consider offering anything more than nuisance value to settle the case. (CP 001; CP 697-707). Ultimately, Ms. Tupas received a favorable jury verdict and a substantial monetary judgment that compensated all of her back pay and awarded some front pay and emotional distress damages. The court should have accounted for these factors in setting her lodestar and/or in addressing her request for a multiplier. This is particularly true with respect to the "most critical factor

in determining an appropriate amount of attorney fees”²¹—*i.e.* Plaintiff’s success in addressing Defendant’s termination of her employment through her lawsuit. It is the ultimate outcome that really matters. *Hensley*, 461 U.S. at 435.

Furthermore, the failure to analyze the risk factor fully in determining whether to award a multiplier constitutes an abuse of discretion. *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1110 (9th Cir. 2002). The court should have considered whether the plaintiff’s counsel’s hourly rate incorporates risk (*e.g.* whether the counsel charges different rates in contingency fee cases). *Id.* In addition, the risk of the litigation must be assessed as of the time that the plaintiff’s counsel decided to pursue the ultimately successful claim. *Id.* at 1002.

Here, although lack of risk was the court’s primary stated justification for denying a multiplier, the court’s analysis of risk is suspect. It was premised on the fact that the defendant did not dispute every element of the accommodation claim. (Appendix B). However, where the defendant forcefully disputed the remaining elements of the claim to the extent that they described Ms. Tupas’s claims as “frivolous” and filed a motion for summary judgment, the fact that they agreed that she was disability separated from her employment does not mean that the claim

²¹ *Barnard v. Theobald*, 721 F.3d 1069, 1077-78 (9th Cir. 2013) (*quoting Hensley v. Eckerhard*, 461 U.S. at 436).

was not risky. (CP 766; CP 001). Here, defendant's experienced lawyers plainly did not believe that attorneys' fees were guaranteed for Plaintiff's counsel, as it did not offer to pay those fees in order to settle the case, calling this a "nuisance value" case in settlement discussions just weeks before trial. (CP 697-707). The State certainly never offered Ms. Tupas a settlement comparable to the substantial monetary award that her lawyers helped to secure at trial. Nor is it surprising that the defendant overlooked the risk of the case on its side given that the plaintiff in this matter speaks English as a second language and is disabled by a severe anxiety disorder, both of which create hurdles in presenting a plaintiff's testimony and case to the jury.²² Prior to terminating the Plaintiff, the State received a report from a forensic psychiatrist opining that Ms. Tupas was disabled from performing the essential functions of her job and could not be accommodated. (CP 006). Similarly, Ms. Tupas's own psychiatrist stated in writing that she did not know whether Ms. Tupas could respond to appropriate supervisory authority. (*Id.*). Although the trial court found that the case was not a high-risk matter for Plaintiff's counsel, after all evidence had been heard, the trial court had denied Plaintiff's motion for judgment as a matter of law under CR 50 on her accommodation claim.

²² See *Pham*, 159 Wn.2d at 551 (Sanders, dissent) ("denying civil rights attorneys adequate fees will simply discourage lawyers from taking difficult cases, not to mention those especially difficult cases with 'less-than-articulate' clients").

Even as of the close of evidence, then, the outcome of Plaintiff's case and the compensation of her attorneys remained in doubt. Furthermore, the policy basis for awarding multipliers in Washington Law Against Discrimination cases would not be served by evaluating the risk of a case at the close of evidence. At the inception of this case, Plaintiff's risk was high for all of the reasons addressed above. In addition, because the employer has unfettered access to most of the documents and witnesses in an employment discrimination case whereas the employee's knowledge is comparatively limited, much of the evidence that ultimately supported Plaintiff's accommodation claim became known to the Plaintiff only through the course of discovery, such as during the depositions of the State's forensic psychiatrist, the coworkers who had expressed fear of Plaintiff, her supervisors, and the individuals responsible for investigating concerns expressed by and about Ms. Tupas. Plaintiff's lawyers took this case without knowing what the many witnesses employed by the State would say when deposed and at trial and without having seen many of the documents in the State's possession. In these circumstances, the court's one-dimensional analysis of risk was an error and should be reversed for more comprehensive consideration.

D. The Trial Court Erred in Failing to Award Pre-Judgment Interest on Plaintiff's Back Pay Award

Following trial, Plaintiff moved for prejudgment interest on the liquidated portion of her damages. It is beyond dispute that such relief is available to plaintiffs in RCW 49.60 actions against private employers. *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 531-32, 832 P.2d 537 (Div. 1 1992), *aff'd* 123 Wn.2d 93, 98 (1994). This makes sense given the broad remedial purpose of WLAD and that “[p]rejudgment interest, of course, is ‘an element of complete compensation.’” *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988). Nonetheless, the trial court denied Plaintiff’s request, holding that the State has not waived sovereign immunity to permit prejudgment interest in WLAD actions by public employees.

The availability of prejudgment issue is a legal question which the Court of Appeals reviews *de novo*. *State Dept. of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 789, 161 P.3d 372 (2007). Because the State has waived sovereign immunity to permit state employees to sue and recover damages under WLAD and because (unlike with the U.S. government under federal law) no statutory provision expressly eliminates prejudgment interest from the damages available to state employees, such

relief should be available to state employee plaintiffs under WLAD.²³ This result aligns with the broad remedial purpose of the Law Against Discrimination. Plaintiff therefore requests that this Court reverse the trial court and remand for a calculation of prejudgment interest.

The Washington tort claims statute, unlike its federal counterpart, makes no mention of the availability of prejudgment interest. The Federal Tort Claims Act (“FTCA”) effects a limited waiver of sovereign immunity, reading in relevant part as follows: “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, **but shall not be liable for interest prior to judgment** or for punitive damages.” 28 U.S.C. § 2674 (emphasis added). In contrast, RCW 4.92.090 provides that “[t]he state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.” The provision contains no restriction against prejudgment interest. Likewise, the text of WLAD does not distinguish between state and private employers.²⁴

²³ A diligent search has uncovered no published cases directly addressing the availability of prejudgment interest under WLAD.

²⁴ Under WLAD 49.60.040(11): “‘Employer’ includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not

In *Loeffler v. Frank*, the U.S. Supreme Court addressed the availability of prejudgment interest in a Title VII claim against the U.S. Postal Service (“USPS”). *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988). USPS argued that absent a specific provision waiving sovereign immunity as to prejudgment interest, no such damages were available, but the Supreme Court disagreed. *Id.* at 553-556. The Court held that a “sue and be sued” provision in the statute establishing USPS opened access to any Title VII remedies that would be available to a private employee. *Id.* *Loeffler* is on point here. In defining who qualifies as an “employer” under WLAD, the legislature expressly set apart certain categories of employers—namely religious entities and businesses that employ fewer than eight individuals. RCW 49.60.040(11). Significantly, the State was not among the employers singled out for distinct treatment under WLAD, nor did Washington expressly limit access to prejudgment interest in RCW 4.92, though the state legislature certainly could have followed the federal statutes and explicitly made fewer (or no) remedies available for public employees. Where the State has waived sovereign immunity and opted to subject itself to a broad remedial statute like WLAD without any expressed limitations on its waiver, courts should not

include any religious or sectarian organization not organized for private profit.” The statute does not distinguish the State from any other employing entity under the statute.

retract the scope of the waiver. *Accord: Loeffler*, 486 U.S. at 557, (declining to read a limitation on prejudgment interest into a broad waiver of sovereign immunity).

WLAD's express instruction that RCW 49.60 *et seq.* should be interpreted liberally to promote the eradication of discrimination further supports Plaintiff's position. The statute expressly favors complete compensation for victims of discrimination, whereas it is silent with regard to any restriction on prejudgment interest against the State. Similarly, neither the Defendant nor the trial court pointed to any separate statutory provision that expressly restricts relevant damages. When another statutory provision establishes restrictions on claims against the state generally, it will be read in harmony with RCW 49.60 where possible. *E.g. Blair*, 108 Wn.2d at 576-77 (holding that WLAD plaintiffs must comply with tort claim presentment requirements prior to suing the state because RCW 4.92.110's goal of providing notice of claims to the state does not conflict with RCW 49.60's goal of eradicating discrimination). However, here, no provision inside or outside of WLAD expressly precludes complete relief to discrimination plaintiffs. Absent such a provision, RCW 4.92.090 requiring that the state "shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation," RCW 49.60.040(11) treating a state

employer like any other employer for purposes of WLAD liability, and the many cases establishing that prejudgment interest is available to private employees, when read in tandem, require the outcome that Plaintiff seeks here.

In parallel circumstances, Massachusetts courts have reached the conclusion Plaintiff here advocates. In *DeRoche v. Mass. Comm. Against Discrimination*, 447 Mass. 1, 11-12 848 N.E.2d 1197 (2006), the Massachusetts Supreme Court considered for the first time whether prejudgment interest could be awarded against the state on damages awarded under that state's law against discrimination. The Massachusetts general law regarding sovereign immunity held that "the Commonwealth or any of its instrumentalities 'cannot be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed by statute.'" *Id.* at 12 (quoting *General Elec. Co. v. Commonwealth*, 329 Mass. 661, 664 (1953)). As here, neither the state's anti-discrimination statute nor its general tort claims statute contained any provision expressly foreclosing or permitting the recovery of prejudgment interest against the Commonwealth. *Id.* (citing G.L. c. 151B and 258). The court stated that absent statutory language clearly waiving sovereign immunity, "the Legislature's intent to subject the Commonwealth to liability may be

found only when such an intent is clear ‘by necessary implication’ from the statute’s terms.” *Id.* at 12-13. The *DeRoche* court found that prejudgment interest was available “by necessary implication” because the legislature opted to subject the state to a statute that authorizes broad remedies (previously interpreted to include prejudgment interest against private employers) as a component of “make-whole relief.” *Id.* at 13-14. The *DeRoche* court added that its “conclusion is in accordance with the broad authority granted ... by the Legislature to order a full range of remedies that will further the purpose of eradicating the evil of discrimination.” *Id.* at 14.

Like Massachusetts, Washington permits recovery of prejudgment interest on any liquidated portion of a WLAD damages award against a private employer. *See Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 531-32, 832 P.2d 537 (Div. 1 1992), *aff’d* 123 Wn.2d 93, 98 (1994) (salary and fringe benefits can be calculated with exactness, so prejudgment interest on such sums is appropriate); *see also Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 723, 1543 P.3d 846 (2007) (“A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated.”). Because WLAD does not expressly distinguish between the damages available to public and private employees, and because WLAD is a broad, remedial statute and

prejudgment interest aids to make whole victims of discrimination, this Court should find that such relief is available to public employees under the statute.

E. Plaintiff Is Entitled to Her Attorneys' Fees and Costs on Appeal.

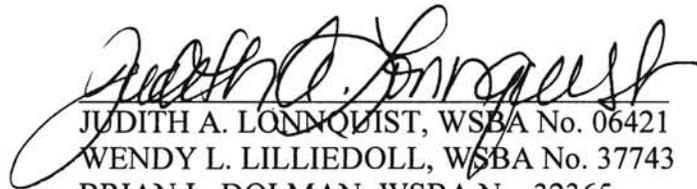
Because Plaintiff prevailed on her underlying WLAD claim, she is entitled under RCW 49.60.030(2) to reasonable attorneys' fees if she prevails on appeal. *See Henningsen*, 102 Wn. App. at 848. Plaintiff therefore requests that this Court award such fees pending Plaintiff's compliance with RAP 18.1.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court remand to the trial court with instructions to reconsider its entry of fees and to award prejudgment interest to Plaintiff Cyma Tupas on her back pay award.

RESPECTFULLY SUBMITTED this 29th day of September 2014.

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.


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Attorneys for Plaintiff Cyma Tupas

APPENDICES

Appendix A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

CYMA G. TUPAS, a/k/a CYMA G.
GREGORIOS
Plaintiff,

NO. 12-2-36393-5 SEA

v.

AMENDED COMPLAINT FOR
DAMAGES AND OTHER RELIEF

STATE OF WASHINGTON d/b/a
DEPARTMENT OF ECOLOGY, KEVIN
FITZPATRICK, GERALD SHERVEY, and
WENDY HOLTON,
Defendants.

I. INTRODUCTION

This action is brought pursuant to common law and RCW 49.60 to redress acts of retaliation and disability discrimination, including failure to accommodate a disability. Plaintiff seeks lost pay, benefits and employment opportunities, emotional distress damages, attorneys' fees and costs, injunctive and other relief.

II. JURISDICTION AND VENUE

1. Defendant Department of Ecology (DOE) does business in King County. Plaintiff resides in King County, and her workplace where the acts complained herein occurred is in King County.

1 2. This court has jurisdiction pursuant to common law and Chapter 49 RCW.

2 **III. PARTIES**

3 3. Plaintiff Cyma G. Tupas is a married woman residing in King County, Washington. She
4 is an Asian-Pacific Islander (Filipina). She worked for Defendant for over 23 years.

5
6 4. Defendant DOE employs more than eight employees and has its principal office in
7 Olympia, Washington. It operates a Water Quality Program in its Northwest Regional Office
8 (NWRO) in Bellevue, Washington, where, at all relevant times, Plaintiff was employed.

9
10 5. Defendants Kevin Fitzpatrick, Gerald Shervy and Wendy Holton, at all relevant times,
11 have been managerial and/or supervisory employees of Defendant DOE and have exercised
12 authority over Plaintiff.

13 **IV. STATEMENT OF CLAIMS**

14 6. Plaintiff began work for Defendant in 1987 as an Environmental Technician, and has
15 held various other technical and scientific positions since that time. She has received favorable
16 evaluations and numerous awards over the course of her career.

17
18 7. During the period from 1989 through 1997, Plaintiff held increasingly responsible
19 Chemist positions for Defendant Department of Ecology. From approximately 1993 through
20 1997 she held an Advisory Laboratorian 1 position, which was equivalent to a Chemist 3
21 position in pay and qualifications.

22
23 8. In or around 1997, Plaintiff transferred into an Environmental Specialist 3 position in
24 Defendant's Water Quality Program in its NWRO in Bellevue. In the fifteen years between
25 Plaintiff's 1997 transfer and her termination in 2012, she was promoted only one time—to
26 Environmental Specialist 4 in 2002. Other Environmental Specialist 3 compliance officers in all
other regions were promoted at the same time in connection with a position reallocation.

1 9. In contrast, Amy Jankowiak, a Caucasian female who joined the Department as an
2 Environmental Specialist 3 in the Water Quality Program in or around 2003, was promoted at
3 least twice between 2003 and 2007, first into a Water Management Specialist position and then,
4 in 2007, into an Environmental Specialist 5 position. In both cases, she wrote her own
5 promotion-related documents.
6

7 10. In or around September 2007, Plaintiff updated her Position Description and requested
8 reallocation to Environmental Specialist 5 via the Water Quality Workforce Management
9 Reallocation Process. Defendant Fitzpatrick denied her request for reallocation, stating that the
10 upgrade request did not meet the business needs of the program.

11 11. Plaintiff's performance evaluations prior to November 2007 do not establish a legitimate
12 reason to upgrade the less senior Ms. Jankowiak to an Environmental Specialist 5 position
13 while Plaintiff retained a lower Environmental Specialist 4 placement. For example, in
14 November 2006 Defendant Kevin Fitzpatrick, Plaintiff's second-level supervisor, appended a
15 note to Plaintiff's evaluation stating "Cyma's dedication and professionalism are inspirational
16 to her coworkers." Likewise, in November 2005, he had written "Cyma is one of the most hard-
17 working and dedicated employees in the NWRO WQ section."
18

19 12. Beginning in or around November 2007, Plaintiff voiced her concerns regarding
20 management actions that she reasonably perceived as discriminating against her on the basis of
21 her national origin. For example, she objected that she had been assigned additional duties and
22 an excessive workload over an extended period of time without a corresponding promotion,
23 increase in pay, or recognition. Similarly, she complained that Ms. Jankowiak was promoted
24 into an Environmental Specialist 5 position with less experience than Plaintiff.
25
26

1 13. In or around December 2007, Plaintiff attended a mandatory meeting regarding
2 communication. Defendant Wendy Holton, Defendant Kevin Fitzpatrick and Plaintiff's then-
3 supervisor Raman Iyer represented the Department of Ecology in the meeting. Defendants
4 accused Plaintiff of communication problems in connection with her complaints regarding Ms.
5 Jankowiak's promotion to ES-5 and other discriminatory and unfair employment practices at
6 Ecology. During this meeting, Defendant Fitzpatrick stood up, pounded his fists on the table
7 and yelled at the Plaintiff..."How dare you complain of Amy's promotion!"

9 14. Following Plaintiff's complaints, her supervisors continued to hand-pick Caucasian
10 employees who had not raised complaints of discrimination and retaliation for desirable out-of-
11 grade assignments, acting appointments, and unposted promotions.

12 15. Plaintiff continued to object to Defendants' actions that she reasonably believed reflected
13 discrimination or retaliation. Plaintiff's objections included complaints in December 2009,
14 September 2010, October 2010, March 2011, April 2011, June 2011, July 2011, November
15 2011, December 2011 and February 2012.

16 16. During the remainder of Plaintiff's employment, rather than addressing the reasonable
17 concerns that Plaintiff continued to raise, Defendants embarked on a course of retaliation
18 against her. For example, plaintiff frequently was singled out for scrutiny in connection with
19 communication breakdowns that were initiated by others, particularly Defendant Shervey.
20

21 17. Despite her strong performance history and heavy workload, Defendants denied Plaintiff
22 promotions for which she was qualified, including by framing job descriptions for promotional
23 opportunities to favor Caucasian employees with no history of EEO activity.
24

25 18. During the night of the October 15, 2010, Plaintiff was exposed to possibly toxic
26 materials when she opened the sample refrigerator in the office laboratory. During and after the

1 incident, Plaintiff was harassed by Defendants and Ecology employees for complaining of the
2 accident, for asking for the building's sample management and after-hours safety procedures
3 and for filing public disclosure requests related to the incident.

4
5 19. In March 2011, Plaintiff filed an Article 47 Formal Complaint against Defendant
6 Shervey alleging harassment and violations of the union contract. Later in July 2011, the union
7 filed its first grievance based on similar concerns.

8 20. In 2011, when Defendants opened an Environmental Specialist 5 position in Plaintiff's
9 program, they tailored several job qualifications to match the experience of Greg Stegman, a
10 less experienced Caucasian employee in Plaintiff's program who had not engaged in any EEO
11 activity. Plaintiff, who was well-qualified, applied for the position. It was given to Mr.
12 Stegman.

13
14 21. Also in August 2011, Defendant opened for internal transfer application a position as an
15 Organics-Chemist 4 at Environmental Laboratory Accreditation Program (ELAP), for which
16 Plaintiff applied. Plaintiff was not granted a transfer. Plaintiff applied again when competitive
17 recruitment began but was not even given an interview despite having lab auditing experience.
18 Instead, the position was given to Kamilee Ginder, an inorganic Chemist 2 who was Caucasian,
19 who had not engaged in any EEO activity, and who, unlike Plaintiff, had not held a Chemist 3
20 position or the equivalent. Ms. Ginder did not have the organics expertise or the lab auditing
21 experience.
22

23 22. Defendants also retaliated against Plaintiff by expanding her position without giving her
24 the pay or title upgrades they had awarded her peers. For example, in December 2009,
25 Defendant unilaterally rewrote Plaintiff's position description to add essential functions, key
26 competencies, and duties that had not previously been part of her job.

1 23. After further overloading Plaintiff with work, Defendants applied additional pressure by
2 scrutinizing minute elements of her performance such as the format in which she transferred
3 information to the Attorney General's office, her file storage practices, and her notations on her
4 Outlook Calendar. When Plaintiff became frustrated and complained that her peers were not
5 held to the same standards as she was, Defendants belittled Plaintiff's concerns and criticized
6 her further for challenging her peers' behavior and treatment.
7

8 24. In the months immediately prior to Plaintiff's placement on home assignment, Defendant
9 Shervey began creating "Performance Feedback Forms" to document his meetings with
10 Plaintiff regarding items tangential to her primary functions, such as her handling of closed
11 files. The form and number of these records had the effect of papering Plaintiff's file with
12 pseudo-disciplinary records where Mr. Shervey did not have a legitimate basis for true
13 discipline. The frequency and nature of the underlying performance conversations placed
14 exceptional stress on Plaintiff between December 2011 and April 2012.
15

16 25. Defendants also took other actions calculated to make Plaintiff uneasy and then criticized
17 her guarded or skeptical response. For example, after her discrimination and retaliation
18 complaints, Defendant Shervey often brought a "witness" when he spoke with Plaintiff, even
19 about matters that otherwise might have seemed mundane. A frequent witness was Raman Iyer,
20 who had been Plaintiff's supervisor at the time of her 2007 discrimination complaint. However,
21 when Plaintiff began to insist that she too needed a witness present for her conversations with
22 Mr. Shervey, Defendants responded as though Plaintiff was irrational and incapable of
23 supervision. Further, Defendants sought to prevent Plaintiff from having a supportive witness
24 or union representative present at meetings with Mr. Shervey. Defendants scheduled meetings
25
26

1 at a time or in a manner that prevented the witness from attending and on one occasion even
2 stated that, although Plaintiff could have a witness attend, it could not be her chosen witness.

3 26. Defendants also exhibited general hostility toward Plaintiff following her complaints.
4 Even after receiving written complaints from Plaintiff, Defendant Holton did not take
5 reasonable steps promptly to investigate and remedy the behavior about which Plaintiff
6 complained. First, Defendant Horton delayed her interviews with witnesses for several months
7 after Plaintiff's original complaint. In those interviews, multiple witnesses described Mr.
8 Shervey harassing Plaintiff, appearing irate in her performance review meetings, and refusing
9 to let her speak or provide feedback during her evaluation process. Despite Mr. Shervey's
10 unprofessional conduct, Defendants refused reasonable requests to change Plaintiff's
11 supervisor, even when the specific supervisor she requested was a manager in her program and
12 unit who occasionally supervised Plaintiff in her supervisor's absence.
13
14

15 27. Plaintiff had an exceptional discipline-free record over twenty-three years at the
16 Department of Ecology. Then, after she raised concerns regarding discrimination and
17 retaliation, Defendants began to look for opportunities to reprimand her. In January 2010,
18 Defendant Shervey sought to discipline Plaintiff because she had not completed a project that
19 had been assigned with no deadline. Similarly, in October 2010, Mr. Shervey reviewed
20 Plaintiff's personnel file and proposed issuing discipline based in part on events that took place
21 in 2007, before he was her supervisor. In direct response to a 2010 email in which Plaintiff
22 complained about increased scrutiny, discrimination and retaliation, Mr. Fitzpatrick sought
23 permission from Human Resources to put her on home assignment without any showing that
24 she was a danger to herself or others. In each case, Defendant's own Human Resources
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1 personnel indicated that Defendants did not have an adequate basis for the discipline they
2 sought to impose.

3 28. Plaintiff suffers from anxiety, panic attacks and depression as well as a migraines,
4 insomnia and heart palpitations. The stress she experienced as a result of the retaliation by
5 Defendants intensified Plaintiff's symptoms associated with her disability and at times
6 prevented her from working. On several occasions between April 2010 and her termination,
7 Plaintiff applied for intermittent FMLA leave to address her disability As a result, Defendants
8 were aware of her medical conditions.

9
10 29. In October 2010, in the context of a discussion regarding Plaintiff's exposure to a
11 possible toxic gas, Plaintiff told Mr. Shervey information about her health condition that he
12 indicated he had not known previously. When Plaintiff returned to work following the
13 exposure, Mr. Shervey was cold to her. He brought her paperwork and demanded that she fill it
14 out, but did not ask her how she was feeling or express any regret about her exposure or the
15 stress associated with the incident.

16
17 30. In November 2010 following the accident, Plaintiff's psychiatrist completed FMLA
18 forms requesting that Plaintiff be granted four weeks of leave between December and January
19 2010 due to possible side effects from a change in medication. On the first day of the requested
20 FMLA leave, Mr. Shervey had not yet approved her leave so Plaintiff went in to work. Rather
21 than asking Plaintiff whether there had been a misunderstanding or otherwise initiating a
22 professional cordial conversation with her, Mr. Shervey demanded that she leave. He then
23 followed her out of the building and all the way to her car, despite Plaintiff protesting that she
24 felt harassed.
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1 31. In spite of Plaintiff's several FMLA requests—which included certifications that she had
2 long-term ongoing disabling medical conditions—at no point prior to placing her on home
3 assignment did Defendant initiate an interactive process to evaluate whether Plaintiff needed a
4 reasonable accommodation to address her known disabilities.

5
6 32. Instead, Defendants took actions certain to exacerbate her condition and to create hurdles
7 to her continued success at the Department. For example, in January 2012, Mr. Shervey met
8 with Plaintiff to instruct her that she could not take leave without pay with less than fourteen-
9 day notice. Given the nature of her disabilities, Plaintiff could not predict her need for leave
10 two weeks in advance.

11 33. In June 2011, three witnesses confirmed that Mr. Shervey was unprofessional and
12 harassing toward Plaintiff, was defensive and belittling, and became so disturbed in a series of
13 performance review meetings that he would not permit Plaintiff to talk, was breathing heavily,
14 and inadvertently spit on one of the attendees. Witnesses also described that Mr. Shervey
15 inappropriately told Plaintiff that he would erase all of her feedback from the evaluation unless
16 she agreed to sign the evaluation form. Even Mr. Shervey himself acknowledged that he was
17 “adrenalized” and angry and should have delayed the meeting. No witness described any action
18 by Ms. Tupas at the meeting to initiate a conflict with Mr. Shervey.
19

20 34. Despite Mr. Shervey's conduct, Defendants did not place Mr. Shervey on home
21 assignment, compel him to attend a medical examination, or even agree to reassign Ms. Tupas
22 to a supervisor who was not hostile to her.

23
24 35. Instead, they retained Mr. Shervey in a position where he was empowered to place
25 increasing pressure on Plaintiff. On one occasion, Defendant Fitzpatrick even put Mr. Shervey
26 in-charge of the Section while he was on vacation. Also, in the four months leading up to

1 Plaintiff's placement on home assignment, Mr. Shervey formally documented four
2 "Performance Review Form" meetings with her about subjects such as moving closed files,
3 providing fourteen-day notice prior to taking leave without pay, modifying timesheets, and
4 receiving advance permission to work beyond 6:00 pm.

5
6 36. On February 13, 2012, Plaintiff timely filed a tort claim alleging discrimination and
7 retaliation by Defendant.

8 37. On February 17, 2012, Plaintiff's psychiatrist, Dr. Nguyen, submitted an FMLA form
9 requesting that Plaintiff be permitted to take intermittent leave due to anxiety, insomnia and
10 depression.

11 38. On February 24, 2012, Raman Iyer, acting for Defendant Shervey, denied the Plaintiff's
12 Automated Leave Form (ALF) FMLA-Sick Leave request for the same day.

13
14 39. On March 8, 2012, Dr. Nguyen requested that the intermittent FMLA period be extended
15 to permit Plaintiff to adjust her medications and work on stress management and sleep.

16 40. Defendants were aware of Plaintiff's ongoing medical condition prior to March 12, 2012.
17 On that date, Defendant Shervey sent Plaintiff an email at 4:25 p.m. criticizing her for including
18 too large a list of people on an email she had sent earlier in the day regarding a public records
19 request.

20
21 41. Without Plaintiff responding to Mr. Shervey's email or taking any other action that
22 required further follow-up, approximately five minutes later, Mr. Shervey approached Plaintiff
23 to discuss this email in person. When Plaintiff indicated that she had not yet read his email, Mr.
24 Shervey continued to pursue the issue. Given the history of their interactions and the
25 unfavorable nature of his comments, Plaintiff requested that Mr. Shervey allow her to have a
26 union representative present for the conversation. When Mr. Shervey refused, Ms. Tupas asked

1 to have the conversation in a colleague's office so that she could witness the discussion. Mr.
2 Shervey insisted that Ms. Tupas leave the colleague's office.

3 42. Although Ms. Tupas was clearly distressed, approximately a half hour later, Mr. Shervey
4 again confronted Ms. Tupas, this time in an almost-empty office building at approximately 5:00
5 p.m. Ms. Tupas again sought out a witness for the conversation, and Mr. Shervey again refused
6 to talk to Ms. Tupas with a witness present.
7

8 43. Defendants then solicited complaints regarding Ms. Tupas's March 12, 2012 behavior
9 from select coworkers. Significantly, the witness to Ms. Tupas's last interaction with Mr.
10 Shervey that evening—the only witness who does not report to Mr. Shervey or Mr. Iyer—
11 indicated that both Mr. Shervey and Ms. Tupas appeared “modestly conflicted,” were “civil but
12 not cordial,” and “seemed to be in control of their emotions.”
13

14 44. Based on alleged concerns stemming from Ms. Tupas's behavior on March 12, 2012, on
15 April 3, 2012, Defendant placed Plaintiff on home assignment and demanded that she submit to
16 a medical examination by a psychiatrist of the Defendant's choosing, threatening her with
17 termination if she did not attend. When she arrived at the medical examination, Plaintiff
18 indicated to the doctor that she would prefer to have a representative present with her during the
19 examination, and the doctor agreed to reschedule the appointment.
20

21 45. After the April 19, 2012 medical appointment, Plaintiff received a written reprimand via
22 e-mail for failing to undergo the examination without representation.

23 46. On May 3, 2012, Plaintiff attended the rescheduled examination, along with her legal
24 representative. Before beginning the examination, the doctor asked the representative to
25 identify herself and to spell her name. The doctor then stated that he was not comfortable
26 conducting the examination with an attorney present. He accused Plaintiff of misrepresenting

1 her intentions at the prior appointment and stating that she planned to bring a union
2 representative. Plaintiff explained that she had just said that she would like to have a
3 representative present and had informed Defendant Wendy Holton, from the Department's
4 Human Resources, of who the representative would be. The doctor repeated his accusation that
5 Plaintiff had misrepresented herself previously. When Plaintiff's representative stated that she
6 just planned to sit quietly and observe, the doctor expressly refused to speak to her and stated
7 that he would not talk again until she was out of the room. Despite the aggressive behavior of
8 Defendants' selected psychiatrist, Plaintiff participated in the examination, believing that she
9 faced termination otherwise.
10

11 47. On June 25, 2012, Defendant notified Plaintiff that it believed that she "may have a
12 disability that necessitates reasonable accommodation," and required that she submit medical
13 and accommodation forms.
14

15 48. Defendant repeatedly extended Plaintiff's home assignment for a total of six months,
16 even after Defendant's own forensic psychiatrist found that Plaintiff was not a danger to herself
17 or others, which had been the basis for her removal from the workplace.
18

19 49. During the course of Plaintiff's home assignment, Defendants repeatedly denied her
20 access to the tools that she required in order to perform her duties from home. When an
21 Ecology employee indicated that she could provide Ms. Tupas with the tools she was
22 requesting, Defendant Fitzpatrick indicated that she should not do so. At the same time,
23 Defendants insisted that Plaintiff remain at her home and available to them for the entire
24 workday throughout her six month assignment.
25
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1 50. Plaintiff returned the forms that her personal physician had completed, verifying that
2 Plaintiff could safely work fulltime as long as she were permitted to telecommute one morning
3 a week.

4 51. On October 2, 2012, Plaintiff was advised by Human Resources that she could not be
5 reasonably accommodated amongst the 11 (eleven) vacancies found in the Plaintiff's region.
6 Contrary to Defendants' own policy statements, Defendants did not seek feedback from
7 Plaintiff's health care provider regarding Plaintiff's ability to perform the duties each position
8 entailed.

9 52. On October 3, 2012, Defendant DOE notified Plaintiff that it was instituting a disability
10 separation and terminating her employment.

11 53. As a result of the discrimination and retaliation, and Defendant DOE's failure to redress
12 it, Plaintiff suffered and continues to suffer economic damages and severe emotional distress.

13
14
15 **COUNT I**

16 Defendants have discriminated against Plaintiff on the basis of a disability, in violation
17 of RCW 49.60.180.

18
19 **COUNT II**

20 Defendants failed reasonably to accommodate the Plaintiff, in violation of RCW
21 49.60.180.

22 **COUNT II**

23 Defendants have retaliated against Plaintiff, in violation of RCW 49.60.210.

24
25 WHEREFORE, Plaintiff respectfully requests the following relief:

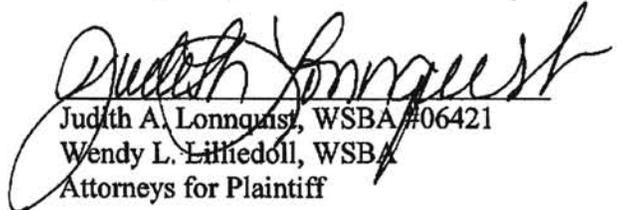
26 A. Back pay and other economic damages;

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- B. Emotional distress damages;
- C. Pre-judgment interest;
- D. Reasonable attorney's fees and litigation expenses pursuant to RCW 49.48.030 and/or RCW 49.60.030(3);
- E. Injunctive relief;
- F. Tax relief;
- G. Costs;
- H. Such other relief as the Court deems appropriate.

Dated this ____ day of October, 2013.

LAW OFFICES OF JUDITH A.
LONNQUIST, P.S.



Judith A. Lonquist, WSBA #06421
Wendy L. Lilliedoll, WSBA
Attorneys for Plaintiff

Appendix B

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Honorable Helen Halbert
Hearing Date: June 27, 2014
With oral argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

CYMA G. TUPAS, a/k/a CYMA G.
GREGORIOS,

Plaintiff,

v.

STATE OF WASHINGTON, d/b/a
DEPARTMENT OF ECOLOGY,

Defendant

NO. 12-2-36393-5 SEA

ORDER GRANTING PLAINTIFF'S
APPLICATION FOR AN AWARD OF
REASONABLE ATTORNEY'S FEES
AND EXPENSES, INCLUDING COSTS

THIS MATTER, having come before this Court upon the application of Plaintiff for an award of reasonable attorney's fees and costs, and the Court having reviewed the pleadings and files herein, having presided over the trial herein, being otherwise fully advised in the premises, and having considered the following documents:

1. Plaintiff's Application for An Award of Reasonable Attorneys' Fees and Expenses, Including Costs;
2. Declaration of Judith A. Lonnquist In Support of Plaintiff's Motion, and Exhibits A-E thereto;

ORDER GRANTING IN PART PLAINTIFF'S
APPLICATION FOR AN AWARD OF
REASONABLE ATTORNEY'S FEES AND
EXPENSES, INCLUDING COSTS

Page - 1

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3. Declaration of Victoria Vreeland In Support of Plaintiff's Application, and Exhibit A thereto;
4. Declaration of John P. Sheridan In Support of Plaintiff's Petition for Fees, and Exhibit I and II thereto;
5. Defendant's Objection To Plaintiff's Motion For Award of Attorney's Fees and Cost Bill;
6. Declaration of Diana Handley and Exhibits 1 and 2 thereto;
7. Declaration of Jana Hartman, and Exhibits 1 through 5 thereto;
8. Declaration of Jaime Taft and Exhibit 1 thereto;
9. Declaration of Michael Reilly and Exhibits A through C thereto;
10. Plaintiff's Reply to Defendant's Objection, and exhibit attached thereto;
11. Second Declaration of Judith A. Lonnquist and Exhibits A through E thereto;
12. Declaration of Philip Ammons and attached resumé;
13. Declaration of Kathleen Phair Barnard;
14. Declaration of Scott Blankenship and Exhibit A thereto;
15. Declaration of Steven Frank and Exhibit 1 thereto;
16. Declaration of Jon Rosen and Exhibit 1 thereto;
17. Declaration of Mark Shepherd; and

THE COURT FINDS and CONCLUDES as follows:¹

1. Plaintiff is the prevailing party in this matter as to the failure to accommodate claim.
2. The hourly rates of Plaintiff's counsel are reasonable and within the market rate:
 - a. Judith Lonnquist - \$475 per hour;
 - b. Brian Dolman - \$275 per hour; and

¹ For ease of counsel, the court has indicated changes in the order proposed by plaintiff through strike outs and underlining.
ORDER GRANTING IN PART PLAINTIFF'S APPLICATION FOR AN AWARD OF REASONABLE ATTORNEY'S FEES AND EXPENSES, INCLUDING COSTS

1 c. Wendy Lilliedoll - \$300 per hour.

2 3. The hourly rate charged by Plaintiff's law firm, for its paralegal, Philip
3 Ammons of \$150 per hour is reasonable and within the market rate.

4 4. The hours expended on this case by Plaintiff's attorneys and their paralegal are
5 appropriate and reasonable, however, plaintiff failed to prevail on two of the
6 three claims presented to the jury.²

7 5. The lodestar amount of fees is \$543,695.00 for work on all claims.

8 6. ~~There is no basis for a reduction of the lodestar amount.~~

9 7. ~~This case was a high-risk case.~~

10 8. Plaintiff's attorneys worked on a contingent fee basis.

11 9. The quality of Plaintiff's attorneys on this case was excellent.

12 10. It is challenging to determine precisely how much time spent plaintiff's counsel
13 spent preparing and presenting evidence on the successful, as opposed, to non-
14 successful claims. Certainly, some background as to Ms. Tupas's employment
15 history at the Department of Ecology would have been relevant background for
16 evaluating the successful failure to accommodate claim. In addition, both
17 parties were entitled to present lay testimony as to incidents that ultimately
18 resulted in Ms. Tupas's disability separation. The court finds and concludes
19 that a 25% reduction in the hours of preparation and trial is appropriate to
20 account for time spent on the unsuccessful claims that do not encompass a
21 "common core of facts and related legal theories" as the failure to accommodate
22 claim. See *Steele v. Lundgreen*, 96 773, 783 (1999). Accord, *Pham v. City*
23 *Light*, 159 Wn. 2d 527 (2007). This would result in an adjusted lodestar of
24 \$407,771.

25
26 ² Because of the court's approach to the amount of fees (see Finding 10), the court did not reduce the award by
arguably redundant billing, such as having two lawyers attend some depositions or the conferences that
occurred among the three lawyers handling this case.

- 1 11. Because of the approach taken by the court, the issue of "block billing" raised
 2 by the Department is unnecessary to address. In addition, the court notes that
 3 many of the examples raised by the Department as examples of "block billing"
 4 are fairly specific.
- 5 12. In determining that a multiplier is not warranted, the court considered, among
 6 other factors, the Department's concession that Ms. Tupas was disabled. It was
 7 also conceded that Ms. Tupas was terminated because of her disability and
 8 because the Department concluded it would be unable to accommodate her.
 9 This was not a particularly high risk claim for plaintiff's counsel to take on.
 10 Some of the other factors considered by the court are briefly summarized in
 11 Footnote 2 to this order. A multiplier of 1.50% is warranted on the lodestar-
 12 amount.
- 13 13. Plaintiff's costs are reasonable and fully recoverable, in the same proportion as
 14 the attorney fees. .
- 15 14. Plaintiff is entitled to recover fees on all post-trial work performed by her
 16 attorneys.
- 17 15. Plaintiff's post-trial costs are ~~reasonable and fully recoverable~~, but amounts after
 18 June 24, 2014 are not yet before the court.

19 NOW THEREFORE, the Court makes the following AWARD to Plaintiff:

- 20 1. For attorneys' fees incurred through trial: \$~~543,695.00~~ \$407, 771
- 21 2. ~~A multiplier of 1.50% on the lodestar:~~ \$271,847.50
- 22 3. For costs and expenses through trial: \$ ~~48,573.98~~ \$12,259.83
- 23 4. For fees incurred post-trial through June 23, 2014: \$ 6,892.50
- 24 5. For fees incurred from June 24, 2014 to date: \$ To be Determined
- 25 6. For costs and expenses incurred post-trial: \$ 9,762.56

26 For a total award of \$ 436,685.89 , plus interest at the statutory rate until paid.

ORDER GRANTING IN PART PLAINTIFF'S
 APPLICATION FOR AN AWARD OF
 REASONABLE ATTORNEY'S FEES AND
 EXPENSES, INCLUDING COSTS

Page - 4

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DONE IN CHAMBERS this 29 day of June, 2014.

Signed electronically

Honorable Helen Halpert

Presented by:
LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.

Judith A. Lonquist, WSBA #06421
Brian Dolman, WSBA #32365
Wendy L. Lilliedoll, WSBA #37743
Attorneys for Plaintiff

Approved as to Form and Content;
Notice of Presentation Waived:

ROBERT W. FERGUSON
Attorney General

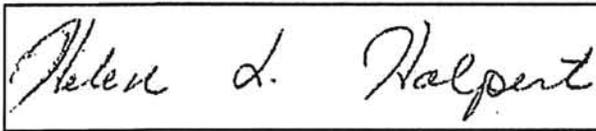
Jana Hartman, WSBA #35524
Assistant Attorney General
Attorneys for Defendants

King County Superior Court
Judicial Electronic Signature Page

Case Number: 12-2-36393-5
Case Title: TUPAS AKA VS WASHINGTON STATE OF DBA ET AL

Document Title: ORDER ON ATTORNEYS' FEES AND COSTS

Signed by: Helen Halpert
Date: 6/30/2014 9:00:00 AM



Judge/Commissioner: Helen Halpert

This document is signed in accordance with the provisions in GR 30.
Certificate Hash: 802772A59F78160EA408BDE000D37A07916208CC
Certificate effective date: 7/29/2013 12:21:03 PM
Certificate expiry date: 7/29/2018 12:21:03 PM
Certificate Issued by: C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA,
O=KCDJA, CN="Helen
Halpert:NG36B3r44hG2yOw3YYhwmw=="

Page 6 of 6

Appendix C

WPI 330.32

**DISABILITY DISCRIMINATION—
DEFINITION OF DISABILITY**

A disability is an abnormal sensory, mental, or physical condition which:

- (1) is medically recognized or diagnosable; or
- (2) exists as a record or history; or
- (3) is perceived by the employer to exist, whether or not it exists in fact.

NOTE ON USE

Use this instruction in conjunction with either WPI 330.31, Disability Discrimination—Treatment Case—Burden of Proof, or WPI 330.33, Disability Discrimination—Reasonable Accommodation—Burden of Proof.

COMMENT

RCW 49.60.180 provides that it is an unfair practice for an employer to discriminate in various employment decisions "because of ... the presence of any sensory, mental, or physical disability...." RCW 49.60.180(1), (2), (3), and (4).

This instruction is based upon WAC 162-22-040(1)(b). See *Hume v. American Disposal*, 124 Wn.2d 656, 670, 850 P.2d 988, 996 (1994).

The applicable regulation uses the term handicap. The word disability is used here as consistent with 1993 revisions to Chapter 49.60, RCW. WAC 162-22-040(1)(b) also indicates that the definition "includes, but is not limited to ..." the three items listed in the instruction.

The portion of WAC 162-22-040(1)(b) which provides that it is sufficient if it is the employer's perception that the plaintiff is disabled was upheld in *Barnes v. Washington Natural Gas Co.*, 22 Wn.App. 576, 591 P.2d 461 (1979).

WAC 162-22-040(1)(a) provides that "A condition is a 'sensory, mental, or physical handicap' if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question.... In other words, for enforcement purposes a person will be considered to be handicapped by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the

WPI 330.33**DISABILITY DISCRIMINATION—REASONABLE
ACCOMMODATION—BURDEN OF PROOF**

Discrimination in employment on the basis of disability is prohibited.

The plaintiff has the burden of proving:

- (a) that [he] [she] had a disability;
- (b) that the employer was aware of the disability;
- (c) that [he] [she] was able to perform the essential functions of the job in question with reasonable accommodation; and
- (d) that the employer failed to reasonably accommodate the plaintiff's disability.

NOTE ON USE

Use this instruction, rather than WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof, or WPI 330.31, Disability Discrimination—Treatment Case—Burden of Proof, when the essential feature of the plaintiff's claim is that the employer has failed to make reasonable accommodation for the plaintiff's disability.

An essential functions instruction may be appropriate depending on the facts and circumstances of the particular case. In an appropriate circumstance, it may be necessary to add the phrase "or without reasonable accommodation" to section (c), to clarify for the jury that plaintiff's case is not defeated if no reasonable accommodation was required.

Select the appropriate bracketed pronouns.

Use this instruction in conjunction with WPI 330.32, Disability Discrimination—Definition of Disability. This instruction is designed to be used together with WPI 330.34, Disabilities Discrimination—Reasonable Accommodation—Definition, and WPI 330.35, Disabilities Discrimination—Undue Hardship.

Use this instruction with WPI 21.01, Meaning of Burden of Proof—Preponderance of the Evidence, in the main volume, 6 Washington Practice, Washington Practice Jury Instructions: Civil (1989, 1994).

Appendix D

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Honorable Dean S. Lum

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

CYMA G. TUPAS, a/k/a CYMA G.
GREGORIOS,

Plaintiff,

v.

STATE OF WASHINGTON, d/b/a
DEPARTMENT OF ECOLOGY and
GERALD SHERVEY,

Defendants.

NO. 12-2-36393-5 SEA

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Hearing Date: February 28, 2014
Hearing Time: 9:45 a.m.

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff Cyma Tupas had been employed by the Department of Ecology for twenty-four years as of her October 2012 involuntary disability separation. Although Defendants' motion and declarations criticize Ms. Tupas' performance during her final years at the Department of Ecology ("Ecology"), her performance evaluations were strong throughout her career, and she received no disciplinary notices to corroborate that she was unable to perform any essential function of her job. Defendants are not entitled to summary judgment on Plaintiff's disability discrimination claim.

1 Similarly, there are ample facts from which a reasonable jury could conclude that
2 Ecology neglected its accommodation duties, including 1) Ecology's sequestration of Ms. Tupas
3 to home assignment for many months after its own forensic psychiatrist nullified the basis for her
4 removal from the office, and 2) Ecology's failure to provide Ms. Tupas with any meaningful
5 accommodations, attempting any accommodation, or identifying how the accommodations
6 suggested by Ms. Tupas and Dr. Nguyen created an undue hardship on the department.
7

8 Finally, Ms. Tupas complained about race discrimination and retaliation on several
9 occasions during the statute of limitations period. On the heels of each complaint, Defendants
10 engaged in a series of actions that a reasonable jury could conclude were motivated to discourage
11 such activity. Managers failed to investigate her concerns, made adverse changes to her position
12 description, pursued unwarranted discipline, began logging her activities, issued performance
13 feedback notices that they did not use with other employees, and generally lashed out at her and
14 those who supported her. Plaintiff therefore respectfully requests that the Court deny
15 Defendants' motion for summary judgment.
16

17 II. STATEMENT OF FACTS

18
19 **A. Background:** Plaintiff Cyma Tupas is a Filipina chemist who was hired by the Department
20 of Ecology in December 1987. Over the following thirteen years, she held positions as a Scientific
21 Tech, a Chemist 1, a Chemist 2, and an Advisory Laboratorian. Her reviews throughout that period
22 described her as diligent, dedicated to her professional development, friendly, and a good team
23 player—supportive of her coworkers and receptive of their support.¹ Ms. Tupas also received
24 awards to corroborate the positive assessments of her performance.²
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¹ Tupas Decl. at ¶ 2.

² Tupas Decl. at ¶ 2.

1 In September 2000, Ms. Tupas took an Environmental Specialist 3 (ES-3) position in the
2 Northwest Region Water Quality division, and the following year she learned that she would be
3 promoted to ES-4 pursuant to a position reallocation. Ms. Tupas continued to receive high praise for
4 her performance—quickly developing excellent working relationships with coworkers, volunteering
5 for new projects, establishing her value and work ethic, and producing high quality work despite an
6 exceptional workload.³

8 Throughout her employment at the regional office, Ms. Tupas was treated by Dr. Cuc
9 Nguyen for anxiety and depression, with periods of insomnia and disabling migraines.⁴ There is no
10 evidence, during that time, that these conditions negatively impacted her job performance.

11 **B. Facts Related to Plaintiff's Retaliation Claim:** In January 2007, Ms. Tupas learned that
12 Mr. Fitzpatrick was promoting Amy Jankowiak, a Caucasian coworker, to ES-5 through the Fiscal
13 Year 2007 Workforce Management Plan.⁵ Ms. Jankowiak had joined Ecology in 2002 and had
14 been promoted three times, while Ms. Tupas had remained an ES-4 in spite of her awards,
15 workload, and excellent reviews. Ms. Tupas requested that she be considered for reallocation to ES-
16 5, but Mr. Fitzpatrick denied her request.⁶ Ms. Tupas was aware that independent studies had raised
17 a history of racial diversity concerns at Ecology, particularly in Environmental Specialist and
18 management positions and with non-competitive promotions. In or around October 2007, Ms.
19 Tupas then met with Mr. Fitzpatrick and complained that, in her opinion, the relative promotional
20 decisions reflected discrimination. Mr. Fitzpatrick criticized Ms. Tupas for voicing her concern, and
21 took no action to investigate her complaint.⁷ Nonetheless, Ecology's failure to investigate Ms.
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26 ³ Tupas Decl. at ¶ 3.

⁴ Tupas Decl. at ¶ 4; Dr. Nguyen Decl. at ¶ 3.

⁵ Tupas Decl., Ex. C.

⁶ Tupas Decl., Ex. D.

⁷ Tupas Decl. at ¶ 5.

1 Tupas's concerns did not prevent her from performing diligently and competently on behalf of the
2 department thereafter.⁸

3 On December 14 and 21, 2009, Ms. Tupas met with her then-supervisor, Gerald Shervey, to
4 discuss her performance evaluation. When Mr. Shervey indicated he planned to expand Ms. Tupas'
5 job duties, Ms. Tupas noted that her workload already was excessive and that her peers (all
6 Caucasian) were not required to perform duties across units. Her eyes began to tear up as she
7 described a history of discrimination and retaliation at Ecology.⁹ Because the expectation to perform
8 enforcement work outside of the unit was unclear, Mr. Shervey later admitted that Ms. Tupas'
9 concerns were legitimate.¹⁰ Ms. Tupas stated that she may appeal if Mr. Shervey altered the duties
10 her position duties, and requested to bring her attorney, Darrell Cochran, to the next performance
11 development plan meeting.¹¹ Mr. Cochran had secured a well-publicized \$700,000 settlement from
12 Ecology in a race discrimination case the prior year.
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15 In the weeks after Ms. Tupas' complaint, Ecology again failed to initiate a review of her
16 concerns. Instead, it began to build a case against Ms. Tupas. Two days after her complaint, Mr.
17 Shervey contacted Ms. Tupas' former supervisors to solicit complaints about Ms. Tupas.¹² Mr.
18 Shervey specifically solicited e-mails from Mr. Iyer that were authored by Ms. Tupas several years
19 prior.¹³ The following week, Mr. Shervey revised her position description to remove beneficial
20 designations. On January 5, Mr. Shervey asked to discipline Ms. Tupas, but human resources said
21 there was no adequate basis.¹⁴ Mr. Shervey investigated Ms. Tupas' document printing habits.
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26 ⁸ Dolman Decl., Ex. 1, Iyer Dep. 47:7-18, 163:23 – 164:22.

⁹ Tupas Decl. at ¶ 6.

¹⁰ Dolman Decl., Ex. 2, Shervey Dep. Vol. I, 71:23 – 73:17.

¹¹ Tupas Decl. at ¶ 6.

¹² Dolman Decl., Ex. 2, Shervey Dep. Vol. I, 127:15 – 128:5.

¹³ Dolman Decl., Ex. 1, Iyer Dep. 112:20 – 113:16.

1 On September 27, 2010, Ms. Tupas responded to an urgent records request from the
2 Attorney General's office. Mr. Shervey called her aside and rebuked her for faxing rather than
3 scanning the documents. On September 28, 2010 Ms. Tupas complained to Mr. Shervey that
4 Ecology's unique scrutiny of her (in this case, applying an unofficial fax policy to her but not the
5 two Caucasian enforcement specialists) appeared to reflect discrimination and retaliation.¹⁵ The next
6 day, Ms. Tupas learned that Lori LeVander, a Caucasian coworker and friend of Mr. Shervey, had
7 been withholding information on an enforcement action, and she wrote a frustrated email about the
8 situation. Mr. Shervey responded with an e-mail criticizing the tone and content of Ms. Tupas'
9 message, but did not similarly admonish Ms. LeVander.¹⁶ Ms. LeVander subsequently admitted that
10 she actively sought to exclude Ms. Tupas as her unit's Enforcement Specialist, and favored working
11 with her friend from a different unit, Ms. Jankowiak.¹⁷
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14 On September 29, in response to an e-mail string in which Ms. Tupas referenced
15 discrimination and retaliation, Mr. Fitzpatrick asked to place Ms. Tupas on home assignment. Ms.
16 Holton responded that there was no indication that Ms. Tupas posed a security threat and thus no
17 basis for home assignment.¹⁸ Mr. Shervey proposed an oral reprimand based on Ms. Tupas's emails
18 regarding the attorney general production and Ms. LeVander's enforcement action, but Ms. Holton
19 informed him that there also was not an adequate basis for discipline.¹⁹
20

21 In March 2011, Ms. Tupas submitted two written complaints to human resources alleging
22 harassment and retaliation by Mr. Shervey and expressly requesting an investigation. A month later,
23 Ms. Holton said that she would not begin the investigation immediately because of "competing
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26 ¹⁴ Dolman Decl., Ex. 2, Shervey Dep., Vol. I, 175:10 – 176:4.

¹⁵ Tupas Decl. at ¶ 7.

¹⁶ Tupas Decl. at ¶ 8.

¹⁷ Dolman Decl., Ex. 3, LeVander Dep., 109:14 – 110:4, 124:5 – 125:20.

¹⁸ Dolman Decl., Ex. 4.

¹⁹ Dolman Decl., Ex. 2, Shervey Dep., Vol. I, 175:10 – 176:4.

1 work priorities.”²⁰ Although Ecology admits that it takes complaints seriously and expects its
2 investigations be conducted in a timely fashion, Ms. Holton delayed the investigation.²¹ In the
3 interim, Ecology did not separate Ms. Tupas and Mr. Shervey, or take any remedial steps to prevent
4 any additional retaliation. At Ms. Tupas’s June 2011 performance evaluation, three witnesses
5 corroborated that Mr. Shervey’s behavior was inappropriate and hostile, including gesticulating
6 angrily, breathing heavily, raising his voice, refusing to allow others to speak, and limiting positive
7 feedback, all while Ms. Tupas said very little.²² Ms. Burgess, a former unit supervisor, also
8 acknowledged that Mr. Shervey tended to incorporate trivial criticisms against Ms. Tupas.²³

9
10 Although she had advised Mr. Shervey regularly regarding Ms. Tupas, Ms. Holton did not
11 defer to a neutral investigator. She did not prepare a report regarding her investigation until
12 December—approximately nine months after Ms. Tupas’s original complaint.²⁴ During the drawn-
13 out investigation period, witnesses to interactions between Mr. Shervey and Ms. Tupas conveyed
14 their perceptions that he was aggressive, discriminatory, and bullying toward her, but Ecology still
15 did not separate them, or take other effective remedial steps. Ultimately Ms. Holton’s report
16 acknowledged witness statements that Mr. Shervey had shouted at Ms. Tupas, slammed doors, and
17 displayed anger management issues, particularly toward Ms. Tupas. The Deputy Director of
18 Ecology noted that Mr. Shervey’s behavior had compromised their ability to support him and that
19 he needed a plan for behavior management.²⁵

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22 During and immediately after Ms. Holton’s investigation, Ms. Tupas experienced a series of
23 negative actions. Although Ms. Tupas performed enforcement duties for three units, Ecology denied
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26 ²⁰ Tupas Decl. at ¶ 9.

²¹ Dolman Decl., Ex. 5, Zehm Dep., 59:20 – 60:14; Dolman Decl., Ex. 6, Holton Dep., 41:16-19.

²² Dolman Decl., Ex. 5, Zehm Dep., 84:8-19, 86:24 – 87:11; Dolman Decl., Ex. 7, Burgess Dep., 62-21 – 65:9.

²³ Dolman Decl., Ex. 7, Burgess Dep., 53:1 – 55:15.

²⁴ Dolman Decl., Ex. 5, Zehm Dep., 62:12 – 63:14.

²⁵ Dolman Decl., Ex. 5, Zehm Dep., 79:4 – 80:9.

1 her request to transfer to one of the other unit supervisors and to continue performing enforcement
2 duties for Mr. Shervey's unit as well. Ecology stated that Ms. Tupas could only transfer to Mr.
3 Fitzpatrick's supervision, which Ms. Tupas rejected; Mr. Fitzpatrick had supported Mr. Shervey's
4 treatment of Ms. Tupas and had been the subject of Ms. Tupas's 2007 complaint. Mr. Shervey
5 began maintaining a log of Ms. Tupas's behavior, which he did not do for any other employee and
6 had not done for Ms. Tupas prior. He prepared numerous "Performance Feedback Forms" critiquing
7 Ms. Tupas, though he did not use these forms for any other employee.²⁶ He asked other employees
8 to act as witnesses to his conversations with Ms. Tupas, while criticizing her and demanding that
9 she leave others alone if she sought her own witnesses. Although Ms. Zehm eventually reassigned
10 Ms. Tupas to the supervision of Mr. Fitzpatrick (long after the complaint investigation process and
11 Mr. Shervey's continued retaliation), she does not recall why she waited until March 2013 to
12 proactively separate Mr. Shervey and Ms. Tupas.²⁷

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15 **C. Facts Also Related to Plaintiff's Disability-Related Claims:** Ms. Tupas took periodic
16 medical leave throughout her employment in Water Quality.²⁸ For example, between May and
17 October 2010, Ms. Tupas submitted three separate Certifications in support of FMLA leave for
18 conditions that could impact her work schedule. Occasionally, and as early as 2007, Ms. Tupas's
19 anxiety condition in particular drew Ecology's notice.²⁹ The employer viewed Ms. Tupas as a
20 potentially disabled worker that may have required accommodations long before to her eventual
21 home assignment and termination.³⁰

22
23 In October 2010, Ms. Tupas and coworker Cynthia Walcker were exposed to an unknown
24 gas while accessing the sample refrigerator. Mr. Shervey knew of Ms. Tupas' exposure and her trip
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²⁶ Dolman Decl., Ex. 2, Shervey Dep., Vol. I, 76:17 – 77:5, 143:20 – 144:19.

²⁷ Dolman Decl., Ex. 5, Zehm Dep., 112:15 – 113:13, 123:15 – 124:5.

²⁸ Dolman Decl., Ex. 6, Holton Dep., 74:8 – 76:2.

²⁹ Dolman Decl., Ex. 6, Holton Dep., 80:20 – 81:13.

1 to the hospital.³¹ Ms. Tupas discussed her FMLA with Mr. Shervey in the context of the exposure.
2 In November 2010, Ms. Tupas's psychiatrist, Dr. Nguyen, requested a medical leave to begin
3 December 6, 2010.³² When Mr. Shervey had not approved the leave as of the day it was scheduled
4 to begin, Ms. Tupas went to work and canceled the leave request. Mr. Shervey approached her and
5 told her that she needed to leave the office immediately and could not return without a doctor's note.
6 He followed her out of the building and into the parking lot even after she indicated that she felt
7 harassed.³³ That day, Mr. Shervey wrote three separate memos to human resources, including
8 accusing Ms. Tupas of "odd behavior."³⁴

9
10 On March 12, 2012 Mr. Shervey pursued two heated conversations with Ms. Tupas
11 regarding a non-urgent matter that he had already addressed in an email, despite her clear escalating
12 anxiety. Two employees sent emails noting safety concerns based on Ms. Tupas's conduct that day,
13 but they were also unable to articulate any specific risk to their safety.³⁵ The next day, Mr. Shervey
14 acknowledged Ms. Tupas' arrival in the office without conflict.
15

16 On April 2, 2012, after three weeks had elapsed without conflict, Ms. Tupas was suddenly
17 called into a meeting and questioned about the events of March 12. Ms. Tupas objected to the
18 suggestion that she may be subject to discipline, arguing that she had already been disciplined
19 through her supervisory reassignment. Ms. Tupas did not make any explicit or implicit threats on
20 April 2 or at any other time.³⁶ Although Ecology views a home assignment to be an unusual
21 procedure that required a substantial justification, the employer suddenly assigned Ms. Tupas to
22 home duty pending a forensic psychiatric examination to determine whether she posed a threat to
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26 ³⁰ Dolman Decl., Ex. 6, Holton Dep., 66:7-14.

³¹ Dolman Decl., Ex. 2, Shervey Dep., Vol. II, 241:9 – 242:8.

³² Dr. Nguyen Decl. at ¶ 3.

³³ Dolman Decl., Ex. 2, Shervey Dep., Vol. II, 279:24 – 282:11.

³⁴ Dolman Decl., Ex. 2, Shervey Dep., Vol. II, 292:9 – 293:19.

³⁵ Dolman Decl., Ex. 3, LeVander Dep., 178:2 – 179:23; Dolman Decl., Ex. 8, Tran Dep., 109:18 – 110:14.

1 the workplace.³⁷ Although Ecology has a policy to minimize the length of home assignments, Ms.
2 Tupas was kept on home assignment for over six months.³⁸ Dr. McClung confirmed in May 2012
3 that she did not pose a threat to the safety of herself or others.³⁹ Even though the employer's own
4 doctor eliminated the supported basis for the home assignment, Ecology did not then provide Ms.
5 Tupas with reasonable accommodations and instead *revised* its justification for a continued home
6 assignment to focus on a disability separation.⁴⁰

8 On July 6, 2012, Dr. Nguyen responded to Ecology by stating that Ms. Tupas was able to
9 return to work and advocated for workplace accommodations.⁴¹ Although Dr. Nguyen responded
10 with "Unknown" due to her concerns about the employer's ability to remediate workplace
11 conditions and provide reasonable accommodations, she affirmatively stated that Ms. Tupas could
12 respond appropriately to supervisory direction.⁴² Dr. Nguyen stated that there was a need for
13 accommodation, suggesting that written expectations for work tasks and an additional day
14 telecommuting would minimize the triggering of Ms. Tupas' anxiety.⁴³ Despite this statement from
15 an active medical provider, Ecology refused to permit her to return to work. A few days later, Ms.
16 Tupas provided an e-mail to Ecology and stated the following methods of accommodation: one to
17 two days working from home per week, receiving routine communications in writing, receiving
18 clear and understandable work assignments, and being permitted to have the representative of her
19 choice at non-routine meetings.⁴⁴

24 ³⁶ Dolman Decl., Ex. 6, Holton Dep., 125:20 – 126:8.

25 ³⁷ Dolman Decl., Ex. 6, Holton Dep., 57:24 – 59:12; 115:12 – 118:25.

26 ³⁸ Dolman Decl., Ex. 5, Zehm Dep., 128:15-24.

³⁹ Dolman Decl., Ex. 9, McClung Dep., 80:14 – 81:23.

⁴⁰ Dolman Decl., Ex. 6, Holton Dep., 159:21 – 163:4.

⁴¹ Dr. Nguyen Decl. at ¶ 4.

⁴² Dr. Nguyen Decl. at ¶ 5.

⁴³ Dr. Nguyen Decl. at ¶ 4-5.

⁴⁴ Dolman Decl., Ex. 10.

1 A month later, Ecology sent a form containing only three follow-up questions to Dr.
2 Nguyen. Question three⁴⁵ focused on Ms. Tupas' ability to accept supervisory direction and also
3 reflected that Ecology was severely constraining its consideration of potential accommodations:
4 Even accepting the constraint that Ecology would not accommodate Ms. Tupas with a flexible
5 schedule, Dr. Nguyen stated that Ms. Tupas was "able to return to work full time, with
6 [Wednesday morning] telecommuting from home." Dr. Nguyen's response reflects Ms. Tupas
7 was medically able "to resume all duties of her current position" including "acceptance of
8 supervisory direction" with the same schedule she had for several years.⁴⁶ More importantly, Dr.
9 McClung stated that he has no basis to dispute Dr. Nguyen's later submitted opinion, and that
10 Ecology should have engaged in discussions designed to establish reasonable accommodations.⁴⁷
11

12
13 In August 2012, Ms. Tupas sent an email to Ecology noting that her home assignment was
14 scheduled to end, and stating that she was looking forward to returning to the office.⁴⁸ Ecology's
15 own physician had not expressed an updated opinion, much less discussed this matter with the
16 employer since June 2012.⁴⁹ Not only did Ecology fail to implement any reasonable
17 accommodations, but they altogether ignored Dr. Nguyen's opinion that Ms. Tupas was capable of
18 returning to the workplace and performing the functions of her job.⁵⁰ Defendants concede that Ms.
19 Tupas's performance and conduct were not deficient to the point that they warranted termination
20 and, as a result, Ms. Tupas would not have been terminated if she were not disabled.⁵¹
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24 ⁴⁵ The first two questions asked what functions of Ms. Tupas's position were impacted by her disability and how the
25 medical condition creates obstacles to performing those functions. Dr. Nguyen responded that Ms. Tupas's "depression
26 and anxieties cause Ms. Tupas to feel overwhelmed and [to have] difficulty" with "work[ing] effectively [and]
efficient[ly] in a stressful environment, manag[ing] workload, and meet[ing] deadlines." Dr. Nguyen did not state
that Ms. Tupas was *unable* to meet those requirements, as was indicated by her response to Question 3.

⁴⁶ Dr. Nguyen Decl. at ¶ 6.

⁴⁷ Dolman Decl, Ex. 9, McClung Dep., 114:9-14, 115:20 – 116:6.

⁴⁸ Tupas Decl. at ¶ 10.

⁴⁹ Dolman Decl, Ex. 9, McClung Dep., 118:20 – 119:8.

⁵⁰ Dr. Nguyen Decl. at ¶ 6-7.

⁵¹ Dolman Decl., Ex. 6, Holton Dep., 68:3-12; 107:22 – 108:1; Dolman Decl., Ex. 5, Zehm Dep., 163:17 – 165:15..

1 **B. Plaintiff Has Established Disputes of Fact to Support Her Retaliation Claim.**

2 To make a *prima facie* case of retaliation, a plaintiff must show that 1) she complained of
3 discrimination, 2) she suffered an adverse employment action, and 3) there was a causal
4 connection between the exercise of the statutory right and the adverse action. *Wilmot v. Kaiser*
5 *Alum.*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Auth.*, 118 Wn.2d 79 (1991); accord
6 *Graves v. Dep't of Game*, 76 Wn. App. 705, 712 (1994); WPI 330.05. Here, Ms. Tupas can
7 establish questions of fact that must be resolved by a jury.
8

9 1. Ms. Tupas Complained of Discrimination and Retaliation on Four Occasions.

10 For purposes of the first prong of the retaliation inquiry, the plaintiff need not
11 demonstrate that the conduct she opposed rose to the level of actionable discrimination. In
12 *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006), the
13 Court held that the scope of the Title VII retaliation provision is broader than its substantive
14 discrimination provision.⁵² Defendants' motion acknowledges that Ms. Tupas complained about
15 discrimination and retaliation on multiple occasions, but suggests that her activity was not
16 protected if she did not explicitly state the protected class at issue.⁵³ Ecology had ample bases to
17 understand that Ms. Tupas' complaints were concerned with race discrimination long before her
18 tort claim notification: She compared her treatment to specific Caucasian employees, she asked
19 to bring an attorney who recently settled a race discrimination case against Ecology to her
20 performance evaluation meeting, and she explicitly mentioned "race discrimination" concerns in
21 her comments section of a performance evaluation.
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26 ⁵² Given that Washington's Law Against Discrimination is broader than Title VII and is to be more liberally construed, see e.g.: *Marquits v. Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996), this case is *a fortiori* to *Burlington Northern*.

⁵³ This argument itself is flawed. Employees are not required to use magic words in their complaints in order to secure protection from retaliation. See *Burch v. Regents of University of California*, 433 F. Supp.2d 1110 (E.D.Cal. 2006) (noting that an employee can use any language sufficient to alert the employer to his, or her belief that
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1 2. Immediately Following Each of Ms. Tupas's Complaints, Defendants Took
2 Actions that a Reasonable Jury Could Conclude Were Adverse to Her.

3 In order to qualify as an "adverse action" for purposes of a retaliation claim, an
4 employer's act need not affect the terms or conditions of the plaintiff's employment. *Burlington*
5 *Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Rather, any response that would
6 have the effect of discouraging a reasonable employee from making or supporting a charge of
7 discrimination constitutes an "adverse action" for purposes of establishing retaliation. *Id.*

8 Over the two months following Ms. Tupas's December 2009 complaint, Defendants
9 changed her position description to remove her lead status, solicited complaints about her from
10 her former supervisors, proposed discipline against her that human resources determined was not
11 warranted, and asked IT personnel to investigate her document printing. Also following Ms.
12 Tupas' September 2010 complaint, Defendants proposed placing Ms. Tupas on home assignment
13 and issuing a reprimand for inappropriate communication, both of which human resources
14 determined were not merited.⁵⁴ Defendant Shervey also sought an alternate basis to reprimand
15 Ms. Tupas based on instructions she received in 2007, which human resources again determined
16 was not appropriate. Mr. Shervey repeatedly raised his voice at Ms. Tupas and was hostile
17 toward her, even failing to inquire into her wellbeing after a workplace incident.

18 Ms. Tupas's March 2011 complaints resulted in an untimely investigation that did not
19 conclude until the end of December 2011.⁵⁵ During that time period: Defendants unreasonably
20 delayed the investigation, failed to name a neutral investigator, failed to retain notes of witness
21 interviews, failed to separate Ms. Tupas and Mr. Shervey, failed to take prompt action to protect
22 Ms. Tupas when three witnesses confirmed Mr. Shervey was aggressive during her June 2011
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discrimination, not just unfair treatment, had occurred). Here, Ecology also had a basis beyond the common use of
"discrimination" in an employment context to understand that Ms. Tupas was engaging in protected activity.

⁵⁴ Dolman Decl., Ex. 4.

1 performance evaluation, unreasonably denied Ms. Tupas's request to be supervised by another
2 supervisor under whom Ms. Tupas already performed work, and required Ms. Tupas to continue
3 to report to Mr. Shervey unless she would agree to transfer to Mr. Fitzpatrick, who had
4 consistently supported Mr. Shervey, had proposed an unwarranted reassignment to home duty
5 following her 2010 complaint, and had been the subject of her 2007 discrimination complaint.
6 Immediately after the investigation: Defendants began maintaining a log regarding Ms. Tupas
7 and no other employee, began preparing critical "performance feedback forms" for Ms. Tupas
8 and no other employee.⁵⁶ These behaviors continued after Ms. Tupas's February 2012 tort
9 claim, and included Mr. Shervey soliciting support from coworkers against Ms. Tupas and
10 repeatedly escalating situations even when the topic he wanted to discuss was not urgent and it
11 was evident that Ms. Tupas's anxiety was causing her increasing distress.
12

13
14 Within two months of Ms. Tupas's tort claim, Defendants placed Ms. Tupas on home
15 assignment. When their own forensic psychiatrist and Ms. Tupas's long-time psychiatrist, Dr.
16 Nguyen, indicated that Ms. Tupas did not pose a threat to herself or coworkers, Ecology did not
17 allow her back in the office to work.⁵⁷ When Dr. Nguyen indicated that she was able to return to
18 work with limited accommodations, they did not call her back to work or attempt those
19 accommodations. When Dr. Nguyen released her to work without any accommodations beyond
20 the schedule she already had prior to her leave, Defendants still did not permit her to return.⁵⁸
21 Instead, they terminated her pursuant to a disability separation.⁵⁹
22

23 3. Timing and Ecology's Patterns of Conduct Support that Ms. Tupas's Complaints
24 Motivated Her Treatment.
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26 ⁵⁵ Dolman Decl., Ex. 5, Zehm Dep., 62:12 – 63:14.

⁵⁶ Dolman Decl., Ex. 2, Shervey Dep., Vol. I, 76:17 – 77:5, 143:20 – 144:19.

⁵⁷ Dolman Decl., Ex. 9, McClung Dep., 80:14 – 81:23; Dr. Nguyen Decl. at ¶ 4-5.

⁵⁸ Dr. Nguyen Decl. at ¶ 6-7.

⁵⁹ Dolman Decl., Ex. 6, Holton Dep., 68:3-12; 107:22 – 108:1.

1 The third element of a retaliation claim is met by establishing that the employee
2 complained of discrimination, the employer knew of it, and adverse action ensued. *Graves*, 76
3 Wn. App. at 712. Our courts have observed that “[b]ecause employers rarely will reveal they are
4 motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to
5 demonstrate retaliatory purpose.” *Vasquez v. State*, 94 Wn.App. 976, 985 (1999), rev. denied,
6 138 Wn.2d 1019 (1999); *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991).

8 The timing and nature of the adverse actions here permit a reasonable jury to conclude
9 that they were motivated by Ms. Tupas’s complaints. Each of the actions described above
10 occurred within two months of one of Ms. Tupas’s complaints or the investigation of a
11 complaint. Further, Defendants have acknowledged that Ms. Tupas’s overall performance of her
12 position was strong during most of her employment. For example, Mr. Shervey did not propose
13 any discipline for Ms. Tupas prior to her December 2010 complaint, he did not seek to
14 downgrade her position to remove her lead designation, and he did not express any concerns
15 regarding her document printing. Similarly, Defendants took actions against Ms. Tupas that they
16 did not take against any employees who did not complain—such as maintaining a log, preparing
17 performance feedback forms, and repeatedly proposing discipline.

19 Even if the Court finds that Defendants meet their burden to establish a legitimate
20 nondiscriminatory reason for Plaintiff’s adverse treatment following her protected activity,
21 summary judgment is not available because of the close proximity of time in between Ms.
22 Tupas’ complaints and her adverse treatment, coupled with the fact that Defendants took actions
23 against her that they did not take against those employees who had not engaged in such conduct.
24 This “raises a genuine issue of material fact on the question of whether the reasons given [] are
25 worthy of belief or that they are a mere pretext for what is in fact a [retaliatory] purpose. *See*
26 *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 852, 859-60, 851 P.2d 716 (1993), rev.

1 denied, 122 Wn,2d 1018 (1993). In contrast, Plaintiff final burden on summary judgment is
2 limited. *Id.* at 860. She need not produce evidence beyond that offered to establish a prima facie
3 case. *Id.* (citing *Tex. Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 255, n.10). Because a
4 reasonable jury could find for Ms. Tupas on her retaliation claim, Plaintiff respectfully requests
5 that the Court deny Defendants' motion for summary judgment.
6

7 **C. A Reasonable Jury Could Find in Favor of Ms. Tupas on Her Disability
8 Discrimination Claim Because Ecology Would Not Have Terminated Her
9 Employment If It Did Not Believe She Was Disabled.**

10 Under RCW 49.60.180, an employer may not discriminate against a person because she has
11 a disability if she is qualified for her job. Defendants took two adverse employment actions against
12 Ms. Tupas based on an actual or perceived disability. The first was placing Ms. Tupas on home
13 assignment. The second was terminating her employment after twenty-four years.

14 1. Ms. Tupas Qualifies for Protection as an Individual Who Had a Disability and Was
15 Perceived to Have a Disability.

16 There is adequate evidence in the present case to establish that Ms. Tupas had a qualifying
17 medical condition and that Defendants perceived her to be disabled. Ms. Tupas took intermittent
18 FMLA leave throughout the relevant period of her employment. Ecology acknowledges that it knew
19 of Ms. Tupas as an employee with medical issues at an earlier time.⁶⁰ Several employees, including
20 Mr. Shervey described Ms. Tupas as anxious or as displaying "odd behavior" including in
21 connection with an event where Mr. Shervey followed Ms. Tupas through and out of the office to
22 ensure that she took requested medical leave. Though she had never threatened or physically
23 attacked anyone, Defendants decided that she may be carrying a gun (which she was not) and be a
24 danger to herself or her coworkers (which their forensic psychiatrist acknowledges she was not).
25 Plaintiff's own physician informed the employer of her disabling conditions.
26

1 2. Ms. Tupas' Disability and Defendants' Perceptions Regarding Her Disability Were a
2 Substantial Factor in Her Six-Month Home Assignment and Termination.

3 In order to survive summary judgment, Ms. Tupas need only show that a reasonable jury
4 could find that Ms. Tupas' actual or perceived disability was a substantial factor motivating her
5 home assignment and termination. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 149-50, 94 P.3d
6 930 (2004). With respect to Ms. Tupas' termination, she has met that burden with direct
7 evidence, in that Ecology's agents testified that Ms. Tupas' performance did not provide a basis
8 for termination and she would not have been separated if she were not disabled.⁶¹ *See Id.*

9 Where direct evidence of discrimination exists, the method of proof of motivation is no
10 different than other civil cases. *See generally Trans World Airlines, Inc. v. Thurston*, 469 U.S.
11 111, 121, 105 S.Ct. 613 (1985) (the burden shifting in *McDonnell-Douglas* is designed for use
12 when direct evidence of discrimination is unavailable); *see also Hegwine v. Longview Fibre Co.*,
13 162 Wn.2d 340, 172 P.3d 688 (2007). The very nature of the home assignment provides direct
14 evidence that it was motivated by perceptions regarding Ms. Tupas's disability status. First, Ms.
15 Tupas was assigned to home duty pending a psychiatric examination. Ecology's treatment of Ms.
16 Tupas in the context of the home assignment also supports that a perceived disability was a
17 substantial factor in the assignment: Defendants had recently received a notification from her
18 psychiatrist that she was experiencing difficulty with medication adjustments, anxiety and
19 insomnia that were affecting her at work. Even after Ecology's hired forensic psychiatrist
20 indicated that Ms. Tupas was not a danger to herself or others, she was not permitted to return to
21 the office.
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24 3. Ms. Tupas Was Otherwise Qualified for her ES-4 Position
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⁶⁰ Dolman Decl., Ex. 6, Holton Dep., 66:7-14.

⁶¹ Dolman Decl., Ex. 5, Zehm Dep., 171:25 – 172:3.

1 Unlike with other discrimination claims, disability discrimination plaintiffs must
2 establish that they were qualified to perform their positions with an accommodation even if they
3 have direct evidence that their disability motivated an adverse action. WPI 330.32. Parties may
4 support their argument regarding qualifications for a position with, for example, performance
5 evaluations, coworker testimony, supervisor testimony, or physician testimony. See, e.g.
6 *Herring v. Department of Social and Health Services*, 81 Wn.App. 1, 914 P.2d 67, (Div. 2 1996)
7 (jury weighed supportive coworker and client testimony against supervisor testimony and
8 performance evaluations stating that employee was not meeting minimum standards and expert
9 testimony stating that employee was not physically capable of meeting performance
10 requirements and found that blind probationary employee was qualified for position).
11

12
13 Here, there is sufficient evidence for a jury to find that Ms. Tupas was qualified to
14 perform her job duties with an accommodation. Though Ms. Tupas had been treated for anxiety
15 and depression throughout her time at Water Quality, her written performance evaluations are
16 strong. A former supervisor who continued to oversee Ms. Tupas's performance on projects in
17 his unit through the time of her termination indicated that he was fully satisfied with her work
18 and communication throughout the period.⁶² Ms. Tupas performed all of the work that was
19 assigned to her during her six-month home duty, and Defendants have not raised any concerns
20 regarding her communications or job performance throughout that time. On May 23, 2012,
21 Defendants' forensic psychiatrist confirmed that Ms. Tupas's presence in the office would not
22 create a direct threat to Ms. Tupas's health or that of her coworkers. In a July 7, 2012
23 communication to Ecology, Dr. Nguyen, who had treated Ms. Tupas for approximately 15 years
24 and had reviewed both Ecology's letter regarding its concerns about Plaintiff and Dr. McClung's
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⁶² Dolman Decl., Ex. 1, Iyer Dep. 47:7-18, 163:23 – 164:22.
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1 report, stated that Ms. Tupas could return to work with accommodations.⁶³ On August 15, 2012,
2 Dr. Nguyen stated that Ms. Tupas was able to return to work and perform the essential functions
3 of her job, including appropriate responses to supervisory instruction, without accommodations
4 beyond the modified schedule she had held since 2010.⁶⁴ Even more persuasive, Dr. McClung
5 stated that he has no basis to dispute Dr. Nguyen's later submitted opinion, and that Ecology
6 should have discussed establishing reasonable accommodations.⁶⁵ Because Ms. Tupas has
7 presented evidence to support that she was a qualified individual who was kept on home
8 assignment for six months and ultimately terminated due to her actual disability and Defendants'
9 perceptions regarding her disability status, Defendants' motion should be denied.
10

11 **D. Summary Judgment is Inappropriate Because Defendant Ecology Failed to**
12 **Accommodate Ms. Tupas's Disability without Establishing Undue Burden and Did**
13 **Not Comply with its Duty to Pursue the Interactive Process in Good Faith.**

14 The Washington Law Against Discrimination requires employers to accommodate disabled
15 employees unless the accommodation would cause an undue hardship on the employer. RCW
16 49.60.180(2); *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). In
17 order to survive summary judgment on her reasonable accommodation claim, Ms. Tupas must
18 establish that there is a sufficient basis for a jury to find in her favor on each of four elements.
19 *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003) (quoting *Hill v. BCTI*
20 *Income Fund I*, 144 Wn.2d 172, 192-93, 23 P.3d 440 (2001)). Plaintiff produced evidence
21 sufficient to raise a question of fact as to each element, and summary judgment should be denied.
22

23 1. Psychiatric Condition that Substantially Limits Job Performance

24 Defendants do not dispute that Ms. Tupas meets the disability standard.

25 2. Otherwise Qualified to Perform the Essential Functions of her Position

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⁶³ Dr. Nguyen Decl. at ¶ 4-5.

⁶⁴ Dr. Nguyen Decl. at ¶ 6-7.

1 Ms. Tupas has produced adequate evidence to create a jury question regarding her
2 qualifications for her position, as discussed in the preceding section.

3 3. Ecology Had Notice of Ms. Tupas's Condition

4 Dr. Nguyen had submitted an FMLA certification form on February 6, 2012 stating that
5 Ms. Tupas was being treated for "recurrent insomnia, panic attacks and increasing depressed
6 mood" that caused "episodic flare-ups" and periodically prevented Ms. Tupas from performing
7 her work functions. On April 3, 2012, Ecology ordered Ms. Tupas to attend a psychiatric
8 examination. Although the employer knew of Plaintiff's medical status at an earlier time, at no
9 time did Dr. Nguyen indicate that Ms. Tupas was unable to perform her job function or otherwise
10 suggest that reasonable accommodations would not work.⁶⁶

11 4. Ecology Failed to Meet Its Obligations to Accommodate Ms. Tupas

12 Whether an employer made a reasonable accommodation and whether an employee's
13 request placed an undue burden on the employer generally are questions of fact for the jury.
14 *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 644, 9 P.3d 787 (2000) (overruled on other
15 grounds by *McClarty v. Totem Elec.*). Here, Defendants are not entitled to summary judgment
16 because (a) there is a genuine dispute regarding whether Defendants engaged in the interactive
17 process in good faith; and (b) Ms. Tupas suggested plausible accommodations in the absence of
18 any undue burden to the employer.

19 (a) There is a Genuine Dispute as to Whether Ecology Approached Accommodation
20 in Good Faith.

21 The interactive process requires a good-faith exploration of potential accommodations.
22 *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1137 (9th Cir. 2001). Courts should
23 look for evidence that a party obstructed or delayed the process or failed to make reasonable
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⁶⁵ Dolman Decl, Ex. 9, McClung Dep., 114:9-14, 115:20 – 116:6.
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1 efforts to help the other party determine what specific accommodations are necessary. *Beck v.*
2 *University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

3 Here, several events call into question Defendants' good faith in the interactive process:
4 Defendants did not accept Dr. Nguyen's conclusion that she was able to work, nor did they
5 solicit another opinion. Ecology did not propose any accommodations to permit Ms. Tupas to
6 return to a position she had held for over ten years. Ecology's Deputy Director testified that there
7 was nothing Plaintiff or her psychiatrist could have said to change their conclusion based on their
8 forensic psychiatrist's May 14, 2012 report that Ms. Tupas was not qualified for her position and
9 could not be accommodated.⁶⁷ Nonetheless, after the report, Ecology initiated a five-month
10 "interactive process." Ecology spent two months allegedly assessing Ms. Tupas's ability to
11 transfer into another position despite its knowledge every position in the Department required the
12 skill that they contended prevented her from returning to her own position.⁶⁸

13 The Ninth Circuit has held that "an employer cannot prevail at the summary judgment
14 stage if there is a genuine dispute as to whether the employer engaged in good faith in the
15 interactive process. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000), *cert. granted*
16 *on other grounds*, 532 U.S. 970, 121 S.Ct. 1600 (2001). Here, there is an obvious dispute and
17 summary judgment should be denied on that basis.

18 (b) Summary Judgment Is Not Available Because Plaintiff Proposed Plausible
19 Accommodations, and Defendants Did Not Offer Alternative Accommodations or
20 Establish Undue Hardship
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26 ⁶⁶ Dr. Nguyen Decl. at ¶ 6-7.

⁶⁷ Dolman Decl., Ex. 5, Zehm Dep., 163:17 – 165:15.

⁶⁸ Ms. Tupas's doctor had stated on August 15, 2012 that Ms. Tupas could comply with reasonable supervisory instructions, but Defendants rejected this conclusion and did not permit Ms. Tupas to return to work, although they had no expert evidence to support their position regarding Ms. Tupas's then-current condition and they had not cited any problems with Ms. Tupas's compliance with supervisory instruction over the preceding four months.

1 In order to satisfy its obligation to accommodate an employee, the employer must take
2 steps that are reasonably calculated to permit the employee to perform her job. *Riehl v.*
3 *Foodmaker, Inc.*, 152 Wn.2d 138, 146, 94 P.3d 930 (2004). If an employee with a disability can
4 establish the existence of an accommodation that plausibly will enable the employee to perform
5 her essential job duties and the employer offers no practical alternative accommodation, the
6 employer has violated its obligations as a matter of law. *Humphrey v. Memorial Hospitals*
7 *Assoc.*, 239 F.3d 1128, 1137-39 (9th Cir. 2001). Furthermore, where the nature of a disability
8 does not provide an objective standard for reasonable accommodation, ***trial and error is***
9 ***necessary*** unless it would pose an undue hardship. *Frisino v. Seattle School Dist. No. 1*, 160
10 Wn.App. 765, 782, 249 P.3d 1044 (Div. I 2011). Even where the employer takes substantial
11 steps to assist an employee to remain employed, which Ecology did not, it generally is a question
12 of fact whether an employer's approach is reasonably calculated to accommodate the disability.
13 *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 537-38, 70 P.3d 126 (2003).

16 A disability discrimination plaintiff does not need to demonstrate that a proposed
17 accommodation is certain or even likely to succeed in order to prove that it is a reasonable
18 accommodation. *Humphrey v. Mem. Hosp. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001); *Kimbrow*
19 *v. Atlantic Richfield Co.*, 889 F.2d 869, 879 (9th Cir. 1989). If the employee can establish the
20 existence of an accommodation that plausibly would have permitted her to perform her essential
21 job duties and the employer offered no accommodation, it violated its accommodation
22 obligations as a matter of law. *Id.* at 1139. Here, Ms. Tupas and her psychiatrist proposed several
23 plausible accommodations. After Ms. Tupas was away from the workplace environment on home
24 assignment for four months, Dr. Nguyen stated on August 15 that Ms. Tupas could return to
25 work and perform all of the duties of her current position, including the acceptance of
26

1 supervisory instruction, with just one morning working from home each week.⁶⁹ This mirrored
2 her schedule prior to her home assignment.

3 The interactive process is intended to be a collaborative venture that embraces trial and
4 error in an effort to find an accommodation that will enable the employee to fulfill the duties of
5 her position. *See Frisino*, 160 Wn.App. at 782. In instances where the parties have not
6 recognized an objective measure for an effective accommodation⁷⁰, trial and error is “appropriate
7 and necessary.” *Id.* The employer’s obligation to test potential accommodations before
8 abandoning the accommodation process is confirmed by the common refrain that an employer
9 has a continuing duty to engage in the interactive process that is not exhausted by a single effort.
10 *See e.g. Id; Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1138 (9th Cir. 2001). In the
11 present case, Defendants’ failure even to test any of the potential accommodations suggested by
12 Ms. Tupas or her psychiatrist further establishes a question of fact regarding whether Defendant
13 complied with its duty to accommodate Plaintiff.⁷¹

14 Although the employer generally may choose between effective modes of
15 accommodation, it may not abandon a search for accommodation without establishing undue
16 hardship. *Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 779, 249 P.3d 1044 (Div. 1
17 2011); *see also Pulcino*, 141 Wash.2d at 639. If the employee identifies plausible
18 accommodations and the employer terminates its effort to accommodate, it is reversible error not
19 to instruct the jury that the defendant bears the burden to establish undue hardship. *Easley v. Sea-*
20 *Land Service, Inc.*, 99 Wn.App. 459, 994 P.2d 27 (Div. 1 2000); *Erwin v. Roundup Corp.*, 110
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26 ⁶⁹ Dr. Nguyen Decl. at ¶ 4-7.

⁷⁰ An example of an objective accommodation measure would be a case where an employee had a certain weight restriction on lifting or specific quantity of time she could be standing during the course of a work day.

⁷¹ This is particularly true given her twenty-four years of overall successful employment, her solid performance during her home assignment, and her overall strong performance outside of the period when she was supervised by Mr. Shervey, who was no longer her supervisor after March 2012.

1 Wn.App. 308, 315-16, 40 P.3d 675 (Div. 3 2002); see also *Pulcino v. Federal Express Corp.*,
2 141 Wn.2d at 643.

3 In *Erwin*, the employer permitted the employee to work on light duty for ninety days,
4 during which time the employee's performance was satisfactory. *Erwin*, 110 Wn.App. at 315-16.
5 The employer thereafter terminated her employment despite her request to continue working in
6 her position with lifting restrictions. The court reversed a jury verdict for the employer because
7 the jury had not been instructed that the defendant had the burden to establish that the
8 employee's proposed accommodation was an undue burden. *Id.* Similarly, here, Defendant kept
9 Ms. Tupas working on home assignment for six months though she was eager to return to work
10 and had been released to work by her doctor. Ecology has not established that Ms. Tupas's
11 performance during her home assignment was deficient, providing support for the reasonableness
12 of an accommodation that involved some degree of home assignment. Defendant thus has the
13 burden to establish that such an accommodation would pose an undue burden. Because
14 Defendant cannot make such a showing as a matter of law, summary judgment is not
15 appropriate.
16
17

18 V. CONCLUSION

19 For all of the foregoing reasons, Ms. Tupas respectfully requests that the Court deny
20 Defendants' Motion for Summary Judgment.
21

22 DATED this 18th day of February, 2014.

23 LAW OFFICES OF
24 JUDITH A. LONNQUIST, P.S.

25 

26 Brian Dolman, WSBA #32365
Judith A. Lonnquist, WSBA #06421
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Attorneys for Plaintiff

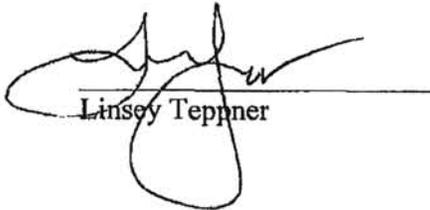
1 **CERTIFICATE OF SERVICE**

2
3 I, Linsey Teppner, an employee of the Law Offices of Judith A. Lonnquist, P.S., declare
4 under penalty of perjury that on the date below, I caused to be served upon the below-listed
5 parties, via the method of service listed below, a true and correct copy of the foregoing
6 document.

7

Party	Method of Service
Jana Hartman, AAG Attorney General's Office 800 Fifth Avenue, Suite 2000 Seattle, WA 98104	<input type="checkbox"/> Hand Delivery
	<input type="checkbox"/> Legal Messenger
	<input type="checkbox"/> Regular Mail
	<input type="checkbox"/> Facsimile
	<input checked="" type="checkbox"/> E-Mail

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14 Dated this 18th day of February, 2014.

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16 
17 Linsey Teppner

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SUPERIOR COURT OF WASHINGTON
FILED SEP 23 PM 2:14