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## **ASSIGNMENTS OF ERROR**

1. Did the trial court err when it denied Garrett Harrell summary judgment on his reasonable accommodation claim?
2. Did the trial court err when it dismissed Garrett Harrell's constitutional claims?
3. Did the trial court err when it dismissed Garrett Harrell's ADA claim?
4. Did the trial court err when it denied Garrett Harrell a new trial?
5. Did the trial court err in denying attorney's fees and costs to Garrett Harrell?

## **ISSUE STATEMENTS**

1. Whether DSHS reasonably accommodated Garrett Harrell when it took away all prescheduled assignments?
2. Whether DSHS reasonably accommodated Garrett Harrell when it never put him to work anywhere?
3. Whether DSHS failed to participate in an interactive process?
4. Whether Garrett Harrell was engaged in free speech?
5. Whether DSHS violated due process?
6. Whether DSHS must follow the ADA?
7. Whether Mr. Harrell should recover attorney's fees and costs on appeal and at the trial level?

## FACTUAL HISTORY

In late 2006, Garrett Harrell applied for a job as a residential rehabilitation counselor (RRC) with the Special Commitment Center (SCC) on McNeil Island.<sup>1</sup> RP 363 CP Ex. 62. The SCC is a sixty million dollar facility designed as secure residential living for sex offenders undergoing treatment to reduce the likelihood that they will reoffend when returning to the community. RP 623, 625. The operating expenses are approximately fifty million a year. RP 303.

The sex offenders are “residents.” RP 303. The RRC positions are the security positions. CP 605-606. An RRC monitors the control room, segregation units, housing units, the perimeter, visiting, recreation, and all of the various posts at the facility. CP 605-606. An RRC does not carry weapons and is not authorized to use lethal force. RP 308-311. An RRC carries a radio and spends most of the shift ensuring a proper head count, reporting on behaviors, and recording residents compliance with their treatment requirements. RP 306. RRCs have various posts to cover, many of which are well lighted. RP 194, 306, 317, 342. The outside perimeter lighting at night was not well lighted in 2007. RP 356. The facility operates twenty four hours a day seven days a week. There are day shifts,

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<sup>1</sup> The SCC is a division of the Department of Social and Health Services (DSHS). The SCC was not closed when the Department of Corrections closed the prison. The RRC position was exempt from hiring freezes related to state budget reductions. RP 1208-1209, 1307.

swing shifts, and night shifts with varying start times. CP Ex. 160. Day shifts start at six thirty and eight in the morning. RP 539. Swing shifts start at two thirty and four thirty. RP 300-301. Night shifts start at ten thirty and midnight. RP 301.

Mr. Harrell filled out a state job application and voluntarily disclosed that he had a disability. RP 962, CP Ex. 61. A panel interviewed him on October 26th, 2006. RP 357. The panel asked him about his disability, which he described as night blindness and some hearing loss.<sup>2</sup> He answered the specific questions of Jack Gibson, the interviewer who later became his scheduling supervisor. RP 962-963. Jack Gibson asked him whether he could work all shifts. RP 357. Mr. Harrell explained that he could work all shifts as long as there was light. RP 963. Jack Gibson made a notation on his interview questionnaire that cannot be deciphered because he scribbled it out, and Mr. Gibson does not recall whether he made a notation regarding Mr. Harrell's disability. RP 359. Mr. Gibson recommended against hiring Mr. Harrell at that time. He claims he did not select Mr. Harrell because he appeared "immature." RP 488. Interestingly, Mr. Gibson recognized the immaturity of another candidate interviewed the same day, noting it on his interview record, but

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<sup>2</sup> Mr. Harrell suffers from a genetic condition called Retinitis Pigmentosa. CP Ex. 90. He is affected by limitations in his ability to hear and see. RP 962. His hearing is corrected with hearing aids. His vision is affected primarily at night or with darkness or low light conditions where the light is not sufficient to allow his eyes to focus. RP 207-208, 219-220, 1299.

that candidate without an apparent disability was selected and hired. RP 358-359.

At the time, Jack Gibson was interviewing 3-4 candidates a week. RP 302. Turnover at the facility was tremendous, requiring new hiring routinely. RP 302. Twenty-five positions were allocated to RRC staff new hires. RP 301-302. In order to maintain the number of staff needed for security coverage at the facility, the SCC hired anywhere from thirty to fifty employees at any time. RP 302 The position description did not mandate shift rotation; the shift designations were not specified. RP 816-817. The position described the hours as “intermittent.” RP 817. CP Ex. 101. The collective bargaining agreement (CBA) covering employment at DSHS permitted hiring of non permanent staff: “The employer may fill a position with an on-call appointment where the work is intermittent in nature, is sporadic and it does not fit a particular pattern.” RP 478 CP Ex. 143 at 9. On-call appointments are not restricted to part-time. RP 337.

On-call employees can be terminated at any time.<sup>3</sup> On-call staff were used to back up permanent positions when the permanent position employee was out on leave or was sick. RP 330-331, 861, 1279. An on-

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<sup>3</sup> At trial, the SCC maintained on-call employees, including new hires within the first six months were entitled to full union protection under the CBA. RP 333-334. A union representative never testified. Sue Sampson, Mr. Harrell's lawyer, questioned whether a new hire within the first six months would have union representation. CP Ex. 179 pg. 44-45. Mr. Harrell was denied union representation because his dues were never paid. RP 1002, 1170. Payroll was responsible for making the deduction and providing the funds to the union. RP 199, 334.

call employee could be assigned to a longer opening due to the known absence of a permanent staff person for a specific duration, which was referred to as a temporary position. RP 338 Intermittent staff when first hired were designated RRC 1, and naturally progressed into the RRC 2 designation within the first year of employment. RP 328-329. The permanent staff reported daily to the same post, same location, on the same shift permanently. RP 464-465. On-call staff were pre-scheduled to a shift, and an area, but not a specific post, for two weeks to a month at a time.<sup>4</sup> RP 476.

The characterization of a non-permanent RRC as “on-call” mischaracterizes the nature of their work because on-call staff are pre-scheduled as well as called in to work as needed. RP 476. On-call staff are expected to work any shift any time. RP 591, 896-897. There is no seniority status within that designation that allows for any preference within the on-call employees. RP 1349. These employees are not paid to be available twenty four seven. RP 919. Most do not call in for shift assignments. CP Ex. 177 pg. 34, Ex. 178 at 13. Most work full time on the schedule given to them. RP 337, 341. Jack Gibson maintained a separate status of “call-in” employees who were put at the bottom of the

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<sup>4</sup> Pre-scheduling on-call staff was in practice during 2007 and 2008 when pre-scheduling for large blocks of time was put temporarily put on hold for a few months while an agreement was reached with the union to allow pre-scheduling on-call staff a month at a time. RP 1314. The union consented to the current practice of pre-scheduling on-call staff a month at a time. RP 1316. The SCC continues to pre-schedule on-call staff and is not budgeting any further cuts to RRC staff. RP 1309.

roster. RP 344, CP Ex. 141. Call-in employees were employees who wanted to work part time, rather than full time like the on-call employees. RP 344 - 345.

Undeterred by his initial rejection, Mr. Harrell applied a second time to become an RRC at the SCC. This time he again noted on his application that he was disabled. RP 352, CP Ex. 1. He added an additional notation that he had “vision/hearing loss.” RP 353, 964 CP Ex. 1. He was interviewed on August 30th by an interview panel that included Jack Gibson. RP 363. Mr. Gibson testified that he remembered Mr. Harrell from the first interview. RP 363. This time he recommended hiring him, and the SCC hired Garrett Harrell to start October 1, 2011. RP 364.

Mr. Harrell attended New Employee Orientation from October 1st through October 17th from eight in the morning to four in the afternoon.<sup>5</sup> RP 396. He successfully completed defensive tactics training and all of the other coursework. RP 413, CP Ex. 6. From October 18th to October 24th he shadowed another experienced RRC with other new hires on shift learning the post requirements. RP 414-432. During shadowing, he never worked a security post at night outside by himself. RP 420-421 CP Ex.

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<sup>5</sup> Mr. Harrell resides in an apartment with his father in Steilacoom. RP 168-169. To get to work, he walked across the parking lot to the parking lot at Western State where he rode a state bus down to the ferry dock with other employees from McNeil to catch the ferry boat. RP 168-169. The ferry boat ride took approximately thirty minutes. Once on the Island, he took another bus from the dock to the North side of the Island to the facility. The whole process of getting to work took about an hour, sometimes longer. RP 402.

33. When he finished NEO training on the 17th at 4:00 in the afternoon, he was scheduled to report to work that midnight for his first shift assignment. RP 414. He had less than five hours between shifts included travel time to return to work. RP 414. He worked a long shift on the 18th, and then was scheduled to report to work the morning of the 19th. RP 413-414, 980-981. He managed to make it to the Island on time, but stayed on the ferry to return home and call in sick. He had a bad cold/flu.<sup>6</sup> RP 414, 1014. His next day scheduled was October 22nd. RP 1014. He reported to duty in the morning and worked all day without incident.<sup>7</sup> RP 1014. Similarly, he worked without incident on the 23rd and the 24th. RP 419-420. He was off the 25th and 26th, and returned to his scheduled shift on the 27th, his first swing shift working alone on the security post Zone C.<sup>8</sup> RP 984. This was the first shift that he noticed an inability to see outside around the buildings at night where the lighting

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<sup>6</sup> Mr. Harrell's phone records indicate he called in at 9:21 in the morning, which was consistent with him taking the ferry and returning to his phone to make the call. Defendants pointed out his first call was to return a message rather than call the facility. The records show he called in within thirty minutes of retrieving his phone. CP Ex. 124

<sup>7</sup> Jack Gibson reported him absent and never paid him for his work on the 22nd because Jack Gibson pulled the wrong shift report to verify his attendance. RP 418-419

<sup>8</sup> Jack Gibson reported him absent on the 27th and never paid him for his work or his shift differential even though he knew Mr. Harrell actually worked that day as reflected on the shift report. RP 421, 424, 509. Jack Gibson claims Mr. Harrell did not properly complete a time sheet; however defendants never produced Mr. Harrell's signed time sheets. RP 410. Mr. Gibson testified as did Lester Dickson that Mr. Harrell's performance and attendance were non-issues. RP 506, 593-594, 838. Mr. Gibson testified that he routinely had problems with RRC staff not completing their paperwork according to his instructions. Mr. Harrell was shorted 16 hours pay and 8 hours shift differential for a total wage loss of \$230.00 that defendants have never paid him. RP 435-436 RP 1002. He actually worked 81 hours in the pay period. CP Ex. 167.

was inadequate.<sup>9</sup> Since this was his first time in Zone C, and he had not yet worked all of the posts, he did not say anything.

He returned to work the next day the 28th. RP 434. He came in early to voluntarily work the day shift. RP 434-435. He also worked Zone B on the security perimeter on the swing shift. RP 513-514, 986. Again there were areas outside at night around the buildings that were not well lighted. This concerned him. RP 986. His next shift was the following day the 29th. RP 987. He was scheduled to work Zone C again on swing shift. RP 987. Prior to his shift, he called in to try to reach his shift commander in the dining hall.<sup>10</sup> RP 1065-1066. He was unable to reach his shift commander, and reported to work as scheduled at 2:30 p.m. RP 1066-1067. While there he discussed with his shift commander the fact that he could not see outside at night. RP 1067. He was told to discuss the situation with Jack Gibson. RP 1067. He did not reach Jack Gibson on the 29th. RP 1067. Although someone did draw Jack Gibson's attention to Mr. Harrell, which is evident from Jack Gibson's memos of the 29th wherein he documented looking into Mr. Harrell's attendance.

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<sup>9</sup> The lighting was also an issue for John Reed, another RRC without a disability who started with Mr. Harrell. CP Ex. 178 pg. 13-14. He reported the insufficient lighting, which the facility later fixed. Cathi Harris the Assistant Superintendent testified lighting was an expenditure the facility was always willing to make for security reasons. CP Ex. 178, RP 1300-1301.

<sup>10</sup> Mr. Harrell's telephone records show a call placed to 253 617-6262 at 12:58. CP Ex. 124. The SCC telephone directory indicates this number belongs to Pat Capozzola in the dining hall, which was where his shift supervisor could be found during the lunch hour. CP 149.

CP Ex. 10 and 11.<sup>11</sup> Jack Gibson prepared two separate documents criticizing Garrett Harrell, before the end of the pay period. RP 409-410, 426-427, CP Ex. 10 and 11. He prepared a Memo regarding Mr. Harrell calling in late to work and the fact that his time sheets were not accurate. RP 409-410, CP Ex. 10. In addition, he prepared a time sheet discrepancy report regarding Mr. Harrell's time sheets for the 28th, when he worked a double shift. RP 426-427, CP Ex. 11. Curiously, he prepared not just a time sheet discrepancy, but also a memo, and copied shift reports, some erroneously, into a file he kept on Mr. Harrell. He also prepared and submitted his own erroneous timesheet to payroll reporting Mr. Harrell working 49 hours during the pay period when he actually worked over eighty hours, including a double shift. RP 432, 436-437. None of these documents were given to Mr. Harrell. RP 531.

Mr. Harrell resumed his efforts to get some help on the 30th, before his scheduled shift. RP 574-575. Mr. Harrell made three calls to the facility to share his concerns, but he was redirected to Jack Gibson who he did not reach that day so he called off and did not report to duty.<sup>12</sup> The next day, October 31st, he began calling again, and was able to reach Jack Gibson at 253-617-6336. RP 367, CP Ex. 124. They had a six minute telephone call. RP 367-368, 989 CP Ex. 124. Jack Gibson told

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<sup>11</sup> The SCC reported the date of his request for a reasonable accommodation as the 29th. RP 805.

<sup>12</sup> Mr. Harrell's telephone records shows calls placed to the facility numbers. CP Ex. 124

him to call in sick until he could figure out what to do with him. RP 385, 990. Jack Gibson questioned whether he had disclosed his disability on his application. RP 990. Jack Gibson concedes he told him to call in sick.<sup>13</sup> RP 385. Jack Gibson testified that Mr. Harrell told him that he was concerned about his safety as well as the safety of others if he could not see when working the perimeter outside at night. RP 368. Jack Gibson did not schedule him for dayshift or any other work. Mr. Harrell had not accrued any sick leave to utilize, which Mr. Gibson understood meant Mr. Harrell would not be getting paid while calling in “sick.” RP 384-385.

Jack Gibson prepared a memo on the 31st confirming the fact that Mr. Harrell said he needed light to work: “RRC Harrell advised me that it would be unsafe for him to work in an environment without light.” CP Ex. 12. Mr. Harrell recommended assignment to day shift as the simplest alternative or assignment to the kitchen. He was never given either. Jack Gibson also prepared a Performance Log making no mention of his performance either as to his sick day or as to proper completion of his time sheets. CP Ex. 109. Instead, Mr. Harrell’s entire Performance Log

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<sup>13</sup> The undisputed testimony was that telling him to call in sick was a violation of policy. Mr. Harrell’s father sent an e-mail to Randy Pecheos a colleague who he thought may be able to help his son get back to work. CP Ex. 15 pg. 2-3. Mr. Pecheos did not respond to him, but did forward the e-mail to Jack Gibson’s supervisor David O’Connor. Mr. O’Connor represented that Mr. Gibson did not tell Mr. Harrell to call in sick. Mr. Gibson testified that Mr. O’Connor was incorrect that he did tell Mr. Harrell to call in sick, but that he never corrected Mr. O’Connor’s error even though the e-mail miscommunication was shared with a number of supervisors who were considering Mr. Harrell’s request for an accommodation. RP 455.

criticizes his responsiveness to Mr. Gibson's request for medical documentation and his reasonable accommodation request. CP Ex. 109. Both the Superintendent, Assistant Superintendent, and the facility Human Resources Representative testified that reasonable accommodation documentation should not be recorded on a Performance Log. RP 1326-1327.

Jack Gibson never spoke to Mr. Harrell again after the six minute call on the 31st. RP 395. He never communicated with him in any manner. He did not send him any e-mails. He did not send him any letters. He did not acknowledge Mr. Harrell's request for an accommodation either formally or informally. Mr. Harrell faxed his medical documentation and a copy of his application to verify he had disclosed his disability when he applied to Mr. Gibson's correct fax number. RP 993, CP Ex. 13. Mr. Gibson says he never got it. RP 350.

Mr. Harrell did not accept the instruction to call in sick. Instead he began to call in trying to get someone to take action. His phone records record 31 calls to the facility in November and 22 calls to the facility in December. RP 1000, CP Ex. 124, 154. He never was assigned another shift. RP 595

When he continued to get no response, attorney Sue Sampson agreed to represent him. RP 1001. She sent a letter to the Superintendent

and Jack Gibson, inviting a response. CP Ex. 23. No one ever responded to her.

The Superintendent Henry Richards gave her letter to his Human Resources Director, Lester Dickson. RP 766-767. Lester Dickson refused to work with Ms. Sampson, although he never told her nor Mr. Harrell that despite having a form letter for that purpose.<sup>14</sup> RP 805-806. Mr. Dickson called Mr. Harrell's home number a few times ultimately reaching Mr. Harrell's mother. Mr. Harrell was then living with his dad, rather than his mom. RP 772-773. She took a message and Mr. Harrell returned Mr. Dickson's call on November 30th. Mr. Dickson refused to speak to Mr. Harrell at that time as he was going into a meeting. RP 773. Later on December 5th, Mr. Harrell reached Mr. Dickson and spoke to him for about five minutes. RP 778, 1003. He was upset that Mr. Dickson was again asking for his medical documentation, and agreed to fax it again. RP 782. Mr. Dickson confirmed he had received it, but he did not otherwise comment on the content. RP 783, CP Ex. 90. He never gave Mr. Harrell any indication that he was interpreting the letter to require Mr. Harrell work day shift only as opposed to a lighted post on any other shift. He never gave Mr. Harrell the opportunity to ask for clarification from his

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<sup>14</sup> Mr. Dickson refuses to work with attorneys in employment matters and has a letter he sends advising the employee that their union representative is their exclusive advocate. He did not send one of these letters to Mr. Harrell or Sue Sampson. RP 806. He did not have their assistant attorney general make any contact either. RP 710-711.

doctor. RP 807. He also did not communicate to Mr. Harrell that Mr. Harrell could be prescheduled on day shift every third month. RP 821-822. He made no mention of any union contract obligations whatsoever. RP 823-824. He did not suggest Mr. Harrell contact his union steward. He did not invite a face to face meeting. He told Mr. Harrell he could continue to call in for day shift assignments. He did not provide him any dayshift assignment. RP 714-715.

Mr. Dickson understood Mr. Harrell was not satisfied with his offer to call in for day shift assignments. RP 718-719, 807-808. Mr. Harrell suggested he be considered for assignment to the kitchen or work in Human Resources. RP 784, 860. Mr. Dickson rejected him. RP 712. He told him he could not and would not assist him in anyway in finding any work that he could perform in lighted conditions.

Mr. Dickson did not process a formal reasonable accommodation. RP 729. He did not acknowledge in writing Mr. Harrell's request for a reasonable accommodation. RP 730. The employer never created a reasonable accommodation file for Mr. Harrell, and in fact the only documentation that he made a request came from Mr. Harrell who produced his faxed medical documentation and from the memos Jack Gibson prepared and a few e-mail communications. RP 705-706. The failure to acknowledge Mr. Harrell's reasonable accommodation request

within thirty days violates the department's policy. CP Ex. 64. The policy requires notification of the request within thirty days and processing the request. CP Ex. 64, RP 648-649. The department's reasonable accommodation unit never became involved. RP 753. Mr. Dickson testified that he filed the medical documentation in the human resources department on the Island and that was the end of it. RP 826. Mr. Harrell then initiated an EEO complaint on December 11, 2007. CP Ex. 30, RP 1006.

After Lester Dickson spoke to Mr. Harrell for five minutes on December 5th, apparently Mr. Dickson spoke to Mario Martinez and told him to document any calls to Mr. Harrell to assign him dayshift. There is no record of his conversation with Mr. Martinez.

There is a record by way of an e-mail from Jack Gibson, approved by his supervisor David O'Conner on December 3rd to Mario Martinez that he should give Mr. Harrell any dayshift assignment available and record each time he called him on the on-call roster. RP 923, CP Ex. 16 and 20. Mr. Gibson sent this e-mail to Mario Martinez on December 4th. RP 449, 1216 CP Ex. 16. On December 12th, he sent another memo to Mario Martinez indicating he had noticed that Mr. Martinez was not recording any calls to Mr. Harrell for the available day shift assignments. RP 450, 1217-1218, CP Ex. 21. Mr. Martinez responded saying he was

not contacting Mr. Harrell because it was his practice to have night shift staff volunteer to hold over to cover day shift when needed. RP 1218, CP Ex. 162. He promised to record any calls to Mr. Harrell on the roster. RP 1221, CP Ex. 162.

No one ever instructed anyone to record Mr. Harrell's calls to the facility on the roster. The facility never introduced any of its phone records. The total number of calls ever recorded were eight calls on the on-call roster beginning December 17th, 2007. CP Ex. 160. Throughout November, there were absolutely zero calls to Mr. Harrell. CP Ex. 105. Of the eight calls on the roster in December, two were entries with the initials "RP" for Randy Pecheos. CP Ex. 160. Randy Pecheos testified and had to admit that he did not make the calls as noted on the roster at the time recorded because there were no incoming calls to Mr. Harrell noted in his phone records, to the same number listed on the roster. RP 877-878 CP Ex. 105 and 162. With regard to the remaining six "message" notations on the roster, no one ever could testify to making any call as noted. CP Ex. 160. Mr. Harrell's phone records showed he did not get any incoming calls on the days when Mario Martinez would have been at work to make the calls. CP Ex. 105. Mr. Martinez conceded only one of the "message" notations could have been his. RP 1245.

Both Lester Dickson and Mario Martinez overstating their contacts with Mr. Harrell in sworn declarations submitted on summary judgment. CP 113-344 and 513-516. Lester Dickson filed a declaration under oath stating he spoke with Mr. Harrell several times in November and December. CP 116. He spoke to Mr. Harrell for one minute in November and five minutes in December. RP 727, 1003. That was it. Mario Martinez filed a declaration under oath saying he called him several times in October, when Mr. Harrell was already working and on the schedule. CP 514. His declaration also states he called over fifteen times in November and December. CP 514. At trial he testified he did not call him at all in November. RP 1229. He said he could not testify how many times he called him in December without looking at his shift reports. RP 1247-1248. He conceded he never reviewed his shift reports when he signed the declaration. RP 1249.

There is an e-mail documenting the fact that Mr. Harrell spoke with Randy Pecheos on December 18th and Mario Martinez on December 19th. CP Ex. 17 RP 901. Neither Mr. Pecheos nor Mr. Martinez gave him a day shift assignment or any assignment when they spoke to him. Mr. Pecheos told Mr. Harrell to call in daily before day shift to get a day shift assignment. CP Ex. 17 RP 902-903. The next morning Mr. Harrell got up at five in the morning and called in for a day shift. RP 879-880,

1126-1127. He was not assigned a day shift. He did that for the next three days, and each time he was denied a day shift assignment. RP 879-880. His phone records show he called early in the morning and later in the day. CP Ex. 124.

Mr. Harrell never worked again. He was kept on the roster as a call-in day shift only position for more than a year and a half. RP 861. DSHS never contacted him to question why he was not getting work. RP 460-461. He was never brought in for a performance evaluation, which was required by his union contract. RP 1331-1333, CP Ex. 143 at 15. He should have received two of them before he was terminated. CP 1333. This would have provided both sides the opportunity to resolve the breakdown in communication.

His EEO complaint was referred to the state Human Rights Commission. CP Ex. 30, RP 1007. The defendants refused to change their position on accommodating him. CP Ex. 35, RP 739. Mr. O'Connor testified that the department did not accommodate on-call staff. According to him, that was not the way to handle it. He did not want to set any "precedent." RP 936, 947. Although he admits he could have accommodated him with a prescheduled day shift assignment or a lighted post if someone above him had told him to. He did not do it on his own because he did not see any "need" to and he did not think it would be fair.

RP 376-377. At trial, Lester Dickson agreed that they could have asked for a volunteer to trade shifts with Mr. Harrell during November when he was prescheduled on swing shift, but they did not do that. RP 823. He agreed they could have pre-scheduled him every third month. RP 821-822. He agreed that he could have invited him to have a sit down meeting to work on prioritizing his assignment to day shift, but he did not do that. RP 853. He agreed that they could have considered other lighted posts, or improved lighting, but never did that because his doctor's note referenced daylight conditions. RP 815. No action was taken by anyone to do anything for Mr. Harrell throughout the administrative process. Then, when they learned he had received his right to sue letter and had filed his claim, he was terminated. CP Ex. 39, 41, 47, 118.

He was terminated within days of initiating his claim. CP Ex. 47, 118, RP 1017. Cathi Harris who made the recommendation made her decision knowing he had an open accommodation request. RP 1324. She did not initiate any investigation, she did not review any documentation other than Mr. Gibson's erroneous time sheet and Performance Log. RP 1325, 1327. She approved Mr. Harrell's termination because he had not been working. RP 1325. Two other RRCs who started with Mr. Harrell who did not have any disability were not terminated during this staff reduction process. In fact, twenty-five on-call RRC staff retained their

positions. RP 1308 The call-in staff who did not work full time or as many hours as on-call staff lost their positions. RP 1325.

After terminating Mr. Harrell, the facility continued to fill available RRC positions. CP Ex. 59 and 60, RP 1023, 1307. That position was exempt from any hiring freeze. RP 639-640, 1209-1210. The program has advised the Governor's office that it cannot continue to operate the facility with fewer security staff, and those positions are not targeted for any reductions. RP 639-640, 1209-1210. The facility has hired many staff into permanent, temporary, and on-call positions. RP 1289-1290. Mr. Harrell has never been considered for any of them, despite the undisputed evidence indicating he can do the job. RP 747, 929, 1023. Defendants never offered him any assistance in finding any position. Defendants have failed to provide any opportunity to Mr. Harrell to return to work.

## **LEGAL ARGUMENT**

### **A. DSHS Failed to Reasonably Accommodate Garrett Harrell as a Matter of Law**

#### **1. De Novo Standard of Review**

The appellate court makes the same inquiry as the trial court when reviewing a denial of summary judgment. *Estate of Jones v. State*, 107 Wn. App. 510, 15 P.3d 180 (2000). The absence of genuine issues of

material fact warrant entry of summary judgment. *Id.* and CR 56. The trial court denied Mr. Harrell's summary judgment motion on his claim that DSHS did not reasonably accommodate him. CP 568. The trial court did not identify any facts at issue in its order. CP 568. DSHS conceded the only action it took in response to Mr. Harrell's request for an accommodation was to take him off the schedule and allow him to call in for any day shift work available. CP 502. Following his request for accommodation, DSHS never assigned him any work, not a day shift or any shift or position where there was light. RP 337, CP 160, 169. Taking work away from a disabled employee who is ready, willing, and able to work does not meet the legal requirements of a reasonable accommodation as a matter of law. Summary judgment should have been granted.

The same *de novo* standard applies to the Court's denial of Mr. Harrell's motion for a new trial. When a motion for a new trial is based upon a question of law, the standard of review is *de novo*. *Ramey v. Knorr*, 130 Wn. App. 672, 124 P.3d 314 (2005) The question of law in this case is whether relegating a prescheduled on-call employee to the status of a non-scheduled call-in employee who is never assigned any more work meets the legal standard for a reasonable accommodation. It does not. DSHS denied Mr. Harrell a reasonable accommodation as a matter of law. The court erred by denying Mr. Harrell a new trial.

2. Assignment to Call-In Status A Demotion, Not An Accommodation

A reasonable accommodation requires the employer take “positive steps” to accommodate the disability. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995). Removing an employee from the schedule is not a positive step. Positive steps are not defined in statute. However, the law recognizes a reduction in workload and pay an adverse employment action. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P. 3d 827 (2004). Adverse action must be judged from the perspective of a reasonable person in the plaintiff’s position. *Tyner v. State*, 136 Wn. App. 545, 154 P.2d 920 (2007). Employer action that amounts to an adverse action harms the employee to a degree that is not acceptable as a matter of law. Adverse action cannot not be characterized as a “positive step.” Removing Mr. Harrell from the schedule was not a positive step. Mr. Harrell was prescheduled and wanted to continued to be prescheduled like all the other on-call staff. He wanted to work. DSHS denied him any work.

Prescheduled on-call employees enjoy several advantages over call-in employees. Call-in staff were part time employees who were not prescheduled like on-call staff. RP 343, 372, 615. CP Ex. 96, 140. Prescheduled on-call staff work more and thus earn more. RP 384. They

are not inconvenienced by having to call in at five or six in the morning every day. They promote faster and get more recognition for the work performed naturally transitioning into an RRC 2 position with higher pay than the RRC 1. RP 338. Prescheduled on-call staff who worked “a lot of hours” were not laid off. RP 1293. Mr. Harrell suffered a loss in workload and pay. CP Ex. 8. He never received any work and was ultimately laid off. RP 1294, 1296. Nothing positive was ever offered to him. RP 749-756.

In Mr. Harrell’s case, a positive step would have been to reassign him to a prescheduled day shift schedule assigned to another on-call staff. DSHS concedes on-call staff were prescheduled on day shift. RP 376, 1314, 1316. DSHS recognizes Garrett Harrell could have been assigned to one of the prescheduled day shift assignments. RP 381-382, 745-746. No one did. If a day shift employee objected to the switch, the supervisor Jack Gibson could have asked for volunteers. DSHS never assigned Mr. Harrell to day shift when day shifts were available. Rescheduling Garrett Harrell to day shift in November would have kept him employed throughout November. When his rotation on day shift came due, DSHS could have scheduled him on swing shift in a lighted post. RP 790, 794. Assignment to a lighted post would also have been a positive step. RP 385-386. DSHS never explored assignment to a lighted post. DSHS

conceded other positive steps were available.<sup>15</sup> DSHS never explored any of them. RP 746-747.

DSHS fails to establish a reasonable accommodation as a matter of law because DSHS never took any positive steps to keep Garrett Harrell working.

3. Call-In For Day Shift Is Not An Accommodation When The Employer Fails to Assign Available Day Shifts - A Reasonable Accommodation Must be Effective

An accommodation that is not effective is not an accommodation. *Frisino v. Seattle School Dist. No. 1*, 160 Wn. App. 765, 249 P.3d 1044 (2011).<sup>16</sup> An accommodation occurs when the employer takes affirmative steps to help the disabled employee continue working at the existing position or attempts to find a position compatible with the limitations. *Id.* at 778. The employer selects the mode of accommodation, not the employee. *Id.* at 779. When the employer stands on its selected mode of accommodation to the exclusion of other choices it risks statutory liability if that attempt is not effective and it cannot show that additional efforts are an undue burden. *Id.* at 782.

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<sup>15</sup> Other positive steps included an in person meeting with night shift staff to prioritize calling him in for day shift, inviting further medical documentation regarding his lighting needs, contact with the union for clarification regarding an exception to its interpretation of "intermittent" in situations where there is a duty to provide a reasonable accommodation; improved lighting; other job assignments or positions for which he was qualified at DSHS, or initiating the formal process at DSHS. RP 789-790, 821-837.

<sup>16</sup> The jury instruction regarding reasonable accommodation does not fairly instruct the jury that the accommodation must be effective or that a failure to accommodate is discrimination. The jury had difficulty understanding Mr. Harrell had no obligation to prove express discriminatory animus.

With Mr. Harrell, DSHS chose one accommodation, call in for day shift assignments. RP 794-795. DSHS never assigned him one. Not one, despite the testimony that there were days shifts available. RP 339, 373-374. 136 day shifts in November to on-call staff. RP 342. 104 day shifts in December to on-call staff. RP 342. As a matter of law, DSHS did not accommodate Garrett Harrell.

DSHS tried to fault Mr. Harrell. Lester Dickson argued Mr. Harrell should have called in more to get a shift assignment. If you count the number of phone calls documented by Mr. Harrell's phone records, he did call in regularly, thirty one times in November alone. The one day he reached Lester Dickson on December 5th, Lester Dickson did not assign him to a day shift. Dickson made no effort to do so. No one offered him a day shift assignment in the thirty one calls he made to the facility in November. In December, after being instructed to call in an hour before the shift started, Mr. Harrell got up and phoned in four days in a row at about 5:00 o'clock in the morning. Each time he was denied work. Randy Pecheos spoke to him on December 18th and Mario Martinez spoke to him on December 19th without offering him work. No one offered him any work in the twenty two calls he made to the facility in December. With regard to calls made to him, no one called him in November to offer him a

day shift. There is no competent evidence that anyone called him in December either.<sup>17</sup>

DSHS never provided him a reasonable accommodation that was effective. Thus, DSHS is liable unless DSHS can prove an accommodation was an undue hardship. DSHS offered no evidence of undue hardship. Pre-scheduled day shifts were available, yet he was not scheduled. Call-in day shifts were available, but Mr. Harrell was not given priority to those until nearly two months after he requested an accommodation. Even then he was never given one. DSHS kept him on the roster from November 2007 to February 2009 and never put him to work, anywhere. CP Ex. 118. DSHS could have assigned him a lighted post. DSHS could have improved the lighting. DSHS could have found him an alternative assignment or directed him to other available positions for which he was qualified. It did not.

Lester Dickson actually violated the legal standard set forth in *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003). The employer must evaluate potential positions in relation to the employee's disability. *MacSuga v. County of Spokane*, 97 Wn. App. 435, 444, 983 P.2d 1167 (1999). The employer must look for open positions that could accommodate the employee's disability and then inform the employee

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<sup>17</sup> Eight calls were logged on the roster, Pechoes admitted two were incorrect, Martinez testified only one could be him. No one testified to actually making the calls recorded on the log.

about it. Lester Dickson refused to help Mr. Harrell find an alternative job assignment. RP 755. He prevented the reasonable accommodation unit from helping Mr. Harrell as well. He never gave them the necessary paperwork. Thus, DSHS never helped find a suitable position for Garrett Harrell when he was ready, willing, and able to work at any location anywhere, including the Special Commitment Center on McNeil Island.

DSHS failed to follow the law. The verdict should be disregarded and liability on reasonable accommodation decided as a matter of law in Mr. Harrell's favor.

4. DSHS's Failure to Engage in An Interactive Process In Violation of Its Own Policy Kept Mr. Harrell Out of Work

The best way to assess the presence of a reasonable accommodation is by evidence of a flexible interactive process between the employer and the employee. *MacSuga v. County of Spokane*, 97 Wn. App. 435, 983 P.2d 1167 (1999). Discussions between the employer and employee are strongly recommended. *Id.* "An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer." *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (1996). An exchange between the employee and employer where information is sought and shared evidences reasonable accommodation. *MacSuga*, 97 Wn. App. at 444.

DSHS' failure to engage in an interactive process is well described in the case of *Sommer v. DSHS*, 104 Wn. App. 160, 15 P.3d 664 (2001). In *Sommer*, DSHS failed to take any positive steps for two years after the employee first requested an accommodation and took action only after the employee contacted a lawyer. The court describes DSHS as engaging in a "long-term pattern of inaction, stalling, and administrative avoidance." *Sommer*, at 174. The appellate court reversed the jury verdict on disputed facts and remanded the matter for a new trial on damages alone. This case is similar, except that this court may rely upon undisputed facts to rule Mr. Harrell was denied a reasonable accommodation as a matter of law.

DSHS never processed Mr. Harrell's reasonable accommodation request. RP 394-395, 729-730. DSHS policy required notification within thirty days of the request and then processing of the request. CP 64. No one sent Mr. Harrell the letter. DSHS policy required an investigation. No one ever engaged in a meaningful investigation. RP 736-737, 753-754. After he filed his human rights complaint, the officials relied upon Jack Gibson's incorrect information regarding Mr. Harrell's attendance. DSHS refused to change its position with regard to trying to accommodate Mr. Harrell. RP 739. Later in support of summary judgment Gibson,

Dickson, and Martinez filed inaccurate and misleading declarations that misrepresented his attendance and contact with him. CP 44, 113, 513.

The evidence that Mr. Harrell requested a reasonable accommodation came primarily from him. He produced his phone records. He produced the fax he sent to Jack Gibson. He produced the fax he sent to Lester Dickson. He produced the letter his lawyer Sue Sampson sent to Henry Richards. DSHS never produced a reasonable accommodation file for Garrett Harrell. It did not have one. His request was never properly processed at DSHS. RP 720-730. Jack Gibson lost Mr. Harrell's paperwork. Mr. Gibson kept a copy of a document called Performance Log. CP Ex. 109. He used this form to comment on Mr. Harrell's accommodation request. He used the form improperly and in violation of policy. DSHS admitted the reasonable accommodation process should not be commingled with performance assessments. RP 731. Jack Gibson produced some memos he created to defend his actions, which acknowledge Mr. Harrell wanted to work wherever it was light<sup>18</sup> CP Ex. 12. Jack Gibson never took any action to help Mr. Harrell. RP 371.

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<sup>18</sup> DSHS argued Mr. Harrell requested day shift as his exclusive accommodation. Significant evidence showed he wanted lighted condition, daylight being the easiest alternative. RP 812, 819-820. No one invited a conversation with his physician or requested further information from his physician. Day shift started at 6:30 a.m. when it was dark out, but no one thought to clear that with Dr. Pham or explore artificial light options. RP 807.

Mr. Harrell hired a lawyer because Jack Gibson told him to call in sick and could not get anyone to override Jack Gibson. Lester Dickson got involved and refused to work with or acknowledge Mr. Harrell's attorney. RP 752, 806.

There were only two people at DSHS whom ever spoke to Garrett Harrell about his request. Jack Gibson and Lester Dickson spent no more than six minutes each. DSHS kept him on their roster for a year and a half without engaging in any process.<sup>19</sup> No one ever even sat down to review his performance despite the union contract requiring it. RP 460-461. There simply is no evidence to support a legal determination that DSHS engaged in a deliberative process. They did not and they should be liable.

**B. The Jury Should Have Heard Mr. Harrell's Constitutional Claims or In the Alternative His ADA Claim**

1. Garrett Harrell Exercised His Free Speech Rights and His Right to Seek Redress.

The trial court granted the State's CR 50 Motion to Dismiss his free speech claim on the grounds that his speech was not of a public interest. RP 1399. The court's ruling is in error. Mr. Harrell reported unsafe lighting conditions on the outside perimeter at night. He sought review of Jack Gibson's instruction to call in sick in violation of policy. He asked for a reasonable accommodation through various means to

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<sup>19</sup> The headcount gave DSHS an advantage for fiscal and budgeting purposes. RP 1333 - 1335.

include filing a Human Rights Complaint and subsequent claim for damages. He was fired within days of filing.

The important factor in determining whether a public employee's speech addresses matters of public concern is the content of the employee's speech. *White v. State*, 131 Wn.2d 1, 929 P.2d 396 (1997). Content is determined by the form and context of the statement as revealed by the whole record. *Id.* White reported suspected nursing home patient abuse while acting as an employee involved in a dispute with her supervisor. The report was investigated and found to be without merit. A statement made in the context of an employment dispute may be of public concern: "the fact that White may have had a personal interest in reporting the incident does not diminish the concern the public would have in this matter." *Id.* at 13. The court reasoned patient abuse is an issue of concern to the public.

Keeping the public safe from sex offenders is of paramount interest to the state. The state invested sixty million dollars in the total confinement facility, and invests fifty million a year in operating expenses. RP 303, 694, RCW 71.09.020(19)The public is very concerned about safety and security at the SCC, and would care about the sufficiency of the lighting whether it was raised in the context of an employment dispute or otherwise. RP 1301-1302. The officials testified lighting was a safety

and security issue that they would fix, despite the cost. Garrett Harrell reported his concerns about the inadequate lighting outside on the perimeter at night because it was not safe. RP 368. It was not safe for him. It was not safe for the public. It was not safe for the sex offenders. At that time, he was not engaged in any employment dispute. He figured the SCC would fix the problem. Jack Gibson admits Mr. Harrell expressed safety concerns for others, not just himself. RP 368. He was not the only one to report the lighting issues.<sup>20</sup> Mr. Harrell was not raising a matter of purely personal interest such as pay, hours, or professionalism.

The fact that Mr. Harrell reported the lighting and questioned the response he received to his request for a reasonable accommodation is a basis for correctly characterizing his speech a matter of public concern. Mr. Harrell has a right to be free from discrimination based upon his disability. RCW 49.60.030. He has an absolute right to oppose unfair practices by reporting the unfair practice. RCW 49.60.210. His complaint about the lighting and his subsequent efforts to get a reasonable accommodation are matters of public concern. If DSHS is abusing its sick leave policy, and fails to follow disability policy society suffers. Society benefits when the barriers to employment are eliminated for those with a disability so that they can be financially independent and not reliant upon

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<sup>20</sup> John Reed, another RRC reported his concerns with the lighting. CP Ex. 178 pg. 13-14

state funded services or support. Free speech protection for an individual asserting fundamental rights is an appropriate protection of the public interest. *Sizemore v. City of Dallas*, 443 F.Supp.2d 1201 (2006).

In *Sizemore*, a police officer had a viable section 1983 case against the department officials for retaliation in violation of his free speech rights when he reported he was subjected to discrimination. The court concluded a “run-of-the-mine single-plaintiff discrimination case” meet the public concern test for free speech protection as disputes over discrimination are not simply individual personnel matters. *Id.* at 1208. Discrimination cases involve “the type of governmental conduct that affects the societal interest as a whole-conduct in which the public has a deep and abiding interest.” *Id.* See also, *Dalton v. WA State Dept. of Corrections*, 344 Fed. Appx. 300 (2009), *Coszalter v. City of Salem*, 320 F.3d 968 (2003).

Mr. Harrell was expressing matters of public concern. His free speech claim should have gone to the jury.

2. Constitutional Claims Not Subsumed by ADA if State Has 11th Amendment Immunity From ADA Liability

The jury never decided Mr. Harrell’s constitutional claims under 42 U.S.C. § 1983. DSHS argued the ADA claim subsumes the constitutional claims under the authority of *Vinson v. Thomas*, 288 F. 3d 1145, 1156 (9th Cir. 2002) A plaintiff cannot bring an action under 42

U.S.C. § 1983 to vindicate rights created by Title II of the ADA). CP 646. At the same time, DSHS claimed 11th Amendment immunity from ADA liability even in state court. CP 678. The first time DSHS raised this 11th Amendment immunity defense was after the close of Mr. Harrell's case on its CR 50 motion to dismiss. CP 671, 1389. The issue was not well briefed and had never been disclosed despite Mr. Harrell asking for the information in discovery. CP 704. The trial court granted DSHS' motion in limine on Mr. Harrell's free speech claims, and later dismissed Mr. Harrell's constitutional claims and ADA claim on DSHS' CR 50 motion. CP 667, 694, RP 1400.

Mr. Harrell argued his free speech rights were violated and that his due process rights were violated, both substantive and procedural, for a variety of reasons. His free speech claims are addresses previously.

With regard to due process, DSHS never provided him notice or an opportunity to be heard in violation of department policy and his union contract. A public employer violates due process protections when it disregards its own policies that provide an employee minimal protections such as notice and opportunity to be heard, or when the resulting decision is so arbitrary and capricious that it amounts to a violation of substantive due process. *Danielson v. City of Seattle*, 45 Wn. App. 235, 724 P.2d 1115 (1986). That is the case here.

DSHS shorted him pay without giving him notice or an opportunity to correct the error. CP Ex. 8 pg. 4. DSHS failed to pay his union dues, which led to the union denying him representation. At the same time, Lester Dickson refused to communicate with Mr. Harrell's independent attorney and did not send him DSHS's standard notice regarding union representation. DSHS never advised Mr. Harrell about its interpretation of the union contract regarding prescheduled employment. DSHS did not send Mr. Harrell the notice required under its policy acknowledging his request for a reasonable accommodation to initiate formal processing of his request with DSHS. DSHS never suggested he get more information from his medical providers. DSHS never contacted him for his annual review required under the union contract. Every step of the way Mr. Harrell was denied any opportunity to meaningfully assert his rights. The officials presented misleading and inaccurate information to discredit him. They refused to give him daylight hours, a lighted post, or notice of positions he was qualified to fill. He was terminated within days of filing his claim form, which DSHS attributes to his lack of hours, but he was not getting hours because they would not assign him work. DSHS never gave him the information he needed, they never told him what the issues were, and they never met with him as required by contract. DSHS

violated minimal constitutional procedural requirements and acted arbitrarily and capriciously in violation of substantive due process.

In public employment cases, an employee's right to retain his position and income are balanced against the government's interest in expeditious removal of unsatisfactory employees. *Danielson*, 45 Wn. App. at 245. DSHS concedes Mr. Harrell was not an unsatisfactory employee. The balance weighs in Mr. Harrell's favor. DSHS erred when it terminated him.

The jury never had the opportunity to hold DSHS accountable for violating Mr. Harrell's constitutional rights. At the same time he was denied any relief under the ADA .

DSHS cannot rely on *Vinson* and 11th Amendment immunity at the same time. If DSHS is immune under the ADA then under the logic of *Vinson* Mr. Harrell's constitutional claim remain viable. They are not subsumed by the ADA because the ADA offers no relief to Mr. Harrell. If he has no viable ADA claim against the State then the court erred in dismissing his constitutional claims.

### 3. The ADA Applies to DSHS

Under the miscellaneous provisions of the ADA, the state must adhere to the ADA. 42 U.S.C.A § 12202. However, the Supreme Court found employment actions brought under Title I of the ADA could not

proceed in federal court against a state because of the 11th Amendment. *University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2000). The court dismissed Mr. Harrell's ADA claim on this basis.

The court erred when it failed to distinguish Mr. Harrell's ADA claim brought in state court from the decisions that involve a federal court action. 11th Amendment immunity bars claims against the state in federal court. *University of Alabama*, 531 U.S. at 363. This action has always been in state court. 11th Amendment immunity may not apply to enforcement of federal claims in state court.<sup>21</sup> *See, Erickson v. Board of Governors*, 207 F.3d 945 (2000). State court may assume subject matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or incompatibility between the federal claim and state court adjudication. *Rice v. Janovich*, 109 Wn.2d 48, 742 P. 2d 1230 (1987). Here enforcement of the ADA against the state in state court is consistent with federal law and compatible with state law.

Congress has clearly expressed its intent to hold states accountable under the ADA. 42 U.S.C. §12202. Washington's Legislature has clearly expressed its interest in holding the state accountable to the same extent as if it were a private person or corporation. RCW 4.92.090. In addition to waiving sovereign immunity, the Legislature made freedom from

discrimination in employment a civil right. RCW 49.60.030. Discrimination in employment on the basis of disability is expressly prohibited. RCW 49.60.180. Civil suits for damages are expressly permitted. RCW 49.60.030. RCW 49.60.030 permits a suit for civil damages to enforce WLAD and the Civil Rights Act as amended. The ADA is a notable expansion of the Civil Rights Act, which provides added protections to those standards articulated in WLAD. *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 643, 911 P. 2d 1319 (1996) (“Effusive praise greeted the passage of the Americans with Disabilities Act of 1990. Former Attorney General of the United States Dick Thornburgh called the ADA “a great leap forward in the civil rights movement.”)<sup>22</sup> The ADA offers the jury the express opportunity to find for plaintiff without a specific finding of discrimination. *Id.* at 628. (“In contrast to Washington's vague standards, the federal standards for treatment of the disabled are specific; they are more in the nature of entitlements. ADA's protection is not even conditioned upon a finding of “discrimination,” as is true under RCW 49.60.”)

The protections of the ADA should have been available to Mr. Harrell. The court erred when it dismissed his ADA claim.

**C. Garrett Harrell Requests Attorney's Fees On Appeal and for Trial**

1. Appellate Fees

Mr. Harrell requests an award of attorneys fees and costs on appeal. His request is based upon WLAD and the Civil Rights Act and the ADA. RCW 49.60.030 and 42 U.S.C. §§§ 1981, 1988, and 12205. Under WLAD, a person deeming himself injured by any act in violation of his rights under WLAD may recover attorney's fees and costs. RCW 49.60.030. Under federal law, a prevailing party may recover costs and attorney's fees. 42 U.S.C. §§§ 1981, 1988, and 12205. Mr. Harrell has incurred significant cost and attorney's fees on appeal. He requests the opportunity to submit a cost bill and attorney's fees affidavit upon entry of an opinion reversing the decision of the trial court.

2. Based upon the same statutory grounds that provide for an award of attorney's fees and costs on appeal, Mr. Harrell requests recovery of his attorney's fees and costs incurred in pursuing his rights at the trial level. He was denied meaningful compensation because the court erred when it denied his motion for a new trial and dismissed his viable causes of action on DSHS' CR 50 motion.

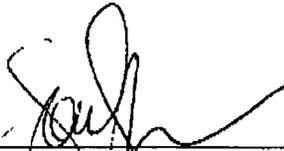
## CONCLUSION

Mr. Harrell proved that DSHS discriminated against him. He was not provided a reasonable accommodation as a matter of law. He further requests a determination that he properly asserted his constitutional rights to free speech and due process, and that the state must comply with the ADA. The trial court erred in dismissing his constitutional and ADA claims. He requests the Court reverse the trial court's dismissal of his claims and denial of his motion for new trial. He requests a new trial on damages.

Respectful submitted this 15th day of August 2011.

III BRANCHES LAW, PLLC

By



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Joan K. Mell, WSBA #21319  
Attorney for Garrett Harrell

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CERTIFICATE OF SERVICE BY \_\_\_\_\_

DEPUTY

I certify that I caused a true and correct copy of the forgoing Mr. Harrell's Appeal Brief on all parties or their counsel of recorded by electronic mail on the date below as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Date this 15th day of August 2011 at Fircrest, Washington.

  
Jonathan Trethewey  
Paralegal