

FILED  
COURT OF APPEALS  
DIVISION II  
2013 MAR 15 PM 12:22  
STATE OF WASHINGTON  
BY DEPUTY

DOCKET NO. 44295-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

MARTHA LEAH WOODS, Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,  
and TERRI VAN AUSDLE and "JOHN DOE" VAN AUSDLE and their  
marital community, Respondents.

---

APPELLANT'S BRIEF

---

Robert S. Kim, WSBA #25042  
Karen E. Hansen, WSBA #35701  
Attorneys for Appellant

Robert Kim, Esq. PLLC  
P.O. Box 7443  
Covington, WA 98042  
(206) 225-4098  
bob@rkcounsel.com

Karen E. Hansen, Esq. PLLC  
P.O. Box 235  
DuPont, WA 98327  
(206) 890-2549  
karen@rkcounsel.com

## **I. TABLE OF CONTENTS**

	<b>Page</b>
<b>I. Table of Contents</b>	<b>2-5</b>
<b>II. Table of Authorities</b>	<b>6-8</b>
<b>III. Assignments of Error</b>	<b>9-13</b>
 <i>Assignments of Error</i>	
1. The trial court erred in granting DOC's motion to strike the expert report of Gary M. Namie, Ph.D. in support of Ms. Woods' Opposition to Summary Judgment without conducting a <i>Frye</i> analysis by order entered on November 9, 2012. CP 830.	<b>9</b>
2. The trial court erred in dismissing Ms. Woods' claim of disability discrimination based on DOC's failure to accommodate by order entered on November 9, 2012. CP 830.	<b>9</b>
3. The trial court erred in dismissing Ms. Woods' hostile work environment claim against Ms. Van Ausdle and DOC by order entered on November 9, 2012. CP 830.	<b>10</b>
4. The trial court erred in dismissing Ms. Woods' claims for retaliation and disparate treatment by order entered on November 9, 2012. CP 830.	<b>11</b>
5. The trial court erred in dismissing Ms. Woods' claims against DOC for negligent hiring, retention and supervision of Ms. Van Ausdle by order entered on November 9, 2012. CP 830.	<b>12</b>

6. The trial court erred in dismissing Ms. Woods' claim against DOC for breach of contract by order entered on November 9, 2012. CP 830. **13**

***Issues Pertaining to Assignments of Error***

1. When a trial court states that a *Frye* analysis must be conducted before allowing an expert's report for consideration, may the trial court then strike that report without conducting a *Frye* analysis? (Assignment of Error 1) **9**
2. What sort of evidence fulfills the required showing of an employee's request for accommodation, triggering an employer's duty to accommodate such a medical necessity? (Assignment of Error 2) **9**
3. Is it improper for a trial court to base dismissal of a claim on arguments raised for the first time in a rebuttal memorandum? (Assignment of Error 2) **10**
4. Does an individual's pursuit and receipt of L&I benefits automatically estop the recipient from subsequently pursuing a discrimination claim? (Assignment of Error 2) **10**
5. Does an act occurring within the statute of limitations period create a pattern of ongoing unlawful practice to bring all previous instances of harassment into the appropriate time frame for stating a hostile work environment claim? (Assignment of Error 3) **10**
6. Should a trier of fact be allowed to assess whether the severity of an employer's abusive treatment meets the standard for hostile work environment, rather than a trial court judge making a summary judgment determination?

(Assignment of Error 3)	10
7. How much evidence is required to permit a jury to determine, rather than a trial court decide on summary judgment, whether an employer's harassment of an employee was based on a perceived disability? (Assignment of Error 3)	11
8. Does knowledge of and failure to act on a supervisor's hostile treatment of a subordinate impute liability to the employer? (Assignment of Error 3)	11
9. Does separation of an employee from state service during a reversion process, which was also a Return to Work Option under L&I, constitute an adverse employment action? (Assignment of Error 4)	11
10. Is nine months from an employee's protected activity within an acceptable time frame to support an inference based on temporal proximity that an employment decision was retaliatory? (Assignment of Error 4)	11
11. Is a regular employee similarly situated to an employee undergoing a trial service training period who performs substantially the same job functions? (Assignment of Error 4)	12
12. Can an employer's discriminatory motivation be inferred by failure to impose equally severe repercussions against a similarly situated, non-protected employee for filing a hostile work environment claim? (Assignment of Error 4)	12
13. Is a negligent supervision claim duplicative of a discrimination claim when it relies on additional facts to show an employer's negligence? (Assignment of Error 5)	12

14. Does an investigation concluding a supervisor inappropriately touched her subordinates and created a hostile work environment constitute sufficient evidence of the supervisor's dangerous tendencies? (Assignment of Error 5)	12
15. Is an internal investigation finding creation of a hostile work environment, plus performance documents summarizing abuse of supervisory power and failure to know basic employee tasks, sufficient to give an employer knowledge of an employee's dangerous tendencies and unfitness as an employee? (Assignment of Error 5)	13
16. Does a settlement agreement dictating an employee's training schedule include an implied covenant of good faith for an employer to facilitate the training in a reasonable time and manner? (Assignment of Error 6)	13
17. Does lack of a "time is of the essence" clause excuse a party to a contract from performing their contracted duties within a reasonable time frame given the circumstances? (Assignment of Error 6)	13
<b>IV. Statement of the Case</b>	<b>14-16</b>
<b>V. Summary of Argument</b>	<b>16</b>
<b>VI. Argument</b>	<b>16-45</b>
<b>VII. Conclusion</b>	<b>45</b>
<b>VIII. Appendix</b>	<b>46-55</b>

## II. TABLE OF AUTHORITIES

	<b>Page</b>
<i>Allen v. Iranon</i> , 283 F.3d 1070 (9 <sup>th</sup> Cir. 2002)	<b>35, 37</b>
<i>Anthoine v. N. Central Counties Consortium</i> , 605 F.3d 740 (9 <sup>th</sup> Cir. 2010)	<b>35, 37</b>
<i>Antonius v. King County</i> , 153 Wn.2d 256, 103 P.3d 729 (2004)	<b>25-26</b>
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991)	<b>42</b>
<i>Banks v. Nordstrom</i> , 787 P.2d 953, 57 Wn.App. 251 (1990)	<b>41</b>
<i>Barrett v. Weyerhaeuser</i> , 40 Wn.App. 630, 700 P.2d 338 (1985)	<b>43-44</b>
<i>Bruns v. Paccar, Inc.</i> , 890 P. 2d 469, 77 Wn.App. 209 (1995)	<b>18</b>
<i>Cavell v. Hughes</i> , 29 Wn.App. 536, 629 P.2d 927 (1981)	<b>43</b>
<i>Cleveland v. Policy Management Systems Corp.</i> , 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999)	<b>23-24</b>
<i>Davis v. Team Elec. Co.</i> , 520 F.3d 1080 (9 <sup>th</sup> Cir. 2008)	<b>26, 28, 34</b>
<i>deLisle v. FMC Corp.</i> , 786 P.2d 839, 57 Wn.App. 79 (1990)	<b>17</b>
<i>Draper v. Coeur Rochester, Inc.</i> , 147 F.3d 1104, (9 <sup>th</sup> Cir. 1998)	<b>29</b>
<i>EEOC v. Hacienda Hotel</i> , 881 F.2d 1504 (9 <sup>th</sup> Cir. 1989)	<b>31-32</b>
<i>Ellison v. Brady</i> , 924 F.2d 872 (9 <sup>th</sup> Cir. 1991)	<b>26, 28, 32</b>

<i>Fisher v. Tacoma School Dist. No. 10</i> , 53 Wn.App. 591, 769 P.2d 318, <i>review denied</i> 112 Wn. 2d 1027 (1989)	31-32
<i>Glasgow v. Georgia Pacific Corp.</i> , 103 Wn.2d 401, 693 P.2d 708 (1985)	28, 32
<i>Harris v. State</i> , 56847-7-1 (Wn. Ct. of Appeals, 2007)	30-31
<i>Hill v. BCTI Income Fund-I</i> , 23 P.3d 440, 144 Wn.2d 172 (2001)	19, 21
<i>Johnson v. Dep't of Soc. &amp; Health Servs.</i> , 80 Wn.App. 212, 907 P.2d 1223 (1996)	37-39
<i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 662 P.2d 385 (1983)	43-44
<i>Martini v. Boeing Co.</i> , 137 Wn.2d 357, 971 P.2d 45 (1999)	19
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57, 106 S.Ct. 2339, 91 L.Ed.2d 49 (1986)	31
<i>Nat'l Railroad Passenger Corp. v. Morgan</i> , 536 U.S. 101, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002)	24-26
<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39 (1997)	41-42
<i>Oncale v. Sundowner Offshore Servs., Inc.</i> , 523 U.S. 75, 118 S. Ct. 988, 140 L.Ed. 2d 201 (1998)	29
<i>Paul v. Christensen Family Trust</i> , No. 30654-9-II (Wash. Ct. App. 2005)	44-45
<i>Ray v. Henderson</i> , 217 F.3d 1234 (9 <sup>th</sup> Cir. 2000)	34
<i>R. D. Merrill Co. v. Pollution Control Hearings Bd.</i> , 137 Wn.2d 118, 969 P.2d 458 (1999)	22-23
<i>Refrigeration Eng'g Co. v. McKay</i> , 4 Wn.App. 963, 486 P.2d 304 (1971)	43

<i>Robinson v. Pierce County</i> , 539 F. Supp. 2d 1316 (W.D. Wash. 2008)	40
<i>Sellsted v. Washington Mut. Sav. Bank</i> , 69 Wn.App. 852, 851 P.2d 716, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993)	17
<i>State v. Cauthron</i> , 120 Wn.2d 879, 846 P.2d 502 (1993)	16-17
<i>State v. Copeland</i> , 130 Wn.2d 244, 922 P.2d 1304 (1996)	16
<i>State v. Martin</i> , 101 Wn.2d 713, 684 P.2d 651 (1984)	17
<i>Vasquez v. County of Los Angeles</i> , 349 F.2d 634, (9 <sup>th</sup> Cir. 2003)	37-38
<i>White v. Kent Med. Ctr., Inc.</i> , 61 Wn.App. 163, 810 P.2d 4 (1991)	22-23
<i>Woods v. Graphic Communications</i> , 925 F.2d 119, (9 <sup>th</sup> Cir. 1991)	33

**Statutes**

<b>CR 56</b>	<b>17</b>
<b>RCW 49.60.010</b>	<b>16</b>
<b>RCW 49.60.020</b>	<b>19</b>
<b>RCW 49.60.040</b>	<b>30</b>
<b>RCW 49.60.180</b>	<b>33</b>

**III. ASSIGNMENTS OF ERROR & ISSUES PERTAINING  
TO ASSIGNMENTS OF ERROR**

1. The trial court erred in granting DOC's motion to strike the expert report of Gary M. Namie, Ph.D. in support of Ms. Woods' Opposition to Summary Judgment without conducting a *Frye* analysis by order entered on November 9, 2012. CP 830.
  - a. When a trial court states that a *Frye* analysis must be conducted before allowing an expert's report for consideration, may the trial court then strike that report without conducting a *Frye* analysis?
2. The trial court erred in dismissing Ms. Woods' claim of disability discrimination based on DOC's failure to accommodate by order entered on November 9, 2012. CP 830.
  - a. What sort of evidence fulfills the required showing of an employee's request for accommodation, triggering an employer's duty to accommodate such a medical necessity?

- b. Is it improper for a trial court to base dismissal of a claim on arguments raised for the first time in a rebuttal memorandum?
  - c. Does an individual's pursuit and receipt of L&I benefits automatically estop the recipient from subsequently pursuing a discrimination claim?
3. The trial court erred in dismissing Ms. Woods' hostile work environment claim against Ms. Van Ausdle and DOC by order entered on November 9, 2012. CP 830.
- a. Does an act occurring within the statute of limitations period create a pattern of ongoing unlawful practice to bring all previous instances of harassment into the appropriate time frame for stating a hostile work environment claim?
  - b. Should a trier of fact be allowed to assess whether the severity of an employer's abusive treatment meets the standard for hostile work environment, rather than a trial court judge making a summary judgment determination?

- c. How much evidence is required to permit a jury to determine, rather than allow a trial court to decide on summary judgment, whether an employer's harassment of an employee was based on a perceived disability?
  - d. Does knowledge of and failure to act on a supervisor's hostile treatment of a subordinate impute liability to the employer?
4. The trial court erred in dismissing Ms. Woods' claims for retaliation and disparate treatment by order entered on November 9, 2012. CP 830.
- a. Does separation of an employee from state service during a reversion process, which is also a Return to Work Option under L&I, constitute an adverse employment action?
  - b. Is nine months from an employee's protected activity within an acceptable time frame to support an inference based on temporal proximity that an employment decision was retaliatory?

- c. Is a regular employee similarly situated to an employee undergoing a trial service training period who performs substantially the same job functions?
  - d. Can an employer's discriminatory motivation be inferred by failure to impose equally severe repercussions against a similarly situated, non-protected employee for filing a hostile work environment claim?
5. The trial court erred in dismissing Ms. Woods' claims against DOC for negligent hiring, retention and supervision of Ms. Van Ausdle by order entered on November 9, 2012. CP 830.
- a. Is a negligent supervision claim duplicative of a discrimination claim when it relies on additional facts to show an employer's negligence?
  - b. Does an investigation concluding a supervisor inappropriately touched her subordinates and created a hostile work environment constitute sufficient evidence of the supervisor's dangerous tendencies?

- c. Is an internal investigation finding creation of a hostile work environment, plus performance documents summarizing abuse of supervisory power and failure to know basic employee tasks, sufficient to give an employer knowledge of an employee's dangerous tendencies and unfitness as an employee?
- 6. The trial court erred in dismissing Ms. Woods' claim against DOC for breach of contract by order entered on November 9, 2012. CP 830.
  - a. Does a settlement agreement dictating an employee's training schedule include an implied covenant of good faith for an employer to facilitate the training in a reasonable time and manner?
  - b. Does lack of a "time is of the essence" clause excuse a party to a contract from performing their contracted duties within a reasonable time frame given the circumstances?

#### **IV. STATEMENT OF THE CASE**

Plaintiff/Appellant Martha Leah Woods was an employee of the Washington State Department of Corrections (hereinafter DOC), working at the Progress House work release facility as a Secretary Supervisor until September, 2005. CP 514, CP 545. Her work record there was excellent. CP 523, CP 552-553, CP 635-649. On September 12, 2005, Ms. Woods entered into a Settlement Agreement with DOC which resolved a disability discrimination tort and transferred her to a position as a Corrections Specialist in the DOC Lakewood Field Office. CP 514, CP 545, CP 558-560. From November 2005 until Ms. Woods was separated from State service in July 2007, Ms. Woods worked in the Records Unit under direct supervision of Ms. Terri Van Ausdle. CP 514-515, CP 545. Ms. Woods' employment with DOC was terminated on July 26, 2007, while she was out on L&I. CP 79-80, CP 525, CP 554.

Based on Ms. Van Ausdle's and DOC's conduct toward Ms. Woods while employed at the Records Unit, Ms. Woods filed a lawsuit against both parties on September 30, 2009, alleging violations of Washington's Law Against Discrimination and state tort laws. CP 1-7. Ms. Van Ausdle and DOC answered Ms. Woods' Summons and

Complaint on November 5, 2009, setting forth multiple affirmative defenses. CP 8-13.

On June 1, 2012, DOC and Ms. Van Ausdle filed a Motion for Summary Judgment, seeking to dismiss all of Ms. Woods' claims against them. CP 204-323 (with supporting documents at CP 14-203). Ms. Woods opposed the motion on October 1, 2012. CP 233-266 (with supporting documents at CP 267-434). DOC and Ms. Van Ausdle filed a reply memorandum supporting their summary judgment motion on October 8, 2012. CP 435-456 (with supporting documents at 457-512). With leave of court, Ms. Woods filed an amended opposition memorandum and supporting documentation on November 2, 2012. CP 513-734. DOC and Ms. Van Ausdle filed a second reply with supporting documentation on November 7, 2012 (CP 735-790) and an errata to that reply on November 8, 2012 (CP 791-810). On November 8, 2012, Ms. Woods also filed an errata to the declaration of Gary M. Namie, Ph.D. in support of Ms. Woods' amended opposition to the summary judgment motion. CP 811-825.

A summary judgment hearing was held on November 9, 2012, at the end of which the trial court dismissed all of Ms. Woods' claims with prejudice based on failure to raise genuine issues of material fact, and

further ruled to exclude the Declaration of Gary M. Namie in support of Ms. Woods' summary judgment opposition. CP 826-830. Ms. Woods timely filed a Notice of Appeal on December 7, 2012. CP 831-836.

## **V. SUMMARY OF THE ARGUMENT**

The declaration and expert report of Gary Namie, Ph.D., submitted in support of Ms. Woods' opposition to DOC's Motion for Summary Judgment, should not have been excluded without proper consideration from the trial court.

Under the Washington Law Against Discrimination (RCW 49.60.010 et seq), Ms. Woods should have been protected from the hostile and discriminatory treatment she received at the Department of Corrections. All of her claims arise from this state statute and should be remanded for further consideration from the trial court.

## **VI. ARGUMENT**

### **a. Standard of Review**

The issues in this appeal are subject to de novo review. Firstly, questions of admissibility under the *Frye* test are reviewed de novo. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996) (citing *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)).

Secondly, the appellate court engages in the same inquiry as the trial court when reviewing a summary judgment, construing all facts and reasonable inferences therefrom most favorable to the non-moving party. *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn.App. 852, 857, 851 P.2d 716, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993). Summary judgment should only be upheld if no genuine issues of material fact are presented, and the moving party is entitled to judgment as a matter of law. CR 56. It has been noted that summary judgment should rarely be granted in employment discrimination cases. *deLisle v. FMC Corp.*, 786 P.2d 839, 57 Wn.App. 79 (1990).

**b. Exclusion of Expert Report**

- i. A trial court's dismissal of an expert report without conducting a *Frye* analysis, when the court itself states a *Frye* analysis is necessary, is reversible error.**

The *Frye* standard requires a trial court to determine whether a scientific theory or principle "has achieved general acceptance in the relevant scientific community" before admitting it into evidence. *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). "[T]he core concern ... is only whether the evidence being offered is based on established scientific methodology." *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993)). However, appellate courts have found that when an

expert's opinion is based on established methods of the type relied upon by experts in the field, and not based on novel scientific theories, a *Frye* analysis is not necessary and a trial court's granting of summary judgment should be reversed. *Bruns v. Paccar, Inc.*, 890 P. 2d 469, 77 Wn.App. 209 (1995).

As noted, the trial court excluded in their entirety the declaration and expert report of Gary M. Namie, Ph.D. from consideration on the summary judgment ruling (CP 833-835), despite Ms. Woods' request that scientific portions of the report be allowed. RP 7. Upon DOC's motion to strike the declaration and report, the trial court stated that in order to do so it would first have to go through the report line by line, and conduct a *Frye* hearing. RP 7. The trial court then struck Dr. Namie's opinion and declaration without conducting any such analysis. RP 8.

Portions of Dr. Namie's expert report explain the theory that harassment and bullying in the workplace can cause emotional trauma and be the source of significant psychological repercussions, including an employee's inability to learn in such an environment. CP 815-819, CP 821. These portions providing scientific explanations for certain behaviors and reactions were based on well established principles in the relevant scientific field of psychology, as evidenced by Dr. Namie's

lengthy bibliography. CP 824-825. Had the trial court given these relevant portions of the report proper consideration, it should have determined that a *Frye* analysis was not necessary because pertinent parts of the report were not based upon novel scientific theories. Therefore, the trial court erred in excluding relevant portions of Dr. Namie's expert report in support of Ms. Woods' opposition to summary judgment by failing to conduct a proper *Frye* analysis after deeming that a *Frye* analysis would be necessary to determine the report's admissibility.

**c. Failure to Accommodate and Disability Discrimination**

In discrimination cases, summary judgment is often inappropriate because RCW 49.60 et. seq., the Washington Law Against Discrimination (hereinafter referred to as "WLAD"), "mandates liberal construction." RCW 49.60.020; *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999).

**i. Medical documentation requesting light modified duty for an employee triggers an employer's duty to provide such an accommodation under the WLAD.**

Rules for establishing a prima facie case of failure to reasonably accommodate a disability are set forth in *Hill v. BCTI Income Fund-I*, 23 P.3d 440, 144 Wn. 2d 172 (2001). *Hill* dictates that as part of a larger test, a plaintiff must show that an employee gave the employer notice of the

physical abnormality and its accompanying limitations, and that upon notice the employer failed to affirmatively adopt measures that were available and medically necessary to accommodate the abnormality. *Id.* at 453.

In August of 2006, Ms. Woods left the Records Unit on Labor & Industries for a previous back injury unrelated to this lawsuit. CP 523, CP 552. In the spring of 2007, Ms. Woods inquired about Return to Work Options under L&I, for which DOC informed her she would also have to voluntarily revert under the Collective Bargaining Agreement. CP 278. Ms. Woods therefore inquired about the reversion process. CP 524. On June 11, 2007, Ms. Woods applied for a Secretary Supervisor position that was vacant at the time. CP 523, CP 552. She was more than qualified to perform the essential functions of the job and provided DOC with positive work evaluations previously received for the same type of position. CP 523, CP 552-553, CP 635-649.

The position for which Ms. Woods applied was relocated to Olympia, which would create an uncomfortable commuting distance given her back injury. CP 524, CP 553. In a standard reversion process, a doctor's clearance is not necessary to be considered for a position. However, DOC insisted that Ms. Woods obtain clearance for this position

from her L&I doctor, therefore treating it as a Return to Work Option. CP 524, CP 553. Ms. Woods submitted the job information to her L&I doctor and awaited a determination on that point. CP 524, CP 553. At no time did DOC advise Ms. Woods that such a determination needed to be produced within a specified time frame. CP 524-525, CP 553-554. Then, just two weeks later, DOC informed Ms. Woods on July 26, 2007 that she was ineligible for the Secretary Supervisor Position and was separated from State Service for failure to provide medical documentation. CP 525, CP 554.

At the summary judgment hearing, both DOC and the trial court questioned whether Ms. Woods ever provided documentation from her doctor that she was released to return to any sort of work with an accommodation request. RP 9-10, RP 16, RP 27. However, at the time Ms. Woods sought to revert to the Secretary Supervisor position, she was released to work with an accommodation request for light modified duties and this paperwork from her L&I doctor was provided to the trial court. CP 763-767, CP 773-776. Contrary to the adverse arguments made at the summary judgment hearing, in accordance with *Hill*, medical documentation of Ms. Woods' request for a light modified duty accommodation was provided to DOC and DOC failed to accommodate

her. Therefore, dismissal of Ms. Woods' claim should be reversed and any remaining questions of fact should be remanded to a trial court for determination by a jury.

- ii. **A judicial estoppel claim is improperly introduced for the first time in a reply memorandum as a rebuttal argument, and a trial court should not base a summary judgment dismissal on that inadmissible argument.**

It is the moving party's responsibility to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. *White v. Kent Med. Ctr., Inc.*, 61 Wn.App. 163, 168, 810 P.2d 4 (1991); *see also R. D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 147 n.10, 969 P.2d 458 (1999). "Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." *White*, 61 Wn.App. at 168.

It was not until their second reply to Ms. Woods' amended opposition to DOC's Motion for Summary Judgment that DOC raised an issue of equitable estoppel, arguing that at the time of her reversion request Ms. Woods represented to L&I that she was incapable of working at any job. CP 800-802. DOC reiterated this argument at the summary judgment hearing. RP 10, RP 25. In fact, Ms. Woods did sign L&I time-

loss notifications that she had not worked and was unable to work until the date of signing (from June through September of 2007), solely because she was not provided an opportunity to return to work at DOC within the accommodation confines requested by her doctor. CP 763-767.

As dictated by *White* and *Merrill*, DOC should not have been allowed to raise new arguments in rebuttal, and the trial court should not have based its summary judgment dismissal on such arguments.

**iii. An individual's pursuit and receipt of L&I benefits does not automatically estop the recipient from subsequently pursuing a discrimination claim.**

In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 802-803, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999), the Supreme Court held that an individual's pursuit and receipt of Social Security disability benefits does not automatically estop the recipient from subsequently pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. *Id.* at 797. To survive a defendant's motion for summary judgment, a plaintiff must explain why that Social Security disability contention is consistent with her ADA claim that plaintiff could "perform the essential functions" of a job, at least with "reasonable accommodation." *Id.* at 798. *Cleveland* explains that unlike the ADA, a Social Security disability insurance application does not

consider whether a plaintiff could perform the essential functions of her position with a reasonable accommodation. *Id.* at 803.

Similar to the facts in *Cleveland*, Ms. Woods sought relief under the WLAD for disability discrimination as failure to accommodate while at the same time receiving benefits from L&I for an injury. CP 802. Following *Cleveland's* reasoning, Ms. Woods should not be estopped from asserting both claims because her L&I benefits did not contemplate whether she could perform the essential functions of the Secretary Supervisor job for which she applied if given a reasonable accommodation. Ms. Woods' L&I and WLAD claims are therefore not mutually exclusive, and her Failure to Accommodate claim should not be barred by judicial estoppel.

**d. Hostile Work Environment**

- i. An act occurring within the statute of limitations period creates a pattern of ongoing unlawful practice to bring all previous instances of harassment into the appropriate time frame for stating a hostile work environment claim.**

The Washington Supreme Court has adopted the reasoning of *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002), "permitting suits based on acts that individually may not be actionable but together constitute part of a unified whole

comprising hostile work environment.” *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729, 736 (2004). Under this analysis, hostile events occurring outside the limitations period may be considered as a basis for the claim so long as those events are part of an ongoing unlawful employment practice.

As in *Morgan* and *Antonius*, Ms. Woods experienced abusive treatment from Ms. Van Ausdle after the limitations period DOC alleges should preclude her claim for hostile work environment. DOC argued that Ms. Woods failed to present evidence of events after July 30, 2006, barring her hostile work environment claim. CP 437. In addition to the many instances of Ms. Van Ausdle’s hostile treatment toward Ms. Woods before July 30, 2006 that are described in the record (CP 516-521, CP 547-551), Ms. Woods’ sworn statement describes a particular event on February 7, 2007, when she was still employed by DOC and supervised by Ms. Van Ausdle. Ms. Woods returned to the Records Unit to collect some belongings and was terrified by Ms. Van Ausdle approaching her from behind, stomping loudly and placing her legs right next to Ms. Woods as if to trip her. CP 521, CP 551. This incident not only constituted an additional hostile act by Ms. Van Ausdle within the limitations period, but

also served as a sharp reminder to Ms. Woods of all that had already occurred, and could be expected in the future.

Ms. Woods did not leave the Records Unit on L&I until early August, 2006 (CP 105), until which time Ms. Van Ausdle's criticism and humiliation of Ms. Woods continued, and Ms. Van Ausdle remained as Ms. Woods' supervisor even while out on L&I until July 2007. CP 534.

Following the reasoning of *Morgan* and *Antonius*, the facts in Ms. Woods' case create a pervasive pattern of unlawful treatment over time that extended beyond the alleged limitations period. Therefore, her hostile work environment claim is not time barred.

- i. Any question as to the severity of an employer's abusive treatment of an employee should be resolved by a trier of fact rather than a trial court's determination on summary judgment.**

In a case resolving a claim for hostile work environment, the required showing of severity or seriousness of harassing conduct varies inversely with the pervasiveness or frequency of the conduct. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). In cases where the severity of frequent abuse is questionable, it is more appropriate to leave the assessment to the fact-finder than for the court to decide the case on summary judgment. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1096 (9<sup>th</sup> Cir. 2008).

Ms. Woods told Ms. Van Ausdle of her mental disability in a meeting on January 19, 2006, after which time Ms. Van Ausdle subjected Ms. Woods to an increasingly hostile work environment until Ms. Woods was ultimately terminated. CP 516, CP 546-547. Ms. Van Ausdle held almost daily meetings with Ms. Woods during which she criticized, belittled and humiliated Ms. Woods. CP 516, CP 547. Ms. Van Ausdle created contradicting instructions and confusion on particular tasks, documenting Ms. Woods' increased error rate due to such unclear guidance during her training period. CP 516-517, CP 547. As additional examples of hostile treatment, Ms. Woods was not allowed to ask questions, was publicly berated for seeing assistance from trainers, and was kicked out of the building for lunch while other employees in the Records Unit ate at their desks. Ms. Van Ausdle repeatedly accused Ms. Woods of disobeying orders, not following instructions, making excuses, and "being the slowest employee ever trained." Ms. Van Ausdle documented Ms. Woods' every move into a 1000+ page supervisory file, evidencing Ms. Van Audle's vendetta against Ms. Woods and her efforts to sabotage Ms. Woods' successful completion of her trial service in the Records Unit. CP 517-521, CP 547-550. Ms. Van Ausdle even

documented when Ms. Woods went to the bathroom and how long it took.  
CP 517, CP 548.

Despite the evidence set forth by Ms. Woods, DOC argued in its pleadings and at the summary judgment motion that such allegations did not rise to the level of a hostile work environment. CP 806-807, RP 13-15. However, as dictated by *Ellison* and *Davis*, the pervasiveness of Ms. Van Ausdle's hostile actions toward Ms. Woods is heightened due to the frequency of such behavior, and any question surrounding such facts should be resolved by a trier of fact rather than determined on summary judgment.

Furthermore, conduct must be regarded as offensive by the employee. *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985). Intent to "harass" is not required because the relevant viewpoint is that of the victim. *Id.* Determining what sorts of workplace behavior constitute discriminatory action that can create a hostile work environment requires "careful consideration of the social context in which particular behavior occurs and is experienced by its target... [and it] often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the

words used or physical acts performed.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 988, 1003, 140 L.Ed. 2d 201 (1998). “Discriminatory behavior comes in all shapes and sizes, and what might be an innocuous occurrence in some circumstances may, in the context of a pattern of discriminatory harassment, take on an altogether different character, causing a worker to feel demeaned, humiliated, or intimidated...” *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1109 (9<sup>th</sup> Cir. 1998).

Based on the reasoning set forth in the above cases, Ms. Van Ausdle’s treatment of Ms. Woods was received as extremely hostile, especially perceived as such due to her mental disability. CP 514, CP 545, CP 561-563. The humiliation, embarrassment, and constant degradation affected Ms. Woods’ ability to concentrate and learn a new job, thus materially affecting the conditions of her employment. CP 535, 815-819, CP 821. The context of hostile treatment toward an employee, the importance of which is emphasized in *Oncale* and *Draper*, cannot be determined in pleadings on summary judgment but must be heard by a trier of fact.

- ii. **Substantial evidence is not required to overturn a finding of summary judgment on the issue of an employer’s perception of an employee’s disability.**

A "disability" is an abnormal sensory, mental, or physical impairment that (1) is medically recognized or diagnosable, (2) exists as a record or history, or (3) is perceived by the employer to exist, whether or not it exists in fact. RCW 49.60.040(7)(a). Case law states that even thin evidence is sufficient to overturn a finding of summary judgment and to permit a jury to determine whether or not an employer perceived an employee to be disabled. *See Harris v. State*, 56847-7-1 (Wn. Ct. of Appeals, 2007). In that case, the appellate court assumed that witness testimony was sufficient to permit a jury to find that the Department of Corrections perceived the plaintiff employee to be disabled, and went on to consider the other elements of disability discrimination. *Id.*

Here, Ms. Woods testified that she received extremely positive performance reviews through the beginning of January 2006, and provided supporting documentation to the trial court. CP 515, CP 546, CP 567-568. Ms. Woods further testified that at her EDPP preview session on January 19, 2006, she told Ms. Van Ausdle of her mental disability. CP 516, CP 546. Despite Ms. Van Ausdle's voluminous documentation of every other meeting she held with Ms. Woods before and after that date, no record exists of the January 19<sup>th</sup>, 2006 meeting. CP 516, CP 546-547. Following that date, Ms. Van Ausdle conspicuously changed her opinion of Ms.

Woods and her performance reviews were drastically more negative. CP 516, CP 547, CP 569-571. According to Ms. Woods' testimony, Ms. Van Ausdle's behavior toward her became intolerable after January 19, 2006 when she became aware of Ms. Woods' disability. CP 516, CP 547, RP 22.

DOC argued that Ms. Van Ausdle's harassment was not due to Ms. Woods' mental disability. CP 807-808. However, based on the standard illuminated in *Harris*, Ms. Woods' testimony constitutes sufficient evidence to raise a question as to Ms. Van Ausdle's discriminatory motivation for treating Ms. Woods in such a hostile manner, and the issue should proceed to a jury for determination.

**iii. A supervisor's hostile treatment of an employee may impute to the employer.**

An employer may be liable for the acts of a supervisor when it knew or should have known he was engaging in harassment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2339, 2405, 91 L.Ed.2d 49 (1986). This standard has been adopted by the Washington courts in *Fisher v. Tacoma School Dist. No. 10*, 53 Wn.App. 591, 596, 769 P.2d 318, 320, *review denied* 112 Wn. 2d 1027 (1989), and by the 9<sup>th</sup> Circuit in *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515 (9<sup>th</sup> Cir. 1989).

If no complaint has been lodged, constructive knowledge may be imputed to the employer when harassment is pervasive. *Fisher*, 53 Wn.App. at 596, 769 P.2d at 320. “Employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known.” *Ellison v. Brady*, 924 F.2d 872, 881 (9<sup>th</sup> Cir. 1991) (quoting *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989)).

DOC argued that in order for harassment to be imputed to an employer, a plaintiff has the burden of establishing either that (a) an owner, manager, partner or corporate officer personally participated in the harassment, or (b) if the harassment was at the hands of a supervisor or co-worker, the employer must have authorized, known, or should have known of the harassment but failed to take reasonably prompt and adequate corrective action. CP 808 (citing *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985)), RP 15.

On the contrary, Ms. Woods made high-level decision makers at DOC aware of her hostile work environment on many occasions. She first complained to the Field Administrator in March of 2006, which was not investigated for more than eight months. CP 519, CP 549, CP 580. Ms. Woods’ subsequent complaints to her high-level supervisor Armando

Mendoza in June of 2007 were not even acknowledged, let alone addressed. CP 522, CP 551, CP 612. Ms. Woods' attorneys reiterated these facts during the summary judgment hearing. RP 20.

The cases above clearly state that for purposes of imputing liability for a hostile work environment, an employer's knowledge of such harassment may be actual or constructive. Here, DOC had both types of knowledge of the pervasively hostile environment Ms. Van Ausdle created for Ms. Woods. After receiving Ms. Woods' multiple complaints, DOC provided no evidence that any disciplinary action was taken against Ms. Van Ausdle for her discriminatory actions. By failing to act, DOC effectively ratified the harassment. See *Woods v. Graphic Communications*, 925 F.2d 1195, 1202 (9<sup>th</sup> Cir. 1991).

**e. Retaliation and Disparate Treatment**

Under WLAD, it is unlawful for an employer to discriminate against any person in the terms or conditions of employment or discharge any employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(2), (3).

- i. Separation of an employee from State service during a reversion process or L&I Return to Work Option constitutes an adverse employment action.**

“An adverse employment action is one that materially affects the compensation, terms, conditions, or privileges of employment.” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9<sup>th</sup> Cir. 2008) (internal quotation marks and citations omitted). The Ninth Circuit has determined that “a wide array of disadvantageous changes in the workplace constitute adverse employment actions.” *Ray v. Henderson*, 217 F.3d 1234, 1240 (9<sup>th</sup> Cir. 2000).

When Ms. Woods applied for the Secretary Supervisor position in June of 2007 while out on L&I, it was unclear whether DOC treated the request as a Return to Work Option under L&I or as a voluntary reversion under the Collective Bargaining Agreement, or both. CP 523, CP 552-553. Regardless, it ended with Ms. Woods being separated from State service on July 26, 2007, with the ultimate effect of termination, causing Ms. Woods to lose all benefits of her employment including insurance coverage, potential for retirement, L&I status, and paid leave. CP 525, CP 554.

DOC argued that the reversion process ending in separation did not constitute an adverse employment action. CP 450, CP 803, RP 12. Based on the Ninth Circuit’s determination in *Davis* that a variety of negative changes in the workplace may constitute an adverse employment action

for the purposes of a retaliation claim, Ms. Woods' separation from State service clearly falls within the broad definition because DOC's actions materially affected the terms, conditions and privileges of her employment by stripping Ms. Woods of all the above.

**i. A gap of several months may constitute existence of a causal link or temporal proximity between a plaintiff's protected activities and an employer's retaliatory adverse employment action.**

Proximity in time may support an inference of retaliation sufficient to survive summary judgment. *Allen v. Iranon*, 283 F.3d 1070, 1077-78 (9<sup>th</sup> Cir. 2002). "Although an inference from temporal proximity would have been stronger had the gap in time been smaller, an eleven-month gap in time is within the range that has been found to support an inference that an employment decision was retaliatory." *Allen*, 283 F.3d at 1077-78 (internal citation omitted). See also *Anthoine v. N. Central Counties Consortium*, 605 F.3d 740 (9<sup>th</sup> Cir. 2010).

DOC argued that a lack of temporal proximity shows a lack of causal connection between Ms. Woods' protected activities and her discharge from employment, therefore eliminating a retaliation cause of action. CP 450, RP 12. On the contrary, within the nine months leading up to Ms. Woods' termination of employment, she actively complained about a hostile work environment. Ms. Woods' internal complaint for

hostile work environment at DOC (a protected activity) was investigated by Armando Mendoza on November 1, 2006, and was not completed until March 2, 2007. CP 521, CP 550, CP 589-600. Also in March of 2007, Ms. Woods engaged in communications on behalf of her support group for people experiencing mistreatment in the workplace as she had undergone. Internal DOC email correspondence requested prompt response to Ms. Woods because they feared she would escalate things to a higher level. CP 536, CP 555, CP 666-668. On May 3, 2007, Ms. Van Ausdle forwarded to Mr. Mendoza statements from the Internet that Ms. Woods made in reference to bullying in the workplace, making him aware of her active role in combating the issue. CP 521-522, CP 551, CP 603-611. On June 26, 2007, just one month before Mr. Mendoza separated Ms. Woods, she forwarded him a hostile and discriminatory email she received and asked for him to investigate it, which he did not. CP 522, CP 551, CP 612. Finally, just before her separation, Ms. Woods actively made public disclosure requests from DOC on behalf of her anti-bullying support group, of which Mendoza must have been aware. RP 20-21. He then separated her from service on July 26, 2007. CP 525.

Ms. Woods' protected activities began in earnest approximately nine months before being subjected to the adverse employment action,

which according to *Allen* and *Anthoine* falls within an accepted window of temporal proximity for inference of retaliatory employment action. Mr. Mendoza was directly aware of Ms. Woods' protected activities and L&I status, which further establishes a causal link. Both theories support the inference that his decision to separate Ms. Woods was a retaliatory action for her protected activities at DOC.

**ii. An employee undergoing trial service is similarly situated to a regular employee when they perform substantially the same job functions.**

Individuals are similarly situated when they have similar jobs and display similar conduct. *Vasquez v. County of Los Angeles*, 349 F.2d 634, 641 (9<sup>th</sup> Cir. 2003). Minor distinctions drawn between the behavior of a plaintiff and a comparator are insufficient to defeat a reasonable inference of discriminatory motivation by an employer. *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn.App. 212, 907 P.2d 1223, 1233 (1996).

DOC argued that Ms. Woods was the only employee being trained in the Records Unit and therefore cannot point to any comparator. CP 803. However, Ms. Woods performed substantially the same work as all other employees in her department by entering offender Judgment and Sentences, taking offenders' finger prints, monitoring offender release dates, and more. CP 205-206. In particular, Ms. Woods performed

comparable job functions to Becky Johnson and Laura Garcia, who also lodged complaints against Ms. Van Ausdle for a hostile work environment paralleling Ms. Woods' prior allegations. CP 518, CP 527, CP 548, CP 556, CP 574-579, CP 669-709. Ms. Johnson and Ms. Garcia were not members of a protected class and were not retaliated against for their actions.

Under the *Vasquez* and *Johnson* analyses, the minor distinction of Ms. Woods being a training employee is not a sufficient basis to dismiss implication of discriminatory intent by an employer. Three female employees in the same department performed substantially the same work and committed acts of comparable seriousness by lodging complaints against Ms. Van Ausdle, however Ms. Johnson and Ms. Garcia were not similarly retaliated against.

**iii. An employer's discriminatory motivation can be inferred by failure to impose equally severe repercussions against a similarly-situated, non-protected employee for participating in comparable activities.**

One test for pretext is whether (1) an employee outside the protected class (2) committed acts of comparable seriousness (3) but was not demoted or similarly disciplined. *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn.App. 212, 907 P.2d 1223 (1996). A plaintiff is not required

to show *both* that he was treated differently than a similarly situated, non-protected employee *and* that the different treatment was based on membership of a protected class; if he could show negative treatment based on belonging to the protected class, he would not need to show how other persons were treated. *Id.*, *Cf. Teamsters*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15 ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment").

As previously described, Mr. Mendoza's treatment of Ms. Johnson and Ms. Garcia was not retaliatory as was his treatment toward Ms. Woods for the same activities. Because Ms. Johnson and Ms. Garcia were not members of a protected class like Ms. Woods, the ruling in *Johnson* allows an inference that Mr. Mendoza's adverse employment action was motivated by discriminatory intent. A question of pretext therefore remains for a jury to decide.

**f. Negligent Hiring, Retention and Supervision**

- i. A claim for negligent supervision is not necessarily duplicative of a discrimination claim when relying on the same facts.**

A negligent supervision claim that is similar to a discrimination claim is not necessarily duplicative if it relies on the same factual

allegations. *Robinson v. Pierce County*, 539 F. Supp. 2d 1316 (W.D. Wash. 2008). This rule does not align with DOC's position that Ms. Woods' claims in the present case are redundant. CP 800-801.

In responses to DOC's summary judgment pleadings, Ms. Woods set forth many facts underscoring the argument that Ms. Van Ausdle was an unfit supervisor and employee. CP 274-275, CP 296, CP 527-528, CP 555-556. Ms. Woods further enumerated facts supporting her claim that DOC negligently hired, retained and supervised Ms. Van Ausdle due to her dangerous tendencies toward other employees. Namely, Ms. Van Ausdle was reported and investigated for grabbing the breast areas and clothing of other female employees with large breasts. CP 271, CP 292-293, CP 518, CP 548-549, CP 574-579. Poor performance and employment records also show Ms. Van Ausdle's unfitness as supervisor and employee dating back to the 1980s. CP 527-528, CP 556, CP 620-634, CP 710-717.

As the court allowed both discrimination and negligent supervision claims to be allowed in *Robinson*, such should be the case here. Ms. Woods' negligent hiring, retention and supervision claims are not duplicative of her discrimination claims as she not only relies on

overlapping facts but also sets forth additional facts supporting such allegations.

**ii. An employer's knowledge of an employee's dangerous tendencies or unfitness gives rise to a claim for negligent retention and supervision.**

In order to establish a claim for negligent hiring, the plaintiff must prove...that the defendant knew or should have known of the employee's unfitness. *Banks v. Nordstrom*, 787 P.2d 953, 57 Wn.App. 251, 263 (1990), citing *Scott v. Blanchet High Sch.*, 50 Wn.App. 37, 43, 747 P.2d 1124 (1987), review denied, 110 Wn.2d 1016 (1988). Washington cases have generally interpreted the knowledge element to require a showing of knowledge of the dangerous tendencies of the particular employee. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 51-52 (1997) (citations omitted).

DOC argued that it had no knowledge of Ms. Van Ausdle's dangerous tendencies toward her subordinate employees. CP 801. On the contrary, on September 12, 2006 DOC investigated and sustained allegations of Ms. Van Ausdle's unsuitable conduct toward two subordinate female employees wherein she touched their clothing and breast areas. CP 518, CP 548-549, CP 574-579. In that report, another manager stated that Ms. Van Ausdle was seemingly targeting staff with large breasts. CP 578. This produced great fear in Ms. Woods, who also

had large breasts. CP 539-540, CP 548. Ms. Woods acted as a Shop Steward at the time of these incidents, and reported them to a DOC safety officer. CP 518, CP 548. DOC provided no records of any action taken to discipline Ms. Van Ausdle for such behavior.

Additionally, Ms. Van Ausdle's poor performance reviews dating back to the 1980s and recurring after her demotion in 2009 evidence DOC's knowledge of Ms. Van Ausdle's tendencies to abuse her supervisory power and of her general unfitness as an employee. CP 539-540.

In accordance with the "knowledge" standards set forth in the *Scott* and *Niece* cases, DOC was expressly aware of Ms. Van Ausdle's dangerous tendencies to abuse her supervisory powers and conduct herself with hostile and discriminatory behavior toward her subordinates. DOC's liability for negligent hiring, retention and supervision therefore stems from its knowledge of such conduct and failure to remedy it.

**g. Breach of Contract**

- i. A settlement agreement dictating an employee's training program includes an implied duty of good faith for an employer to facilitate such training in a reasonable time and manner.**

There is in every contract an implied duty of good faith and fair dealing. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d

356 (1991). This implication obligates each party "to cooperate with the other so that [each] may obtain the full benefit of performance." *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385 (1983) (quoting *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966)). Failure or nonoccurrence of a condition will not excuse the promisor's performance if the condition's failure was the fault of the promisor. *Barrett v. Weyerhaeuser*, 40 Wn.App. 630, 636, 700 P.2d 338 (1985), citing *CHG Int'l, Inc. v. Robin Lee, Inc.*, 35 Wn.App. at 515; *Cavell v. Hughes*, 29 Wn.App. 536, 540, 629 P.2d 927 (1981); *Refrigeration Eng'g Co. v. McKay*, 4 Wn.App. 963, 969-70, 486 P.2d 304 (1971).

Ms. Woods entered into a Settlement Agreement with DOC on September 12, 2005, which dictated (among other things) that her training needs were to be established by September 30, 2005. CP 514, CP 545, CP 558-560. Ms. Woods training program was not in fact established until December 5, 2005, which significantly cut into her prescribed twelve-month allotted training period. CP 515, CP 546. The Settlement Agreement further dictated that Ms. Woods would provide input to her supervisor in establishing the training program, which did not occur and therefore contradicts the collaborative efforts required by the contract. CP 515, CP 546, CP 558-560.

DOC did not cooperate with Ms. Woods so that she was able to obtain the full benefit of her performance, as the courts require in *Lonsdale and Miller*. Furthermore, according to *Barrett*, failure to perform duties required by the Settlement Agreement was attributed to DOC (the promisor), placing the fault for non-performance of contract provisions DOC and making them liable for breach.

**ii. Absence of a “time is of the essence” clause does not excuse a party to a contract from performing their contracted duties with a reasonable time frame under the specific circumstances.**

The lack of an express “time is of the essence” clause is not dispositive. *Paul v. Christensen Family Trust*, No. 30654-9-II (Wash. Ct. App. 2005).

DOC argued that Ms. Woods’ breach of contract claim fails because the Settlement Agreement did not contain a “time is of the essence” clause. CP 792. It did, however, provide for Ms. Woods’ training needs to be established by September 30, 2005 (CP 514, CP 545, CP 558-560), and the failure of DOC to abide by that provision deprived Ms. Woods of a significant portion of her contracted training period. DOC’s delay in meeting the contract terms was without merit and was detrimental to Ms. Woods, regardless of an absence of a “time is of the

essence clause,” which according to *Paul* is not dispositive in determining breach of contract claims.

**h. Ms. Woods Should Be Awarded Reasonable Attorneys’ Fees Pursuant to RAP 18.1**

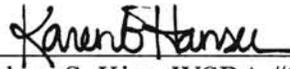
Pursuant to RAP 18.1, Ms. Woods requests her reasonable attorneys’ fees and costs associated with this appeal of the trial court’s granting of DOC’s Motion for Summary Judgment on all claims plus the exclusion of Dr. Namie’s expert declaration and opinion.

**VII. CONCLUSION**

Ms. Woods has stated sufficient questions of material fact to overcome summary judgment determination on all claims. Furthermore, she has set forth reason for Dr. Namie’s expert opinion and report to be given proper consideration by the trial court before admission or exclusion is determined.

Ms. Woods should be awarded her attorneys’ fees on appeal. The decision of the Superior Court should be reversed on all accounts and this case remanded for further proceedings in accordance with this Court’s rulings.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of March, 2013.



Robert S. Kim, WSBA #25042  
Karen E. Hansen, WSBA #35701  
Attorneys for Appellant

### **VIII. APPENDIX**

#### **WASHINGTON COURT RULE 56 - SUMMARY JUDGMENT**

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay,

origin, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights. This chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation. Inclusion of sexual orientation in this chapter shall not be construed to modify or supersede state law relating to marriage.

**RCW 49.60.040 – Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or

the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

### **RCW 49.60.010 - Purpose**

This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

### **RCW 49.60.020 – Construction of chapter.**

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national

children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing

impaired persons.

(9) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

(12) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) "Honorably discharged veteran or military status" means a person who is:

(a) A veteran, as defined in RCW 41.04.007; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

(18) "National origin" includes "ancestry."

(19) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(22) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(23) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(24) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a sensory, mental, or physical disability of a person with a disability.

(25) "Sex" means gender.

(26) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

**RCW 49.60.180 – Unfair practices of employers.**

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other

terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

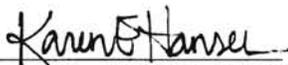
**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of this Appellant's Brief to be served on all parties or their respective attorneys of record on the date below as follows:

<u>PARTY</u>	<u>METHOD OF SERVICE</u>
<b>Garth Ahearn, WSBA #29840</b> ATTORNEY GENERAL OF WASHINGTON P. O. Box 2317 Tacoma WA 98402-2317 (253) 593-5243 GarthA@ATG.WA.GOV	<input type="checkbox"/> U.S. Mail Postage Prepaid <input checked="" type="checkbox"/> By email <input checked="" type="checkbox"/> Hand delivered
<b>Court of Appeals, Division II</b> 950 Broadway, Suite 300 Tacoma, WA 98402 (253) 593-2970	<input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> By email <input checked="" type="checkbox"/> Hand delivered

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

DATED this 15<sup>th</sup> day of March, 2013 at DuPont, Washington.

  
 Robert Kim, WSBA #25042  
 Karen E. Hansen, WSBA #35701  
 Attorneys for Appellant

FILED  
 COURT OF APPEALS  
 DIVISION II

2013 MAR 15 PM 12:22  
 STATE OF WASHINGTON

DEPUTY