COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 44326-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PETER and RACHAEL ATKINSON,
husband and wife, and the
marital community composed thereof

Appellants,

vs.

LES SCHWAB TIRE CENTERS OF WASHINGTON, INC.,

Respondent(s).

APPEAL FROM THE
SUPERIOR COURT FOR LEWIS COUNTY
THE HONORABLE JAMES W. LAWLER

APPELLANTS' REPLY BRIEF

LAW OFFICES OF
EUGENE N. BOLIN, JR., P.S.

By: Eugene Nelson Bolin, Jr.
WSBA #11450

114 Railroad Avenue, Suite 308
Edmonds, WA 98020
(425) 582-8165

Attorney for Appellants

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I. INTRODUCTION

In this appeal of a WLAD case, Les Schwab does not cite, much less discuss, a single statute or regulation from the WLAD anywhere in their 50-page brief.[1] In March of 2006, Peter Atkinson was promoted to 1st assistant manager. At the same time, store manager Rory Cox inexplicably withdrew the modest accommodations Les Schwab had always provided to Peter for his severe migraine condition. Cox told Peter to "get your migraines under control or look for work elsewhere." This is uncontroverted.

Peter asserts that the discrimination, disparate treatment, hostile work environment, and wrongful termination he experienced in the 32 months after the email, and until he was fired in March of 2009, were the product of Cox's continuing discrimination or in retaliation for the email. Respondents claim that, unlike the fourteen prior years of exceptional performance which preceded the email, Peter's performance simply declined, thus warranting termination. They do not and cannot explain why Peter received good performance reviews from Cox before the email, or why Cox did not

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[1] This Court has recognized that in light of the broad remedial purposes and protection for election of remedies in RCW 49.60.020, it must "view with caution any construction that would narrow the coverage of the law." Marquis v. City of Spokane, 130 Wn.2d 97, 108, 922 P.2d 43 (1996).

show Peter negative performance reviews he authored after the email. Les Schwab also relies on conclusory claims, misstated facts, and inapplicable legal arguments. This Court should reverse the trial court and remand for trial.

II. ADMITTED AND UNCONTESTED FACTS

The Respondent's Brief either admits or does not contest the following facts:

1. Peter's migraine condition required flexibility in his work schedule to accommodate his attacks. (Pg. 30).[2]

2. Cox testified that Peter was "an up guy" and "good with customers" and "honest" and a "good person." (Pg. 21).

3. Cox knew that Peter took the "radical step" of having a nerve stimulator implanted in his head for his migraines. (Pg. 17).

4. Assistant managers working under Cox at the Chehalis store worked 70-80 hours a week. (Pg. 20).[3]

5. Assistant managers had no time to sit down and rarely got to sit down for lunch, let alone take a 10 or 15 minute break for Peter's migraine condition. (Pg. 31).

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[2] These citations are to the Appellant's Opening Brief, which in turn cite to the record.

[3] This important fact is actually admitted by Les Schwab in their own brief at page 6. Simply because managers work 70-80 hours per week is not *per se* evidence that it is necessary or an essential function of the job. *See* Brumbalough v. Camelot Care Centers, Inc., 427 F.3d 996, 1005-1006 (6th Cir. 2005). Les Schwab has never articulated a reason or explanation why it is necessary for managers alone to work 70-80 hours per week, frequently without breaks or meals. Les Schwab has also not addressed the multiple health and safety issues that arise from such onerous working conditions.

6. Cox testified that there is no limit on the number of hours managers can work at Les Schwab. (Pg. 21).

7. Cox also testified that there is no requirement for breaks or lunches for assistant managers. (Pg. 21).

8. Peter testified that after his promotion to 1st assistant manager, he remained able to fulfill all the duties with the same modest accommodation of work flexibility. (Pg. 32).

9. Cox testified he does not know what the WLAD is. (Pg. 19).

10. Cox testified he does not know of any obligations to employees who are mentally or physically impaired. (Pg. 19).

11. Cox testified that the only accommodation he provided to Peter was to give him two sick days a month. (Pg. 20).

12. Peter would take 3-5 sick days per year, which he made up on his time off. (Pg. 31).

13. Cox refused Peter's requests for breaks for his migraines. (Pg. 32).

14. Instead, Cox told Peter to "get your migraines under control or find work elsewhere." (Pg. 32).

15. Peter "felt there was so much animosity" from Cox and the other assistant manager, because of Peter's migraine condition. (Pg. 33).

16. Peter would have to "work through the pain" of his migraines instead of taking a break. (Pg. 32).

17. July 10, 2006, Peter emailed corporate managers in Oregon and reported the threat made to him by Cox. (Pg. 15).

18. One of the corporate managers called Peter and assured him that his migraine condition would "have no bearing on [his] future with the company." (Pg.16).

19. Another manager talked with Cox about the email. (Pg. 16).

20. Cox admitted that he "was at fault" for the email. (Pg. 22).

21. After Cox learned about the email, Peter believed Cox wanted to get back at him for going over his head. (Pg. 16).

22. Cox gave Peter "no leeway" after the email and undermined Peter's authority with the store employees. (Pg. 16).

23. Cox did not have any doubt about Peter's honesty or truthfulness in reporting his medical condition. (Pg. 18).

24. It was Cox's idea to fire Peter. (Pg. 17).

25. Peter was fired without any warning on March 6, 2009, in a meeting that lasted 2-3 minutes. (Pg. 33).

26. On his way home, Peter pulled off to the side of the road and started crying. (Pg. 34).

27. Peter has exchanged roles with his wife: he is the homemaker and his wife works outside the home. (Pg. 34).

28. Peter testified that he would have been physically able to continue working had he not been fired. (Pg. 30).

29. Cox claimed that other store employees complained to him about Peter's work as an assistant manager. (Pg. 22).

30. However, employee Rob Rider "never had a problem" with Peter and thought he worked as hard as others. (Pg. 23).

31. Rider never heard Cox complain about Peter. (Pg. 24).

32. Rider believes that Cox was fired because of his "really bad" headaches. (Pg. 24).

33. Rider knew they were "really bad" because he saw Peter in the office with his head down for short periods. (Pg. 24).

34. Rider never had any criticisms of Peter. (Pg. 25).

35. Store employee Manuel Mendez also never had a problem with Peter. (Pg. 25).

36. Store employee Jesse Aumiller never heard anyone in the store say that they "couldn't count on Peter." (Pg. 25).

37. Cox has fired about 100 hourly wage employees but Peter was the only manager he ever fired. (Pg. 18).

38. Cox testified that he probably would not have re-hired Peter for an hourly wage position after firing him. (Pg. 21).

39. Peter began seeing neurologist Dr. Elena Robinson, a specialist in migraines, several years before he was fired by Cox. (Pg. 26-27).

40. More than half of the thousands of migraine patients she treats are able to work with accommodations. (Pg. 26).

41. Robinson says Peter was a very compliant patient, very committed to his treatment, with no other disorders. (Pg. 27).

42. Dr. Robinson believed that Peter fought harder than most migraine patients in his circumstances. (Pg. 27).

43. He was able to work through his migraines and his medications made attacks shorter. (Pg. 28).

44. Dr. Robinson rates Peter's migraine condition as "probably a 9 to 10" out of ten in terms of severity. (Pg. 27).

45. When Dr. Robinson recommended that Peter not return to work, she thought he was working a regular job. (Pg. 27, 28).

46. Peter did not ask for the disability. (Pg. 27).

47. She did not know that Peter was regularly working 70 hours a week, which she described as "terrible." (Pg. 29).

48. Had she known this, she would have recommended accommodations that could be enforced. (Pg. 29).

III. LES SCHWAB VIOLATED THE WLAD

Washington's law against discrimination declares it an unfair practice for any employer to discharge an employee because of his or her sensory, mental, or physical disability. RCW 49.60.180(2). Courts have held that a "disability" is a medically cognizable or diagnosable condition that exists as a record or history and that substantially limits the ability to do the job. Roeber v. Dowty Aerospace Yakima, 116 Wn. App. 127, 136, 64 P.3d 691, 79 P.3d 446 (2003) (migraines can be a disability).

IV. TAKING AWAY ACCOMODATIONS = FAILURE TO ACCOMMODATE

Peter Atkinson contends that the taking away of long-standing and necessary accommodations for his known disability is tantamount to a failure to accommodate. Even if an employer does not discriminate in hiring, promoting or firing a disabled employee, it may still have a duty to accommodate a disabled employee and failure to do so constitutes disability discrimination. Pulcino v. Federal Express Corp., 141 Wn.2d 629, 639, 9 P.3d 787 (1998). The WLAD requires employers to reasonably accommodate a disabled employee unless the accommodation would be an undue hardship. *Id.* The failure to accommodate a disability is disparate treatment. Roeber, 116 Wn. App. at 136-137.

For fourteen years, Peter Atkinson excelled at his job, first as an hourly employee and then as a second assistant manager. [4] To the extent Peter's job performance declined in the last thirty-two months he worked for Les Schwab, it was because his store manager took away the modest accommodations he had received

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[4] Les Schwab makes much of critical "peer reviews" concerning Peter while he was competing for selection to the Manager's list, but does not produce them, or disclose that such reviews are made anonymously. This would permit Cox himself to author a "peer review," posing as one of Peter's subordinates. Such reviews cannot survive scrutiny as admissible evidence because they are worse than rank hearsay.

since he started work for Les Schwab. This was discriminatory and unlawful under RCW 49.60.180. Les Schwab claims Peter was "totally disabled and unable to work in any capacity"[5] when he was fired. However, the company has been unable to produce any testimony from any employee to support this claim----including Cox.

V. LES SCHWAB REJECTS THE CLEVELAND CASE

Les Schwab's main defense in this case continues to rely on an antiquated, inflexible, and dogmatic argument which was rejected in 1999, under nearly identical facts, by a unanimous U.S. Supreme Court. Cleveland v. Policy Management Systems Corp., 526 U.S. 795. Cleveland held that a trial court cannot summarily dismiss an employee's suit for discrimination in the workplace solely because the employee has applied for or received disability benefits after a wrongful termination. The Cleveland decision was praised almost universally after it was issued.[6] The facts and

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[5] *See* page 13 of Les Schwab's brief.

[6] Christine Neylon O'Brien, *The United States Supreme Court Resolves the Effect of Disability Benefit Claims Upon Americans with Disabilities Act Complaints in Cleveland v. Policy Management Systems Corporation*, 17 Hofstra Lab. & Emp. L.J. 115, 122 (1999); Dominque Jones-Sam, Case Note, *Cleveland v. Policy Management Systems: A Step Towards Equity*, 27 S.U. L. REV. 63, 79 (1999); Jessica Barth, Note, *Disability Benefits and the ADA After Cleveland v. Policy Management Systems*, 75 Ind. L.J. 1317, 1337 (2000); Don C.H. Kautzmann, Case Comment, *Compatibility of Claim: The U.S. Supreme Court Declines to Adopt a Presumption of Judicial Estoppel Against Plaintiffs in an Americans With Disabilities Act Claim Who Have Already Applied for Social Security Disability*

holding in that case were thoroughly briefed in the trial court [7] and it is not necessary to repeat the same arguments here. The trial court relied almost exclusively on judicial estoppel in dismissing the Atkinsons' complaint,[8] which the Cleveland court rejected under the same facts. The trial court also declined to grant reconsideration after the Atkinsons first brought the Cleveland case to the attention of the trial court. There is no way of knowing why.

Les Schwab rejects Cleveland because it drives a stake through its main defense: that Peter's application for disability benefits alone proves he was "totally disabled and unable to work in any capacity." [9] Les Schwab likes the judicial estoppel doctrine discarded in Cleveland, because Peter's application for disability benefits is the only arguable evidence in this case that Peter was unable to perform the essential functions of his job. There is no other evidence to support this claim. [10] Not one Les Schwab

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Benefits, Cleveland v. Policy Management Systems Corp., 76 N. D. L. Rev. 411, 423 (2000).

[7] *See* Plaintiffs' Motion for Reconsideration, CP 985-1013; Defendant's Opposition to Motion for Reconsideration, CP 1014-1026; Plaintiffs' Reply in Support of Motion for Reconsideration, CP 1096-1109.

[8] This is evident from the reconsideration pleadings filed after dismissal.

[9] *See* page 13 of Les Schwab's brief.

[10] The only testimony that Les Schwab has been able to produce in this case which remotely suggests that Peter was unable to do his job, was that of his physician, neurologist Elena Robinson. However, her testimony was elicited with trick questions by Les Schwab's counsel without ensuring that she knew the facts

employee---not even Cox----has testified that Peter Atkinson was unqualified to perform the essential functions of his job. Without the automatic and inflexible application of the judicial estoppel doctrine, Les Schwab has no defense.

Les Schwab tries to revive pre-Cleveland law by citing three federal trial court decisions. All three are factually different from Peter Atkinson's case. However in Swonke v. Sprint, Inc., 327 F.Supp 1128 (N.D. Cal. 2004), the court held that "[t]he interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation." *Id.* at 1137. This undercuts another Les Schwab's main arguments at pages 25-27 of their brief ("Mr. Atkinson Did Not Engage in the Interactive Process") because Les Schwab knew of Peter's migraine condition from the first day of his employment.

Les Schwab's reliance on California cases for authority is helpful because their law is more developed than ours in

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concerning Peter's working conditions at the store. Once she knew that Peter's accommodations had been taken away and that he worked under truly onerous conditions at Les Schwab without them, her reaction was predictable: "Dear Lord" and "I never knew that of course" and "I would have asked him . . . to be accommodated and enforce it in some way."

accommodation cases. For example, in Foster v. City of Oakland, 649 F. Supp. 1008, 1022 (N.D. Cal. 2009), the court held that the duty to accommodate an employee's disability arises when the employer has knowledge that the employee is disabled. In Faust v. Cal. Portland Cement Co., 150 Cal. App. 4th 864, 887 (Cal. Ct. App. 2007), the court held that "[A]n employer knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition." (Quoting Schmidt v. Safeway Inc., 864 F. Supp. 991, 997 (D. Or. 1994). Another California Court of Appeal has rejected an employer's "suggestion that the disabled employee must first come forward and request a specific accommodation before the employer has a duty to investigate such accommodation." Prilliman v. United Air Lines, Inc., 53 Cal. App. 4th 935, 954 (Cal. Ct. App. 1997).

The second case cited by Les Schwab to revive pre-Cleveland law is Jackson v. Simon Prop. Group, Inc., 795 F.Supp.2d 949 (N.D. Cal. 2011), which is also factually dissimilar from Peter Atkinson's case. Jackson held that the FMLA does not require an employer hold an employee's job for longer than 12 weeks.

The third case cited by Les Schwab to revert to pre-Cleveland law, is Musarra v. Vineyards Dev. Corp., 343 F.Supp.2d 1116 (M.D. Fla. 2004). There, the court admonished an SSDI recipient who brought ADA claim for "[c]learly ... attempting to perpetrate a sham." *Id.* at 1122. It is not relevant to Peter's appeal.

VI. PRETEXTUAL TERMINATION

Peter was not fired because he was unable to do his job. He was fired because he crossed his manager by reporting the manager's wrongful conduct to superiors. Cox told Peter to "get your migraines under control or find work elsewhere." [11] After Peter exposed Cox's threat to corporate headquarters, Cox admitted "fault" for making the threat.[12] Cox rode Peter nearly every day for the next 32 months, refusing to provide accommodation, writing secret performance reviews critical of Peter, and trying to undermine Peter's authority with the store crew until his performance declined. Cox's conduct was therefore a violation of the WLAD. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 186-87,23 P.3d 440 (2001).

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[11] See page 32 of Appellant's Opening Brief and the record cited therein.
[12] See page 22 of Appellant's Opening Brief and the record cited therein.

To satisfy the *prima facie* elements of a pretext, a plaintiff must show any one of four things: 1) that the defendant's articulated reasons for the adverse employment action had no basis in fact; (2) that the defendant's articulated reasons were not really motivating factors for its decision; (3) that the defendant's articulated reasons were not temporally connected to the adverse employment action; or (4) that the defendant's articulated reasons were not motivating factors in employment decisions for other employees in the same circumstances. Kuyper v. Department of Wildlife, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995). A plaintiff's *prima facie* showing of any these elements, and evidence sufficient to disbelieve an employer's explanation, will ordinarily prevent summary judgment. Hill, 144 Wn.2d at 185.

Where there is direct evidence of an employer's discriminatory intent (such as Cox's threat to Peter, or the email reporting the threat), the Ninth Circuit has held that plaintiff need only show little or minimal evidence of discrimination to prove pretext. Kang v. U. Lim. Am., Inc., 296 F.3d 810, 819 (9th Cir. 2002). The Atkinsons contend that Cox's withdrawal of Peter's accommodations, followed by Cox's threat, followed by Peter's email describing the threat, followed by Cox's admission of fault,

followed by Cox's failure to show Peter the negative performance reviews he authored, followed by false claims of criticism of Peter by store staff (see discussion *infra*), are each direct evidence of discriminatory intent.

Where evidence of pretext is circumstantial, rather than direct, the Ninth Circuit has held that plaintiff must produce "specific" and "substantial" facts of the pretext to survive summary judgment. Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1113 (9th Cir. 2011). In the remote event the Court does not consider this case to be one of direct evidence of discriminatory intent, the totality of the evidence certainly consists of numerous "specific" and "substantial" facts to create a triable issue of pretext. An employer's reasons may be considered pretextual if they are factually debatable. See Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 151-152, 94 P.3d 930 (2004). If the employer's reasons are not supported by documentary evidence, they may be found to be pretextual. *Id.*

VII. DISPARATE TREATMENT

The disparate treatment metted out to Peter by Cox after the email was unlawful. The *prima facie* elements of a disparate treatment claim are that the plaintiff was (a) disabled; (b) subject to

an adverse employment action; (c) doing satisfactory work; and (d) discharged or suffered other adverse employment actions under circumstances that raise a reasonable inference of unlawful discrimination. Anica v. Wal-Mart Stores Inc., 120 Wn. App. 481, 489-91, 84 P.3d 1231 (2004).

Washington has adopted the McDonnell Douglas/Burdine three-part burden allocation framework for disparate treatment cases. Kastanis v. Educ. Emps. Credit Union, 122 Wn. 2d 483, 490, 859 P.2d 26 (1993); McDonnell Douglas, Corp. v. Percy Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 753 P.2d 517 (1988). Under McDonnell Douglas/Burdine, the plaintiff has the initial burden to prove a *prima facie* case. Once the plaintiff establishes a *prima facie* case, a rebuttable presumption of discrimination arises and the burden shifts to the employer to produce evidence of a legitimate, non-discriminatory reason for its actions. Becker v. Cashman, 128 Wn. App. 79, 85, 114 P.3d 1210 (2005). If the employer meets this burden, then the burden then shifts back to the plaintiff to produce evidence that the asserted reason was merely a pretext. Anica at 120 Wn. App. 488.

Les Schwab claims that the passage of time from the email, until Peter's firing more than two years later, is not sufficient evidence of retaliation. (Respondent's Brief at pgs. 40-41). However, Cox could not have immediately fired Peter without proving that he was making good on his threat to fire Peter---which he already admitted was wrong. Immediately firing Peter would have jeopardized Cox's own career with Les Schwab. If Cox wanted to fire Peter, it would take both planning and time.

Cox had already taken away the modest but long-standing accommodations Peter had received since he began work with Les Schwab. Cox knew this would result in a decline in Peter's job performance if he had to work during a severe migraine attack. Then Cox began consistently undermining Peter's authority among the two-dozen hourly employees at the Chehalis store. Then Cox authored a series of negative performance reviews for Peter without even showing them to Peter,[13] or providing him with an opportunity to defend himself. Only after Cox was able to divert

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[13] CP 451 at 110/13-16. Peter also denied ever having been warned of termination in a meeting that Les Schwab claims took place in January of 2009, described in their Brief at pgs. 11-12. Peter's testimony concerning this alleged meeting is at CP 455-456, 128/19-130/17.

attention from his own animus for Peter with these actions, could he fire Peter.

VIII. RETALIATION CLAIMS

In Tyner v. DSHS, 137 Wn.App. 545, 563, 154 P.3d 920 (2007), a case cited by Les Schwab, the court held:

> "To establish a *prima facie* case for retaliation, a plaintiff must show that (1) he or she engaged in statutorily protected activity, (2) an adverse employment action was taken, and (3) there is a causal link between the employee's activity and the employer's adverse action." Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 861-62, 991 P.2d 1182 (2000). "If the employee makes out a *prima facie* case, the burden shifts to the employer to show that it acted on a legitimate, nondiscriminatory basis" for its actions. Milligan v. Thompson, 110 Wn.App. 628, 636, 42 P.3d 418 (2002). Atkinson has established a *prima facie* case of retaliation.

The admitted and uncontroverted evidence above clearly supports Peter's claims for retaliation. However, even if Les Schwab creates a factual dispute regarding any evidence supporting Peter's *prima facie* evidence of retaliation, the Atkinsons must survive summary judgment.

1. THE EMAIL WAS A "STATUTORILY PROTECTED ACTIVITY"

Les Schwab claims that Peter's July 10, 2006 email was not "a statutorily protected activity" because he was only seeking

"career advice." [14] This claim, like so many others by Les Schwab in this case, totally mischaracterizes the evidence. First, the email was prompted by Cox's threat "get your migraines under control or find work elsewhere." [15] Second, Atkinson wrote the email to managers in Oregon, asking if Cox could indeed fire him because of his migraines.[16] Third, the managers expressly assured Atkinson that Cox was wrong and that his migraines would "have no bearing on your future with the company." [17] And fourth, the store manager Cox testified that he was "at fault" for the threat he made to Atkinson. [18] This evidence is clear: Peter's email was a statutorily protected activity seeking to protect his rights under the WLAD.

It was not necessary that Peter cite the WLAD statute in his email, or describe the *prima facie* elements of a violation in his email. Les Schwab did not communicate to its managers the company's duty to employees to refrain from discriminating against its own employees.[19] Cox admitted that he had <u>no understanding</u>

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[14] *See* Respondent's brief at page 40.
[15] CP 84 at 2-17, cited at page 32 of Appellants' Opening Brief.
[16] CP 9.
[17] CP 85 at 2-14.
[18] CP 533 at 72/2-12. cited at page 22 of Appellants' Opening Brief.
[19] CP 530 at 59/15-19, cited at page 20 of Appellant's Opening Brief.

of the WLAD.[20] Peter too may not have been specifically aware of the WLAD, but he knew that it was wrong for Cox to threaten him with termination for his migraines for one reason: no one at Les Schwab had ever made such a threat in 14 years of employment.

2. COX TOOK SEVERAL "ADVERSE EMPLOYMENT ACTIONS" AGAINST PETER

Contrary to all of the evidence in the case, Les Schwab apparently argues that it took no "adverse employment action" against Peter. To establish an adverse employment action, the plaintiff must show "an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action." Robel v. Roundup Corp., 148 Wn.2d 35, 74 n.14, 59 P.3d 611 (2002). A decision-maker's notice of the employee's disability can give rise to evidence that the condition played a role in the adverse employment action. Callahan v. Walla Walla Housing Authority, 129 Wn. App. 812, 820-821, 110 P.3d 782 (2005)(a supervisor's notice from her secretary that the plaintiff may have been diagnosed with multiple sclerosis

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[20] CP 524 at 35/12 to 36/19, cited at pages 19-20 in the Appellant's Opening Brief.

created an issue of fact as to whether the condition played a role in the termination decision).

Les Schwab cites Burlington N. Santa Fe Ry. V. White, 548 U.S. 53 (2006), for the proposition that an action for discrimination must involve more than "petty slights, minor annoyances, and simple lack of good manners..."[21] The Atkinsons thoroughly agree, but this case is not about "petty slights." It is about Cox's retaliation against Peter for reporting Cox's wrongful conduct. It is about Cox taking away Peter's long-standing accommodations for his known medical condition. It is about Cox's multiple efforts on multiple fronts to make it harder for Peter to do his job. And finally, it is about the loss of hard-working man's career.

Les Schwab also ignores the facts in Burlington N. Santa Fe Ry. v. White, which is an important discrimination case decided by a 9-0 Roberts Supreme Court. White alleged that her employer sexually discriminated against her transferring her to less desirable duties and suspending her without pay. Even though her new duties were within the same job classification and her pay was

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[21] The specific holding in this important retaliation case under the Civil Rights Act, was that suspension without pay is indeed an "adverse employment action." *Id.* at BNSF argued that because she had not been fired, demoted, denied a promotion, that no retaliation occurred.

reinstated, the court found the defendant's actions sufficiently harsh to constitute retaliatory discrimination. The court held that in order to prevail on a claim of retaliatory discrimination, a plaintiff must show that a "reasonable employee" would have found the challenged action materially adverse. *Id.* at 57.

3. THE "CAUSAL LINK" BETWEEN THE EMAIL AND ADVERSE ACTION

Les Schwab then goes on to argue that Peter cannot show a causal link between the email and his employer's discrimination against him, because he was not fired until almost three years later after sending the email. The evidence, however, clearly reveals that store manager Rory Cox began his campaign of discrimination and retaliation after the email was sent. Cox violated the WLAD before he ever sent the email, by telling Peter: "get your migraines under control or find work elsewhere." [22] However, the email incident triggered Cox's retaliation against Peter. As Peter testified, the email "was the final issue" after which Cox gave him "no leeway." [23]

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[22] CP 84 at 2-17, cited at page 32 of Appellants' Opening Brief.
[23] CP 128 at 5-13, cited at page 16 of the Appellant's Opening Brief.

After the email, Cox began undermining Peter's authority with the store crew. [24] Cox falsely complained that many of the hourly employees at the store complained about Peter. [25] The testimony of several hourly-wage employees flatly contradicts Cox's claims. [26]

Cox ignored Peter's migraine headaches after the email and testified that Peter's medical condition was "not to be brought up in the context of the job..."[27] This became more of the false justification that Cox used to take away all of the accommodations that Peter had received since he started work for Les Schwab in 1993. The only accommodations Cox provided to Peter after the email was to let him take two sick days per month.[28] Even then, Peter was required to make up those sick days by working on his days off---unlike any other employee.[29]

IX. COX CREATED A HOSTILE WORK ENVIRONMENT

In addition to disparate treatment and failure to accommodate claims, WLAD permits a disability-based hostile work

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[24] *Id.*
[25] CP 531 at 63/22-64/19 cited at page 22 of Appellant's Opening Brief.
[26] See excerpted testimony of the store employees at pages 22-26 of the Appellant's Opening Brief.
[27] CP 525 at 38/15-19, cited at page 20 of the Appellant's Opening Brief.
[28] CP 526 at 44/25-45/3, cited at page 20 of the Appellant's Opening Brief.
[29] CP 9, cited at page 20 of the Appellant's Opening Brief.

environment claim. Robel, 148 Wn.2d at 43. The Robel court extended the reasoning in Washington's landmark hostile work environment sexual harassment case, Glasgow v. Georgia-Pac. Corp., 103 Wn. 2d 401, 693 P.2d 708 (1985), to disability claims under the anti-discrimination statute. Robel, 148 Wn.2d at 44-45 (citing Glasgow, 103 Wn. 2d at 406 n. 2). The plaintiff in a disability-based hostile work environment case must show (1) that he or she was disabled within the meaning of the antidiscrimination statute; (2) that the harassment was unwelcome; (3) that it was because of the disability; (4) that it affected the terms or conditions of employment; and (5) that it was imputable to the employer. *Id.* at 45. To prove that the conduct was "unwelcome," the plaintiff must show that he or she "did not solicit or incite it" and viewed it as "undesirable or offensive." Robel, 148 Wn.2d at 45 (quoting Glasgow, 103 Wn.2d at 406). Generally, if the plaintiff reports or complains about the alleged conduct, courts will consider the conduct unwelcome. *Id.*

Peter asserts that the conduct of Cox toward him in the last thirty-two months of his employment satisfied all of the requirements of a hostile work environment claim. Virtually everything that Cox did relative to Peter, was motivated either by

his refusal to provide an accommodation to his first-assistant manager, or in retaliation for the email. Since Les Schwab managers in Oregon were aware of Cox's animus toward Atkinson because of his migraine condition, they had constructive notice that he may well act on that animus without close supervision. There is no evidence that Les Schwab took any steps to protect or monitor Peter's work under Cox, even after expressly assuring him that he had nothing to worry about.

X. ATKINSONS' SECOND MOTION FOR SANCTIONS

Opposing counsel does not dispute or defend his instructions to Les Schwab's speaking agent to not answer 76 questions at her deposition, or that she answered "I don't know" or words to that effect, to 131 basic questions.[30] The inability of the Atkinsons to obtain this basic discovery was extremely prejudicial in their ability to defend themselves against Les Schwab's motion for summary judgment. The trial court should have imposed sanctions.

XI. LES SCHWAB'S MOTION TO STRIKE DECLARATIONS

It is difficult or impossible for the Atkinsons to argue with clarity the evidentiary issues resulting from the trial court's order to

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[30] See pages 35-36 to the Appellant's Opening Brief.

strike certain portions of declarations without knowing what they are. This error was enabled by Les Schwab's deliberate failure to obtain an order on their motion to strike and the declarations must therefore be admitted.

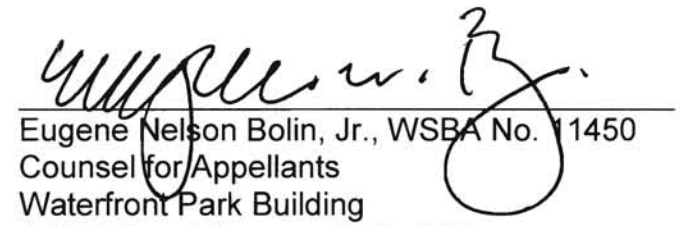
XII. FEES ON APPEAL

Reasonable attorney fees may be awarded on appeal if applicable law grants a party the right to recover such fees or expenses on review before either the Court of Appeals or the Supreme Court. RAP 18.1(a). The WLAD allows a plaintiff in a discrimination action to recover "the cost of suit including reasonable attorneys' fees." RCW 49.60.030(2).

XIII. CONCLUSION

The Atkinsons respectfully request that the Court of Appeals reverse the trial court's dismissal and remand this case for trial.

RESPECTFULLY SUBMITTED this 2nd day of July, 2013.



Eugene Nelson Bolin, Jr., WSBA No. 11450
Counsel for Appellants
Waterfront Park Building
144 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I electronically transmitted a true and accurate copy of appellants' reply brief to counsel for respondent at the following addresses:

Kenneth J. Diamond,
WSBA #27009
Winterbauer & Diamond, PLLC
1200 Fifth Avenue, Suite 1700
Seattle, WA 98101
Attorney for Defendant
ken@winterbauerdiamond.com

Vanessa Scott-Thorson
WSBA #42950
Winterbauer & Diamond, PLLC
1200 Fifth Avenue, Suite 1700
Seattle, WA 98101
Attorney for Defendant
vanessa@winterbauerdiamond.com

DATED this 2nd day of July, 2013, at Edmonds, Washington.

Eugene Nelson Bolin, Jr., WSBA No. 1450
Counsel for Appellants
Waterfront Park Building
144 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165

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