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attached errata

Case # 49091-9-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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TANYA NOZAWA,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it granted Respondent's motion for summary judgment because there were issues of material fact applicable to all claims made by Appellant.

Issues Pertaining to Assignment of Error:

1. Does a material issue of fact exist when an Appellant presents evidence of a temporary disability as well as evidence of disparate treatment?

(De Novo)

2. Does a material of fact exist when an Appellant presents evidence that she was retaliated against for being a whistleblower?

(De Novo)

**B. STATEMENT OF THE CASE**

Appellant was an employee of the Washington State Department of Corrections from January 1987 to February 2012, a period spanning twenty-five (25) years. Clerk's Papers #59, Declaration of Nelson C. Fraley, Deposition of Nozawa, pages 11-20. At the time that Appellant's employment with DOC ceased she was in the position of the Community Partnership Program Coordinator (CPPC/CIPC) for Cedar Creek Correctional Center, a minimum security prison with approximately 480

male inmates. The Superintendent of the prison was and still is Mr. Douglas Cole.

Prior to the cessation of her employment with the DOC, Appellant occupied various positions within DOC in several locales. In addition to the position stated above, Appellant held positions as a Graphic Designer from January 2004 to December 2010; Correctional Officer at Clallum Bay Prison from 1987 to 1997; from 1997 to 2000 she held a position producing training manuals for the DOC; she was a Secretary Supervisor and promoted into the position of Community Involvement Program Coordinator at Pine Lodge prison from 2000 to 2003; and then as Community Involvement Program Coordinator at Airway Heights Prison for approximately 6 months until promoted to a Graphic Designer position at DOC Headquarters in Olympia, Washington in 2004. CP #59, Nozawa Dep. Pages 11-16. Appellant's supervisor while a Graphic Artist was Ms. Belinda Stewart. Id., Nozawa Dep, Pg. 18.

In November 2010, Appellant's position as a Graphic Artist at DOC Headquarters was being abolished requiring her to be placed into another available position which she was qualified to occupy. Appellant began making use of the Public Records Act (PRA) and made approximately 16 public disclosure requests. Id., Nozawa May 6, 2013 Dep. Pg. 8. She was attempting to determine why her position as a

Graphic Artist was abolished. Id. lines 10-12, 20-21, Pg. 10, lines 13-16. During the course of receiving documents from DOC, she was able to obtain documents related to her temporary disability accommodation request.

Shortly after Appellant began making public disclosure requests pursuant to the PRA, Appellant began communicating with the office of deceased Washington State Senator Mike Carrell. CP #60, Declaration of Michelle Lewis, page 1. In early 2011, Senator Carrell and his Senior Legislative Assistant, Ms. Michelle Lewis became acquainted with a Mr. Jones through electronic mail address storiestotell1@hotmail.com. As it turned out this was an e-mail address established by Mrs. Beth Delong that Mrs. Tanya Nozawa was to utilize for a short period of time in order to preserve some level of anonymity. Mrs. Delong was the sister-in-law to slain Lakewood Police Officer Tina Delong Griswold. Mrs. Delong also used the e-mail address to send documents and correspondence to Ms. Lewis and Sen. Carrell. Mrs. Delong and Mrs. Nozawa are friends. CP #60, Lewis Dec. page 2, lines 1-5.

At the end of 2010 and beginning of 2011, the Delong family and Mrs. Nozawa had a confluence of issues surrounding the actions of Ms. Belinda Stewart, former Washington State Department of Corrections Communications and Outreach Director. The Delong family simply

wanted assistance in prohibiting Ms. Stewart from claiming that certain family members belonged to organizations that Mrs. Stewart championed. Mrs. Nozawa sought a way in which to provide whistleblower information about Mrs. Stewart using state resources for personal gain. Mrs. Nozawa was extremely concerned about retaliation against her and her family due to the power Mrs. Stewart claimed to yield and her connections within the DOC. Id. at lines 6-16.

In February 2011, Sen. Carrell and Ms. Lewis met with Tanya regarding documents she provided to the Senator's office. Mrs. Nozawa broke her anonymity with Senator Carrell because he told her that his office could not help if her identity was concealed. In a sense, Tanya came out of the shadows. Id. lines 17-20.

On March 18, 2011, Sen. Carrell filed a document with the Executive Ethics Board entitled Complaint Against Department of Corrections Employee Belinda Stewart. This complaint would not have been made possible without the bravery of Mrs. Nozawa as she felt that she would experience retaliation at some point by DOC employees. Id. lines 21-26, pg. 3, lines 1-3.

Based upon the credible information that was presented by Mrs. Nozawa, Sen. Carrell and Ms. Lewis felt compelled to afford then DOC Secretary Eldon Vail an opportunity of notice as to what was to come so

that he was not surprised by the complaint against Mrs. Stewart. Ms. Lewis scheduled the meeting with Mr. Vail regarding the allegations that were to be levied against Mrs. Stewart. That meeting took place in early March 2011. Senator Carrell and his staff showed Mr. Vail calendars belonging to Mrs. Stewart and Mrs. Nozawa along with other documents so that Mr. Vail understood the existence of substantiating evidence to the allegations as well as witnesses. At the conclusion of the conversation, Sen. Carrell made it explicitly clear that retaliation against known or suspected whistleblowers against Mrs. Stewart would not be tolerated. Sec. Vail expressed his understanding and left Senator Carrell's office without further comment. *Id.* lines 4-17.

Within days after the meeting with Mr. Vail, Ms. Lewis received a panicked telephone call from Mrs. Nozawa regarding the scheduling of a meeting by Cedar Creek Corrections Center Superintendent Douglas Cole. Mrs. Nozawa was suspicious of the timing of such a meeting since it was Ms. Lewis who had informed Appellant of the meeting with Sec. Vail. According to Mrs. Nozawa she was not given a reason for the meeting as she was not working due to a non-work related injury. According to Superintendent Cole, he simply wanted to offer his 2 cents. CP. #59, Ruiz Dep. Pg. 9, ln 1-24, Exh. 1. Even to Ms. Lewis, it was suspicious as to why an employee who was then currently temporarily disabled would be

required to go into her place of employment for a face-to-face meeting with a superintendent. What further raised suspicions was the fact that Mrs. Nozawa was given no information as to the reason of the meeting or subject matter. According to Mrs. Nozawa, the meeting was to occur on March 14, 2011. The meeting did not occur until after Tanya returned to work. *Id.* lines 18-26, pg. 4, lines. 1-4

On April 20, 2011, Mrs. Nozawa used the alias e-mail aforementioned to tell Senator Carrell's office of the meeting. CP #60, Lewis Dec., Exh. B.

After Mrs. Nozawa went to Sen. Carrell's office, the Senator and Ms. Lewis did their best to protect Tanya's identity for fear of retaliation against her. She was instrumental in providing supporting documentation and testimony against Mrs. Stewart which eventually lead to findings against Ms. Stewart. *Id.*, Lewis Dec., Exh. C. There were preliminary findings made on September 9, 2011 regarding Stewart's violations. Based upon these findings Sen. Carrell then called for the termination of Stewart's employment. *Id.*, Lewis Dec. Exh. D. *Id.* lines 10-16.

Within a matter of weeks after their meeting with Sec. Vail, the DOC launched an investigation into the allegations that Sen. Carrell alerted Sec. Vail were to be filed against Stewart. Amongst concerns of conflicts of interests by DOC, so too were concerns of retaliation against

Mrs. Nozawa. Sen. Carrell and Ms. Lewis expected some level of carnage regarding DOC employees, but did not expect the sudden resignation of Sec. Vail on July 2, 2011 amid a release video of him. Id., Lewis Dec. Exh. E.

Ms. Lewis witnessed the changing terms and conditions of Tanya's employment with the DOC as the ethics complaint and investigation against Mrs. Stewart progressed. Sen. Carrell did not have the power to order Superintendent Cole to allow Mrs. Nozawa to work in an accommodated position following her non-work related injury. Many suggestions were made to Appellant by Sen. Carrell and Ms. Lewis as Mrs. Nozawa revealed more and more problems with her bosses and with the Human Resource Department. Mrs. Nozawa followed through with suggestions from contacting superiors to looking for open DOC positions for which she was qualified to perform without taking major pay decreases.

Mrs. Nozawa was a model DOC employee and was a model complainant whom Sen. Carrell and Ms. Lewis had no reservations regarding her qualifications or integrity as a front row witness to the Stewart abuses and violations. The whistleblower protections did nothing to prevent Mrs. Nozawa from experiencing retaliation at the hands of Superintendent Cole. Tanya's expertise and quality work were recognized

and utilized in the Jayme Biendl memorial service in February 2011, despite no longer being assigned to graphic design work or communications. She was a long time DOC employee and was highly regarded. Ms. Biendl was a Correctional Officer who was murdered by an inmate in February 2011. Appellant had been requested to prepare materials for the memorial service and to be present for the services to take photos. CP #59, Exh. 7, Pg. 29-30.

As previously stated, Mrs. Nozawa suffered a non-work related injury in February 2011. *Id.*, Pgs. 41-45. Since February 2011 up until her departure from DOC in February 2012, Appellant made attempts to return to work in a light duty capacity, to work in a different building as a CPPC, sought a light duty position, and sought shared leave. *Id.* Pgs. 22-24, 29-31, 33-35, 50. After a meeting in April 19 or 20, 2011, with Superintendent Cole of Cedar Creek Correctional Center, Appellant was met with resistance and was denied her requests for accommodation, light duty and shared leave. *Id.* Pgs. 54-58; 60, lines 10-24, Pgs. 65 and 67, lines 5-8, Pg. 68, lines 2-17, Pg. 70, lines 20-25, Pg. 71, lines 1-25, Pgs. 76-81; 112, lines 7-25, Pgs. 113 and 149-150. In fact, Appellant was told that she needed to respond to emergencies despite not being a part of her job description and that she was not a Correctional Officer. *Id.* Pg. 113 lines 1-6. Appellant also held the position of CPPC/CIPC at 2 separate

facilities in the past. She was not required to work directly with, supervise or be alone with inmates. Id. Page 120.

Appellant was placed in the most difficult positions when she was offered a light duty position that would have resulted in approximately a thousand dollar a month reduction in pay. Id. page 81 and 83 lines 20-24, Pg. 93, lines 24-25, Pgs. 94-95, lines 1-9, Pg. 102, lines 12-25. When her leave time was about to exhaust, Appellant sought shared leave. Id page 103; 107, lines 5-19. Shared leave however is not an accommodation. Id., Ruiz Dep., pg. 26 lines 11-25.

Based upon the lack of support regarding her concerns, disparate treatment and failure to accommodate, Appellant was constructively discharged from her employment with the DOC in February 2012.

## **C. ARGUMENT**

### **1. Summary Judgment Standard**

The defense motion is made pursuant to CR 56 (a), which provides in pertinent part:

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 Respondent 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.

The primary purpose of the summary judgment rule is to secure a just, speedy, and inexpensive determination of every issue by avoiding unnecessary trial. Olympic Fish Products, Inc. v. Lloyd, 93 Wn.2d 596 (1980). Pursuant to CR 56(c), summary judgment may be granted if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). A material fact is one upon which the outcome of the litigation depends. Eriks v. Denver, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

The moving party bears the initial burden of showing the absence of an issue of material fact and an entitlement to judgment as a matter of law. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182, 187-88 (1989). Then the burden shifts to the nonmoving party to set forth facts showing that there is a genuine issue of material fact. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). A party resisting a motion for summary judgment must present some evidence, not mere speculation, which will support the existence of a material fact in issue. Diamond Parking, Inc. v. Frontier Building Ltd. Partnership, 72 Wn. App. 314, 864 P.2d 954 (1993). The kind of facts necessary to oppose a motion for summary judgment are characterized in

Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, (1988) as follows:

A fact is an event, an occurrence, or something that exists in reality.... It is what took place, an act, an incident, a reality as distinguished from supposition or opinion.... The “facts” as required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice... (internal citations omitted.)

**2. Appellant presented evidence of a violation of RCW 49.60-Failure to Accommodate.**

The Washington Law Against Discrimination expressly prohibits discrimination because of “the presence of a sensory, mental, or physical disability.” RCW 49.60.180(1). Disability discrimination may be divided into three types of unfair practices: (1) Disparate treatment; (2) disparate impact; and (3) failure to accommodate. Disparate impact has not been alleged in this litigation.

In addition to prohibiting disparate treatment based upon disability, WLAD imposes an affirmative duty upon employers of disabled workers to provide reasonable accommodation. As the Gambini court stated; “the law often does provide more protection for individuals with disabilities. Unlike other types of discrimination where identical treatment is the gold standard, identical treatment is often not equal treatment with respect to disability discrimination (citing Holland v. Boeing). That’s why the ADA

and F.3d at Washington law require employers to make reasonable accommodation for disabilities.” 486 F.3d at 1095. Where the employer fails to provide reasonable accommodation, it may have violated RCW 49.60. Such claims are premised on the recognition that “[i]dentical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.” Holland v. Boeing 90 Wn.2d 384, 388 (1978) (emphasis in original); accord: Doe v. Boeing, 121 Wn.2d 8, 20 (1993); Dean v. METRO, 104 Wn.2d 627 638-39 (1985).

To establish a prima facie case of failure to accommodate, the Appellant must show that she or he (1) had a sensory, mental, or physical abnormality that substantially limited her or his ability to perform the job; (2) was qualified to perform the essential functions of the job with or without reasonable accommodation, or was qualified to fill vacant positions; and (3) gave the employer notice of the disability and its accompanying substantial limitations; and that (4) upon notice, the employer failed to reasonably accommodate her/him. Davis v. Microsoft Corp., 149 Wn.2d 521, 532 (2003). The term “essential function” is defined as “a job duty that is fundamental, basic, necessary, and indispensable to filling a particular position, as opposed to a marginal duty

divorced from the essence or substance of the job.” Id. At 533. Reasonable accommodation does not require that the employer eliminate an essential function of the job in question. Id. At 534, quoting Hill v. BCTI Income Fund - I, 144 Wn.2d at 193.

One need not establish intent to discriminate on a reasonable accommodation claim. See: Pulcino v. Federal Express Corp., 141 Wn.2d at 640; Parsons v. St. Joseph’s Hospital, 70 Wn. App 804, 804 (Div. II, 1993); Goodman v. Boeing, 75 Wn. App. 60 n. 7 (Div. I, 1994), aff’d 127 Wn2d 401 (1995). The duty to reasonably accommodate a disability extends to measures which will help an employee perform his or her job (Doe, 121 Wn.2d at 18) or avoid termination (e.g.: Clarke v. Shoreline School District, 106 Wn.2d 102, 119-21 (1986)) or avoid aggravating a disability (Goodman, 127 Wn.2d at 405-06; Martini v. Boeing, 88 Wn. App. 442, 454-55 (Div. I, 1997), aff’d on different ground, 137 Wn.2d 357 (1999). Whether the disability arises from an on-the-job injury or not is irrelevant to the duty. Reese v. Sears Roebuck & Co., 107 Wn.2d at 572-73. Recognized types of accommodation include (a) making “changes to a work stations,” (b) providing “enhanced... equipment,” (c) “[p]ermitting rest periods to accommodate a physical condition,” (d) modifying the workplace, (e) providing leaves of absence (Doe, 121 Wn.2d at 17 n. 4 and 21 n. 5), (f) providing light duty (Pulcino, 141 Wn.2d at 645) and (g)

taking affirmative steps to help an employee find another position if she or he has become disabled from his or her usual job (Davis v. Microsoft, 149 Wn.2d 521, 536 (2003) Pulcino, 141 Wn.2d at 643-44; Dean, 104 Wn.2d at 638-39; Reese, 107 Wn.2d at 574; Clarke, 106 Wn.2d at 119-21) or has otherwise lost it (Curtis v. Security Bank of Washington, 69 Wn. App. 12, 16-19 (Div. III, 1993); see; Holland, 90 Wn.2d at 386, 391). An employee's ability to perform the essential function of a job should be measured after reasonable accommodation. Davis, 149 Wn.2d at 533 and n. 5.

An employer must act "affirmatively" to "determine the extent of the [the employee's] disability," "call[ing] him [or her] into the office to assist' him or her, giving him or her "special attention" (Dean, 104 Wn.2d at 638-39; Clarke, 106 Wn.2d at 121) and "perform[ing] capabilities testing on the open positions. Curtis v. Security Bank of Washington, 69 Wn. App. 12, 19 (Div. III). The employer must continue to take such steps after the employee's termination. Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 561-63 (Div. I, 1992) aff'd, 124 Wn.2d 634 (1994).

An employer's duty is a wide-ranging one which is not necessarily limited to these specific measures, although the outer boundary of the duty is that an employer need not make a reasonable accommodation when

doing so would impose an “undue hardship”. Phillips v. City of Seattle, 111 Wn.2d at 911; WAC 162-22-075. “Undue hardship” is considered an affirmative defense. See: Pulcino, 141 Wn.2d at 639.

Whether an accommodation is “reasonable” is distinct from whether it would cause “undue hardship” (Easley, 99 Wn. App. At 464-72), although both typically involve factual inquiries. Pulcino, at 644. An employer need not make the specific accommodation the employer requests, as long as it does make a reasonable accommodation. *Id* at 643. If an employee can perform the essential functions of the job with accommodation, the employer should make the accommodation that will enable the employee to do so. See: Davis, 149 Wn.2d at 533 and n.5. Typically, the employee has the burden of showing a specific reasonable accommodation was available. Pulcino, at 643. Regulations also make it unlawful for an employer “to refuse to hire or otherwise discriminate against” a disabled employee in order to avoid the duty to reasonable accommodate. WAC 162-22-025(3).

Cases addressing the duty to accommodate by helping an employee find another job use a burden shifting approach. Under it, the employee can make a prima facie case by showing “(1) that he or she [has a disability], (2) that he or she had the qualifications to fill vacant positions and (3) that the employer failed to take affirmative measures to

make known such job opportunities to the employee and to determine whether the employee was in fact qualified for those positions.” Dean, 104 Wn.2d at 638-39; accord: Snyder v. Med. Serv. Corp of E. Wash., 145 Wn.2d at 240; and Clarke, 106 Wn.2d at 120. The employer can rebut the prima facie case by showing it gave the jobs in question to a more qualified candidate (see Dean, at 634, 638) or it in fact had no vacancies or the employee failed to cooperate or refused to accept “reasonably compensatory work” or had “some other non-discriminatory reason for refusal to accommodate”. *Id.*; Clarke, at 121; and Reese, 107 Wn.2d at 579.

One case cites the burden-shifting analysis developed in disparate treatment cases, although intent to discriminate is not at issue. Dean at 636-37. Dean also speaks of the employer’s need to “prove” at defense. *Id.* at 638. Other cases talk of the employer’s burden of demonstrating reasons. Reese, at 579; Wheeler at 561. Such words suggest a burden of persuasion rather than production. An employer’s silence in the face of the prima facie case entitles the employee to judgment as a matter of law. Wheeler at 564.

Before the duty to accommodate arises, the employer must be put on some “notice of disability,” although the employer need not know “the full nature and extent of the disability.” Goodman, 127 Wn.2d at 408.

Once accommodated, an employee must notify the employer when the disability subsides, if she or he wants a job from which in the past she or he was disabled. Wurzbach v. City of Tacoma, 104 Wn. App. At 899-900. An employee need not formally request an accommodation. Downey v. Crowley Marine Services, Inc., 236 F.3d at 1023; Kimbrow v. Atlantic Richfield Co., 889 f.2d at 877 n. 7. Notice of an employee's disability alone triggers the employer's burden to take positive steps to accommodate the employee's limitations. Goodman, 127 Wn.2d at 408.

There is no dispute that Appellant suffered from a temporary disability. In fact, Respondent concedes that Appellant can establish that a reasonable accommodation was made by the Appellant. Efforts were made by Sue Leppard to look for light duty positions. The requested accommodation of simply moving to an adjacent building was denied despite allowing Appellant to work in the administration building in April 2011.

According to the DOC they utilized DOC Policy 830.200 as applicable to Appellant even though she had not suffered an on the job injury. The DOC Human Resources Department coordinated "all personnel action, including assisting with facilitating modified duty assignments, locating new permanent positions, and/or processing

disability separations.” It is clear from the policy statements of the DOC that:

Employees who sustain a workplace injury or suffer an occupational disease will be provided assistance that includes claim filing information, coordination of return to work opportunities, and monitoring of claims activities. These efforts are to demonstrate care and concern for the economic welfare and physical recovery of employees, while at the same time minimizing the costs of industrial insurance claims for the Department.

To effectuate the policy statements of DOC 830.200, Modified Duty is specifically enumerated within the policy.

Respondents offer no reason as to why no other positions were offered other than positions that would have resulted in a \$1,000.00 per month reduction in pay. As of July 2011, there were at least 5 vacant and funded positions available. *See*, Nozawa Dec. Exh. F. Based upon the foregoing, there is a dispute of material fact as to whether Appellant was actually accommodated regarding her temporary disability.

In Respondents evidence there exists no suggestion or explicit statement that the OA3 position was the only job available to meet the qualifications of Appellant and her disability. Thus, the question of whether any proposed accommodation was “reasonable” in the light most favorable to the Appellant.

A dispute of fact exists regarding whether DOC's offer of an OA3 position was a reasonable accommodation offer. Coupled with the fact that Appellant was a whistleblower and her status was acknowledged by Superintendent Cole on or about April 19 or 20, 2011, raises an additional question of fact as to whether Appellant was retaliated against by the appointing authority of CCCC.

### **3. Appellant presented evidence of disparate treatment**

To establish a prima facie case of disparate treatment based on disability, an Appellant must show that she or he (1) has a disability, (2) suffered an adverse employment action, (3) was doing satisfactory work, and (4) was treated differently than someone not in the protected class. Kirby v. City of Tacoma, 124 Wn. App. 454, 468 (Div. II, 2004); accord; Riehl v. Foodmaker, Inc., 152 Wn.2d 138 (2004). To establish the first prong of a claim for disparate treatment, an Appellant must show that she or he was disabled within the meaning of the statute. For the second prong, an Appellant must establish that she or he was subject to an adverse employment action. An adverse employment action requires "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. 24 (2002). An adverse employment action, therefore, is more than an "inconvenience or

alteration of job responsibilities.”” Kirby, 124 Wn. App at 465 (quoting DeGuisepe v. Village of Bellwood, 68 F.3d 187, 192 (7th Cir. 1995).

The third prong may be shown, for example, that the employee consistently received positive evaluations during her employment. The fourth prong can be satisfied by showing that the employer treats able-bodied employees more favorably than it treats the disabled Appellant.

An employer may be liable for employment decisions when the employer has knowledge of a disability. In addition, an employee’s conduct resulting from a disability, not merely the disability per se, may be protected under WLAD when the employer knows or should have known of a disability. Riehl, supra at 152; see also; Gambini v. Total Renal Care, 486 F.3d 1087, 1093 (9th Cir. 2007). Discrimination is illegal if it is based upon the employer’s perception that the employee is disabled, even if she or he is not, in fact, disabled. Barnes v. Washington Natural Gas Co., 22 Wn. App. 576(Div. I, 1979). An undiagnosed condition can even be a disability under the WLAD if (1) it can be recognized or diagnosed; (2) it has record or history, and (3) if it substantially limits the employee’s ability to do his or her job. Callahan v. Walla Walla Housing Authority, 126 Wn. App. 812 (Div. II, 2005).

In this case there exists no dispute that Mrs. Nozawa suffered from a temporary disability. There is no dispute that she requested light duty.

What is in dispute is the positions that were available and funded for which Appellant qualified. CP #61, Nozawa Declaration, Exhibit F. Throughout DOC's pleadings and evidence as well as the Ruiz Declaration, DOC claims to have presented Appellant with the available positions of an OA3. For a period of time, this was the only claimed position available. Yet, through public disclosure request obtained by Appellant, there were more positions available in July 2011 that were not presented to Appellant. In fact, within reason, location was not a determining factor for Appellant in considering a placement. CP #59, Exh. 7, Pg. 47, lines 13-25, Pg. 48, lines 1-17, Pg. 99 line 25 through Pg. 101 Line 2. Appellant also provided names of individuals who were treated more favorably than she was. Id. Pg. 78 lines 12-25, Pg. 79, lines 1-2, Pgs. 136-138.

The appointing authority claimed that he had no concerns of the physical ability of volunteers who worked around inmates. Id., Cole Dep. Pg 11, pg 12 lines 18-25, pg 13 lines 1-25. In fact, during Superintendent Cole's tenure thus far there have been no issues of attacks against volunteers or administrative staff. Id., Pg 14-16. There have been 3 Correctional Officer related issues, but none involving administrative staff such as Appellant. Id, page 16.

Despite having a low to no incident rate, Superintendent Cole was requiring a job requirement that was not a part of an administrative staff members job-responding to emergencies. Mr. Cole had less regard for the volunteers that worked more closely with inmates than that of Appellant. Mr. Cole failed to allow any accommodation of Appellant.

**4. Appellant presented evidence of retaliation.**

RCW 49.60.210(1) makes it unlawful for "any employer, employment agency, labor union, or other persons to discharge, expel, or otherwise discriminate against any person because he or she has (1) opposed any practices forbidden by [the law against discrimination] or ... (2) filed a charge, testified, or assisted in any proceeding under this [the law against discrimination]." Under RCW 49.60.210, the employee bears the burden of proving that the employer's action was retaliatory and that such retaliation was the cause of the employee's damages. See: Delahunty v. Cahoon, 66 Wn.App. 829, 839, 832 P.2d 1378, 1383-84 (Div. III, 1992). RCW 42.40.050 discusses the remedies available to an individual for workplace reprisal and retaliatory action is presumed to have established a cause of action for the remedies provided under RCW 49.60.

Three elements are needed to support this cause of action: (1) the employee engaged in a statutorily protected activity, (2) an adverse

employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employer's adverse employment decision. Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 861-62, 991 P.2d 1182, 1191 (Div. III, 2000); see: Kahn v. Salerno, 90 Wn.App. 110, 129, 951 P.2d 321, 331 (Div. I, 1998); Delahunty, supra at 839.

Washington courts usually analyze retaliation claims under a burden shifting framework. To establish a prima facie case of retaliation the Appellant must produce evidence of (1) a protected activity by the employee, (2) an adverse action by the employer and (3) the employer's knowledge of the protected activity. Allison v. City of Seattle, 118 Wn.2d 79, 89 n.3, 821 P.2d 34, 39 (1991); Graves v. Dep't of Game, 76 Wn.App. 705, 712, 887 P.2d 424, 427 (Div. III, 1994).

Washington courts have generally labeled this third element as requiring proof of a "causal connection" between the exercise of the legal right and the adverse employment action. See: Wilmot v. Kaiser Aluminum and Chem. Corp., 118 Wn.2d 46, 68, 821 P.2d 18, 29 (1991). However, the Washington Supreme Court has emphasized that a showing of "but for" causation is not required to establish a prima facie case of retaliation. See: Allison, supra, at 89 n.3. Instead, an Appellant need only show that the protected activity was "a substantial factor" for the adverse

action. See e.g.: Vasquez v. State, 94 Wn.App. 976, 984, 974 P.2d 348, 352-53 (Div. III, 1999).

If a prima facie case is established, the burden shifts to the employer to produce admissible evidence of a legitimate reason for the adverse employment action. Renz v. Spokane Eye Clinic, 114 Wn.App. 611, 618, 60 P.3d 106, 109 (Div. III, 2002). If the employer meets this burden of production, the burden shifts back to the employee to create a genuine issue of fact that the legitimate reason is merely pretext. *Id.* at 619.

**a. Opposition to Unlawful Practices**

As for the first prong of the above test, this is satisfied if an employee had a good faith, objectively reasonable belief that her activity is protected by the statute. Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App. 774, 798, 120 P.3d 579 (Div. I, 2005) (Appellant need only prove that her complaints went to conduct that was "arguably" a violation of law); Renz, supra, 114 Wn. App. at 619 (Appellant need only show "reasonable belief" that discrimination occurred); Kahn, supra, 90 Wn. App. at 130 (Appellant's "opposition must be to conduct that is at least arguably a violation of the law"); Blackford v. Battelle Mem'l Inst., 57 F.Supp.2d 1095, 1099 (interpreting the WLAD).

Protection for opposition activity also extends to employees who confirm unlawful behavior in response to questioning during an employer's investigation of co-worker complaints. See: Crawford v. Metro. Gov't of Nashville et. al., U.S., 129 S.Ct. 846, 2009 U.S. LEXIS 870 (2009). While Washington courts have not addressed this specific factual scenario and whether it constitutes opposition or participation activity, courts have protected employee participation in investigations. See: Blinka v. WSBA, 109 Wn.App. 575, 590, 36 P.3d 1094, 1102 (Div. I, 2001), rev. denied, 146 Wn.2d 1021 (2002) (retaliating against employee for participating in internal investigation would violate the WLAD); See also: Gaspar v. Peshastin Hi-Up Growers, 131.Wash.App. 630, 128 P.3d 627 (Div. III, 2006), rev. den'd, Wn.2d, 152 P.3d 1033 (2007) (discharging employee in retaliation for cooperating with a police investigation violates public policy).

**b. Participation**

When "participation" is the protected activity, the standard is more liberal in that an employee need not prove the merits of the underlying claim because, unlike the "opposition clause," the "participation clause" does not mention "practices forbidden by [RCW 49.60]." RCW 49.60.210(1); Blinka, supra at 583-84. Federal courts have interpreted "participation" to include a wide range of activities connected with

reporting unlawful activity, extending far beyond just the filing of a formal charge. See e.g.: Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997) (testifying in deposition for co-worker's Title VII suit is protected activity); see also: Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997) (finding employee's meeting with EEO counselor was protected activity where counselor thought formal complaint would be filed and notified management officials). But see: Brower v. Runyon, 178 F.3d 1002, 1006 (8th Cir. 1999) (finding that employee's visit with EEO counselor to "explore her options" did not constitute protected activity where she didn't complain of discrimination).

**c. Adverse Employment Action**

With respect to the second element of retaliation claims, an adverse employment action must involve a change that is more than an "inconvenience or alternation of job responsibilities." Kirby v. City of Tacoma, 124 Wn.App. 454, 465, 98 P.3d 827, 833 (Div. II, 2004) (internal citations omitted). Thus, reducing an employee's workload and pay constitutes an adverse employment action, whereas yelling at an employee or threatening to fire an employee is not. *Id.* (internal citations omitted). A demotion or adverse transfer may also constitute an adverse employment action. See: Campbell v. State, 129 Wn.App. IO, 22, 118 P.3d 888, 893 (Div. III, 2005) (jury question whether demotion without loss of pay was

an adverse action) (citing Robel v. Roundup Corp., 148 Wn.2d 35, 74 n.14, 59 P.3d 611, 631 n.14 (2002) (Bridge, J. dissenting in part)).

Federal law offers some useful guidance on this issue. The Ninth Circuit has adopted the EEOC's broad definition of an adverse employment action as any action by an employer that is "reasonably likely to deter employees from engaging in protected activity," such as "lateral transfers, unfavorable job references, and changes in work schedules." Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000); see also: Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir.1997) (holding dissemination of unfavorable job reference an adverse employment action even though the Appellant would not have received the prospective job in any event - squarely rejecting the employer's "no harm, no foul" argument); Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 869 (9th Cir.1996) (finding lateral transfer constitutes an adverse employment action).

The U.S. Supreme Court confirmed the Ninth Circuit's general approach to this question in Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S.Ct. 2405 (2006). The Court explained that an adverse employment action "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge" of unlawful conduct by the employer. Burlington Northern, 126 S.Ct. at

2409. The Court cautioned, however, that "petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id.*, 126 S.Ct. at 2415.

Based on this decision, the federal courts in Washington have continued to cite prior Ninth Circuit precedent, but have reached very different results in applying this standard on summary judgment. See: Ramirez v. Olympic Health Management Systems, Inc., 610 F.Supp.2d 1266, 1284, (E.D.Wash. Apr 17, 2009) (Shea, J.) (telling other workers about a discrimination complaint contrary to company policy created an issue of fact); Prue v. University of Washington, 2009 WL 302272 (W.D.Wash. Feb 05, 2009) (Lasnik, J.) (posting employee's complaint on database for all hiring managers raised a fact question); Sims v. Lakeside School, 2008 WL 2811164 (W.D.Wash. Jul 16, 2008) (Martinez, J.) (two months on probation may be adverse employment action); but see: Cloer v. United Food & Commercial Workers Intern. Union, 2007 WL 601426, (W.D.Wash. Feb 22, 2007) (Robart, J.) (no adverse employment action as a matter of law despite lower performance rating, written admonishment and other "slights").

**d. Evidence Sufficient to Establish the Causal Link**

The third prima facie element is met by establishing a causal link between the employee's activity and the employer's adverse action. Absent

an admission by a decision maker, Appellants must gather circumstantial evidence of motive. "Because employers rarely will reveal they are motivated by retaliation, Appellants ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose." Vasquez, supra at 985 (citing Kahn, supra at 130); see also Renz, supra at 621. For instance, proximity in time between the protected activity and the adverse action is circumstantial evidence of the employer's motivation, as is comparison of the employee's performance evaluations before and after the protected activity. See: Vasquez, supra at 985 (citing Kahn, supra at 130-31).

With respect to proximity of time, there is no exact time period sufficient to create an issue of fact. The other indicia of retaliation are usually factored into the analysis. See: Estevez v. Faculty Club of Univ. of Wash., 129 Wn.App. 774, 120 P.3d 579 (Div. I, 2005) (finding summary judgment inappropriate where in addition to direct evidence, employee who had never received negative performance review or been reprimanded was terminated nine days after reporting harassing behavior, and the day after telling employer she would seek a restraining order).

The passage of one to three months has been sufficient to support an inference of retaliation. Campbell v. State, 129 Wn.App. 10, 18, 118 P.3d 888, 891 (Div. III, 2005) (finding prima facie case established where

employee filed complaint on April 18 and demoted "in May."); Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 491-92, 84 P.3d 1231 (Div. 1, 2004) (finding causation element satisfied where employee discharged approximately three months after filing claim). Longer gaps in time have not supported a finding of causation. See: Francom, supra at 862 (the lapse of 15 months between employee complaint and alleged adverse employment actions did not support an inference of retaliatory motive.).

The Ninth Circuit has articulated its standard as follows: "[c]ausation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the Appellant engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." Yartzojf v. Thomas, F.2d 1371, 1376 (9th Cir. 1987). Ninth Circuit decisions are generally consistent with Washington cases on the issue of what length of time supports a prima facie finding of causation. See e.g.: Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 507 (9th Cir. 2000) ("evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the Respondent."); Miller v. Fairchild Indus., Inc., 885 F.2d 498, 505 (9th Cir. 1989) (holding that discharges 42 and 59 days after EEOC hearings were sufficient to establish prima

facie case of causation); Yartzoff, supra at 1376 (finding sufficient evidence of causation where adverse actions occurred less than three months after complaint was filed, two weeks after charge first investigated, and less than two months after investigation ended). But see: Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 1511 (2001) (holding that timing alone did not support claim of retaliation because almost two years had passed between protected activity and adverse employment action).

Washington courts have also considered a shift in performance reviews as circumstantial evidence supporting an Appellant's claim of retaliation. See: Allison, supra at 97 (relying on fact that once employee's age was disclosed performance evaluations changed from "good and superior with recommendations of advancement to satisfactory"); Hudon v. West Valley Sch. Dist. No. 208, 123 Wn.App. 116, 131, 123 P.3d 39, 47 (Div. III, 2004) (finding employee established prima facie case by showing that after engaging in protected activity she received poor performance evaluation and new supervisor rejected poor evaluation as unjustified).

Ninth Circuit jurisprudence is similar on this issue. See e.g.: Little v. Windermere Realty, 301 F.3d 958, 970-71 (9th Cir. 2002) (stating that employee presented sufficient evidence that reasons for termination were

pretextual where she had received only years of positive feedback prior to termination); Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1287, n. 10 (9th Cir. 2001) (concluding that Appellant's complaints, which closely preceded reduction in her performance review scores, supported a reasonable inference that Respondent acted with a retaliatory motive).

Washington case law seems to recognize a "rebuttable presumption" of causation after a prima facie case is shown, which shifts the burden of persuasion to the employer to prove a non-retaliatory motive for its actions. Vasquez, supra at 985 ("if the employee establishes that he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged, then a rebuttable presumption is created in favor of the employee that precludes us from dismissing the employee's case.") An employee can demonstrate evidence of pretext by showing that: (1) the proffered reasons have no basis in fact, or (2) even if based in fact, the employer was not motivated by these reasons, or (3) the reasons are insufficient to motivate an adverse employment decision. See: Renz, supra at 619 (internal citations omitted).

Finally, in terms of proving causation, it is important to bear in mind that a claimant need not show that retaliatory motivation was the

main reason for action against an employee - liability is established when an employer is motivated in part by retaliation. Kahn, supra at 129.

On or about April 19 or April 20, 2011, Cedar Creek Correctional Center Superintendent Mr. Douglas Cole had a conversation with Appellant Mrs. Nozawa. CP #59, Exh. 7, Pg., 54, lines 3-25, Pgs 55-58. Appellant recalls that the discussion centered on the whistleblower complaint that she filed against Ms. Belinda Stewart for utilizing state resources for private gain. CP #60. Superintendent Cole recalls that the conversation involved a discussion of Appellant "gossiping" about Ms. Belinda Stewart and Mr. Earl Wright. CP 59, Exh. 2, Pg. 18, lines 8-25; Pg. 19, lines 19-25; Pg. 20, lines 1-24; Pg. 21, lines 1-23. Interestingly, Appellant sought the assistance of Mr. Earl Wright in an attempt to obtain shared leave approval. CP 59, Exh. 1; CP 53, Exh. 8. It is difficult to believe that Appellant would have been gossiping about a high ranking DOC official and then seek his assistance. There is no dispute that a conversation between Appellant and Mr. Cole took place wherein the topic of conversation involved Ms. Belinda Stewart. What is in dispute is whether threats were made and whether Appellant was referred to as a whistleblower against Ms. Stewart. Surprisingly, the HR consultant, Ms. Sue Leppard, had no idea regarding the topic of gossiping related to Appellant. CP 59, Ruiz Dep. Pg 10 lines 17-25, pg 11 lines 1-25.

What we know based upon the facts is that Appellant was permitted to work in the administration building on or about April 19 or 20, 2011. Charlie Washburn, second in command at Cedar Creek Correctional Center permitted Appellant to work in the administration building. CP 59, Nozawa Dep. Pg 44 lines 8-25. Mr. Washburn was Appellant's direct supervisor and was in best position to know her job duties. He was in the best position to determine whether a location change to the CCCC administration building was an accommodation appropriate for Appellant's position after her non-work related ankle injury. Not only was Appellant denied meaningful work but she was also being required to accept a reduction in pay in violation of RCW 42.40.050.

Appellant reported retaliation on September 8, 2011, to Sue Leopard (Ruiz), Ms. Leopard's boss Ms. Karen Hopper, Deputy Director Earl Wright, and Superintendent Doug Cole. CP 59, Exh. 1, Ruiz Dep., Pg 29, lines 2-25, Exh. 9. Appellant's retaliation complaint was never investigated and Appellant was never questioned about her complaint of retaliation. In fact, it is the duty of the DOC human resource department and its representatives to follow-up on the slightest complaint of retaliation to that the issue can be determined. Id., Exh. 3, Rodriguez Dep., pages 26-30. According to Mr. Marco Rodriguez, current DOC HR Director, any HR representative is to at least ask clarifying questions of a

complainant when terms of “retaliation” or “discrimination” are mentioned by an employee. Id. Mr. Rodriguez has spent his career in the Human Resource field since 1999 and has a great knowledge of the field as well as the accommodation process for DOC. Id., pages 5-7, pages 30-34.

DOC’s accommodation process is not a cookie cutter process. The information is gathered, assessed, investigated, and analyzed. Once all steps are taken, the information is presented to the appointing authority and that individual makes the ultimate decision. Id, pages 19-23. The appointing authority is the person who has the ability to hire, fire and discipline employees. Id., page 21, lines 13-25, Ruiz Dep., pg. 24 lines 1-25, pg. 25, pg. 26 lines 1-2.

**5. The acts of Respondent constitute action under the “continuing violations doctrine.”**

In National Railroad Passenger Corp. (Amtrak) v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), the United States Supreme Court held that the continuing violation doctrine is available for hostile work environment claims as long as one act of the harassment occurred within the statutory period.

Amtrak hired Abner Morgan, a black male, as an electrician’s helper in August 1990. Morgan claimed that he should have been hired as

an electrician. Morgan eventually was given the electrician's position, but only after he filed a union grievance over the issue.

In February 1991, Morgan was terminated for refusing to follow orders. He filed another union grievance. Morgan won his grievance claim and was reinstated. His termination was reduced to a suspension. Morgan still claimed the suspension was harsher discipline than given to white workers in the same situation.

Morgan further claimed that in 1991 he was treated unfairly when he was given written warnings for insubordination. One warning occurred after he complained to Amtrak's Equal Employment Opportunity office about discrimination and another warning was issued to him shortly after a Congresswoman visited Amtrak's facility to discuss employees' concerns about the company.

Morgan also complained that he was wrongfully denied the ability to return to work in January 1994 without producing a doctor's note even though the company did not have a policy requiring such a note. Finally, Morgan claimed that his managers used racial epithets against him throughout his employment.

Morgan filed a charge of discrimination with the EEOC on February 27, 1995 and cross-filed the charge with the California Department of Fair Employment and Housing. Even though all of the

above conduct occurred more than 300 days prior to Morgan's filing a charge of discrimination, he claimed other discriminatory acts occurred within the statutory period: being denied training, being wrongfully suspended for insubordination, and being falsely accused of threatening a manager.

Morgan also claimed that, on March 3, 1995, he was wrongfully terminated after his manager reported that Morgan threatened the manager. Morgan was ordered to his supervisor's office for a meeting. At the meeting, Morgan asked for union representation or a co-worker witness. His supervisor denied him both and told Morgan to get his "black ass" into the office.

The Ninth Circuit reversed the district court. It held that the continuing violation doctrine "allows courts to consider conduct that would ordinarily be time-barred 'as long' as the untimely incidents represent an ongoing unlawful employment practice." Morgan, 232 F.3d 108, 1014 (9th Cir. 2000) (quotation omitted). Specifically, the Ninth Circuit held that a Appellant could pursue claims that ordinarily would be time-barred so long as they are either "sufficiently related" to incidents that fall within the statutory period or are part of a systematic policy or practice of discrimination that took place, at least in part, within the statutory period.

The Ninth Circuit then remanded the case for a new trial. Amtrak appealed the decision to the United States Supreme Court.

The Supreme Court affirmed the Ninth Circuit in part, reversed in part and remanded the matter. The Supreme Court defined the issue before it as “whether, and under what circumstances, a Title VII Appellant may file suit on events that fall outside [the] statutory time period.”

In an opinion by Justice Thomas, the Court unanimously ruled that discrete discriminatory and retaliatory acts are *not* actionable if time-barred – even if related to timely filed charges. The Court reasoned that discrete acts such as termination, refusal to hire, and denial of a promotion or transfer are “easy to identify” and constitute a separate, actionable unlawful employment practice. Therefore, each discrete act “starts a new clock” for filing charges under Title VII. However, the Appellant still may be able to introduce time-barred acts as evidence at trial to support timely filed charges.

In Appellant’s case, she presented to the trial court evidence related to Superintendent Cole and his human resource representative, who followed the directions of Mr. Cole. Stemming from his conversation with Appellant in the spring of 2011 and his continuing to deny Appellant reasonable accommodations were not only violations of WLAD but they

such actions were also retaliation for Appellant having been a whistleblower against Ms. Belinda Stewart.

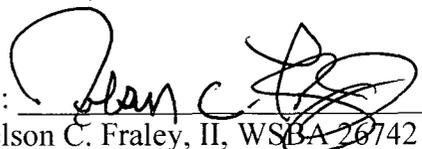
**E. CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Court remand this matter to the trial court to allow Appellant to take her claims to trial against Respondents.

Dated this 11<sup>th</sup> day of October, 2016.

Respectfully submitted,

FAUBION, REEDER, FRALEY  
& COOK, PS

By:   
Nelson C. Fraley, II, WSBA 26742  
Attorney for Appellant

**DECLARATION OF SERVICE**

I certify under penalty of perjury that on the 11<sup>th</sup> day of October 2016, I served a copy of this BRIEF OF APPELLANT to the individuals and via the method(s) designated below:

Grace O'Connor OFFICE OF THE ATTORNEY GENERAL 7141 Cleanwater Drive SW PO Box 40126 Olympia, WA 98504	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email Transmission
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Lona Hertz, Legal Assistant

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Case # 49091-9-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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TANYA NOZAWA,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

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ERRATA SHEET

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On October 10, 2016, Appellant filed her Opening Brief, however, the brief that was filed was a draft and incorrect. The substance of the corrected brief has not changed. Attached is Appellant's corrected Opening Brief with the following changes.

1. Corrected case number;
2. Corrected Table of Authorities;
3. Number 2 under "Assignment of Error" removed; and

4. Words Plaintiff and Defendant changed to Appellant and Respondent.

Dated this 11<sup>th</sup> day of October, 2016.

Respectfully submitted,

FAUBION, REEDER, FRALEY  
& COOK, PS

By: 

Nelson C. Fraley, II, WSBA 26742  
Attorney for Appellant