

NO. 49091-9-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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TANYA NOZAWA, an individual,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT W. FERGUSON  
Attorney General

GRACE C.S. O'CONNOR  
Assistant Attorney General  
WSBA No. 36750  
OID No.: 90123  
7141 Cleanwater Lane S.W.  
P.O. Box 40126  
Olympia, WA 98504  
(360)586-6300

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. RESTATEMENT OF THE ISSUES ON APPEAL .....	2
III. RESTATEMENT OF THE CASE.....	3
A. Ms. Nozawa Joins DOC’s Communications Team As A Graphic Designer, But The Position Is Later Abolished Due To Historic Budget Shortfalls. ....	3
B. Ms. Nozawa Files A Whistleblower Complaint Against Belinda Stewart.....	3
C. Ms. Nozawa Joins Cedar Creek Correctional Facility As A Community Involvement Program Coordinator. ....	4
D. Ms. Nozawa Injures Her Ankle And Asks To Stop Working With Offenders. ....	5
E. Ms. Nozawa Is Accommodated With Nearly Eleven Months Of Paid Leave While DOC Searches For A Temporary Re-Assignment. ....	7
F. Ms. Nozawa Voluntarily Resigns From DOC. ....	10
IV. STANDARD OF REVIEW .....	11
V. ARGUMENT .....	12
A. Ms. Nozawa’s Retaliation Claim Is Time-Barred In Full, And Her Failure To Reasonably Accommodate Claim Is Time-Barred In Part, Because Ms. Nozawa Waived Appeal On This Issue, And Her Claims Accrued More Than Three Years And 60 Days Before She Filed Suit. ....	14
1. This Court Should Affirm On The Dispositive Ground That Ms. Nozawa Waived An Appeal On The Statute Of Limitations Issue. ....	15

2.	Ms. Nozawa Untimely Brought Her Retaliation Claim And, In Part, Her Failure To Reasonably Accommodate Claim.....	17
B.	The Undisputed Record Establishes Ms. Nozawa Was Offered Multiple Reasonable Accommodations.....	19
1.	Ms. Nozawa Offers No Argument Disputing DOC’s Assertion That Ms. Nozawa’s Initial Accommodation Request Was Not Reasonable.....	21
2.	DOC Presented Undisputed Evidence That It Notified Ms. Nozawa of Available Positions For Which She Was Qualified And Which Met Her Medical Restrictions.....	23
3.	DOC Reasonably Accommodated Ms. Nozawa With Nearly Eleven Months Of Paid Leave While It Searched For A Temporary Reassignment.....	28
C.	Ms. Nozawa’s Disability-Based Disparate Treatment Claim Fails As A Matter of Law Because It is Duplicative Of Her Reasonable Accommodation Claim And Ms. Nozawa Identifies No Adverse Employment Action.....	31
1.	Ms. Nozawa’s Disability-Based Disparate Treatment Claim Fails Because It Is Duplicative of Her Claim for Failure to Reasonably Accommodate.....	32
2.	Ms. Nozawa Failed To Make A Prima Facie Showing On Disability-Based Disparate Treatment.....	33
a.	Ms. Nozawa Does Not Identify An Actionable Adverse Employment Action.....	34
b.	Ms. Nozawa Offers No Evidence That A Non-Disabled Person Was Treated More Favorably.....	36

3.	DOC Articulated Legitimate, Non-Discriminatory Reasons For Its Accommodation Decisions, Ms. Nozawa Does Not Dispute These Reasons, And She Raises No Fact Suggesting Pretext.....	37
D.	In Addition To Being Time-Barred, Ms. Nozawa’s Retaliation Claim Fails As A Matter Of Law On The Merits Because She Has Identified No Adverse Employment Action. ....	39
1.	Ms. Nozawa Has Not Raised a Genuine Issue Of Material Fact On The Elements of An Opposition Retaliation Claim.....	41
2.	Ms. Nozawa Has Not Raised A Genuine Issue Of Material Fact On The Elements Of A Whistleblower Retaliation Claim.....	46
VI.	CONCLUSION.....	49

## TABLE OF AUTHORITIES

### Cases

<i>Allison v. Hous. Auth. of City of Seattle</i> , 118 Wn.2d 79, 89 n.3, 821 P.2d 34 (1991).....	41
<i>Andersen v. Prof'l Escrow Servs., Inc.</i> , 141 Idaho 743, 118 P.3d 75 (2005).....	17
<i>Ashcraft v. Wallingford</i> , 17 Wn. App. 853, 565 P.2d 1224 (1977) .....	15
<i>Biales v. Young</i> , 315 S.C. 166, 432 S.E.2d 482 (1993).....	17
<i>Boyd v. Dep't. of Soc. &amp; Health Serv.</i> , 187 Wn. App. 1, 349 P.3d 864 (2015) .....	43
<i>Burlington N. &amp; Santa Fe Ry. Co. v. White</i> , 548 U.S. 53, 126 S.Ct. 2405, 165 L. Ed. 2d 345 (2006) .....	43
<i>Campbell v. Kvamme</i> , 155 Idaho 692, 316 P.3d 104 (2013).....	17
<i>Castro v. Stanwood Sch. Dist. No. 401</i> , 151 Wn.2d 221, 86 P.3d 1166 (2004) .....	17
<i>Christiano v. Spokane County Health Dist.</i> , 93 Wn. App. 90, 969 P.2d 1078 (1998) .....	28, 29
<i>Clarke v. Shoreline Sch. Dist. No. 412, King Cty.</i> , 106 Wn.2d 102, 720 P.2d 793 (1986) .....	24
<i>Coronado v. Valleyview Pub. Sch. Dist. 365-U</i> , 537 F.3d 791 (7th Cir. 2008).....	17
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992) .....	16

<i>Crownover v. State ex rel. Dep't of Transp.</i> , 165 Wn. App. 131, 265 P.3d 971 (2011) .....	34
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003) .....	22
<i>Dean v. Municipality of Metropolitan Seattle-Metro</i> , 104 Wn.2d 627, 708 P.2d 393 (1985) .....	24, 25, 26, 27
<i>Delahunty v. Cahoon</i> , 66 Wn. App. 829, 832 P.2d 1378 (1992) .....	41
<i>deLisle v. FMC Corp.</i> , 57 Wn. App. 79, 786 P.2d 839 (1990) .....	11
<i>Doe v. Boeing Co.</i> , 121 Wn.2d 8, 846 P.2d 531 (1993) .....	20
<i>Douchette v. Bethel Sch. Dist. No.</i> , 403, 117 Wn.2d 805, 818 P.2d 1362 (1991) .....	17
<i>Douglass v. United Services Auto. Ass'n</i> , 79 F.3d 1415 (5th Cir.1996).....	38
<i>Fey v. State</i> , 174 Wn. App. 435, 300 P.3d 435 (2013) .....	21, 23
<i>Francom v. Costco Wholesale Corp.</i> , 98 Wn. App. 845, 991 P.2d 1182 (2000) .....	41
<i>Frisino v. Seattle Sch. Dist. No. 1</i> , 160 Wn. App. 765, 249 P.3d 1044 (2011) .....	21
<i>Fuller v. Frank</i> , 916 F.2d 558 (9th Cir. 1990).....	28, 29
<i>Graves v. Dep't of Game</i> , 76 Wn. App. 705, 887 P.2d 424 (1994) .....	41

<i>Griffith v. Boise Cascade, Inc.</i> , 111 Wn. App. 436, 45 P.3d 589 (2002) .....	20
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.3d 440 (2001) .....	32, 38, 45
<i>Hillebrand v. M-Tron Indus., Inc.</i> , 827 F.2d 363 (8th Cir. 1987).....	11
<i>Jackson v. Quality Loan Serv. Corp.</i> , 186 Wn. App. 838, 347 P.3d 487 (2015) .....	16
<i>Johnson v. Com.</i> , 45 Va. App. 113, 609 S.E.2d 58 (2005).....	17
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 P.2d 321 (1998) .....	12, 41
<i>Kastanis v. Educational Employees Credit Union</i> , 122 Wn.2d 483, 859 P.2d 26 (1994) .....	32
<i>Kellis v. Est. of Schnatz</i> , 983 So.2d 408 (Ala.Civ.App.2007) .....	17
<i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454, 98 P.3d 827 (2004) .....	34, 36
<i>Lodis v. Corbis Holdings, Inc.</i> , 172 Wn. App. 835, 292 P.3d 779 (2013) .....	41
<i>MacLeod v. Reed</i> , 126 Idaho 669, 889 P.2d 103 (Ct. App. 1995) .....	17
<i>Maher v. City of Chicago</i> , 547 F.3d 817 (7th Cir. 2008).....	17
<i>McBride v. Walla Walla Cnty.</i> , 95 Wn. App. 33, 975 P.2d 1029 (1999) .....	12
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973) .....	32, 38, 39, 45

<i>McKee v. Am. Home Prod., Corp.</i> , 113 Wn.2d 701, 782 P.2d 1045 (1989) .....	16
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002) .....	45
<i>Milligan v. Thompson</i> , 90 Wn. App. 586, 953 P.2d 112 (1998) .....	17
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 519 P.2d 7 (1974) .....	11
<i>Nat'l R.R. Passenger Corp. v. Morgan</i> , 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) .....	16
<i>Oliver v. Pac. Northwest Bell Tel. Co.</i> , 106 Wn.2d 675, 724 P.2d 1003 (1986) .....	20
<i>Phillips v. King Cnty.</i> , 136 Wn.2d 946, 968 P.2d 871 (1998) .....	11
<i>Pulcino v. Federal Express</i> , 141 Wn.2d 629, 9 P.3d 787 (2000) .....	24, 33
<i>Reeves v. Sanderson Plumbing Products, Inc.</i> , 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) .....	11, 45
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004) .....	19, 34, 36
<i>Rivas v. Overlake Hosp. Med. Ctr.</i> , 164 Wn.2d 261, 189 P.3d 753 (2008) .....	15
<i>Rochon v. Gonzales</i> , 438 F.3d 1211 (D.C. Cir. 2006) .....	43
<i>Scrivener v. Clark College</i> , 181 Wn.2d 439, 334 P.3d 541 (2014) .....	11

<i>Sentinel C3, Inc. v. Hunt</i> , 181 Wn.2d 127, 331 P.3d 40 (2014) .....	12, 37, 44
<i>Shannon v. Pay 'N Save Corp.</i> , 104 Wn.2d 722, 709 P.2d 799 (1985) .....	31
<i>Sharpe v. Amer. Tel. &amp; Tel. Co.</i> , 66 F.3d 1045 (9th Cir. 1995).....	20, 27, 28
<i>Smith v. King</i> , 106 Wn.2d 443, 722 P.2d 796 (1986) .....	16
<i>State v. Lewis</i> , 62 Wn. App. 350, 814 P.2d 232 (1991) .....	42
<i>Torgerson v. City of Rochester</i> , 643 F.3d 1031 (8th Cir. 2011).....	11
<i>Utah ex rel. Div. of Forestry, Fire &amp; State Lands v. United States</i> , 528 F.3d 712 (10th Cir. 2008).....	17
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989) .....	14

**Statutes**

RCW 4.92.110 .....	17
RCW 42.40 .....	40
RCW 42.40.050 .....	47, 48
RCW 42.40.050(1)(a) .....	47
RCW 42.40.050(1)(b).....	47
RCW 42.40.050(2).....	48
RCW 42.40.050(iv), (viii).....	47
RCW 42.40.050(vii).....	48

RCW 49.60 .....	1, 47
RCW 49.60.180 .....	19
RCW 49.60.210(1).....	39, 40, 41, 42
RCW 49.60.210(2).....	40

**Rules**

CR 56 .....	12
CR 56(c).....	14
CR 56(e).....	12

## I. INTRODUCTION

The Washington Law Against Discrimination (WLAD), RCW 49.60, prohibits any employer from discriminating on the basis of disability. “Discrimination” may take the form of a failure to accommodate a disability, or disparate treatment because of an employee’s disability. The WLAD also protects employees who complain about such discrimination from retaliation. Ms. Nozawa brought these three causes of action against DOC, claiming that DOC failed to accommodate her disability, and discriminated and retaliated against her, after a non-workplace injury prevented her from working directly with offenders, an essential function of her job.

To the contrary, it is undisputed as a matter of fact that after Ms. Nozawa’s injury, during the eleven months she was on paid leave, DOC worked with her to find a suitable temporary position as a reasonable accommodation. Ms. Nozawa rejected every position DOC offered her, and can identify no position she should have been offered or would have accepted. DOC’s search for a temporary reassignment ended only when Ms. Nozawa, still on paid leave, gave notice that she was resigning from DOC to pursue a supervisory position with another agency.

Ms. Nozawa’s claims were properly dismissed on summary judgment based on the applicable statute of limitations and because she

failed to establish essential elements of each claim. This Court should affirm.

## **II. RESTATEMENT OF THE ISSUES ON APPEAL**

1. Whether the trial court properly dismissed as time-barred Ms. Nozawa's claim for failure to reasonably accommodate, in part, and her retaliation claim, in full, where the claims are based on an April 20, 2011, decision that occurred outside the statute of limitations and Ms. Nozawa waived any appeal on this issue.

2. Whether the trial court properly dismissed, as a matter of law, Ms. Nozawa's claim for failure to reasonably accommodate where DOC presented undisputed evidence it offered Ms. Nozawa multiple reasonable accommodations.

3. Whether the trial court properly dismissed, as a matter of law, Ms. Nozawa's disability-based disparate treatment claim where she presented no evidence that she suffered an adverse employment action or that DOC treated a similarly situated, non-disabled employee more favorably.

4. Whether the trial court properly dismissed Ms. Nozawa's retaliation claim where she presented no evidence that she engaged in opposition activity, or that she suffered a retaliatory act or reprisal.

### III. RESTATEMENT OF THE CASE

#### A. **Ms. Nozawa Joins DOC's Communications Team As a Graphic Designer, But The Position Is Later Abolished Due To Historic Budget Shortfalls**

Tonya Nozawa began her career with DOC in the late 1980s. Clerk's Papers (CP) 31 at ¶ 2. In 2004, Ms. Nozawa was promoted to the position of graphic designer in DOC's Communications and Outreach Office, which was located in DOC's headquarters in Tumwater. *Id.* Ms. Nozawa reported to Belinda Stewart. CP at 226, ¶ 3.

In October 2010, Ms. Nozawa learned that her position, along with many others, would be abolished due to historic budget shortfalls. CP at 226-29, ¶ 4, 5, 8, 11. Ms. Nozawa was given a formal layoff option to take a Corrections Specialist 1 position at Cedar Creek Correctional Facility. CP at 232-33. Ms. Nozawa accepted the option, though she was unhappy with the layoff and unsuccessfully grieved the decision. CP at 109.

#### B. **Ms. Nozawa Files A Whistleblower Complaint Against Belinda Stewart**

In November or December 2010, after learning her would be abolished, Ms. Nozawa claims to have filed a whistleblower report against her supervisor, Ms. Stewart. CP at 112-13.<sup>1</sup> Ms. Stewart was eventually disciplined for using state resources to conduct business for outside

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<sup>1</sup> For the purposes of its summary judgment motion, DOC assumed Ms. Nozawa did in fact file a whistleblower complaint against Ms. Stewart.

organizations. DOC Headquarters learned of Ms. Stewart's activities from the State Auditor's Office (SAO) on or around February 11, 2011, as the result of a whistleblower report received by the SAO on or around January 26, 2011. CP at 57-58, 60-66.

**C. Ms. Nozawa Joins Cedar Creek Correctional Facility As A Community Involvement Program Coordinator**

Ms. Nozawa's started working at Cedar Creek on December 1, 2010. CP at 630, ¶ 7. Her supervisor in her new position was Charlie Washburn, the Corrections Program Manager. *Id.* Mr. Washburn reported to the Superintendent of Cedar Creek, Doug Cole. *Id.* Ms. Nozawa's position was Community Involvement Program Coordinator (CIPC). *Id.*<sup>2</sup>

At Cedar Creek, the CIPC works regularly with offenders, overseeing a variety of offender-related programs, offender work crews, and the facility's offender-family events, among other duties. CP at 638-44. A CIPC at Cedar Creek is required to be accessible to the facility's offender population, and to engage in regular in-person contact with offenders. CP at 631, ¶ 12. The CIPC's office was in Cedar Creek's Program building, inside the facility's secure fence. CP at 632, ¶ 1.

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<sup>2</sup> This position is also referred to as the Community Partnership Program Coordinator (CPPC). CP at 630, ¶ 7.

**D. Ms. Nozawa Injures Her Ankle And Asks To Stop Working With Offenders**

In late February 2011, Ms. Nozawa slipped on ice in a non-work related incident and injured her ankle. CP at 87. She was initially advised to stay off her ankle completely, and took paid sick leave from Tuesday, March 1, 2011, through Friday, March 11, 2011. CP at 67, 75, 91-92.

Ms. Nozawa returned to work on Monday, March 14, 2011. *See* CP at 75. She asked to work that day in Cedar Creek's Administration building instead of the Program building, because the Administration building was a shorter walk from the facility parking lot than the Program building. CP at 93-94, 631, at ¶ 14. Superintendent Cole denied this request because it was not reasonable for Ms. Nozawa to relocate to the Administration building; her position required frequent offender contact and offenders could not have regular access the Administration building. CP at 95, 631-34, ¶ 14-21.

However, the location of Ms. Nozawa's office quickly proved irrelevant because Ms. Nozawa's physical activity on March 14 exacerbated her ankle injury, and her doctor advised her to stay off it entirely. CP at 96-97. Ms. Nozawa returned to paid leave (sick and vacation leave) from Tuesday, March 15 through Monday, April 18, 2011. CP at 74-75.

Because Ms. Nozawa had initiated the reasonable accommodation process, on March 15, 2011, Cedar Creek Human Resources Manager Sue Leopold explained to Ms. Nozawa that she would need to provide additional medical information to aid the process. CP at 122, 133-34.<sup>3</sup> Sometime between March 15 and March 24, 2011, Ms. Leopold received information from Ms. Nozawa's medical providers explaining that Ms. Nozawa was restricted from driving *and from working directly with offenders*. CP at 127, ¶ 8; 138. These restrictions were based on Ms. Nozawa's providers' review of her job description. CP at 124, ¶ 8; *see also* CP at 192. On or around March 29, 2011, Ms. Leopold spoke with Ms. Nozawa, and learned that Ms. Nozawa's restrictions remained the same, and she was not cleared to work with offenders. CP at 124, ¶ 9.

Ms. Nozawa returned to work for a day or two on April 19, 2011, but from April 21, 2011, through her resignation from DOC in January 2012, Ms. Nozawa remained on paid leave. CP at 71-74. During the months she was on paid leave, Ms. Nozawa continued to provide notes from her medical providers restricting her from contact with offenders or from working entirely. CP at 141-46, 185. Thus, while Ms. Nozawa initially asked to work in the Administration building due to its proximity

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<sup>3</sup>Ms. Leopold changed her last name to Ruiz since the events at issue here. CP at 122.

to the parking lot, her medical restrictions precluded her at various points from either working at all, or from performing her job as a CIPC, whether in the Administration building or anywhere else on Cedar Creek's grounds.

**E. Ms. Nozawa Is Accommodated With Nearly Eleven Months Of Paid Leave While DOC Searches For A Temporary Re-Assignment**

Because Ms. Nozawa's medical providers restricted her from working with offenders or working at all, Ms. Nozawa was on leave all but a handful of days between March 2011 and January 31, 2012, when she resigned from DOC. Her leave was all paid. CP at 71-75.

Sometime in May 2011, Ms. Nozawa was cleared to return to work so long as she had no contact with offenders, and reiterated her desire to work as a CIPC despite her medical providers' restriction on contact with offenders. CP at 147-48. Ms. Nozawa's desire work as a CIPC without offender contact was frequently referred to in emails between Ms. Nozawa and Ms. Leppard as a "light duty request." *Id.* Ms. Leppard explained again that Ms. Nozawa's CIPC position required her to work regularly with offenders, and that her "light duty request" therefore could not be granted. *Id.*

In late May 2011, Ms. Leppard suggested to Ms. Nozawa the possibility of a temporary reassignment to a position that did not require

regular contact with offenders. CP at 126, 148. A reasonable accommodation in the form of a temporary reassignment required the reassignment position to be vacant, funded, one for which Ms. Nozawa was qualified, and at or below her pay classification. CP at 47, 125, at ¶ 13. This naturally limited the pool of available positions. On May 31, 2011, Ms. Leppard suggested the possibility of placing Ms. Nozawa in an Office Assistant 3 position, which would be housed in the Administration building. CP at 126, ¶ 14. On June 30, 2011, Ms. Nozawa told Ms. Leppard she did not want this position. *Id.*, CP at 161. She asked Ms. Leppard to explore other possible assignments. CP at 161.

On July 5, 2011, Ms. Leppard sent an email to human resources consultants across DOC about their funded vacancies. CP at 126, ¶ 15. On July 12, 2011, Ms. Leppard reminded Ms. Nozawa that she was still waiting for Ms. Nozawa to authorize DOC to communicate with Ms. Nozawa's medical providers. CP at 158. Such authorization was necessary so that DOC could communicate with Ms. Nozawa's doctors about the suitability of potential reassignments in light of Ms. Nozawa's medical restrictions. CP at 154, 156-58, 164. Ms. Nozawa refused to provide the authorization document. *Id.* In a series of emails between July 13, 2011, and August 4, 2011, Ms. Leppard repeated her request and the

reasons for it. CP at 126, ¶ 15-18; 154-68. Ms. Nozawa eventually provided the medical release on or around August 4, 2011. CP at 170-71.

On August 4, 2011, Ms. Leopold followed up on leads she received in July regarding vacant, funded positions. CP at 127, ¶ 18. Ms. Leopold's review of the vacant funded positions revealed two positions for which Ms. Nozawa was qualified and that were at or below her pay classification and met her medical restrictions. CP at 127, ¶ 20. Ms. Nozawa was offered, and rejected, these two positions. CP at 127, ¶ 20, 21. As of September 14, 2011, despite several inquiries, Ms. Leopold was not able to locate other positions for which Ms. Nozawa qualified, and that was geographically near Ms. Nozawa, was vacant and funded, at or below Ms. Nozawa's pay classification, and met Ms. Nozawa's medical restrictions. CP at 127, ¶ 20.

On September 22, 2011, Ms. Nozawa was approved for shared leave, with a retroactive date of September 14, 2011. CP 635 at ¶ 26, 648. Her request was initially denied because there was insufficient information from her medical providers demonstrating the necessity of shared leave. When Ms. Nozawa submitted additional information, Superintendent Cole approved her request. CP at 635, ¶ 26-28. The medical information Ms. Nozawa supplied in support of her approved shared leave request indicated that she could not work at all. CP 651.

Ms. Nozawa's shared leave approval was good for 90 days. CP at 648-52. On November 11, 2011, Ms. Leppard contacted Ms. Nozawa via email to inquire about a return to work. CP at 127-28, ¶ 24. On November 30, 2011, Ms. Nozawa advised Ms. Leppard that it was not clear whether her ankle would be healed enough to return to work with offenders in the next month or so, so she requested that Ms. Leppard continue looking for a temporary reassignment. CP at 188. On Monday, December 5, 2011, Ms. Leppard sent an inquiry to DOC human resources consultants for available positions, which revealed a night shift position in DOC headquarters in Tumwater, as well as an office assistant position in Longview. *Id.* CP at 128, ¶ 25, 26. Ms. Nozawa asked Ms. Leppard to hold off on exploring these possibilities. CP at 195. Meanwhile, Ms. Nozawa's shared leave was approved for another 90 days. CP at 128, ¶ 27.

**F. Ms. Nozawa Voluntarily Resigns From DOC**

On January 13, 2012, Ms. Nozawa resigned from DOC via email, effective January 31, 2012, explaining that she had accepted a new position as a supervisor with a different state agency. CP at 197. In her email, she thanked DOC "for acknowledging my years of dedication and service" and noted her "appreciation for all the amazing opportunities" she was afforded with DOC. *Id.* On June 27, 2014, Ms. Nozawa filed the present employment discrimination lawsuit. On April 15, 2016, the

Thurston County Superior Court dismissed all of Ms. Nozawa's claims. This appeal, involving three of her claims, followed.<sup>4</sup>

#### IV. STANDARD OF REVIEW

Summary judgment is proper when consideration of the admissible evidence establishes the absence of a genuine issue of material fact.<sup>5</sup> *Phillips v. King Cnty.*, 136 Wn.2d 946, 956, 968 P.2d 871 (1998). A material fact is one upon which the outcome of the litigation depends. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). While *reasonable* inferences must be viewed in the light most favorable to the

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<sup>4</sup> On appeal, Ms. Nozawa neither assigns error nor offers argument regarding her hostile work environment and gender-based disparate treatment claims. These claims are thus waived on appeal. Likewise, Ms. Nozawa makes passing reference to "constructive discharge" in the fact-section of her briefing, Br. of Appellant at 9, but she did not plead this claim, argue it before the trial court, and makes no argument as to it now, so it is waived.

<sup>5</sup> Recent dicta from Washington courts suggest that summary judgment is "seldom appropriate" under WLAD. *Scrivener v. Clark College*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014). Upon examination, the authority cited in support of this assertion traces back to *deLisle v. FMC Corp.*, 57 Wn. App. 79, 83-84, 786 P.2d 839 (1990), a case which quoted the "seldom appropriate" language from an Eighth Circuit opinion in *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364-65 (8th Cir. 1987). But the Eighth Circuit has since repudiated this sentiment, affirming that there "is no 'discrimination case exception' to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043, 1060 (8th Cir. 2011).

Indeed, the United States Supreme Court has rejected the notion that courts should "insulate an entire category of discrimination from" judgment as a matter of law, and admonished that courts should not "treat discrimination [claims] differently from other ultimate questions of fact." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

non-moving party, a reasonable inference cannot rest upon supposition, conclusory statements, or mere opinion. *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 127, 140-41, 331 P.3d 40 (2014).

“An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial.” *McBride v. Walla Walla Cnty.*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999); *see Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998); CR 56. Under CR 56(e), “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.”<sup>6</sup>

## V. ARGUMENT

Ms. Nozawa raises three issues on appeal—failure to reasonably accommodate her disability, disability-based disparate treatment, and retaliation. As a threshold matter, the statute of limitations disposes of Ms. Nozawa’s retaliation claim in full, and her failure to reasonably accommodate claim in part, to the extent they are based on the April 20, 2011 denial of her request to avoid offender contact, a decision that

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<sup>6</sup>Below, DOC objected to much of the evidence presented by Ms. Nozawa in opposition to summary judgment as violative of CR 56(e). CP 582. DOC renews that objection here and urges this court to disregard the record Ms. Nozawa built on summary judgment to the extent it is based on speculation, hearsay, or would otherwise be inadmissible at trial.

predated the filing of her lawsuit by more than three years and 60 days. On the merits, Ms. Nozawa's claims fail because she cannot establish their essential elements. On her claim for failure to reasonably accommodate, she cannot show she requested and was denied a reasonable accommodation. On her disability-based disparate treatment and retaliation claims, she cannot show she suffered an adverse employment action.

Critically, Ms. Nozawa identifies only two events that she claims constitute either a failure to reasonably accommodate or an adverse employment action: 1) Superintendent Cole's decision denying her request to work as a CIPC in the Administration building, and 2) her unsubstantiated claim that in July 2011 DOC failed to offer her vacant positions it should have. *See* Br. of Appellant at 17-19 (identifying the denial of request to work in the Administration building and the search for a temporary position in relation to the accommodation claim); at 21 (claiming (without evidence) that DOC failed to offer her available positions in July 2011 and arguing this constituted an adverse employment action for the purposes of her disability-based disparate treatment claim); at 33-35 (arguing that the denial of her request to relocate to the Administration building was an adverse employment action for the purposes of her retaliation claim).

Despite the lengthy factual recitation in Ms. Nozawa's opening brief, these two events are the only events to which she attributes liability to DOC. For the reasons that will be explained below, and as the trial court properly concluded, these events do not as a matter of law meet the threshold requirements for Ms. Nozawa's claims. Because she cannot make a prima facie showing on any claim, the trial court properly dismissed her claims on summary judgment. CR 56(c).<sup>7</sup> This Court should affirm the summary judgment dismissal.

**A. Ms. Nozawa's Retaliation Claim Is Time-Barred In Full, And Her Failure To Reasonably Accommodate Claim Is Time-Barred In Part, Because Ms. Nozawa Waived Appeal On This Issue, And Her Claims Accrued More Than Three Years And 60 Days Before She Filed Suit**

This Court should affirm dismissal of Ms. Nozawa's claim for retaliation, and the portion of her reasonable accommodation claim based on events prior to May 4, 2011, as untimely. The applicable statute of limitations disposes of Ms. Nozawa's retaliation claim in full, and her claim for failure to reasonably accommodate in part, for two reasons. First, Ms. Nozawa failed to address this affirmative defense on summary

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<sup>7</sup> A defendant may move for summary judgment by simply pointing out to the trial court that the plaintiff lacks sufficient evidence to support the essential elements of his or her claims, or by providing declarations demonstrating the absence of a genuine issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-27, 770 P.2d 182 (1989). In this case, DOC expressly moved for summary judgment under both techniques—DOC argued that Ms. Nozawa lacked sufficient evidence to support any of the essential elements of her claims, and DOC provided evidence affirmatively demonstrating the absence of a genuine issue of material fact.

judgment, and failed to assign error to it on appeal. This alone provides this Court with reason to affirm the trial court's dismissal of these claims. Second, on the merits, Ms. Nozawa's claims were untimely brought, and therefore should be dismissed as a matter of law.

**1. This Court Should Affirm On The Dispositive Ground That Ms. Nozawa Waived An Appeal On The Statute Of Limitations Issue**

DOC moved for summary judgment on several alternative grounds below, one of which was its affirmative defense that some of Ms. Nozawa's claims were untimely brought. To avoid dismissal of these claims before the trial court on statute of limitations grounds, Ms. Nozawa then bore the burden of establishing an exception to the general rule that claims accrue when tortious conduct occurs. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008). But before the trial court, Ms. Nozawa made *no argument* in response to DOC's statute of limitations argument, let alone an attempt to argue an exception to the general accrual rule. *See* CP at 234-59. "A party has the obligation to assert its claims, legal positions, and arguments to the trial court to preserve alleged error on appeal." *Ashcraft v. Wallingford*, 17 Wn. App. 853, 860, 565 P.2d 1224 (1977). Ms. Nozawa did not preserve any argument in answer to DOC's statute of limitations argument, and cannot assert one now on appeal.

Ms. Nozawa further compounded this omission by failing before this Court to assign error to the dismissal on statute of limitations grounds, or present argument concerning this issue in her opening brief. Indeed, the phrase “statute of limitations” does not appear in her brief at all.<sup>8</sup> Ms. Nozawa thereby waived her ability to challenge this dispositive issue on appeal. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (plaintiffs waived assignment of error by failing to present argument in their opening brief); *McKee v. Am. Home Prod., Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (“We will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority.”); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845-46, 347 P.3d 487 (2015), *review denied*, 184 Wn.2d 1011, 360 P.3d 817 (2015) (an appellate court will not consider a claim of error that a party fails to support with legal argument in an opening brief). With respect to Ms. Nozawa’s retaliation claim, and a

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<sup>8</sup>Ms. Nozawa’s may be attempting to (improperly) argue the statute of limitations issue with her discussion of the continuing violation doctrine. Br. of Appellant at 35-39. This discussion is inapposite, even if not improperly raised. The doctrine does not apply to retaliation or reasonable accommodation claims. It only applies to hostile work environment claims. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) (holding that when considering “the entire scope of a *hostile work environment claim*, including behavior alleged outside the statutory time period” is permissible) (emphasis added). There is no hostile work environment claim here.

portion of her reasonable accommodation claim, this renders moot her other arguments on the substantive merits of these issues offered in her opening brief, because even if her argument on those issues had merit, summary judgment must still be affirmed on this dispositive ground to which Ms. Nozawa failed to assign error or address. *Id.*<sup>9</sup>

**2. Ms. Nozawa Untimely Brought Her Retaliation Claim And, In Part, Her Failure To Reasonably Accommodate Claim**

The statute of limitations for these claims is three years. *Milligan v. Thompson*, 90 Wn. App. 586, 591, 953 P.2d 112 (1998) (*Milligan I*); *Douchette v. Bethel Sch. Dist. No.*, 403, 117 Wn.2d 805, 809-10, 818 P.2d 1362 (1991). The requirement to file a tort claim prior to filing a complaint tolls, and thereby extends, the statute of limitations for 60 days. RCW 4.92.110; *see Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 225-26, 86 P.3d 1166 (2004). Thus, claims that accrued more than

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<sup>9</sup> This is not just the rule in Washington, but is followed by other jurisdictions that have confronted an appellant's failure to challenge one of the alternative grounds for summary judgment. As one court explained, "When a decision is 'based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds.'" *Andersen v. Profl Escrow Servs., Inc.*, 141 Idaho 743, 746, 118 P.3d 75, 78 (2005) (quoting *MacLeod v. Reed*, 126 Idaho 669, 671, 889 P.2d 103 (Ct. App. 1995)); *see also Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104 (2013); *Kellis v. Est. of Schnatz*, 983 So.2d 408, 413 (Ala.Civ.App.2007); *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482, 484 (1993); *Johnson v. Com.*, 45 Va. App. 113, 609 S.E.2d 58, 60 (2005); *Maher v. City of Chicago*, 547 F.3d 817, 821 (7th Cir. 2008); *Coronado v. Valleyview Pub. Sch. Dist. 365-U*, 537 F.3d 791, 797 (7th Cir. 2008); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States*, 528 F.3d 712, 724 (10th Cir. 2008).

three years and 60 days before Ms. Nozawa filed her Complaint are barred by the statute of limitations. Ms. Nozawa filed her Amended Complaint on July 3, 2014. CP at 11. Therefore, claims that accrued before May 4, 2011, (three years and 60 days prior to July 3, 2014) are time-barred.

Ms. Nozawa identifies Superintendent Cole's decision to deny her request to relocate her office to the Administration building as one basis for her failure to reasonably accommodate claim and *the sole* basis of her retaliation claim. Br. of Appellant at 17-19 (failure to accommodate); Br. of Appellant at 33-35 (retaliation). Ms. Nozawa claims this decision was first made on April 19 or 20, 2011.<sup>10</sup> Br. of Appellant at 8. This brief will assume the April 20 date. Because the decision therefore predates May 4, 2011, to the extent her claims are premised on the April 20, 2011, decision about offender contact, these claims are barred as a matter of law.<sup>11</sup>

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<sup>10</sup> Ms. Nozawa's sole citation to the record in support of this date actually demonstrates the decision was made even earlier, in March 2011. *See* Br. of Appellant at 8 (citing "CP #59, Exh. 7, pgs 54-58; 60:10-24, 65, 67:5-8, 68:2-17, 70:20-25, 71:1-25, 76-81, 112:7-25, 113, 149-150," which translate to Clerk's Paper cites, respectively, as CP 423-27, 428, 431, 432, 433, 434, 435, 436-38, 450, 451, and 456-457). These citations, which all come from Ms. Nozawa's deposition, reveal that she recalls the decision not to allow her to relocate to the Administration building was made in March, while another alleged conversation with Superintendent Cole took place on April 19 or 20. But for the sake of argument, DOC will assume this decision occurred on April 20, 2011.

<sup>11</sup> Before the trial court, DOC based its statute of limitations argument on the date Ms. Nozawa's amended complaint was filed, July 3, 2014. Ms. Nozawa did not object to this assertion below and did not address it at all in her opening brief before this Court. However, in preparing this briefing DOC counsel realized that Ms. Nozawa filed her original complaint on June 27, 2014, (CP at 4), making

This Court could stop here with regard to Ms. Nozawa's retaliation claim, and with regard to her reasonable accommodation claim to the extent it is based on the April 20, 2011, decision about the Administration building. But those claims also fail as a matter of law on the merits, as do her claims predicated on events that took place within the statute of limitations—namely, DOC's efforts to find her a suitable temporary position while her ankle healed. This briefing will now turn to those arguments.

**B. The Undisputed Record Establishes Ms. Nozawa Was Offered Multiple Reasonable Accommodations**

To overcome summary judgment on a claim for failure to reasonably accommodate a disability under WLAD, RCW 49.60.180, a plaintiff must establish a prima facie case by demonstrating (a) that she was qualified to perform the essential functions of the job in question and (b) that upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.<sup>12</sup> *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004).

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April 28, 2011, the earliest date by which a claim must have accrued to have been timely brought. Nonetheless, the earlier date does not change the analysis herein because the conduct at issue occurred *before* April 28, 2011.

<sup>12</sup> The plaintiff must also demonstrate that she had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job and that the employee gave the employer notice of the abnormality and its

An employee is not entitled to the accommodation of her choice. *An employer* ultimately selects the accommodation it will provide, and need not provide the accommodation requested by the employee. *Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993) (explaining that WLAD “does not require an employer to offer the employee the precise accommodation he or she requests.”); *Sharpe v. Amer. Tel. & Tel. Co.*, 66 F.3d 1045, 1050-51 (9th Cir. 1995).<sup>13</sup> The employer meets its obligation by offering an accommodation that is reasonable, even if the offered accommodation is not what the employee desires. *Sharpe*, 66 F.3d at 1050; *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 442-43, 45 P.3d 589 (2002).

Ms. Nozawa’s claim for failure to reasonably accommodate is premised on her belief that DOC failed to accommodate her ankle injury. CP at 12, 104-05. She bases her claim upon two discrete acts she attributes to DOC: the decision not to allow her to work as a CIPC in the Administration building away from offenders, and the purported failure of DOC to offer her five positions in July 2011. Neither basis is supported by

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accompanying substantial limitations. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004). For purposes of summary judgment only, DOC conceded these elements.

<sup>13</sup> Washington courts look to federal law as persuasive authority in construing Washington anti-discrimination statutes where not inconsistent. *See Oliver v. Pac. Northwest Bell Tel. Co.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986).

competent evidence so as to overcome a summary judgment attack, and this Court should affirm dismissal, particularly where DOC offers undisputed evidence of multiple accommodations it offered her: temporary reassignments and paid leave.

**1. Ms. Nozawa Offers No Argument Disputing DOC's Assertion That Ms. Nozawa's Initial Accommodation Request Was Not Reasonable**

As explained above, any claim premised on the April 20, 2011, decision denying Ms. Nozawa's request to work in the Administration building away from offenders is barred by the statute of limitations. In addition, it fails on the merits because Ms. Nozawa cannot make the required prima facie showing that she was qualified to perform the essential functions of the job in question with or without reasonable accommodation.

"A reasonable accommodation must allow the employee to work in the environment *and perform the essential functions of her job* without substantially limiting symptoms." *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 777-78, 249 P.3d 1044 (2011) (emphasis added). As a matter of law, an employer is not required to "revamp the essential functions of a job to fit the employee." *Fey v. State*, 174 Wn. App. 435, 452, 300 P.3d 435 (2013). "[T]he employer's identification or judgment as to the essential functions of a position is entitled to deference." *Id.* at 451.

“[A]n ‘essential function’ is 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.” *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533, 70 P.3d 126 (2003).

On summary judgment DOC asserted that Ms. Nozawa’s request to work in the Administration building was not reasonable given that an essential function of Ms. Nozawa’s job as a CIPC was to regularly interact with offenders and it was not possible to have offenders regularly escorted outside the secure perimeter to the Administration building. CP at 212, n.92. Likewise, DOC argued that the location of Ms. Nozawa’s work station quickly became irrelevant, because as early as March 24, 2011, her medical providers restricted her contact with offenders entirely, and she could not perform an essential function of her position. CP at 138.

Before this Court, Ms. Nozawa offers no analysis, argument, or evidence rebutting these assertions, so she has made no argument to which DOC can respond. *See* Br. of Appellant at 11-19. There is no genuine issue of material fact in this appeal as to the essential functions of Ms. Nozawa’s position, or the unreasonableness of the initial accommodation she asked for. It is unrebutted before this Court, as it was before the trial court, that Ms. Nozawa’s ankle injury prevented her from working with offenders as of at least March 24, 2011 (CP at 124, ¶ 8;137-

38); that at Cedar Creek, frequent contact with offenders was an essential function of the position (CP at a630-31, ¶ 10-12; 638-44); and that therefore Ms. Nozawa was not qualified to perform the job of a CIPC as of March 24, 2011. It is un rebutted that on this date, she essentially asked that work with offenders be removed from her job duties.

This was not an accommodation request. It was a request to revamp the essential functions of her job, a request that Washington law recognizes is not reasonable. *Fey*, 174 Wn. App. at 452. Before this Court, Ms. Nozawa offers no authority or fact that changes this conclusion. As a matter of law, DOC is not liable for denying Ms. Nozawa's request to avoid working with offenders as a CIPC. The trial court properly dismissed her accommodation claim to the extent it was premised on her request not to work with offenders, either in the Administration building or elsewhere.

**2. DOC Presented Undisputed Evidence That It Notified Ms. Nozawa of Available Positions For Which She Was Qualified And Which Met Her Medical Restrictions**

Ms. Nozawa's second basis for claiming a failure to reasonably accommodate her is her assertion that DOC failed to offer her temporary positions that it should have. Br. of Appellant at 17-19. Ms. Nozawa's suggestion is that DOC should have offered her 5 vacancies in July 2011

and that the “failure” to do so creates a genuine issue of material fact for a jury as to whether Ms. Nozawa was reasonably accommodated.

She is incorrect. She has not set forth sufficient evidence about the July 2011 positions to raise a genuine issue of material fact about DOC’s reasonable accommodation efforts. Moreover, she does not dispute the facts demonstrating DOC’s affirmative participation in the temporary reassignment process, including the offer of two temporary positions and notification of a third that was pending when she voluntarily resigned from DOC. For these multiple reasons, the trial court properly rejected Ms. Nozawa’s claim for failure to reasonably accommodate.

As a matter of law, a temporary reassignment is a reasonable accommodation. *Clarke v. Shoreline Sch. Dist. No. 412, King Cty.*, 106 Wn.2d 102, 121, 720 P.2d 793 (1986). But an employer is not required to reassign an employee to a position that is already occupied or to create a new position. *Id.*; *Pulcino v. Federal Express*, 141 Wn.2d 629, 643-44, 9 P.3d 787 (2000) (*overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006)). When an employee bases a claim for failure to reasonably accommodate on an employer’s failure to provide a temporary reassignment, the employee makes out a prima facie case when 1) she had the qualifications to fill vacant positions and 2) the employer failed to take affirmative measures to make known such job

opportunities to the employee and to determine whether the employee was qualified for those positions. *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 639, 708 P.2d 393 (1985). On this record, under this test Ms. Nozawa fails to make a prima facie case.

Ms. Nozawa claims that she was not offered 5 positions vacant in July 2011. Br. of Appellant at 18 (referencing an exhibit that appears at CP 552). Mere identification of these positions as vacant in July 2011 fails to make a prima facie case. Ms. Nozawa must show that she had the qualifications to fill these vacant positions. *Dean*, 104 Wn.2d at 639. She put forth no evidence before the trial court about these positions' required qualifications or whether she met them.

Further, a July 2011 vacancy is irrelevant on this record. There is no dispute that in July 2011 Ms. Nozawa refused to submit the medical authorization that would have enabled Ms. Leppard to act on vacant, funded positions for which Ms. Nozawa was qualified by allowing her to communicate with medical providers about whether proposed positions met Ms. Nozawa's medical restrictions. CP at 154, 156-58, 164. Ms. Nozawa did not submit that paperwork until August 4, 2011. CP at 126, ¶ 15-18; 153-71. Evidence of vacancies in July 2011 has no relevance to whether these positions could have been offered to Ms. Nozawa.

There is no dispute of material fact about DOC's efforts here, which demonstrate that DOC took "affirmative measures" to determine if Ms. Nozawa was qualified for vacant positions and to notify her of such positions. *Dean*, 104 Wn.2d at 639. Ms. Nozawa claims, "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." Br. of Appellant at 18. The record flatly contradicts this claim. The unrebutted testimony is: Sue Leppard followed up on the leads Ms. Lasley provided in her July 7 email to Ms. Leppard (CP at 126-27, ¶ 18; 168);<sup>14</sup> that Ms. Leppard reviewed potential positions to determine whether they were vacant and funded, in or below Ms. Nozawa's pay classification, whether Ms. Nozawa was qualified for them with or without reasonable accommodation, and whether they met Ms. Nozawa's medical restriction on offender contact (CP at 125, ¶ 13); and that after this review, DOC offered Ms. Nozawa the positions that met these criteria (CP at 127, ¶ 20; 176-78). Ms. Nozawa declined them.

Between September and November 2011, Ms. Nozawa was on shared leave and restricted from working at all by her medical providers. CP at 127, ¶ 2; 185, 188. In December 2011, Ms. Leppard notified Ms. Nozawa about a potential graveyard Correctional Records Technician

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<sup>14</sup> The email at CP 168 is the same July 7, 2011, email found at CP 552.

I position (CRT1). CP at 128, ¶ 25-26; 189-95.<sup>15</sup> Ms. Nozawa told Ms. Leopard not to look into the position right away because it was a graveyard position. CP at 128, ¶ 26; 194-205, 598-99. This position was pending as a potential temporary assignment when Ms. Nozawa resigned.

The record is unequivocal that DOC took myriad affirmative steps to assist Ms. Nozawa with a temporary reassignment and notified Ms. Nozawa of all possible temporary reassignments. *Dean*, 104 Wn.2d at 639. The fact that DOC did not have a vacant assignment to offer for which Ms. Nozawa was qualified, that met her medical restrictions, and that Ms. Nozawa also wanted before Ms. Nozawa accepted another position with a different agency is not evidence of failure to reasonably accommodate. In *Sharp*, the Ninth Circuit considered a reasonable accommodation claim under WLAD on summary judgment. It held that as a matter of law, the employer had reasonably accommodated the employee by taking affirmative steps to find the employee another position within the company while allowing the employee paid leave. *Sharpe*, 66 F.3d at 1050-51. The fact that the employee was not qualified for any of the available positions, and therefore was not hired for them, did not

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<sup>15</sup> This was the same position that had been identified as vacant in Ms. Lasley's July 7, 2011, email. CP at 613-14, ¶ 4. After the July vacancy was filled, the position was next vacant on October 1, 2011. CP at 614, ¶ 4.

undermine that court's conclusion that the employer's accommodation efforts were reasonable as a matter of law. *Id.* at 1051.

Here, DOC took exactly the same steps on Ms. Nozawa's behalf, and therefore reasonably accommodated her as a matter of law. Indeed, the only significant factual difference between this case and *Sharpe* is that here Ms. Nozawa turned down available positions, rather than being passed over for the positions by DOC, making DOC's position even stronger here than that of the employer in *Sharpe*. Ms. Nozawa was offered all positions that met the criteria for a temporary reassignment, and she offers no fact to dispute this reality. As a matter of law, DOC's affirmative temporary reassignment efforts offered Ms. Nozawa reasonable accommodation.

**3. DOC Reasonably Accommodated Ms. Nozawa With Nearly Eleven Months Of Paid Leave While It Searched For A Temporary Reassignment**

As a matter of law, approving paid leave is a reasonable accommodation. *See Fuller v. Frank*, 916 F.2d 558, 560, 562 (9th Cir. 1990) (granting leave without pay for treatment fully satisfies duty of reasonable accommodation); *see Christiano v. Spokane County Health Dist.*, 93 Wn. App. 90, 94, 969 P.2d 1078 (1998) (explaining that granting all of plaintiff's leave requests, in concert with other accommodation

efforts, meant reasonable minds could only conclude plaintiff was reasonably accommodated).

When Ms. Nozawa refused the multiple available, vacant, funded positions for which she was qualified, DOC could have initiated a disability separation and terminated Ms. Nozawa from employment. CP at 48. It did not do so. Instead, it approved Ms. Nozawa's requests for leave, with no end in sight. CP at 127, ¶ 23; 128, ¶ 23.<sup>16</sup> Like the employer in *Fuller*, DOC approved paid leave. Like the employer in *Christiano*, it coupled its leave approval with other efforts to accommodate Ms. Nozawa. As a matter of law, Ms. Nozawa's paid leave was a reasonable accommodation.<sup>17</sup>

As a final matter, Ms. Nozawa claims, without citation, that DOC applied to her accommodation request a policy concerning on-the-job injuries, as distinct from the policy concerning reasonable accommodation of a disability. Br. of Appellant at 17 (referencing DOC Policy 830.200, concerning work place injuries). It is not clear what relevance

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<sup>16</sup> Ms. Nozawa's leave history shows one day of leave without pay (LWOP) between March 2011 and January 2012, on March 28, 2011. CP at 74. This LWOP was not related to her disability leave, but was rather a mandatory furlough imposed on all Cedar Creek non-essential staff as a result of budget shortfalls. CP at 636, ¶ 30; 659.

<sup>17</sup> Ms. Nozawa claims that shared leave is not an accommodation. Br. of Appellant at 9. She cites to a portion of Ms. Leppard's deposition without also citing to a later clarification in the same deposition that shared leave is an accommodation. *Compare* CP at 286, *with* CP at 611-12. *See also* CP at 47-48.

Ms. Nozawa believes this assertion has to her arguments. However, the record clearly reflects that DOC applied the appropriate policy concerning disability accommodation, DOC Policy 840.100. CP at 134 (email to Ms. Nozawa from Human Resources Manager Susanna Leopold attaching Policy 840.100).<sup>18</sup>

In sum, Ms. Nozawa's reasonable accommodation claim fails for the principle reason that the undisputed facts show she was offered multiple reasonable accommodations. Her claim is premised on assertions unsupported by either legal or factual argument. She offers no dispute of material fact about DOC's efforts to find her a temporary assignment while approving nearly eleven months of paid leave. The trial court properly dismissed her reasonable accommodation claim and this Court should affirm that decision.

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<sup>18</sup>It is worth noting that there is an important distinction between these two policies. An on-the-job injury that prevents an employee from performing his or her regular duties is covered by worker's compensation laws under RCW Title 51, and results in an employee being assigned to "light duty," *wherein he or she may have essential functions removed from their position or may be temporarily placed in another position at their normal rate of pay*. CP at 39-40 (Policy 830.200 explaining modified duty following an on-the-job injury). In contrast, DOC Policy on disability accommodation—tracking with reasonable accommodation law as described above—does not require an employer to strip essential functions from a position or place an employee in a temporary position at their same rate of pay. CP at 47 (Policy 840.100). At various points in her briefing before the trial court and this Court, Ms. Nozawa seems to assume, mistakenly, that the accommodations available under worker's compensation law should have been available to her.

**C. Ms. Nozawa’s Disability-Based Disparate Treatment Claim Fails As A Matter of Law Because It is Duplicative Of Her Reasonable Accommodation Claim And Ms. Nozawa Identifies No Adverse Employment Action**

Disparate treatment, which “is the most easily understood type of discrimination,” occurs when “the employer simply treats some people less favorably than others” because of a protected characteristic. *Shannon v. Pay ‘N Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985) (overruled on other grounds by *Blair v. Washington State University*, 108 Wn.2d 558, 740 P.2d 1379 (1987)).

In discrimination claims such as this one, where the plaintiff lacks direct evidence of discriminatory intent, Washington courts employ the following four-step burden-shifting scheme to rule on summary judgment motions:

- First, the plaintiff bears the burden of establishing a prima facie case of discrimination, and the defendant is entitled to judgment as a matter of law if the plaintiff fails to meet this burden.
- Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a nondiscriminatory reason for the adverse employment action at issue.
- Third, if the defendant articulates such a reason, the burden shifts back to the plaintiff to produce evidence demonstrating that the reason was pretext, and the defendant is entitled to judgment as a matter of law if the plaintiff fails to meet this burden.
- Fourth, if the plaintiff demonstrates pretext, summary judgment is denied if the record contains reasonable but

competing inferences of both discrimination and nondiscrimination.

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 490-91, 859 P.2d 26 (1994); see *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-82, 186-90, 23 P.3d 440 (2001).

Here, Ms. Nozawa cannot even make a prima facie case, so DOC is entitled to judgment as a matter of law at the first step of the *McDonnell Douglas* test. In addition, even if she had made a prima facie case, DOC articulated a nondiscriminatory reason for the actions it took, and Ms. Nozawa offers no evidence that this reason is pretext for discrimination. Moreover, Ms. Nozawa's disparate treatment claim is premised entirely on her belief that DOC failed to accommodate her; her disparate treatment claim is thus duplicative of her reasonable accommodation and for this reason alone should fail. For these reasons, the trial court properly dismissed the claim and this Court should affirm.

**1. Ms. Nozawa's Disability-Based Disparate Treatment Claim Fails Because It Is Duplicative of Her Claim for Failure to Reasonably Accommodate**

Ms. Nozawa's asserted "adverse actions" are the same claimed failures she uses to underpin her claim for failure to reasonably accommodate. This fact alone requires dismissal of Ms. Nozawa's

disparate treatment claim. An “adverse action” in the form of a failure to reasonably accommodate is properly brought only as a claim for failure to reasonably accommodate. *Pulcino*, 141 Wn.2d at 640. Ms. Nozawa’s claim for failure to reasonably accommodate fails on the merits for the reasons described in Section V.B. of this brief, which means she was not discriminated against as a result of those events. They cannot be repurposed as an adverse employment action for a disparate treatment claim. But if this Court concludes that her reasonable accommodation claim survives summary judgment, her disability-based disparate treatment claim is subsumed in her accommodation claim. *Pulcino*, 141 Wn.2d at 640. In other words, the claims may fall together, but they cannot stand together.

DOC argued this point below, and Ms. Nozawa offered no argument in response before the trial court. For the reasons and under the authority argued in Section V.A, Ms. Nozawa failed to preserve error on this dispositive argument, and this Court could end its analysis on her disparate treatment claim here.

**2. Ms. Nozawa Failed To Make A Prima Facie Showing On Disability-Based Disparate Treatment**

A prima facie case for disability-based disparate treatment requires the employee to show, *inter alia*, that she suffered an adverse employment

action and that she was treated differently than someone not in the protected class. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 827 (2004); *Riehl*, 152 Wn.2d at 150. Ms. Nozawa can show neither.

**a. Ms. Nozawa Does Not Identify An Actionable Adverse Employment Action**

“An actionable adverse employment action must involve a change in employment conditions that is more than an ‘inconvenience or alteration of job responsibilities.’” *Kirby*, 124 Wn. App. at 465 (citation omitted); *Crownover v. State ex rel. Dep’t of Transp.*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011). Examples of an adverse employment action include a “demotion, or adverse transfer, or a hostile work environment that amounts to an adverse employment action,” *Kirby*, 124 Wn. App. at 465, and “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Crownover*, 165 Wn. App. at 148.

Ms. Nozawa identifies only two claimed adverse actions. First, she identifies the claimed failure of DOC to offer her the positions that were vacant in July 2011. Br. of Appellant at 21. As explained above, this claim fails. *See* Section V.B.2. As a matter of law, the mere existence of five positions in July 2011 is not an adverse employment action. *See Crownover*, 165 Wn. App. at 148.

Second, Ms. Nozawa also appears to claim as an adverse action Superintendent Cole's "requirement" that she be able to respond to emergencies. Br. of Appellant at 21-22. But as Superintendent Cole and DOC imposed no such requirement, this cannot constitute an adverse employment action. Superintendent Cole, and DOC, never required Ms. Nozawa to be able to respond to emergencies, and never stated that she could not work around offenders with an injured ankle.<sup>19</sup> That requirement came from Ms. Nozawa's medical providers. CP at 138, 142, 144-46. It is unchallenged that Ms. Nozawa's medical providers imposed the restriction that she could not work with offenders because her ankle injury prevented her from running. CP at 124, ¶ 8; 138, 192, 142 (note from doctor explaining that Ms. Nozawa was "unable to run and cut, therefore I am requesting 1-2 more weeks out [of work] [. . .] unless you have light duty away from inmates.").

In sum, Ms. Nozawa failed to identify an adverse employment action, an essential element of a disparate treatment claim. The trial court properly dismissed the claim, and this Court should affirm.

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<sup>19</sup> As Ms. Nozawa notes, in his deposition Superintendent Cole explained that he himself had "no concerns" about "the physical ability of volunteers who worked around inmates." Br. of Appellant at 21 (referencing CP 327-29). As Superintendent Cole stated in response to a question about how he would deal with a volunteer who had broken a leg, "I don't have any specifics about whether they come in or not. It's if they feel that they are able to come and capable, then we would facilitate their access to that program." CP at 328-29.

**b. Ms. Nozawa Offers No Evidence That A Non-Disabled Person Was Treated More Favorably**

Ms. Nozawa's prima facie case also fails because she does not put forth any evidence that a non-disabled person was treated more favorably than she was. *Kirby*, 124 Wn. App. at 468; *Riehl*, 152 Wn.2d at 150. The only individual she points to is another DOC employee named Tammy White. Br. of Appellant at 21. Ms. Nozawa alleges that Ms. White was reasonably accommodated with a "light duty" position, and that this therefore demonstrates that others were treated more favorably than Ms. Nozawa was.

Ms. White is a false comparator. Ms. White was disabled by reason of a work-place injury, so she does not represent a non-disabled person treated more favorably than Ms. Nozawa. There is no evidence Ms. White was offered positions Ms. Nozawa should have received. And Ms. White was accommodated under worker's compensation laws due to her work-place injury, an entirely separate process than reasonable accommodation for an off-work injury.<sup>20</sup> What Ms. White did or did not receive is entirely irrelevant to Ms. Nozawa's claim, and in no way advances her attempts to survive summary judgment. Ms. Nozawa failed to raise a genuine issue of

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<sup>20</sup> See discussion, *supra*, n.18.

material fact as to the fourth prong of a prima-facie disability-based disparate treatment claim.

**3. DOC Articulated Legitimate, Non-Discriminatory Reasons For Its Accommodation Decisions, Ms. Nozawa Does Not Dispute These Reasons, And She Raises No Fact Suggesting Pretext**

Even if this Court finds that Ms. Nozawa makes out a prima facie case for disability-based discrimination, which she has not, DOC articulated legitimate, non-discriminatory motives for its accommodation decisions, and Ms. Nozawa did not rebut those reasons such that she raised a genuine issue of material fact as to pretext for disability discrimination. As to the decision not to allow her to work as a CIPC without working with offenders, DOC provided ample evidence as to the legitimate reasons for this decision, CP at 630-34, ¶¶ 10-12, 16-18, 23, and Ms. Nozawa has not rebutted any of the factual assertions underpinning this decision.<sup>21</sup> Likewise, with regard to its efforts to find her a temporary position, the undisputed record demonstrates that DOC notified Ms. Nozawa of vacant,

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<sup>21</sup>Ms. Nozawa makes passing reference to the fact that she was a CIPC at two separate facilities before Cedar Creek, and in neither position did she have to work directly with offenders. Br. of Appellant at 8-9. This unsubstantiated statement does not create a genuine issue of material fact about the essential functions of her position at Cedar Creek. *Sentinel C3, Inc.*, 181 Wn.2d at 140-41. And she concedes that a superintendent may require different essential functions from a CIPC than a superintendent at a different facility, so it is undisputed that what she experienced at another facility is irrelevant. CP at 594.

funded positions for which she qualified and that met her medical restrictions on offender contact.

Ms. Nozawa does not set forth any evidence challenging DOC's good faith decisions throughout the reasonable accommodation process such that a material issue of fact creating an inference of pretext is raised. *See Hill*, 144 Wn.2d at 190 n.14 (relevant inquiry in pretext is whether an employer honestly believed the reason when he or she made the relevant decision); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir.1996) (explaining that "employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion[.]").

Even if Ms. Nozawa could establish a prima facie case of disability discrimination and pretext—which she cannot—there would still be insufficient evidence of disability discrimination to survive summary judgment. If a plaintiff demonstrates pretext, the court is then required under *McDonnell Douglas* to look at the entire record and determine whether it permits "*reasonable but competing inferences of both discrimination and nondiscrimination.*" *Hill*, 144 Wn.2d at 186 (emphasis in original). This fourth step exists because "there will be instances where, although the plaintiff has . . . set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the

action was discriminatory.” *Id.* at 188-89. There is simply no evidence of disability-based discriminatory animus against Ms. Nozawa—and in fact there is significant evidence of a *lack* of animus. DOC offered Ms. Nozawa eleven months of paid leave, made repeated attempts to place Ms. Nozawa in a temporary reassignment, and accepted Ms. Nozawa’s refusal of these positions with more paid leave and a continued search for a suitable position. Even if Ms. Nozawa has made out a prima-facie case, which she has not, she fails to make out a case under the remaining prongs of the *McDonnell Douglas* burden-shifting scheme.

Overall, Ms. Nozawa’s disability-based disparate treatment claim fails. She cannot make out a prima facie case. Even if she could, she cannot satisfy her remaining burdens under *McDonnell Douglas*. And in any event, her disability-based disparate treatment claim is duplicative of her claimed failure to reasonably accommodate. Because of multiple, independent reasons, the trial court properly dismissed Ms. Nozawa’s disability-based disparate treatment claim. This Court should affirm

**D. In Addition To Being Time-Barred, Ms. Nozawa’s Retaliation Claim Fails As A Matter Of Law On The Merits Because She Has Identified No Adverse Employment Action.**

Even if Ms. Nozawa’s retaliation claim were not time-barred, which it is, it would still fail on the merits. On appeal, Ms. Nozawa seeks to save her claim for retaliation under RCW 49.60.210(1). Br. of

Appellant at 22. As she explains, this statute prohibits an employer from retaliating against an employee for opposing a discriminatory practice. *Id.*; RCW 49.60.210(1). This claim will be referred to as “opposition retaliation.” This is a separate and distinct cause of action from a claim of whistleblower retaliation, which is maintained as a statutory cause of action under RCW 49.60.210(2), and further relies on provisions outlined in 42.40 RCW. Below, Ms. Nozawa brought claims for retaliation under RCW 49.60.210(1) and for whistleblower retaliation. CP 14. Both claims were dismissed on summary judgment.

It is not clear in this appeal whether Ms. Nozawa is now challenging the dismissal of her opposition retaliation claim or her whistleblower retaliation claim, or both. She assigned no error to the dismissal of her opposition retaliation claim on appeal, yet the argument she offers is entirely premised on this claim. There may be some degree of overlap in the analysis of these separate claims, but they are not identical. Ms. Nozawa’s analysis, however, draws no distinction between them and seems to set forth analysis and argument only on opposition retaliation. Assuming one or both of these claims is not waived under the argument and authority discussed in Section V.A, DOC will brief them separately.

**1. Ms. Nozawa Has Not Raised a Genuine Issue Of Material Fact On The Elements of An Opposition Retaliation Claim.**

In order to establish a prima facie case of opposition retaliation under RCW 49.60.210(1), Ms. Nozawa must show “(1) [she] engaged in statutorily protected opposition activity; (2) an adverse employment action was taken, and (3) [there exists] a causal link between the former and the latter.” *Delahunty v. Cahoon*, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 846-48, 292 P.3d 779 (2013); *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 861-62, 991 P.2d 1182 (2000); *Kahn*, 90 Wn. App. at 129; Br. of Appellant at 23 (citing *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 89 n.3, 821 P.2d 34 (1991) and *Graves v. Dep’t of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994)). Ms. Nozawa fails to make a prima facie case on this claim, and the trial court properly dismissed it.

First, Ms. Nozawa does not even allege (much less support with competent evidence) that she opposed a discriminatory practice. As she never “opposed” a discriminatory practice, she did not “engage in statutorily protected *opposition* activity.” RCW 49.60.210(1). Instead, she asked for an accommodation (to move her work station as a CIPC to the Administrative building), DOC refused that request but offered other reasonable accommodations, and the interactive reasonable accom-

modation process continued. She offers no evidence that she complained about the denial of her requested accommodation, which *then* resulted in an allegedly retaliatory act, as the statute requires.<sup>22</sup>

Likewise, Ms. Nozawa offers no evidence of an adverse action, let alone one that follows opposition activity. The sole adverse action she alleges here is the April 20, 2011, denial by Superintendent Cole of her request to work as a CIPC in the Administration building, away from offenders. Br. of Appellant at 34.<sup>23</sup> That decision cannot constitute an adverse employment action sustaining an opposition retaliation claim, because in such a claim, the adverse employment action must be made *in response* to a complaint about (i.e. in opposition to) a discriminatory act. RCW 49.60.210(1). Superintendent Cole's decision did not follow a

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<sup>22</sup> For the purpose of its summary judgment motion below, DOC assumed that Ms. Nozawa engaged in protected activity when she requested an accommodation for her disability. CP 220. But it is clear that the plain-language of the statute requires the claimant to have engaged in *opposition* activity, not merely protected activity. RCW 49.60.210(1). To the extent DOC may have conceded this point below, this Court is not bound by a concession that is an error of law. *State v. Lewis*, 62 Wn. App. 350, 351, 814 P.2d 232 (1991). But even if Ms. Nozawa has proved the first prong of a prima facie case due to DOC's assumption below, her lack of oppositional activity is fatal to the remaining prongs, which DOC did challenge below.

<sup>23</sup> Ms. Nozawa alleges that a September 8, 2011, email from Ms. Nozawa complaining of retaliation was never investigated. Br. of Appellant at 34 (citing CP at 287, 306-07). Ms. Nozawa did not explain how this assertion relates to her retaliation claim, but in any event, in the September 8 email Ms. Nozawa complained that she was being required to choose one of two Office Assistant positions that she did not want, and complained about the denial of her shared leave request. CP at 306-07. It is undisputed that Ms. Nozawa was not required to accept a position she did not want, and that her shared leave was approved.

complaint from Ms. Nozawa about unfair treatment. It was a response to a request she made. There was no intervening complaint between the request and the decision.

Moreover, Ms. Nozawa offers no evidence demonstrating this decision was adverse. An employee claiming opposition retaliation “must show that a reasonable employee would have found the challenged action materially adverse, meaning that it would have ““dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Boyd v. Dep’t. of Soc. & Health Servs.*, 187 Wn. App. 1, 13, 349 P.3d 864 (2015) ((quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L. Ed. 2d 345 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006))).

Ms. Nozawa does not make this requisite showing. She claims without citation that Superintendent Cole’s second-in-command, Charlie Washburn, was in a better position than the Superintendent to know whether a location change was a reasonable accommodation. Br. of Appellant at 34. Perhaps she intends to imply that if, allegedly, Mr. Washburn would have allowed the move, but Superintendent Cole did not, the decision was inherently adverse. But she offers no testimony from Mr. Washburn or anyone else that rebuts Superintendent Cole’s testimony

about the feasibility of allowing a CIPC to regularly work in the Administration building. CP at 630-34.

Ms. Nozawa claims, without citation or support, that Superintendent Cole's decision resulted in the "denial of meaningful work" and her "being required to accept a reduction in pay." There is no evidence of either result. Conclusory statements cannot raise a genuine issue of material fact. *Sentinel C3, Inc.*, 181 Wn.2d at 140-141. And to the contrary, through the reasonable accommodation process Ms. Nozawa was offered at least three positions that would have provided "meaningful work." When she rejected those positions because they did not pay enough, or did not have a schedule she wanted, DOC continued looking for more positions, all while approving Ms. Nozawa's paid leave. Thus, she received no reduction in pay.

Finally, Ms. Nozawa cannot demonstrate a "causal connection" between any opposition activity and the April 20, 2011 decision, because, again, she engaged in no opposition activity. But even if she had engaged in opposition activity by simply asking for an accommodation, common sense further dictates that the denial of an accommodation cannot also be retaliation for asking for the accommodation. If it were, every failure to reasonably accommodate claim would also be a retaliation claim—even if, as here, the denied accommodation was not reasonable as a matter of law.

Ms. Nozawa fails to establish a prima facie case of opposition retaliation because she alleges no opposition activity, she provides no evidence of an adverse action, and the “causal connection” required to establish retaliation cannot be shown simply by pointing to the denial of a request for an accommodation.

Even if Ms. Nozawa has made out a prima facie case for retaliation for the April 20, 2011 decision, which she has not, she fails to make out a case under the remaining prongs of the *McDonnell Douglas* burden-shifting scheme. In an opposition retaliation claim where a plaintiff lacks direct evidence of retaliation, courts apply the *McDonnell Douglas* burden-shifting protocol on summary judgment, as they do in disparate treatment claims. *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002); *see supra* at 31-32 (setting forth the burden-shifting framework under *McDonnell Douglas*). Thus, in an opposition retaliation claim, as in a disparate treatment claim, “there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory [or retaliatory].” *Hill*, 144 Wn.2d at 188-89 (*quoting Reeves*, 530 U.S. at 148).

Here, DOC produced evidence as to its non-retaliatory reasons for denying Ms. Nozawa's request to work as a CIPC in the Administration building. CP at 630-34 (¶¶ 10, 11, 12, 16, 17, 18, 23). Ms. Nozawa has not challenged any of these reasons with contrary facts of her own. Superintendent Cole testified that for those reasons, he "would not allow *any* [CIPC] to work in the Administration building on a temporary or permanent basis, *and I never have.*" CP at 633 (Cole Decl., ¶ 19) (emphasis added). Ms. Nozawa has not and cannot challenge this assertion, which demonstrates that the decision was not about retaliating against Ms. Nozawa—it was about the realities of security in a correctional facility and the demands of the CIPC position.

For these reasons, Ms. Nozawa's opposition retaliation claim fails as a matter of law.

**2. Ms. Nozawa Has Not Raised A Genuine Issue Of Material Fact On The Elements Of A Whistleblower Retaliation Claim.**

Because Ms. Nozawa analyzes her distinct retaliation claims together, she identifies the same allegedly retaliatory act for her claimed whistleblowing activity, the April 20, 2011, decision not to allow her to move her workstation to the Administration building. Br. of Appellant at 33-34. As with her opposition retaliation claim, Ms. Nozawa argues this decision "denied her meaningful work" and "required [her] to accept a

reduction in pay in violation of RCW 42.40.050.” Br. of Appellant at 34. As argued in Section V.A of this brief, Ms. Nozawa’s whistleblower claim is barred by the applicable statute of limitations, and this Court could end its analysis here.

However, Ms. Nozawa’s whistleblower claim is also barred as a matter of law on the merits. “Any person who is a whistleblower. . . and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW.” RCW 42.40.050(1)(a). “Reprisal or retaliatory action” is defined in statute. RCW 42.40.050(1)(b). While this Court must assume on review of a summary judgment that Ms. Nozawa qualifies as a whistleblower and that Superintendent Cole was aware on April 20 of the whistleblower complaint, Ms. Nozawa nonetheless fails to make out a prima facie case for whistleblower retaliation.

The only retaliatory action or reprisal Ms. Nozawa has identified under the statutory definition in RCW 42.40.050 is the “denial of meaningful work” and “being required to accept a reduction in pay.” Br. of Appellant at 34; *see also* RCW 42.40.050(iv), (viii). However, neither of these things happened to Ms. Nozawa. DOC did not “refuse” to assign meaningful work to Ms. Nozawa. It is undisputed that it was Ms. Nozawa’s medical providers who restricted her from fulfilling an essential

function of her position as a CIPC. It is undisputed that DOC in turn offered Ms. Nozawa multiple positions within DOC that met her medical restrictions. It is undisputed that when Ms. Nozawa turned those positions down, DOC continued its search. DOC did not refuse to assign Ms. Nozawa meaningful work.

Likewise, Ms. Nozawa does not argue, because she cannot, that DOC actually reduced her pay, as the plain-language of RCW 42.40.050(vii) requires. While Ms. Nozawa was offered positions that would have reduced her pay in order to accommodate her injury, she was not required or forced to take these positions. Indeed, when she turned them down DOC continued to search for suitable positions—while Ms. Nozawa remained on paid leave with no reduction in pay. Ms. Nozawa has provided no evidence of a retaliatory act or reprisal for her alleged whistleblowing activity under RCW 42.40.050.

Moreover, even if Ms. Nozawa established a prima facie case of whistleblower retaliation, which she has not, DOC produced sufficient and un rebutted evidence that the April 20 decision was “justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor.” RCW 42.40.050(2). For the reasons discussed in Section D.1, DOC produced ample evidence demonstrating that Superintendent Cole’s decision not to allow Ms. Nozawa to move her

workstation to the Administration building was justified by reasons unrelated to her alleged whistleblowing activity.

Whether presented to this Court on appeal as an opposition retaliation claim or a whistleblower retaliation claim, Ms. Nozawa fails to set forth a prima facie case on either claim. The trial court properly dismissed this claim on summary judgement.

## **VI. CONCLUSION**

Ms. Nozawa's claim for failure to reasonably accommodate was properly dismissed as a matter of law to the extent it is based on an April 20, 2011, decision because that decision is outside the statute of limitations. Alternatively, and otherwise, her claim for failure to reasonably accommodate fails on the merits because she identifies no reasonable accommodation that was not offered.

Ms. Nozawa's disparate treatment claim is duplicative of her reasonable accommodation claim, but in any event fails because she suffered no adverse action and identified no non-disabled employee who was treated more favorably.

Finally, Ms. Nozawa's claim for retaliation was properly dismissed as a matter of law because it was barred by the statute of limitations. Alternatively, her claim for retaliation was properly dismissed because she did not engage in opposition activity and, even if she did, she did not

suffer a retaliatory act or reprisal. On the contrary, following her ankle injury she was approved for eleven months of paid leave and repeatedly offered temporary reassignment.

For these reasons, the Court should affirm dismissal on summary judgment of all of Ms. Nozawa's claims.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of December, 2016.

ROBERT W. FERGUSON  
Attorney General of Washington

*s/ Grace C.S. O'Connor*  
\_\_\_\_\_  
GRACE C.S. O'CONNOR  
WSBA No. 36750  
Assistant Attorney General  
OID No. 91023  
7141 Cleanwater Lane SW  
P.O. Box 40126  
Olympia, WA 98504  
(360) 586-6300

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing BRIEF OF  
RESPONDENT TO THE WASHINGTON STATE COURT OF  
APPEALS, DIVISION II, and on the following parties:

Nelson Fraley  
Faubion Reeder Fraley & Cook PS  
5316 Orchard St. W.  
Tacoma, WA 98467

Attorneys for Appellant

By e-mailing said document to the following email addresses in accordance  
with the parties' service agreement on the date stated below:

[nfraley@fjr-law.com](mailto:nfraley@fjr-law.com)

Dated this 12<sup>th</sup> day of December, 2016.

*s/ Grace C.S. O'Connor*  
\_\_\_\_\_  
GRACE C.S.O'CONNOR,  
WSBA No.: 36750  
OID No.: 91023  
Assistant Attorney General  
Attorney for Respondent

# WASHINGTON STATE ATTORNEY GENERAL

**December 12, 2016 - 2:50 PM**

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[nfraley@fjr-law.com](mailto:nfraley@fjr-law.com)

[lhertz@fjr-law.com](mailto:lhertz@fjr-law.com)

[graces@atg.wa.gov](mailto:graces@atg.wa.gov)

[tinasl@atg.wa.gov](mailto:tinasl@atg.wa.gov)

[torolyef@atg.wa.gov](mailto:torolyef@atg.wa.gov)