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Division II
State of Washington
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No. 50858-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHEILA LAROSE,

Appellant,

v.

KING COUNTY, WASHINGTON,
and PUBLIC DEFENDER ASSOCIATION AKA
THE DEFENDER ASSOCIATION (TDA)

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Respondents for decades have had the legal duty to employ public defenders to represent indigent, low income and mentally ill persons accused of crimes in King County. In 2012 through and 2015 Respondents had no policy or procedure to record information about, nor warn public defenders, when a client being assigned to them was known to constitute a criminal threat to the attorney.

On October 31, 2012, Appellant Sheila LaRose ("LaRose") was a public defender on her first felony rotation, when Respondents assigned her to represent a repeat stalker of women - Client A¹. LaRose was not told prior to Client A being assigned to her, nor thereafter, that the Respondents had recently determined that Client A should be represented by a male public defender.

Client A had begun offensive gender related calls to, and failed to "maintain boundaries" with, public defender Rebecca Lederer who briefly represented Client A on another felony charge of stalking women. That case was reassigned to a male public defender but Respondents placed no warning or "flag" on Client A's record. LaRose, per representation requirements, diligently met

¹ The parties are using a pseudonym for the client based on attorney client privilege and because there is every reason to believe that Client A if he knew

with Client A and accepted his phone calls. Soon he was making repeated unwanted (non-representation related) offensive statements to her. With pressure to fulfill her felony caseload and no training on such issues, she went to her supervisors about the increasing harassing/stalking conduct from Client A. The supervisors, failed to disclose their knowledge of Client A's being reassigned from Lederer for such conduct, did not remove the case from her, nor investigate, nor remedy the situation, nor act to protect her. After the stalking escalated from incessant calls, to tracking her around her workplace, to stalking at her home, Client A was finally arrested in February 2014 and convicted of felony stalking of Ms. LaRose with sexual motivation in 2015.

In February 2014, Ms. LaRose learned about her supervisors' prior knowledge and failure to warn or protect her. She complained about the assignment and being subjected to harassment and stalking. LaRose's supervisor stopped all normal communications with her and treated her adversely. Her emotional state and ability to remain in the workplace deteriorated, she sought treatment, took medical leave and was transferred from the Felony Division.

about this lawsuit would continue his obsessive stalking behavior towards Sheila

From cumulative effects of persistent and frightening harassment/stalking by Client A, unsupportive management responses to her, and learning that Respondents betrayed her trust LaRose has severe Post Traumatic Stress Disorder (“PTSD”) resulting in her disability to continue in her career. She was medically terminated from employment by Respondents on June 9, 2017. She is a single mother, fifty- four years old and unemployed.

LaRose asks this Court to reverse the CR 12(B)(6) and CR 56 and CR 54(b) Orders denying her a “hostile work environment” claim under the Washington Law Against Discrimination [WLAD]. She asks for reversal of summary judgment orders dismissing negligence claims based on the employers’ special relationship duty to make reasonable provision against foreseeable dangers of criminal misconduct; and for reversal of summary judgment orders dismissing her intentional injury and RCW 49.60.180 WLAD disability discrimination claims. CP 1908, 2989-2995

II. ASSIGNMENTS OF ERROR

A. The trial court erred in granting Respondents’ CR 12(b)(6) and CR 56 motion dismissing LaRose’s WLAD claim of hostile work

LaRose despite being in prison.

environment, and in denying reinstatement of the claim under CR 54(b).

B. The trial court erred in granting summary judgment dismissing LaRose's negligence, intentional injury and disability claims.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in interpreting *DeWater v. State* to mean that if a non-employee is involved in harassing an employee, the employer cannot be liable for a hostile work environment under the WLAD despite its knowledge of the harassment and its failure to act? *Assignment of Error A.*

2. Did the trial court err in dismissing LaRose's negligence claims as barred by the Industrial Insurance Act where Respondent opposed her IIA claim and the BIIA has denied her claims? *Assignment of Error B.*

3. Did the trial court err in dismissing LaRose's intentional injury and WLAD disability discrimination claims when there is evidence creating material issues of fact as to those claims? *Assignment of Error B.*

IV. STATEMENT OF THE CASE

A. Respondents' Unified Identity

King County has provided public defenders to indigent and low-income persons charged with crimes in King County courts through contracts for decades. From at least 2011 forward it is settled law that King County maintained such complete control of

the Defender Association that it is an “arm and agency” of King County and TDA’s employees are employees of King County. *Dolan v. King County* 172 Wash.2d 299, 317-319 (2011) CP 1717, 1721-1737.²

After the 2011 *Dolan* decision King County, through a June 29, 2013 Memorandum of Understanding [MOU], CP 1739-1758, formally and officially incorporated the TDA public defender chain of command into a division of the King County Department of Public Defense called The Defender Association Division [TDAD]. CP 1740. The MOU required that the TDA retain responsibilities and insurance for pre-July 1, 2013 liabilities (CP 1756) and rename itself the “Public Defender Association” [PDA] CP 1745-1746.

B. Respondents Failed To Warn LaRose, Or To Remedy
Serious And Pervasive Gender Based
Harassment/Stalking By Their Client

Ms. LaRose specifically went to law school in order to work as a public defender for Respondents. She was employed by Respondents as a public defender from 2009 (in misdemeanors until her first felony rotation in summer of 2012) until June 9, 2017 when she was medically terminated due to the disability caused by conduct of Respondents and their client. CP 304-317.

² For simplicity LaRose refers to TDA/PDA and King County as Respondents. King

In 2012-2013 the Respondents represented Client A on criminal charges as a repeat stalker of professional women. CP 34-35, 70-73. In March – June 2012 Respondents assigned Client A to one or more female public defenders and received an email reporting his pattern of stalking, and his repeated phone calls to his female attorney implicating the beginning of that stalking pattern. That female attorney was removed from representing him after he initiated the (non-representation related) “boundary crossing” harassing/stalking calls. CP 75-77.

One of Ms. LaRose’s supervisors, Deputy Director Daron Morris, reassigned Client A from public defender Rebecca Lederer, to male public defender Paul Vernon. *Id.* The report and decision is memorialized in an email string between Lederer and Respondents’ felony supervisors in June – July 2012:

[Client A] is charged with felony stalking. Kinda creepy facts - he follows and repeatedly calls a woman he doesn't know, but who sat next to him on a bus once. He has a conviction in SMC [Seattle Municipal Court] for apparently similar circumstances. I've been ok with client so far, but yesterday he called me [Rebecca Lederer] repeatedly without any apparent question. [REDACTED A/C PRIVILEGE].

Late last night he left me a rambling voicemail where he repeatedly tells me he loves me. I was upset at the

County was found vicariously liable for the actions of PDA/TDA. CP 2983.

time, but I'm ok now. [Client A] just called again and I told him that he couldn't talk to me like that and if he continued I would request to be removed from his case. [REDACTED A/C PRIVILEGE]. I just wanted to keep you informed because it's a situation I haven't had before and I'm thinking I should have consulted with one of you before I told a client I would ask to be removed from his case. Please let me know if there's another way you want me to handle this.

Daron Morris, Deputy Director manager over the Felony Division responded to Ms. Lederer as follows:

No problem and don't think twice about it. The combo of boundary crossing and mental illness is good reason to reassign here. I'll reassign tomorrow.
Daron

CP 75-77.

Four Supervisor/Managers received the above emails including Deputy Director Morris and Felony Division supervisors Ben Goldsmith (supervisor of Ms. LaRose), Leo Hamaji and Christine Jackson. CP 35, 75-77.

Deputy Director Morris wrote to the paralegal handling Client A's case after the removal of Ms. Lederer stating:

Larry,

...

Unfortunately, we need to pull time from four sources on this one: 1) DD; 2) Paul [Vernon] 's excel sheet; 3) Rebecca's excel sheet; 4) Leona's excel sheet. **If you're wondering why all the transfers it's because [Client A's] crossing boundaries with female attorneys.**

Daron

CP 77³.

Respondents' had no system for flagging a particular client regarding potential threats to public defender attorneys. CP 862, 871-872, 877, 885, 891-892.

July 2012 Client A's case was reassigned from Ms. Lederer to male public defender Paul Vernon who closed Client A's case September 25, 2012 with a "guilty plea" to stalking. CP 85.

King County soon returned Client A to TDA in October of 2012 with a new felony charge of stalking a female. Under the Respondents' assignment policies or preferred practice, Client A's new case should have been assigned to the prior attorney who represented Client A -- Paul Vernon. CP 337, 363. If not to Mr. Vernon, then by the prior decision of Deputy Director Morris, known to felony supervisors, it should have been assigned to a male attorney. CP 337.

Anita Paulsen who worked as a public defender for TDA for 27 years and retired in March of 2013 testified that:

In my experience as a public defender if a client threatens or stalks a female public defender who then asks to be removed from representing the client, the client's case or any subsequent case involving the

³ LaRose did not see or know the contents of these emails until at least June of 2015 [after Client A's 2015 trial and sentencing] when Ms. Lederer handed them to her CP 539.

same client would not be reassigned to another-female public defender. CP 337.

Paul Vernon told LaRose's supervisor Ben Goldsmith that Client A should not be assigned to a female attorney **before** Client A was assigned to LaRose. CP 566, 327⁴.

Still Respondents assigned Client A to be represented by Ms. LaRose on October 31, 2012. LaRose was a few months into her first felony rotation as a public defender. CP 449, 453. Respondents said **nothing** to Ms. LaRose at the time of her assignment or thereafter regarding the recent removal of Client A from Ms. Lederer and reassignment to a male public defender - Paul Vernon. CP 539, 543, 546, 569.

Ms. LaRose had no training or information about any policies or procedures to respond to threats, harassment or dangers of boundary crossing from clients. CP 536. A few months into the representation, Ms. LaRose reported to her supervisors in April, May and June 2013 on multiple occasions that she was concerned about Client A's non-representation related, repetitive phone calls which contained gender based and sexual comments towards and

⁴ Mr. Vernon testified that he cannot recall making that statement but he has no reason to believe that the statement contained in the declaration of Twyla Carter is false. CP 327, 368-371. Mr. Vernon subsequent to his deposition testimony gave a declaration for

about her. She told supervisors she thought she needed to get off the case, *inter alia*. CP 309-312.

At the time of the first conversation in April of 2013 with her supervisor Ben Goldsmith Ms. LaRose was concerned about Client A's calls, but also feeling pressure from supervisors about her job. She had recently asked to be removed from a murder case that her supervisor Ben Goldsmith asked her to second chair. After trying, she told him she was unable to handle her own felony case load and devote the additional time necessary to work on his murder case, particularly in light of a 5 week trial she handled solo in December 2012-January 2013. CP 344. When she spoke to Mr. Goldsmith he appeared angry and frustrated with Ms. LaRose and said "he was thinking about taking her off the case anyway." CP 374.

When she then asked Goldsmith about getting off Client A's case, Mr. Goldsmith appeared angry, dismissive, and impatient with Ms. LaRose and said only okay. CP 376. Mr. Goldsmith made no inquiry regarding her concerns, and withheld from her his knowledge of Ms. Lederer's reassignment, and that Paul Vernon had also told him not to assign Client A to a female. CP 311-312,

Respondents wherein he now says he does not remember making that statement.

1165-1168. He did not remove her from the case or identify other counsel to whom he would transfer the case.

It was around this time that Ms. LaRose had also been required to bring all her case files into a conference room so that her supervisors Mr. Morris and Mr. Goldsmith could "audit" a few files at random to see how she was doing. CP 375. As a result of Goldsmith's reaction and her fears about meeting expectations, she came back to Mr. Goldsmith to tell him that she would try to finish Client A's case. CP 377⁵. She continued to report Client A's incessant offensive calls. Thereafter no one offered to reassign Client A away from LaRose. CP 379.

Despite Ms. LaRose's ongoing reports to Respondents, in April 2013 through February 2014, no supervisor or manager informed Ms. LaRose of their knowledge of his boundary crossing conduct toward his prior female attorney, nor the prior decision that Client A should be assigned to a male attorney. CP 334.

However, he does not deny making the statement. CP 2671-2672.

⁵ Anita Paulsen testified that "[w]orking as a public defender is highly stressful, particularly when handling Class A Felony matters. There has always been a subtext, for want a better term, that it is a sign of weakness if one is unable to handle the stresses of the job. It makes reporting stresses difficult for fear of being perceived as weak. Recognition and management of the stresses inherent in the work has seemed to be a neglected part of work at TDA/TDAD." CP 337.

Management did not reassign Client A away from Ms. LaRose nor protect her nor remedy the ongoing harassment/stalking.

As Ms. LaRose has testified:

In the Felony Division offices on the 8th Floor of the Central Building I experienced the harassing and stalking phone calls from Client A that I have testified to in my previous discovery answers and Declarations. After I complained to Ben Goldsmith about the harassing calls from Client A and told Supervisor Ben Goldsmith I thought I needed to get off the Client A case, I continued to report more gender based harassment and stalking to him. Mr. Goldsmith's response to my reports of harassment was to exhibit irritation, disinterest, disrespect and anger. There was no investigation or corrective action. I also reported to Supervisor Leo Hamaji that I was receiving calls and writings that were offensive and unwanted and that the Client would not stop. His response was to tell me to "ignore the calls". In May 2013 I set up a meeting for supervisors to review a writing from the client which implicated him in stalking me, and both Ben Goldsmith and Mr. Hamaji attended and reviewed the writing. No corrective action was taken and no investigation of the stalking, and no effort to protect me or stop the harassment / stalking was taken by management.

CP 1280 Decl. of Sheila LaRose.¶2

Ms. LaRose had subsequent conversations with Mr. Goldsmith about the phone calls she received from Client A that were of concern to her, and unrelated to the representation. CP 377-378. Mr. Goldsmith admits that Ms. LaRose talked to him

between two and four times about Client A's offensive conduct but he took no notes of the conversations. He admits he never told her about Ms. Lederer being removed from representing Client A and claims, "I did not recall that at the time". CP 1165-1168.

When LaRose was finishing the representation of Client A at the end of July of 2013, the obsessive sexual phone calls continued. CP 544-545. The conduct then escalated after Client A was released from jail in the fall of 2013. Client A continued to harass and stalk Ms. LaRose locating her at her coffee shop near work, in the parking garage where she parked for work, and at the home where she and her minor daughter lived alone. CP 545-546. Ms. LaRose continued to report to supervisors Goldsmith and Hamaji until February 2014 when she had to personally seek police protection and a restraining order against Client A. CP 547.

Ms. LaRose emailed employees in the public defenders office regarding the former client on February 18, 2014. CP 79.

A former client, [Client A], came to my home on Sunday and Monday night. On Sunday night I believe he relocated my flat topped garbage can - placing it directly in front on my padlocked front gate. I do not know his purpose but believe he may have attempted to use it to peer or climb over my gate. He also left religious materials in my mailbox. The following day he left voicemail referencing seeing my daughter (10 years old) as

well as referencing my house. On Monday night he stood directly in front of my gate (inches from the gate door). I have contacted the police. I am also seeking an anti-harassment order. [My minor daughter] is very frightened. I am concerned. I do not represent him and have not for some time. He has continued to leave repeated and numerous messages over the past six to eight months. He remains focused on pursuing, from his perspective, a relationship. [...] I have spoken to [supervisor] Leo [Hamaji] about this Issue (prior to this weekend).

I would be appreciative of suggestions.

Sheila

CP 79.

Three minutes after she sent the email Rebecca Lederer responded as follows:

Oh no! I am so sorry sweetie. I remember this client. It's the only client I've ask to have reassigned because he started leaving me love messages on my answering machine. Let me [Rebecca Lederer] know if there's anything I can do.

CP 79-80.

By then Client A had harassed and stalked Ms. LaRose for nearly a year including:

- incessant phone calls at work with sexual comments and messages;
- tracking Ms. LaRose to her work coffee shop
- tracking Ms. LaRose to her work parking space;
- placing lingerie and messages on her car windshield;
- jumping out of a stairwell at her in the dark;

- surveilling her and her family at her home;
- leaving "gifts" for Ms. LaRose including a pamphlet describing how to convert non-Muslim women to the Muslim faith;
- repeatedly coming to Ms. LaRose's house and yard when her daughter was present, requiring removing her daughter to a safe house;
- hiding in her "private" back yard watching her through the windows for months;
- appearing at her back yard bedroom door multiple times in the middle of the night;
- bashing in her bedroom window;
- on multiple nights, when she called the police and they came, he fled and later returned and continued to watch her;
- leaving messages about having watched the police arrive and leave,
- leaving continuing calls on her work phone expressing his sexual intent toward her;
- threatening to find and shoot and kill the male family member or any other person who attempted to keep him from her.
- Getting into her home and letting her know he had been there.

CP 315.

After midnight early on February 20, 2014, Ms. LaRose wrote an email outlining what she had **just learned**: (1) Client A's prior conduct and removal from Rebecca Lederer's representation; and (2) Paul Vernon had specifically told Ben Goldsmith that Client A should only be represented by a male public defender. CP 334.

Given recent events I would like to obtain a clear idea of what resources are available to me re: [Client A] and the stalking behaviors that have ensued, On five occasions on the past 72 hours he has made contact with my home or person. I have found a safe place for

my ten year old daughter to stay (a daughter who, when learning that [Client A] was at her home, emerged from her bedroom with her Christmas given bow and arrow drawn,) This is not okay.

It is not okay that this client was assigned to a first (female attorney) and that this case was reassigned to another female attorney when a complaint of stalking had been made and a request for transfer as a result had been made. Advisement against reassignment to a subsequent female attorney followed. I received the assignment of [Client A] felony stalking case as new felony attorney and without knowledge of the issues re: prior representation and advisement. I elected to keep the case after harassment behavior arose not knowing of the harassment taking place with the original attorney...

CP 334.

This is the **only** contemporaneous document that relates to what Sheila LaRose knew and shows that from October 31, 2012 until the day before Client A's arrest, she did not know about Rebecca Lederer being removed from representing Client A, nor that Paul Vernon had told Ben Goldsmith that Client A should not be assigned to a female public defender.

Client A was finally arrested on February 21, 2014, and after a public trial, he was convicted in January of 2015 of felony stalking of Ms. LaRose with sexual motivation. CP 315-316. He is

incarcerated but will be eligible for release while Ms. LaRose's daughter is still a minor. CP 316.

Ms. LaRose spoke with Seattle Police in February of 2014 who identified Client A to her as a known "erotomaniac" stalker whose behavior could escalate, and who was a threat to anyone who came between the stalker and his intended target.⁶ CP 35.

C. The Hostile Workplace Environment Includes Management's Conduct and Betrayal During And After The Stalking

LaRose gave notice while representing Client A from April 2013 through July 31, 2013, that she was worried, concerned that she needed to get off the Client A case, was seeking help repeatedly from supervision about the calls and writings, not able to sleep, getting 10 – 20 harassing calls per day. CP 541-544.

Her supervisors, rather than investigating or inquiring about her condition or having an interactive process to understand and relieve her distress, were increasing pressure on her with

⁶ Erotomania is a type of delusional disorder where the affected person believes that another person is in love with him. Erotomaniacs are socially-inapt, awkward, schizoid, and suffer from a host of mood and anxiety disorders. They are driven by their all-consuming loneliness and all-pervasive fantasies. Consequently, erotomaniacs react badly to any perceived rejection by their victims. They turn on a dime and become dangerously vindictive, out to destroy the source of their mounting frustration – their victim. When the "relationship" looks hopeless, many erotomaniacs turn to violence in a spree of self-destruction.

humiliating audits, having her drag her boxes of case files into a conference room and similar heightened scrutiny, and telling her to “ignore” the harassing calls which were aggravating her mental health. CP 542-546. As many as 1000 harassing calls came to her work phone and there is evidence that a supervisor listened to one without any effect on the ongoing harassment. CP 545-546.

Supervisor Goldsmith hardly spoke to her from the time she began reporting the stalking phone calls and her concerns about getting off the Client A Case.

In and before November 2013, LaRose had repeatedly come to supervision about continuing to receive incessant harassing/stalking phone calls and writings, and she came to Leo Hamaji upset about seeing the stalker out of custody at her coffee shop near work. CP 513.

In February 2014 Ms. LaRose learned the stalker had tracked her home and she relocated her daughter to a safe house to obtain an Order of Protection and Client A’s arrest. She emailed an alert to the Felony Division and a brief flurry of activity followed (Feb 18 – 21, 2014) including Lederer’s disclosure. Emailed one time offers of temporary help were made that week. CP 1492-1494.

That week, Ms. LaRose told manager Floris Mikkelsen she was “upset” that Ben Goldsmith assigned her and kept her assigned to a stalker after Rebecca Lederer had been removed after receiving offensive calls from the same client. Ms. Mikkelsen responded “Ben should not have done that.” CP 538-39; CP 1281.

Following her complaint, supervisors withheld even normal supervisory communication. CP 538-539. Ben Goldsmith failed to engage her at all as a supervisor. CP 538-539 LaRose Decl. ¶10.

In May 2014, LaRose asked Felony Division supervision to be relieved of a case assigned to her against Deputy Prosecutor Dernbach who was prosecuting Client A. LaRose needed Dernbach’s assistance to obtain conviction, incarceration and protection from the stalker. Deputy Director Morris by email discounted her request and delayed a decision keeping her in emotional turmoil. CP 1171. Ms. Mikkelsen emailed Morris a month later, but did not respond to LaRose. CP 1169-1170. Goldsmith Dep. at 150-151; and CP 1171-1173.

From 2013 through 2015 Ms. LaRose suffered cumulative traumatic stress from workplace and stalking events, including from being “retriggered in the workplace, and during the 2015 trial and sentencing of Client A”. The cause of Ms. LaRose’s disability

includes a “sense of unsafety, betrayal and lack of support from her employer” including learning that the “employer had known before assigning the client to her, that the client should not be assigned to a female attorney.” CP 646-647. Declaration of Shyn, MD Para. 13,14, 15,17.

In December 2014, she asked for assistance begging supervisors and coworkers for coverage to go out of town for two weeks with her daughter prior to the stalking trial of Jan.15, 2015. Despite her “approved vacation” because she could not obtain coverage for all her calendars in time to go, she and her daughter were not able to leave town and she returned to work, covered her calendars, awaiting the trial. CP 551. ¶50 and CP 625-643 Ex. 9.

After the 2015 trial of Client A, she had to seek “coverage” again for the sentencing, the critical day for her safety and the safety of her daughter. Her emails are excruciating, and the disregard of supervisor Goldsmith palpable. She was told to repeatedly ask overworked coworkers by email and in person, until at the last minute, a supervisor, not Goldsmith, offered to provide coverage. CP 550-551. LaRose Decl. Para 49, CP 579-623 Ex. 8.

As Ms. LaRose complained about stalking and harassment and got negative responses, she became more aware of the level

of sexual and offensive comments by supervisors and some attorneys in the Felony Division including joking about sex and sexual violence against women and children. She felt out of place and was less able to tolerate such comments and jokes in the workplace. CP 1282 ¶¶9, 10. She was diagnosed with PTSD in March 2015 and took FMLA leave in April - June 2015. CP 550-551.

D. Transfer To Involuntary Treatment Act Division

When she returned from FMLA leave in June 2015 she was told she was being transferred to the Involuntary Treatment Act ("ITA") Division at Harborview Hospital and psychiatric hospital outstationed courts. CP 1279-80.

Her disability was aggravated in that workplace and by December 30, 2015, she was placed on medical leave and not able to return to work. It is undisputed that Ms. LaRose was terminated in June 2017 because of her disability as diagnosed by Dr. Shyn. CP 550 LaRose Decl. Para 44; and see Shyn Decl. CP 644-46.

Now in 2017, Deputy Director, Daron Morris, Rebecca Lederer and Former Director Floris Mikkelsen all claim they each had conversations with Ms. LaRose about Client A during her representation (2012-2013). Despite these inconsistent

“admissions” that they knew of Client A’s conduct and that it warranted her getting off the case, they have **no** memos, emails, notes or any other documentation of any kind that would confirm that any of these alleged conversations ever took place, nor that they acted on that knowledge of the offensive work environment. These individuals cannot say **when** any of these alleged conversations **ever** took place. CP 2951-2952 , CP 1559-1571, CP 1575-1579, CP 1583-1589. Daron Morris questioned his own memory at the end of his deposition. CP 2952, CP1570-1571.

When Ms. Lederer was asked about the email she sent Ms. LaRose on February 18, 2014 (supra p. 14) she testified as follows:

Q. Okay. At the time you wrote this e-mail, had you had a prior conversation with Sheila about this client?

A. Yes.

Q. Okay. Yet you don’t say anything about that in your e-mail?

A. No.

Q. Why not?

A. What was I going to say, I told you so? That’s not exactly a comforting response to blame the victim.

CP 384.

And as to when this alleged conversation about Client A took place Ms. Lederer testified as follows:

Q. So the conversation that -- you had one conversation or more than one conversation with Sheila about this?

A. Just one.

Q. Okay. And when did it take place?

A. Sometime when we were both in felonies

Q. Can you give me a month?

A. No.

Q. A day?

A. No.

Q. A year?

A. Yeah. 2000 -- actually, no, I can't give you a year. It was either in 2012 or 2013. I don't recall.

CP 724.

Ms. LaRose alleges Respondents' managers participated in causing the hostile work environment and acquiesced in and ratified the hostile environment, assigning LaRose to represent a repeat harasser/stalker in this employer's work environment, failing to take prompt and effective action to remedy the offensive conduct, failing to protect LaRose, and later adversely treating LaRose for objecting harassment and objecting to management's culpable conduct.

V. ARGUMENT AND CITATION TO AUTHORITY

A. Standard Of Review For Granting A CR 12(B)(6)

Review of a CR 12(b)(6) dismissal is *de novo*, *Nissen v. Pierce County*, 183 Wn.2d 863, 872, 357 P.3d 45, 51 (2015), and contemplates a situation where the complaint or claim simply omits any factual allegations supporting the claim or sets out a claim which is either not recognized in the State of Washington or is

directly contrary to law. See *Blenheim v. Dawson & Hall*, 35 Wn.App. 435, 667 P.2d 125 (1983). The moving party bears the burden to establish “beyond doubt that the claimant can prove no set of facts, consistent with the complaint,” that would justify recovery. Such motions should be granted sparingly and with care, and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief. Allegations in the complaint are taken as true and all reasonable inferences in favor of the nonmoving party. *Regan v. McLachlan*, 163 Wash. App. 171, 177, 257 P.3d 1122 (Div. 2 2011).

B. Standard Of Review For Summary Judgment

Review of CR 56 summary judgment dismissal is also *de novo*, *Dean v. Fishing Co. of Alaska, Inc.* 177 Wn.2d 399, 405, 300 P.3d 815, 819 (2013), and appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). All disputed facts are considered in the light most favorable to the non-moving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

C. The Superior Court's Reliance On *DeWater* Was Error

Under Washington law, to establish a prima facie case for a hostile work environment claim, the employee must demonstrate that there was (1) offensive, unwelcome conduct⁷ that (2) occurred because of sex or gender⁸, (3) affected the terms or conditions of employment⁹, and (4) can be imputed to the employer. *Glasgow v. Georgia-Pacific Corp.*, 103 Wash.2d 401, 406-407, 693 P.2d 708 (1985).

The Trial Court relied on language from *DeWater v. State*, 130 Wn.2d 128 (1996) to preclude LaRose's WLAD claim for a hostile work environment. CP 1908. The Trial Court interpreted *DeWater* as standing for the proposition that the only person responsible for the alleged hostile work environment was the non-employee harasser/stalker Client A, regardless of Respondent

⁷ "Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive." *Schonauer v. DCR Entm't, Inc.*, 79 Wash.App. 808, 820, 905 P.2d 392 (1995).

⁸ The second element does not require that the harassment be overtly sexual. It does require, however, that the harassment be gender based. *Kahn v. Salerno*, 90 Wash.App. 110, 118, 951 P.2d 321, review denied, 136 Wash.2d. 1016, 966 P.2d 1277 (1998); *Payne v. Children's Home Soc'y*, 77 Wash. App. 507, 513, 892 P.2d 1102, review denied, 127 Wash.2d. 1012, 902 P.2d 164 (1995). Harassment is gender based if it constitutes unequal treatment that would not have occurred but for the employee's gender. *Payne* at 512, 892 P.2d 1102.

⁹ "Conduct affects the terms or conditions of employment if it is "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Glasgow*, 103 Wash.2d at 406, 693 P.2d 708; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, ---, 114 S.Ct. 367, 370, 126 L.Ed.2d 295, 301 (1993); *Meritor Sav. Bank*, 477 U.S. at 67, 106 S.Ct. at 2405." *Schonauer v. DCR Entm't, Inc.*, 79 Wn. App. 808, 820, 905 P.2d 392, 400 (1995)

employers' assignment of Client A to LaRose with notice of the client's prior offensive gender based conduct towards a female public defender, the employers' ongoing knowledge of offensive gender based conduct, and their failure to take corrective action.

Thus, the Trial Court concluded that:

[the] hostile work environment claim is founded on allegations of harassment by a third party outside King County's or Public Defender Association's control. As such, liability cannot be imputed to King County or Public Defender Association as a matter of law.

CP 1908.

However, the *DeWater* decision is limited to its unique facts.

Justice Guy, writing for the Supreme Court, limited the *DeWater* decision with this language:

The only issue before us is whether the State may be vicariously liable for the actions of a licensed foster parent toward persons working in the foster home. The facts with respect to that limited issue are not in dispute.

DeWater, 130 Wn2d at 133-34.

Ms. *DeWater* was a "tracker" who was hired by the foster parent, Troyer, to supervise children in the foster home in accordance with the foster parent's scheduling and direction, and whose services could be terminated by the

foster parent. The State did not control the manner and means of operating the foster home. Its involvement was limited to mailing payment to the tracker upon the foster parent's submittal of vouchers. In these circumstances,

"the State did not exercise, and did not have the right to exercise, the degree of control over the Troyer foster home or its trackers which is necessary to hold the State vicariously liable for Mr. Troyer's alleged discriminatory acts."

DeWater, 130 Wash. 2d at 141.

Further Ms. DeWater never informed anyone at the State about Troyer's alleged conduct. *Id.* at 132.

The issue correctly taken from *DeWater* is that liability depends on whether Respondents' had notice of the offensive conduct, or learned of it by way of reports or complaints, and failed to take remedial action - the same facts that would create liability for coworker harassment.

DeWater, if it stands for anything in the context of Ms. LaRose's assertion of a hostile work environment claim, should stand for the proposition that there is liability of an employer where the employer has a practical ability to regulate the workplace and the non-employee's conduct or presence in relation to the employee eg. the ability to assign Client A to a male public

defender instead of Lederer or LaRose, or to “conflict” the client out of the office.

This is in addition to the employer being directly accountable for furthering the creation of a hostile work environment by knowingly assigning the client harasser to Ms. LaRose, while failing to reveal known information LaRose before and after she raised concerns about Client A engaging in the boundary crossing conduct.

Respondents maintained based on language in *DeWater*, that in order to impute liability to the employer for the offensive unwelcome conduct must be from an employee of the defendant. *DeWater*, 130 Wn2d at 135.

However, “*Glasgow* held that where an owner, manger, partner or corporate officer personally participates in the harassment, this fourth element is met by proof of management status. *Glasgow*, 103 Wn2d at 407, 693 P2d 708.” *DeWater* at 135. That alleged requirement is met in this case given the facts as outlined above. *Supra* at 4-23.

Although “[a]n employer is strictly liable for quid pro quo harassment perpetrated by supervisory personnel who have actual or apparent authority to make

employment decisions on behalf of the employer[.]" a plaintiff *837 asserting a hostile work environment claim against an employer must demonstrate some specific basis for imputing liability to the employer for the conduct of its employees. *DeWater*, 130 Wash.2d at 135, 921 P.2d 1059. The Washington Supreme Court has heretofore recognized two bases upon which employees can impute liability on their employers for hostile work environments: (1) If "an owner, manager, partner or corporate officer personally participate[d]" in creating the hostile work environment, the employer is automatically liable. **954 *Glasgow v. Georgia Pac. Corp.*, 103 Wash.2d 401, 407, 693 P.2d 708 (1985); (2) If the plaintiff's supervisor(s) or co-worker(s) created the hostile work environment, "the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *Id.*

Henningsen v. Worldcom, Inc., 102 Wn. App. 828, 836-37, 9 P.3d 948, 953-54 (2000) (emphasis added).

Respondents knew about Client A's pattern of felony harassment and stalking, and about his initiating that conduct toward a female employee, when they assigned Client A to Ms. LaRose.

D. WLAD Is To Be Liberally Construed To Achieve Its Purposes; To Give Greater Protection Against Discrimination Than Federal Title VII Law

Our Supreme Court in *Antonius v. King County* 153 Wash.2d 256 (2004) summarized the history of the relationship of WLAD to Federal Title VII law:

"We have frequently recognized that while federal discrimination cases are not binding, they may be persuasive and their analyses adopted where they further the purposes and mandates of state law. (cites omitted)[...]

When we described the remedies of Title VII as "radically different" from those in WLAD, we did so in rejecting federal cases that would have provided a more limited remedy under state law than WLAD would allow. *Martini [v. Boeing]*, 137 Wash.2d [357] at 372–75, 971 P.2d 45 [(1999)]. Thus, while the County is correct that we said in *Martini* that the two laws provide for "radically different" remedies, we do not see *Martini* as providing a reason to reject *Morgan*. Instead, *Martini* suggests that **federal case law that provides the potential for greater recovery is consistent with WLAD's broad scope and the requirement that the act be liberally construed to accomplish its purposes, RCW 49.60.020.**

Antonius, 153 Wash. 2d at 267, 103 P.3d at 735 (2004) (emphasis added)

In *Antonius*, plaintiff prevailed on a hostile work environment claim based on "non-employee" conduct, being "frequently subjected to sexually derogatory comments and name-calling by **inmates**, co-workers and supervisors, and was exposed to **sexually explicit inmate conduct...**" She often encountered pornographic materials, including magazines and videos, in **inmate areas**. *Id.* at 259, 103 P.3d at 731.

Respondent admits through its CR 30(b)(6) Deponent that the clients of the felony public defenders are substantially the same population as the inmate population of the King County jail. CP 880,

883:11-23. (the inmate population has been responsible for approximately 900 documented assaults to King County employees in a 10 year period. CP 882.)

E. Federal Title VII Law Allows Claims For Hostile Work Environments Caused By A Non-Employee Harasser

It well established that under Federal anti-discrimination law that employers may be liable for failing to remedy the harassment of their employees by non-employee third parties who create a hostile work environment. *Beckford v. Dep't of Corrections* 605 F.3d 951, 957-58 (11th Cir. 2010). In *Beckford*, female employees at a state correctional institution filed a state court action under Title VII alleging that the State Department of corrections failed to remedy a sexually hostile work environment created by male inmates. The Eleventh Circuit opinion makes clear how uniformly that law has been adopted in employment discrimination cases nationwide.

In *Watson v. Blue Circle, Inc.*, we held that an “employer may be found liable for **the harassing conduct of its customers if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the *958 employer knew or reasonably should have known.**” 324 F.3d 1252, 1258 n. 2 (11th Cir.2003). Uniformly, our sister circuits have applied the same rule that employers may be held liable under Title VII for harassment by third parties when that conduct creates a hostile work environment. See, e.g., *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605 (7th Cir.2006); *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir.2005);

Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244 (10th Cir.2001); *Weston v. Pennsylvania*, 251 F.3d 420, 427 (3d Cir.2001); *Slayton v. Ohio Dep't of Youth Servs.*, 206 F.3d 669, 677 (6th Cir.2000); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073–74 (10th Cir.1998); *Rodriguez–Hernandez v. Miranda–Velez*, 132 F.3d 848, 854 (1st Cir.1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1108 (8th Cir.1997); see also Noah D. Zatz, *Managing the Macaw: Third–Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L.Rev. 1357, 1372–73 (2009).

[...] it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer. Ability to 'control' the actor plays no role." *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir.2005).

[...] —and in this respect [third parties] are no different from employees." *Id.* To illustrate this point, Judge Easterbrook famously used the colorful analogy of managing a macaw:

Indeed, it makes no difference whether the actor is human. Suppose a patient kept a macaw in his room, that the bird bit and scratched women but not men, and that the Hospital did nothing. The Hospital would be responsible for the decision to expose women to the working conditions affected by the macaw, even though the bird (a) was not an employee, and (b) could not be controlled by reasoning or sanctions. It would be the Hospital's responsibility to protect its female employees by excluding the offending bird from its premises.

Beckford v. Dep't of Corr. at 957-58.(emphasis added)

In *Little v. Windermere Relocation*, 301 F.3d 958, 966 (9th Cir. 2001) the Ninth Circuit reversed summary judgment and allowed the Plaintiff (Little) to pursue claims under both Title VII and the WLAD for a hostile work environment where the Plaintiff was raped by a business customer of the employer. The Court stated:

Little alleges that Windermere's response to the rape created a hostile work environment in violation of Title VII and the Washington Law Against Discrimination, Rev. C. Wash. § 49.60.180(3). Because Washington sex discrimination law parallels that of Title VII, see *Payne v. Children's Home Society of Washington, Inc.*, 77 Wash.App. 507, 892 P.2d 1102, 1105 (1995), it is appropriate to consider Little's state and federal discrimination claims together.

Little v. Windermere Relocation, Id. At 966.

The Court went on to explain the rule:

In this circuit, **employers are liable for harassing conduct by non-employees “where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”** *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir.1997); see also *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073 (10th Cir.1998) (adopting *Folkerson* standard). The Equal Employment Opportunity Commission Guidelines endorse this approach: “An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.” 29 C.F.R. § 1604.11(e) (emphasis added). **Thus, if Windermere ratified Guerrero's rape of Little by failing to take immediate and effective corrective action, it is liable for the harassment.**

Id. at 968. (emphasis added)

Respondents should be subject to liability under WLAD for creating or for ratifying a hostile work environment by failing to act.

F. The Trial Court's WLAD Ruling Is Inconsistent With An Employer's "Special Duty "To Protect Employees From Foreseeable Criminal Activity

Washington law recognizes a special relationship between employers and employees such that an employer owes a duty to its employees regarding known criminal dangers. *Bartlett v. Hantover*, 9 Wash.App. 614, 621, 513 P.2d 844 (1973), *rev'd on other grounds*, 84 Wash.2d 426, 526 P.2d 1217 (1974). The *Bartlett* court wrote:

Thus an employer owes to an employee a duty to provide a safe place to work. *621 *Lillie v. Thompson*, 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 (1947); *Torrack v. Corpamerica, Inc.*, 1 Storey 254, 51 Del. 254, 144 A.2d 703 (1958). **The employer has a duty to make reasonable provision against foreseeable dangers of criminal misconduct to which the employment exposes the employee.** Annot., 9 A.L.R.3d 517 (1966). **If the nature of the work is such that it exposes the employee to the risk of injury from the criminal acts of third persons, a jury question is raised as to whether the employer has been negligent in not foreseeing the risk of criminal acts and acting to protect employees against the danger.** *Atlantic Coast Line R.R. v. Godard*, 211 Ga. 373, 86 S.E.2d 311 (1955); 53 Am.Jur.2d Master & Servant ss 215, 216 (1970); Annot., 10 A.L.R.3d 619 (1966).

Bartlett at 620-621. (emphasis added)

The *Bartlett* holding that an employer has a "special relationship" duty to warn and protect its employees from known criminal risks was recognized by the Supreme Court in *Hutchins v.*

1001 Fourth Ave. Assocs., 116 Wash.2d 217, 229, 802 P.2d 1360

(1991) The Supreme Court wrote in *Hutchins*:

According to the Restatement (Second) of Torts § 302B (1965), where the third party conduct is intentional in nature, [a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

[...] Comment e explains that there are nevertheless situations where the defendant is required to anticipate and guard against the intentional misconduct of third parties. Subcomments describe, among other things, the special relationships discussed above, ...

Hutchins, supra at 230, 802 P.2d at 1367 (emphasis added)

The Supreme Court also recognized in *Robb v. City of Seattle*, 176 Wn.2d. 427, 295 P.3d 212 (2013) that under § 302 B, comment e, mere nonfeasance is sufficient to impose liability. *Id.* at 436. Examples listed under comment e include the following:

A. Where the actor stands in such a relation to the other that he is under a duty to protect them against such misconduct. Among such relations are those of carrier and passenger, innkeeper and guest, **employer and employee**, possessor of land and invitee, and bailee and bailor.

[...]

D. Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.

Unlike the State in *DeWater*, which was a step removed from a special relationship, because the foster home was *DeWater's* employer- and the State did not control the operations of the foster home, Respondents in this case are LaRose's employer and did have a special relationship duty towards her. For these additional reasons reliance on *DeWater* was misplaced and it was error to deny LaRose's hostile work environment WLAD claim.

G. Respondents' Negligence Proximately Caused The Harms Suffered By Sheila Larose

Respondents violated the special relationship duty of care by assigning Client A to LaRose in the first place and then leaving Client A's case with her after reports of harassment by a client stalker, regardless of her willingness to "try to finish the case" or to "want to finish the case". Public Defense Expert Geoff Brown. CP 670-688. The stalking risk was easily foreseeable to an experienced Public Defender supervisor or manager as illustrated by Deputy Director Morris' removal of Rebecca Lederer from representing Client "A" based on "boundary crossing and mental illness." CP 673 ¶116, 686-688. Expert Brown further testified regarding duties of both Respondents:

... the office has to have a flagging system so that if lawyers are bothered in varying ways by clients or threatened by clients, that that situation is flagged.

CP 1140 Lines 2-13

there should have been a red flag that would have said... this particular client [Client A] is a client that should probably not go to a female [attorney].

CP 1143 Lines 4-9

It was negligent to assign this case – in other words, that there was a foreseeable possibility of danger to this woman, to Ms. LaRose.

CP 1144 Lines 19-21.

A. MR BROWN:....The most recent situation was crossing boundaries with a lawyer [Rebecca Lederer] who seriously felt that she had to get out of the case on one hand, and a person [Client A] that had really stalked a lot of women in a very very aggressive way. And in that situation I think it was imprudent and violated a standard of care to allow her to continue with representation, her being Ms. LaRose, in light of the conviction that occurred in Mr. Vernon's case.

Q. Is it your opinion that the office should have taken the case away from Ms. LaRose over her objection?

A. Yes.

CP 1146 Lines 4-15

And our job, whether they're guilty or not, is to protect their legal rights. But where you have a situation involving an employee, you as the captain of the ship have to be concerned about that employee as well as the rights of the defendant. You don't say just because your job is to protect the presumption of innocence that you're oblivious to the rights of the safety of an individual. This is a high-risk business.

CP 1154

H. LaRose's Claims And Damages Are Not Barred By The Industrial Insurance Act RCW 51.08 *Et Seq* .

1) Industrial Injury versus Occupational Disease: Plaintiff LaRose filed a timely claim for worker's compensation benefits.

Respondents assert that Appellants' negligence-based claims are barred by the Industrial Insurance Act ("IIA") as a matter of law. CP 1924-1926¹⁰

However, Ms. LaRose's initial diagnosis of PTSD was in March 2015, over a year after the last stalking events. Respondents claim that if Ms. LaRose had filed a worker's compensation claim for an "injury" within one year after she was injured, she would have been entitled to worker's compensation benefits. There was medical attention, no diagnosis or time off work at that time. Ms. LaRose did not have a qualifying event that would be considered an "injury" under the IIA.

Injury means a sudden and tangible happening, of a traumatic nature, producing an **immediate or prompt result**, and occurring from without, and such physical conditions as result therefrom.

¹⁰ There is no dispute that claims under the WLAD RCW 49.60 for reasonable accommodation of disability and for a Hostile Work Environment would NOT be barred by the IIA. *Goodman v. Boeing*, 127 Wash.2d 401, 407, 899 P.2d 1265 (1995). Likewise "Intentional Infliction of Emotional Distress" would not be barred. *Birklid v. Boeing*, 127 Wash.2d 853, 872 (1995).

RCW 51.08.100

There must be a connection between the physical or mental condition and employment. RCW 51.08.100 requires a relationship between the injury and “some identifiable happening, event, cause or occurrence capable of being fixed at some point in time and connected with the employment.” *Spino v. Department of Labor and Industries*, 1 Wash.App 730, 733, 463 P.2d 256 (1969). The key is “in the establishment of causation, the connection between the physical or mental condition, and employment.

Garrett Freightlines, Inc. v. Department of Labor and Industries, 45 Wash.App 335, 342, 725 P.2d 463 (1986).

An injury related to stress is treated as an industrial injury under RCW 51.08.100 if the stress resulted from “exposure to a single traumatic event.” WAC 296-14-300(2). Accordingly, a mental condition caused by stress can qualify as an industrial injury and fall under the coverage of the IIA if the condition resulted from a sudden, tangible, and traumatic event that produced an **immediate result**. RCW 51.08.100; *Boeing Co. v. Key*, 101 Wash.App 629, 632, 5 P.3d 16 (2000).

Rothwell v. Nine Mile Falls Sch. Dist., 173 Wash. App. 812, 819–20, 295 P.3d 328, 331–32 (2013) (emphasis added)

At no time in response to any “traumatic event” of stalking did Ms. LaRose seek medical treatment, rather she continued to work as a public defender as the cumulative stressors occurred¹¹ and for a full year afterward, before she was diagnosed in March

¹¹ Client A began harassing/stalking calls in March 2013, calls escalated to a degree that she reported them to supervisors in April, May, June, July, August 2014. Client A was released from custody in fall of 2013 and followed Ms. LaRose to various places in the community, her coffee shop (fall 2013), her parking garage (February 2014), her neighborhood and finally her back yard and home (February 2014) resulting in his arrest on or about February 21, 2014. CP 452-459.

2015 with Post-Traumatic Stress Disorder (PTSD), almost 24 months after the initial stalking calls began. CP 550, 2461 Lines 11-15. LaRose's disabling conditions (PTSD, major depressive disorder and generalized anxiety disorder) developed cumulatively Dr. Stanley Shyn. CP 646-647 ¶ 13-17.

In June 2015 Rebecca Lederer provided Ms. LaRose a redacted copy of the 2012 emails between Lederer and Respondents managers/supervisors, Ms. LaRose's first written confirmation that Respondent employer knew of Client A's history of offensive calls to Ms. Lederer, knew of his criminal stalking pattern, and had made a prior decision that Client A should be represented by a male attorney, all before assigning Client A to Ms. LaRose. Yet Respondent failed to warn her of his prior behavior or protect her. CP 33-34, 75-77, 327, 539. This June 2015 knowledge of a Respondents' "betrayal" was a contributing cause of her disability. CP 645-647, 659-660.

The cumulative stalking events [March 2013 – February 2014] were not individual injuries, but rather, repeated, cumulative exposures to harassment and stalking, as to which the BIIA has issued a Decision and Order that none of the events were a single traumatic event as defined in subsection (2) (b) and (c) of WAC

296-14-300.CP 731-735. No one incident was independently a sudden traumatic cause of her mental health disorders. CP 645-647, 659-660

Further, those cumulative events have been determined not to qualify as compensable or as industrial "injuries" under the IIA.¹² *In re: Sheila M. LaRose*, Dckt. No. 16 18970 (May 19, 2017) citing RCW 51.08.140, RCW 51.08.142 and WAC 296-14-300; RCW 52.08.100. CP 731-735 Adm. Judge Proposed Decision and Order 3/17/2017) ; CP 738-739 BIIA Decision and Order.

King County itself filed a "Self-Insured Employer's Request for Denial of Claim" CP 762-764; did not Petition for Review of the Proposed Decision; and did not appeal the BIIA Decision. King County stated its reasons for denial of the claim including, *inter alia*:

2. Claims based on mental conditions or mental disabilities caused by stress are specifically excluded from coverage by law.
3. Claimant was not a workman as defined by the IIA of the State of Washington.

I. LaRose's Application For Benefits For Occupational Disease

¹² CP 734; BIIA Finding of Fact 4 : Ms. LaRose applied for benefits under the Industrial Insurance Act based on an occupational disease of post-traumatic stress disorder and major depressive disorder brought about by repeated exposure to traumatic events (none of which amounted to an industrial injury). CP 735 Conclusions of Law 3: Ms. LaRose's Application for Benefits for an occupational disease based on mental conditions resulting from repeated stressful events is not an occupational disease within the meaning of RCW 51.08.040, RCW 51.08.142, and *Rothwell v. Nine Mile Falls Sch. Dist.*, 149 Wn.App. 771 (2009).

March 21, 2015, was the date that Ms. LaRose was advised by treating professionals that she may have an occupational disease (PTSD and Major Depressive Disorder) and that the condition resulting from the occupational disease may be **disabling**. From that date she has continued treatment for the constellation of mental health diagnoses. CP 550 ¶ 47. Ms. LaRose took a brief medical leave for 4 weeks in March-April 2015; and a long term leave beginning December 31, 2015 which lasted until Respondents “medically terminated” her employment on June 9, 2017. CP 316-317 LaRose Decl. pp. 14-16.

On May 4, 2016, LaRose applied for benefits under the Industrial Insurance Act based on an occupational disease of post-traumatic stress disorder and major depressive disorder brought about by repeated exposure to stalking events.

On July 22, 2016, the Department of Labor and Industries issued an order denying her application for benefits finding no industrial injury and no covered occupational disease. CP 729. On August 18, 2016, LaRose filed an appeal with the Board of Industrial Insurance Appeals. On March 28, 2017, Industrial Appeals Judge Mychal H. Schwartz issued a Proposed Decision

and Order affirming the Department Order which denied benefits.

Judge Schwartz's Finding of Fact #3 stated:

Ms. LaRose applied for benefits under the Industrial Insurance Act based on an occupational disease of post-traumatic stress disorder and major depressive disorder brought about by repeated exposure to traumatic events **(none of which amounted to an industrial injury)**. [emphasis added].

CP 734.

Judge Schwartz's Proposed Decision and Order was affirmed by the Board on May 19, 2017 in its Decision and Order. Findings of Fact #3 remained undisturbed and Conclusion of Law #3 found LaRose's condition was not a covered Occupational Disease. CP 738-739¹³.

Respondents failed to file a Petition for Review from the Administrative Judge's Proposed Order, and failed to appeal the BIIA Order, and thus did not challenge either Finding of Fact #3 in the Proposed and Final Order, or BIIA Conclusion of Law #4 in the final order. RCW 51.52.104.

Respondents should be collaterally estopped from re-litigating those issues. Though an appeal has been filed by LaRose and is

¹³ As part of her appeal LaRose alleged that the Department of Labor and Industries exceeded its authority when it amended WAC 296-14-300 adding language regarding "repeated exposure to traumatic events" to the types of things that may not give rise to an occupational disease based on a mental condition or disease. The Board's Decision and

pending in King County Superior Court, the Board's findings are presumed "prima facie correct **and the burden of proof shall be upon the party attacking the same.**" RCW 51.52.115; *Bayliner Marine Corp v. Perrigoue*, 40 Wash. App at 113, 697 P.2d 277 (1985) (quoting *Department of Labor and Indus. v. Moser*, 35 Wash. App 204, 208, 665 P.2d 926 (1983)).

Even if speculatively, LaRose's claim at some point in the future was allowed, the medical conditions, treatment and wage claims allowed under that claim would be subject to Respondents' opposition and need extensive determination. Because a claim is allowed does not mean that all conditions, dates, treatment or lost wages are automatically allowed. There are thousands of Board cases addressing the allowance of conditions under accepted claims. Self-Insurance Claims Adjudication Guidelines, pg. 36 January 2015; WAC 296-23-302.

Further it has been held that the IIA does not preclude a negligent supervision suit against an employer by an injured employee for emotional damages from stress since "injury" which occurred by harassment which did not occur suddenly or have immediate result, and no "occupational disease" existed. See

Order dated May 19, 2017 concluded that the Board had no authority to rule on the

Wheeler v. Catholic Archdiocese of Seattle (1992) 65 Wash.App. 552, 567-568, 829 P.2d 196, 204-205 review granted in part, denied in part 120 Wash.2d 1011, 844 P.2d 436, reversed on other grounds 124 Wash.2d 634, 880 P.2d 29 (1994).

J. Washington's IIA Allows *Birklid v. Boeing* Type Claims With Willful Disregard Or Actual Knowledge Of Certain Ongoing Injury

There is an exception to the IIA bar when the employer intentionally injures the employee. RCW 51.24.020. This statute states:

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.
Id.

The Supreme Court has recognized this exception in situations where the employer had actual knowledge that the harm was occurring or certain to occur, and allowed it to continue:

The exception is designed to deter employers from deliberately injuring their employees; "[e]mployers who engage in such egregious conduct should not burden and compromise the industrial insurance risk pool."

Birklid v. Boeing Co., 127 Wash.2d 853, 860-61, 904 P.2d 278 (1995)

validity of the amendments to WAC 296-14-300. CP 739 Concl. of Law 2.

Prior to *Birklid*, the exception was permitted only where an employer physically assaulted an employee. *Birklid*, 127 Wash.2d at 861–62, 904 P.2d 278. The *Birklid* Court expanded the exception to situations in which “the employer had **actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.**” *Id.* at 865, 904 P.2d 278.

As this Court has held:

“[W]e hold that where an employer's willful disregard of **actual knowledge that any injury was certain to occur caused the employee's specific injuries, the deliberate intention exception applies regardless of whether the employer had actual knowledge that the employee's specific injuries themselves were certain to occur.**” *Michelbrink v. State*, 191 Wn. App. 414, 428, 363 P.3d 6, 13 (2015) Defendants are liable for “any physical injury they cause, no matter how unforeseeable, once they inflict harm on a plaintiff's body.” *Gibson v. County of Washoe*, 290 F.3d 1175, 1192 (9th Cir.2002). **RCW 51.24.020's term “such injury” was intended to require only that the employer's willful disregard of actual knowledge that an injury was certain to occur caused the employee's specific injuries, not that the employer had actual knowledge the employee's specific injuries were themselves certain to occur.** Limiting employees' remedies for deliberate injury by employers to only the specific type of injury intended would not serve the intended purpose of the deliberate intention exception.

Michelbrink v. State, 191 Wn. App. 414, 429, 363 P.3d 6, 14 (2015)

The policy behind RCW 51.24.020 assures that employers who deliberately expose their employees to injury should not enjoy

immunity from suits. Employees' remedies should not be limited by the IIA when their employers intentionally expose them to certain injury. *Birklid*, 127 Wash.2d at 859, 904 P.2d 278; *Michelbrink v. State*, 191 Wn. App. 414, 429, 363 P.3d 6, 14 (2015).

¶ 44 If WSP had actual knowledge that an injury was certain to occur from being shot by a Taser and compelled its employees to be shot anyway, WSP willfully disregarded actual knowledge that the Taser would cause certain injury. It is undisputed that WSP required employees who used a Taser to be shot with a Taser, and an issue of material fact exists as to whether WSP had actual knowledge that muscle seizures, minor wounds, pain, skin irritation, blisters, *435 redness, or bleeding were certain to occur from Taser exposure. WSP's actions to prevent injury did not address these injuries. Rather, WSP's actions addressed secondary injuries such as falling or medical complications. Thus, an issue of material fact exists as to whether WSP willfully disregarded knowledge that an injury was certain to occur from Taser exposure.

Michelbrink at 434-35, 363 P.3d at 16

Here, Respondents assigned a female attorney to represent a client who was actually known to be a repeat stalker of professional women, and known by the employer to obsessively target professional females upon casually meeting them. This employer knew the client "was crossing boundaries with female attorneys" (CP 77) and should not be assigned to a female public defender. The employer knew the client's specific pattern of felony

stalking of women, that the client “called [Lederer] repeatedly without any specific question” and left her a “rambling voice mail where he repeatedly tells me he loves me.” CP 554-556.

Despite LaRose’s numerous reports of harassing calls, concern, not sleeping to supervisors Goldsmith and Hamaji, and Respondent admissions they knew the client’s conduct justified reassigning Client A to a male attorney CP 75-77, 337, 363, Respondent did not separate LaRose from the client nor warn her. CP 1168: 6-15.

Respondent violated its duty of care when it assigned and left Client A’s case with Sheila LaRose regardless of her willingness to “try to finish the case” or to “want to finish the case.” Supra at 31-32 CP 670-673 Decl. of Public Defense Expert Geoff Brown ¶¶ 1-15, and Ex. B (CP 680), C (CP 682-684), D (CP 686-688). The stalking risk which actually occurred to Ms. LaRose was easily foreseeable to an experienced public defender supervisor or manager as illustrated by Mr. Morris’ removal of Ms. Lederer from representing Client “A” based on “boundary crossing and mental illness.” Id. ¶¶ 16 and Ex. D thereto CP 686-688.

Expert Brown further testified to his opinion that office should have taken the case away from Ms. LaRose, even over her objection. CP 1146 Lines 4-15:

And our job, whether they're guilty or not, is to protect their legal rights. But where you have a situation involving an employee, you as the captain of the ship have to be concerned about that employee as well as the rights of the defendant. You don't say just because your job is to protect the presumption of innocence that you're oblivious to the rights of the safety of an individual. **This is a high-risk business.**

CP 1154.

Birkliid most clearly applies after Ms. LaRose has apprised Goldsmith on more than one occasion of ongoing the harassing/stalking phone calls from Client A. May 24, 2013 Ms. LaRose met with Goldsmith and Hamaji regarding a letter that implicated Client A in stalking Ms. LaRose. The case should have been taken from her. CP 673 Brown Decl. ¶ 14. No action was taken by management to remove Ms. LaRose from the ongoing injury. CP 542-545; CP 654; CP 576. A question of fact exists for the jury as to whether the Respondents had actual knowledge an injury was occurring or certain to occur, given the reported conduct and Lederer's, Vernon's and LaRose's reports.

K. Plaintiff's RCW 49.60 Disability Discrimination Claim Is Supported By Material Evidence And Inferences

There are three recognized ways of proving disability discrimination under WLAD 49.60.180; hostile work environment discrimination, failure to make reasonable accommodation including a mandatory duty to engage in an interactive process and different treatment discrimination.

1. Hostile Work Environment Discrimination.

The WLAD supports a disability based hostile work environment claim. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002). This claim parallels the gender based hostile work environment claim but is based on the response of Respondents' managers, supervisors and coworkers to Ms. LaRose's cumulative post traumatic disabilities, offensive conduct or comments because of her disability.

2. Reasonable Accommodation Discrimination.

WLAD requires an employer to reasonably accommodate a disabled employee unless the accommodation would pose an undue hardship. RCW 49.60.180(2); *Pulcino v. Fed. Express Corp.*, 141 Wash.2d 629, 639 (2000), overruled in part on other grounds by *McClarty v. Totem Elec.*, 157 Wash.2d 214, 228 (2006).[6] A

reasonable accommodation must allow the employee to work in the environment and perform the essential functions of her job without substantially limiting symptoms. See, e.g., *Griffith v. Boise Cascade, Inc.*, 111 Wash.App. 436, 442 (2002). The employer must affirmatively take steps to help the disabled employee continue working at the existing position or attempt to find a position compatible with the limitations. *Griffith*, 111 Wash.App. at 442, 45 P.3d 589. In cases where an objective standard is not available to measure whether an accommodation is effective, a good faith *Goodman* interactive process is especially important. During that process, the duty to accommodate is continuing. *Frisino v. Seattle School Dist.* 160 Wash.App. 765, 249 P.3d 1044, 1051 (2011).

To establish an employer's duty to provide a reasonable accommodation, the plaintiff must prove . . . that the plaintiff either requested of the defendant an accommodation due to a disability," or, in the alternative, that "the defendant knew or had reason to know that the plaintiff has a disability, was experiencing workplace problems because of the disability. "[r]easonable accommodation. . . envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions."

Goodman v. Boeing Co., 127 Wn.2d 401, 408-409, 899 P.2d 1265 (1995).

WLAD and the ADA require employers to engage in an interactive process when a disabled employee requests an accommodation or when the employer recognizes the employee's need for an accommodation. *Snyder v. Medical Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 239, 35 P.3d 1158 (2001), and see *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1113 (9th Cir. 2000) (vacated on other grounds, 535 U.S. 391 (2002)). The Ninth Circuit, en banc, described the employer's role in the required mandatory "interactive process" stating:

[W]e join explicitly with the vast majority of our sister circuits in holding that the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation.

Barnett, Id at 1113.

The interactive process requires (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and

effective. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002).

3. Different Treatment Discrimination.

Plaintiff is not required to present “direct evidence of discriminatory intent ... [r]ather, [c]ircumstantial, indirect and inferential evidence will suffice....” *Dumont v. City of Seattle*, 148 Wn.App. 850, 867-68, 200 P.3d 764 (2009).

Ms. LaRose’s supervisors and managers did not have patience for Ms. LaRose seeking assistance, her reporting about her concerns about Client A’s calls, her lack of sleep, her increasing anxiety, her need assistance with Client A finding her around the workplace, parking garage and her home, her fear for her daughter, her need for assistance with “coverage” to manage stalking related absences, anxiety and stress. Goldsmith was impatient with her asking to be relieved of Client A’s case, then to be relieved of cases assigned to her that were against the Prosecutor prosecuting Client A. After formal diagnosis of PTSD, Depression and Generalized Anxiety Disorder, she took one month of FMLA leave and without interactive process, she was immediately transferred out of the Felony Division.

Despite her many requests and reports of traumatic distress, Respondent failed to engage in an interactive process regarding her increasing disability from March 2013 through December 2015, and failed to discuss or make reasonable accommodations to assist her to work without aggravating the disability. *Martini v. Boeing Co.*, 88 Wn.App. 442, 945 P.2d 248 (1997), quoting *Goodman v. Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Respondent failed to make “a good-faith effort to ascertain ... how [LaRose’s] disability affect[s] [her] job performance....” so that it could determine if it needed to accommodation” See *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007).

Her supervisor withheld even normal supervisory communication during increasing symptoms of her cumulative traumatic stress disability, and withheld management support for necessary absences, vacations, high stress court appearances, precipitous transfer away from her job to a different division. Supervisor Ben Goldsmith simply failed to engage her at all as a supervisor. CP 538-539 LaRose Decl. Para. 10; CP 550-551.

During 2013-2014 supervisors were increasing pressure on her while ignoring as many as 1000 offensive stalking calls which were aggravating her mental health. CP 542-546. LaRose’s

requests for assistance were ignored or delayed, eg. November 2013 she came to Leo Hamaji for help after seeing the client stalker out of custody at her coffee shop near work; February 2014 she emailed the office for help and complained to Floris Mikkelsen about Goldsmith's assignment of Client A but there was no interactive process, investigation or resolution; May 2014 she asked to be relieved of a cases assigned to her against Deputy Prosecutor Dernbach who was prosecuting Client A. CP 1171. Floris Mikkelsen emailed a month later to have Morris talk to Mikkelsen, but did not respond to LaRose. CP 1169-1170. Goldsmith Dep. at 150-151 and CP 1171-1173; December 2014, she begged unsuccessfully for coverage to go out of town on a "approved vacation" for two weeks with her daughter prior to the stalking trial of January 15, 2015. CP 551. LaRose Decl. Para. 50 and CP 625-643 Ex. 9; After the January 2015 trial, she asked for coverage again for the day of the sentencing, the critical day for her safety and the safety of her daughter documented in excruciating emails; Goldsmith sent her to beg her coworkers individually. CP 550-551 LaRose Decl. Para 49, CP 579-623 Ex. 8.

A reasonable jury could find that management observed and knew she suffered from increasing traumatic stress with progressive difficulty at being at work in 2013, 2014 and 2015.

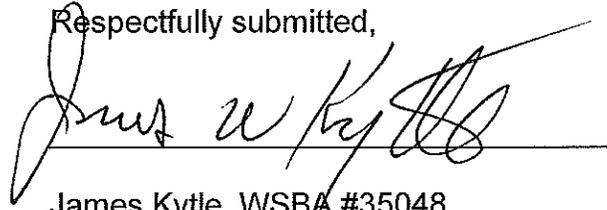
After her documented PTSD medical leave; she was immediately transferred to different work upon her return without any interactive process or medical documentation; she experienced triggers in the workplace, lack of support; disability leave and medical termination. CP 646-647 Declaration of Shyn, MD Para. 13,14, 15,17.

VI. CONCLUSION

LaRose asks this Court to reverse the CR 12(B)(6) and CR 56 and CR 54(b) Orders denying her a "hostile work environment" claim under the Washington Law Against Discrimination [WLAD]. She asks for reversal of summary judgment orders dismissing negligence claims based on the employers' special relationship duty to make reasonable provision against foreseeable dangers of criminal misconduct; and for reversal of summary judgment orders dismissing her intentional injury and Washington Law Against Discrimination disability discrimination claims. CP 1908, 2989-2995. Per RAP 18.1, Ms. LaRose also asks the Court for an award of reasonable attorney fees and costs under RCW 49.60.030.

DATED this 30th day of November 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Kytte", written over a horizontal line.

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