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NO. 358623

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

ENRIQUETA SANCHEZ,

Appellant,

v.

MCDUGALL & SONS, INC.,

Respondent.

RESPONSE TO OPENING BRIEF OF APPELLANT

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INTRODUCTION

Appellant Enriqueta Sanchez filed a lawsuit against her former employer, Respondent McDougall & Sons, alleging disability discrimination and wrongful termination. The trial court granted McDougall's summary judgment motion because: (1) Sanchez was unable to perform the essential functions of her job as a Fruit Packer at any time after her July 7, 2012 work injury (including at the time of her layoff); and (2) the lost wages and emotional injuries underlying Sanchez's civil claims were the exact same injuries for which she had applied and received lifetime benefits from the Department of Labor and Industries ("L&I"), meaning her civil claims were preempted. For each of these two independent reasons, Sanchez's claims fail as a matter of law.

Further, Sanchez has never provided any evidence connecting her layoff to her disability or workers' compensation claim. And it is undisputed that Sanchez failed to provide the required medical documentation to support her request to switch to the day shift so she could work with her husband – the only accommodation McDougall ever denied. For these additional reasons, Sanchez's claims fail as a matter of law.

On appeal, Sanchez focuses on immaterial facts, and only challenges *one* of the arguments advanced by McDougall (that her claims

are preempted by Washington's Industrial Insurance Act). As she did before the trial court, Sanchez disregards the record on the basis of misplaced evidentiary objections and misinterpretations of relevant case law.

For these reasons, McDougall respectfully requests this Court deny Sanchez's appeal and uphold the trial court's granting of summary judgment.

STATEMENT OF THE CASE

A. McDougall and the Fruit Packing Business.

McDougall is a fruit packing company based in Wenatchee, Washington that was founded in 1976. Clerk's Papers (CP) at 89. Fruit packing is seasonal work; the cherry packing season lasts roughly June through July, and the apple and pear packing season lasts roughly August through May. CP at 89. Depending on the time of year and volume of fruit to be packed, McDougall may operate out of one to three facilities, and run one or two shifts. CP at 89. Like many companies in the agricultural industry, McDougall's employee numbers fluctuate significantly over the course of a year – for example, in 2012, McDougall employed as few as 397 and as many as 774 workers; in 2013, it ranged from 416 to 838. CP at 89. Seasonal workers are regularly laid off for

periods of time as a packing season wanes, and are rehired when the next season picks up. CP at 89; 216.

McDougall prides itself on maintaining a safe and sanitary work environment. CP at 89. However, workplace injuries do occur in the fruit packing industry, where workers are performing repetitive manual labor in an industrial setting. CP at 89. McDougall provides light duty assignments to keep as many injured employees as possible working and on salary during the workers' compensation process. CP at 90. Between 2012 and 2016, McDougall helped 400 employees file L&I claims. CP at 92. McDougall has a Human Resources Assistant – Ana Chavez – whose primary duty is to oversee the L&I process for injured workers. CP at 89; 120-121.

B. McDougall Hires Sanchez as a Fruit Packer in September 2011.

McDougall hired Sanchez as a night-shift Fruit Packer in September 2011. CP at 178. A Fruit Packer stands at a waist-high conveyer line, using his or her hands to quickly sort through fruit as it comes down the line, separating it by grade, and packing fruit of different qualities in different specified locations. CP at 163-164; 122; 127. A packer must continuously retrieve or assemble cardboard boxes into which the fruit will be packed, and push full boxes of fruit in either cardboard

trays or plastic “clamshells” down the conveyor line. CP at 163-164; 127. Physically, the job requires near constant standing, repetitive neck twisting and bending, repetitive back twisting, occasional back bending, regular reaching above shoulder level, and lifting objects above shoulder level. CP at 163-164; 129.

C. Sanchez is Injured at Work in July 2012.

On July 7, 2012, Sanchez was packing cherries on the night shift at McDougall’s Olds Station facility. CP at 292-293. She was bending over when a cardboard box fell from about five feet above the ground and hit her on the head. CP at 188; 133-134. Sanchez did not fall to the ground or lose consciousness, but felt shooting pain in her head. CP at 188. Sanchez reported the injury to her supervisor, filled out an injury report, then drove herself to the hospital. CP at 189-190; 173; 291-293; 335-336.

D. McDougall Provides Sanchez with Light Duty Consistent with her Work Restrictions for Six Months.

The same day as her injury, Sanchez filed a claim with L&I for a neck sprain. CP at 122; 127-131. L&I accepted the claim on July 13, 2012. CP at 122; 133-134. When Sanchez returned to work four days later, McDougall gave her a light duty assignment placing plastic bags into the cherry boxes. CP at 193. A few days later, Sanchez aggravated her neck injury when she bumped her head into a filled clamshell held by

another employee. CP at 192-193. After that, Sanchez felt she could not pack, sort, stand all day, perform work with her left hand above shoulder level, or work with her head bent downwards. CP at 196. Sanchez's doctor submitted several Activity Prescription Forms to McDougall communicating these restrictions. CP at 92; 98-109.

Following McDougall's standard practice, Chavez spoke with Production Manager Lee Coonfield to determine what light duty work was available for an employee with Sanchez's medical restrictions. CP at 122. Because Sanchez could not work standing up, could not work above her shoulders, and had limitations with her head and neck, Sanchez could not pack, sort, make boxes, or sticker bags/clamshells. CP at 196; 206; 92; 163-164; 170.

The only light duty position available that was consistent with Sanchez's restriction was as Washroom Attendant. CP at 122; 165; 196. McDougall had created the Washroom Attendant position many years prior, to give employment opportunity to injured workers with limited physical movement who could not perform any other light duty positions. CP at 169. The Washroom Attendant would sit in the doorway to the washroom and make sure that employees using the washroom took off their aprons before entering the washroom, and washed their hands after using the toilet. CP at 169. The washroom is large, well-lit, and cleaned

throughout the day given the food safety precautions McDougall must take. CP at 92; 111-119. The position did provide some minimal value to McDougall in terms of its food safety benefits, but it was not a regular position – it was only used for injured workers who could perform no production work, and then only until the workers could return to productivity. CP at 169. Since 2008, at least 27 McDougall employees with pending L&I claims were kept on full salary working a light duty assignment as Washroom Attendant. CP at 121-122; 92.

McDougall provided an Employer's Job Description form to Sanchez's doctor detailing the duties and physical demands of the Washroom Attendant position. CP at 122; 139. On July 20, 2012, Sanchez's doctor signed the form, approving Sanchez for the Washroom Attendant position. CP at 122; 139. Sanchez agreed to work within the restrictions detailed by her doctor, and agreed to the Washroom Attendant position. CP at 122-123; 141; 142; 144; 145; 146.

E. Sanchez Requests to Switch to the Day Shift to Work with her Husband.

It is McDougall's standard practice to keep employees working light duty on their original shift assignment to the extent possible, for a variety of important reasons. CP at 90. These include: maintaining headcount, keeping the employee on the same hours so that they can more

easily transition back to regular work after recovery, ensuring employees are not using L&I claims to switch to a preferred shift, and because McDougall pays an extra \$0.25-0.50 to night shift employees, and must continue paying the worker's wage at the time of injury during the pending L&I claim. CP at 90.

When Sanchez started in the Washroom Attendant position it was at the tail-end of cherry season and before apple and pear packing season began in earnest. CP at 89; 122; 133-134. As such, McDougall cut back to operating only one shift at its Olds Station facility (the day shift). CP at 191. Rather than lay off Sanchez, McDougall temporarily switched her to the day shift Washroom Attendant position, switching her back to the night shift when the apple- and pear-packing night shift began again in late August. CP at 191.

According to Sanchez, she requested to switch from the night shift to the day shift sometime in October or November of 2012. CP at 198. Sanchez's husband worked the day shift at McDougall as a packer, and Sanchez wanted to commute with him. CP at 197. As was almost always the case, there was a long waitlist of employees who wanted to switch from the night shift to the day shift. CP at 90. McDougall told this to Sanchez, but also said that if there was a medical reason for her to needing to switch shifts, she should provide a doctor's note stating as much. CP at

199; 123. Sanchez never provided any medical documentation stating it was necessary for her to be on the day shift, or that she otherwise could not perform the functions of the night shift Washroom Attendant position. CP at 186-187; 123. McDougall therefore required Sanchez to stay in her original shift, from 4:30 p.m. to 1:30 a.m. CP at 145; 199; 376; 381; 532, 588, 595; 596.

F. L&I Closes Sanchez’s Claim.

On November 19, 2012, Sanchez underwent an independent medical exam (“IME”) at the behest of L&I in connection with her ongoing workers’ compensation claim. CP at 203; 123; 147-153. An orthopedic surgeon and a neurologist performed the exam, and found “no objective basis for the persistence of any” diagnoses for neck sprain, facial contusion, dizziness, giddiness, or headache – the conditions that formed the basis of Sanchez’s L&I claim. CP at 152. The report concluded there was no basis for any impairment rating. CP at 153.

As a result of the November 19, 2012 IME, L&I wrote to Sanchez on December 28, 2012 notifying her that her work-related condition had stabilized and had not caused any permanent impairment. CP at 204; 155. As a result, L&I was closing her claim. CP at 204; 155. McDougall received a copy of this L&I notice as well as the IME report. CP at 123.

On January 14, 2013, Sanchez faxed a letter to L&I protesting the

decision to close her claim. CP at 173; 296-299. She wrote: “**I cannot go back to my job packing apples and pears in the condition I’m in,**” and, “**I cannot do the work I used to do before the accident.**” CP at 206; 298 (emphasis added).

G. McDougall Lays Off Sanchez.

On January 14, 2013, shortly after L&I closed Sanchez’s claim, Sanchez met with McDougall HR Manager Julie Loreth and HR Assistant Ana Chavez. CP at 215; 91; 123. According to Sanchez’s version of the meeting, she was told she was being laid off, same as the other cherry hires who had been laid off at the end of cherry season. CP at 212-213. Sanchez testified she was physically unable to return to work as a packer at the time of her layoff. CP at 195-196.

H. Sanchez Applies for and Receives Time Loss Benefits and a Lifetime Disability Pension from L&I.

Following her layoff from McDougall, Sanchez applied for lifetime Totally Disabled Worker Benefits under Washington’s Industrial Insurance Act (IIA)¹, claiming she was unable to work in any capacity as a result of her injury at McDougall. CP at 162; 207. Sanchez signed L&I forms swearing she had not been able to work since her July 2012 injury due to her disability. *See, e.g.*, CP at 301. On November 13, 2015, after several intermediary decisions and appeals, L&I accepted Sanchez’s

¹ Chapter 51.04 RCW.

claims for total disability based on her neck and back injury as well as anxiety and depression allegedly caused by her work at McDougall. CP at 162; 207; 210-211; 683. L&I made time loss payments to Sanchez from her layoff through December 15, 2015, and after that date Sanchez began receiving monthly Totally Disabled Worker Benefits under the IIA, which will continue for the rest of her life. CP at 160, 162; 179.

I. Sanchez Files a Complaint with the Washington State Human Rights Commission and Sues McDougall.

On February 7, 2013, Sanchez filed a complaint with the Washington State Human Rights Commission (WSHRC) alleging disability discrimination and retaliation. CP at 218-219; 303-326. The WSHRC interviewed Sanchez and found no reasonable cause to believe McDougall had discriminated or retaliated against her. CP at 224.

Sanchez filed this lawsuit on August 27, 2014. *See* CP at 3-7. She claims that McDougall violated the Washington Law Against Discrimination (WLAD)² by terminating her because of her disability and failing to reasonably accommodate her, and also wrongfully terminating her in retaliation for her L&I claim. CP at 5.

J. The Trial Court Grants Summary Judgment.

On June 20, 2017, McDougall moved for summary judgment of Sanchez's claims. CP at 36. At the motion hearing, the trial court

² Chapter 49.60 RCW.

requested a Notice of Decision from L&I demonstrating that L&I had accepted Sanchez's claim for emotional damages allegedly caused by her work at McDougall. CP at 690. McDougall then submitted an October 23, 2014 Notice of Decision issued by L&I, which Chavez authenticated in a new declaration. CP at 683; 679.

On December 15, 2017, the trial court granted summary judgment for two independent reasons: (1) because the IIA precluded Sanchez's claims based on the same alleged injuries; and (2) because Sanchez was unable to perform the essential functions of her job at the time of the alleged adverse actions. CP at 695; 698-700.

K. The Trial Court Denies Sanchez's Motions to Strike and for Reconsideration, and Sanchez Appeals.

Sanchez then filed a motion for reconsideration on December 26, 2017, along with a motion to strike the October 9, 2017 Chavez declaration and its exhibit, the October 23, 2014 Notice of Decision. CP at 706; 702; 679; 682. On February 5, 2018, the trial court denied the motion to strike as untimely and without merit, and denied the motion for reconsideration because it did not provide any legal or factual basis to alter the trial court's summary judgment ruling. CP at 42-43.

Sanchez now appeals: (1) the denial of the motion to strike, arguing the L&I Notice of Decision is hearsay; and (2) the trial court's

decision that Sanchez’s claims were preempted by the IIA. CP at 733-744. Sanchez does *not* address the trial court’s holding that Sanchez’s claims were barred due to Sanchez’s admission she was unable to perform the essential functions of her job at the time of her termination – an argument she apparently has waived.

ARGUMENT

A. Standard of Review.

When reviewing a decision on summary judgment, the Court of Appeals “engage[s] in the same inquiry as the trial court.” *Funk v. City of Duvall*, 126 Wn. App. 920, 925, 109 P.3d 844 (2005). Once the moving party shows that there is no genuine issue of fact and judgment is appropriate as a matter of law, the “nonmoving party must set forth *specific facts* showing a genuine issue and *cannot rest on mere allegations.*” *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989) (emphasis added); CR 56(e).³ The non-

³ CR56 (e): Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

moving party “must do more than express an opinion or make conclusory statements” to defeat summary judgment. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992); *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997) (same). Summary judgment is proper if the plaintiff cannot meet this burden. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (citation omitted).

The trial court properly granted the motion for summary judgment because Sanchez failed to establish that she could perform the essential functions of her job at the time of her layoff, and because the IIA preempts her civil claims. This Court should affirm on both grounds. Moreover, because the Court may affirm the trial court decision on any grounds supported by the record (*McGowan v. State*, 148 Wn.2d 278, 287-288, 60 P.3d 67 (2002)), the Court also can and should conclude Sanchez failed to establish any connection between her layoff and her disability or L&I claim, and that McDougall did not deny Sanchez any reasonable accommodations.

B. Sanchez’s Disability Discrimination Claim Fails as a Matter of Law.

To establish disability discrimination under the WLAD, Sanchez must first establish a *prima facie* case that she was: “[1] disabled, [2]

subject to an adverse employment action, [3] doing satisfactory work, and [4] discharged under circumstances that raise a reasonable inference of unlawful discrimination.” *Brownfield v. City of Yakima*, 178 Wn. App. 850, 873, 316 P.3d 510 (2014) (internal quotations omitted). If Sanchez proves these elements, the burden shifts to McDougall to present evidence suggesting a nondiscriminatory reason for its actions. *Id.* Then, Sanchez can only succeed on her claim if she shows McDougall’s reason was pretext to hide illegal discrimination. *Kuyper v. Dep’t of Wildlife*, 79 Wn. App. 732, 738, 904 P.2d 793 (1995).

Sanchez cannot establish a *prima facie* case of disability discrimination because, by her own admission, she was unable to perform the essential functions of her job (with or without accommodation) after July 2012. There are also no circumstances giving rise to a reasonable inference of discrimination. Finally, even if Sanchez could establish a *prima facie* case, McDougall provided a legitimate, non-discriminatory reason for her termination – she was laid off consistent with the other cherry packing hires – and Sanchez cannot point to any evidence that this reason was pretext to hide disability bias.

1. Sanchez Does Not Dispute that She Was Unable to Perform the Essential Functions of Her Job.

It is well-settled that it is not a violation of the WLAD for an

employer to discharge an employee who is “unable to perform an essential function of the job.” *See Clarke v. Shoreline Sch. Dist. No. 412, King Cty.*, 106 Wn.2d 102, 120, 720 P.2d 793 (1986). As the Supreme Court held in *Clarke*, the WLAD specifically provides that “the prohibition against discrimination because of [a disability] shall not apply if the particular disability prevents the proper performance of the particular worker involved.” *Id.* at 117-18 (internal quotations omitted). An employer therefore “may refuse to hire or may discharge a handicapped person, if the handicap prevents the ‘proper performance’ of the job.” *Id.* at 118; *see also Stieler v. Spokane Sch. Dist. 81*, 88 Wn.2d 68, 74, 558 P.2d 198 (1977) (“There is no civil rights violation in denying a job to a person who is not qualified to perform it.”).

Sanchez admitted she could not perform the essential functions of the Fruit Packer job at any time after her July 7, 2012 injury – including at the time of her layoff. CP at 195-196; 298; 333. Physically, the job required near-constant standing, repetitive neck twisting and bending, repetitive back twisting, occasional back bending, regular reaching above shoulder level, and lifting objects above shoulder level. CP at 163-164; 129. McDougall had no other jobs available for which Sanchez was qualified. CP at 121-122; 170. Indeed, L&I subsequently awarded

Sanchez lifetime benefits retroactive to her layoff because she can no longer work. CP at 162; 683.

On appeal, Sanchez does not address these facts, let alone dispute them. Because Sanchez could not perform the essential functions of a Fruit Packer at the time of her layoff, Sanchez's discrimination claim fails as a matter of law regardless of the circumstances regarding her dismissal.

2. No Evidence Suggests a Reasonable Inference of Discrimination.

Both in opposition to summary judgment and in her opening brief, Sanchez failed to connect her layoff to her disability. She therefore fails to establish a *prima facie* case of discrimination because there is no evidence establishing that her layoff "occurred under circumstances that raise a reasonable inference of unlawful discrimination." *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 489, 84 P.3d 1231 (2004), *as amended on denial of reconsideration* (Feb. 24, 2004). Sanchez was injured in July 2012, after which McDougall kept her on full salary and gave her a light duty position consistent with her medical restrictions. CP at 181-182; 122; 169; 216; 89. McDougall laid her off six months later, and only after receiving a letter from L&I and a doctors' note stating Sanchez *was not disabled*. CP at 152; 155. It is unreasonable to infer from these facts that the layoff was due to Sanchez's medical issues. *See*

Anica at 489 (no reasonable inference of disability discrimination where employer kept employee on full salary and benefits during workers' compensation claim and terminated her after she returned to work without restrictions).

3. Sanchez Was Laid Off for Legitimate, Non-Discriminatory Reasons.

Even if Sanchez could eke out a *prima facie* case, McDougall provided a non-discriminatory reason for its decision, and Sanchez again offers no evidence (let alone “specific, substantial evidence”) this was mere pretext for disability discrimination. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir. 1995) (affirming summary judgment of Americans with Disability Act (ADA)⁴ and WLAD claims where plaintiff failed to provide “‘specific, substantial evidence of pretext’ in order to avoid summary judgment.”) (quoting *Sticki v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)); *Kuyper*, 79 Wn. App. at 738.

McDougall told Sanchez on January 14, 2013 that it was laying her off consistent with the other cherry hires, as cherry packing was seasonal work and the cherry-packing season had ended. CP at 212-213; 89; 91; 95-96. Sanchez admits that, but for her light duty assignment meant to keep her on salary during her L&I claim, she would have been laid off at

⁴ 104 Stat. 327, 42 U.S.C. § 12101 *et seq.* (1990).

the end of cherry season. CP at 216. This is a legitimate and non-discriminatory reason for Sanchez's layoff.

Given McDougall's legitimate reason for Sanchez's layoff, Sanchez must provide "'specific, substantial evidence of pretext' in order to avoid summary judgment." *Collings*, 63 F.3d at 834. But at no point during the many opportunities provided in this lawsuit – including written discovery, her deposition, in her response to summary judgment, or in her opening brief to this Court – has Sanchez pointed to a single piece of evidence suggesting McDougall was motivated by disability bias or otherwise providing a false reason for her layoff. Indeed, she admits that Loreth – the decision-maker – never made any statements reflecting any discriminatory animus, and does not identify any other conduct indicating discriminatory intent. CP at 221.

Instead, Sanchez offers several meaningless arguments:

- **McDougall only created the Washroom Attendant position out of self-interest.** Appellant's Br. at 3.

McDougall created the Washroom Attendant position years before Sanchez's hire, and dozens of injured workers have taken advantage of it rather than go on time-loss. CP at 169. Further, the testimony cited by Sanchez actually says that there were two purposes to creating the Washroom

Attendant position: (1) to benefit both McDougall (by decreasing time-loss claims) *and* (2) to benefit the employees (who would get full salary as opposed to partial salary through time loss). Appellant's Br. at 3.

- **No “governmental body or medical provider has specifically gone to the location of McDougall to actually observe the” bathroom where the Washroom Attendant works.** Appellant's Br. at 4. First, this is not a legal requirement. Second, Sanchez has not provided any argument for why personal inspection is necessary or useful. Third, Sanchez's doctor approved the Washroom Attendant position and Sanchez accepted it and worked in the position for five months without complaint. CP at 122-123; 139; 215; 91.

- **McDougall did not rely on other companies' policies when creating the Washroom Attendant position.** (Appellant's Br. at 5). Again, there is no legal requirement McDougall research and consider how other companies handle light-duty assignments.

Sanchez's final effort to manufacture a discrimination claim is to point to an “End of Employment Status Form,” where Julie Loreth

indicated Sanchez's performance was "unsatisfactory" and "would not rehire." Appellant's Br. at 7-8. Sanchez incorrectly contends this is inconsistent with the fact Sanchez never had any performance issues as a Fruit Packer. Appellant's Br. at 7. In fact, Sanchez was not laid off for poor performance; the very same End of Employment Status Form states, Sanchez was "laid off to be consistent w/ all cherry/C&M night shift hires." CP at 647. Sanchez even admits she would have been laid off but for her L&I claim. CP at 216. Further, as Ms. Loreth explained in her deposition, she marked "unsatisfactory" and "would not rehire" because – at her layoff meeting – Sanchez was asking to remain in the temporary, light-duty Washroom Attendant position full-time, even though she had been medically released to work. See CP at 675-676. To Ms. Loreth, this was unsatisfactory.

This is not "specific, substantial evidence" that Sanchez's layoff was motivated by disability discrimination. *Collings*, 63 F.3d at 834. Indeed, the record contains ample evidence undercutting any claim of pretext. McDougall allowed Sanchez to remain at work in a light-duty position earning full salary while she recovered from her workplace injury. It did not lay her off when she was injured or submitted doctors' notes about her medical condition; she was not laid off until after L&I told McDougall that Sanchez was released *with no medical restrictions*, at

which point she was laid off consistent with the other seasonal cherry packers. CP at 152; 153; 155; 212-213; 216; *See Ross v. Fred Meyer Stores, Inc.*, 2010 WL 3730175, at *6 (W.D. Wash. Sept. 20, 2010) (no evidence of pretext where employer did not discharge employee until after employee was released to work with no restrictions).

Sanchez provides no facts to the contrary – she only speculates about a possible “hidden discriminatory motive” without actually supporting that conclusion. Appellant’s Br. at 23-25. This is not sufficient to defeat summary judgment. *See Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (“A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.”) As such, Sanchez’s disability discrimination claim fails as a matter of law because she cannot carry her ultimate burden even under the most generous interpretation of the facts.

C. Sanchez Has Failed to Establish a Failure-to-Accommodate Claim.

Sanchez cannot make a *prima facie* case for her failure to accommodate claim, which also requires her to establish “she was qualified to do the job.” *Becker v. Cashman*, 128 Wn. App. 79, 84, 114 P.3d 1210 (2005). Sanchez was a Fruit Packer for McDougall, and she testified that she was unable to perform the essential functions of her job *at any point* after her July 2012 injury, including at the time of her layoff. CP at 163-164; 122; 127; 195-196; 298; 333. As a matter of law, Sanchez cannot recover for failure to accommodate. *See Becker*, 128 Wn. App. at 84; *Clarke*, 106 Wn. 2d at 119 (“[A]n employer may discharge a handicapped employee who is unable to perform an essential function of the job, without attempting to accommodate that deficiency.”); *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 534–35, 70 P.3d 126 (2003) (same, granting summary judgment on failure-to-accommodate claim because plaintiff could not perform essential functions of job); *Staub v. Boeing Co.*, 919 F. Supp. 366, 370 (W.D. Wash. 1996) (affirming summary judgment of failure-to-accommodate claims under ADA and WLAD where employee could not perform essential functions of job even with reasonable accommodation).

The second, independent reason Sanchez’s failure-to-accommodate

claim fails as a matter of law is that Sanchez never provided any medical support for the one “accommodation” McDougall did not provide: switching her from the night shift to the day shift so she could commute with her husband. CP at 197. When Sanchez made this request, there was a waitlist of night-shift employees wanting to transfer. CP at 90; 197-198. As McDougall told Sanchez when she requested the transfer, the company could add her to the waitlist but could not move her ahead of other employees unless it was medically necessary. CP at 199; 123. At the time – and generally at all times – there was a long list of employees wanting to switch from the night shift to the day shift (which is a preferred schedule). CP at 90. McDougall told her that if it was medically necessary, she must provide medical documentation supporting the request. CP at 199; 123. McDougall “was not prohibited from requesting documentation from an appropriate medical professional concerning plaintiff’s condition.” *Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 844 (9th Cir. 2000) (citing Equal Employment Opportunity Commission guidance). Sanchez never provided any notes from any medical professionals stating it necessary for Sanchez to be on the day shift, or that she otherwise could not perform the functions of the night shift Washroom Attendant position. CP at 186-187; 123. Washington law does not require McDougall to provide with “medically unnecessary accommodations.”

Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 193, 23 P.3d 440 (2001), as amended on denial of reconsideration (July 17, 2001), and abrogated on other grounds by *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516 (2017).

It therefore was **Sanchez** who halted the interactive process by never providing this medical documentation – which McDougall had a right to request and rely on. *See Hill*, 144 Wn.2d at 193 (no failure to accommodate where employee failed to provide evidence from doctor that accommodation was medically necessary); *Allen v. Pac. Bell*, 348 F.3d 1113, 1115 (9th Cir. 2003) (holding that if the employer requests reasonable medical evidence to support an employee’s accommodation request, the employer is under no obligation to engage in further interactive processes if the employee fails to submit such evidence).

Sanchez now offers an opinion by Dr. Silverio Arenas speculating that the Washroom Attendant job caused Sanchez further emotional injury. Appellant’s Br. at 4-5. Dr. Arenas is an expert witness who was hired for purposes of this lawsuit, and who did not examine Sanchez until three years **after** Sanchez’s layoff. *See CP* at 423-429. At the time Sanchez worked for McDougall, Sanchez’s doctors all agreed that the Washroom Attendant position fit her medical restrictions. This was the only medical information ever communicated to McDougall on the subject. *CP* at 122-

123; 139; 141; 146; 186-187. McDougall asked Sanchez to provide any updated or contrary medical information, and she never did. And tellingly, even Dr. Arenas does not claim that there was an accommodation that could have permitted Sanchez to perform her job as a Fruit Packer – because there were not any. *See* CP at 423-429; 195-196; 298; 333.

Because Sanchez could not perform the essential functions of the Fruit Packer position even with reasonable accommodation, and because Sanchez cites no reasonable, medically-necessary accommodation that McDougall failed to provide to her, her failure-to-accommodate claim fails as a matter of law.

D. Sanchez’s Wrongful Discharge Claim Fails as a Matter of Law.

Under RCW 51.48.025(3)⁵, an employee can bring a wrongful termination claim against an employer who has discharged the employee in retaliation for pursuing workers’ compensation benefits by showing: “1) she exercised the statutory right to pursue workers’ benefits ...; 2) she was discharged; and 3) there is a causal connection between the exercise of the legal right and the discharge.” *Anica*, 120 Wn. App. at 490–91. If the employer presents a legitimate, non-retaliatory reason for the

⁵ (3) If the director determines that this section has not been violated, the employee may institute the action on his or her own behalf.

termination, the employee bears the burden of showing that the “employee’s pursuit of workers’ compensation benefits was a substantial factor motivating the employer to fire the employee.” *Id.* at 492.

Because the burden of demonstrating a *prima facie* case in this context is low (it is met “by merely showing that [the employee] filed a workers’ compensation claim, that the employer had knowledge of the claim, and that the employee was discharged”), McDougall did not and does not dispute that Sanchez has satisfied this requirement for the purposes of summary judgment. *Id.* at 491. However, Sanchez’s wrongful termination claim fails as a matter of law because she has no evidence whatsoever that her workers’ compensation claim was a “substantial factor” in her layoff, which was based on the fact she was a seasonal Fruit Packer who could not go back to packing fruit. Sanchez did not respond to this argument on summary judgment, effectively conceding that no evidence supports her retaliation claim. CP at 667; *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003) (by failing to address an argument, party “apparently concedes the issue.”). Sanchez does not address this argument or cite any supporting evidence in her appeal, either.

Indeed, the undisputed facts dispel any notion that Sanchez’s L&I claim played *any* role in her layoff. These include:

- After Sanchez's injury, McDougall helped her file an L&I claim, and tried multiple light duty positions to find one consistent with her restrictions that would keep her on full salary (CP at 133-134; 189; 193; 196);
- Sanchez was laid off *after her L&I claim was closed*, and a full *six months* after filing her L&I claim with McDougall's assistance (CP at 215; 123-124; 155);
- Sanchez admits that she normally would have been laid off at the end of July following the end of cherry season, but McDougall in fact kept her on salary during her L&I claim (CP at 181-182; 122; 169; 216; 89);
- McDougall regularly assists employees with L&I claims, having handled 400 L&I claims between 2012 and 2016, with not a single employee (besides Sanchez) alleging retaliation of any sort (CP at 92; 90); and
- Since 2008, at least 27 McDougall employees with pending L&I claims were kept on full salary working a light duty assignment as Washroom Attendant, with none alleging retaliation besides Sanchez. (CP at 121-122; 92).

Given these facts, it is not reasonable to infer that McDougall was motivated by retaliatory intent when it placed Sanchez in the Washroom Attendant position in order to keep her on full salary.

The Court of Appeals upheld summary judgment of a wrongful termination claim under similar circumstances in *Anica*, where the employee “was terminated approximately three months after her filing for workers’ compensation benefits,” during which time she had “received substantial workers’ compensation benefits for surgery and recovery and [employer] took no retaliatory action.” *Id.* at 494. The fact that McDougall retained Sanchez in a light duty position instead of laying her off after her injury highlights its good will towards injured workers, as does the fact that it has accommodated hundreds of employees in recent years without any allegation of retaliation. *See Ross*, 2010 WL 3730175 at *7 (evidence other employees had filed L&I claims, received workers’ compensation benefits, and were retained, negated argument of pretext).

For these reasons, Sanchez’s retaliation claim fails as a matter of law.

E. All of Sanchez’s Claims and Damages Are Precluded by Her Workers’ Compensation Benefits.

Another reason why Sanchez’s claims fail as a matter of law – and the only argument Sanchez addresses in her appeal – is that they are

preempted by Sanchez’s workers’ compensation claims. L&I has paid (and continues to pay) Sanchez for all lost income since her layoff because she is totally disabled. As a result, Sanchez cannot recover any damages for lost wages – a fact she does not dispute. *See Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 765, 855 P.2d 711 (1993) (“[P]ermanent total disability benefits under RCW 51.32 are intended as a replacement for lost income....”). L&I *also* accepted Sanchez’s claim for emotional distress injuries caused by her work at McDougall. Therefore, her civil claims are wholly precluded.

1. Sanchez Testified that Her L&I Pension Covers All Emotional Distress Damages Caused by McDougall.

A person who is injured at work and subsequently receives benefits for that injury under Washington’s IIA “has no separate remedies for his or her injuries except where the IIA specifically authorizes a cause of action.” *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2004); RCW 51.04.010⁶. One such authorized exception is where an employer

⁶ RCW 51.04.010: The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in

deliberately caused a workplace injury – an exception that *can* be invoked in discrimination actions if the alleged injuries: “(1) are of a different nature, (2) [arose] at different times in the employee’s work history, and (3) [have] different causal factors . . .” *Hinman v. Yakima Sch. Dist. No. 7*, 69 Wn. App. 445, 451, 850 P.2d 536 (1993) (internal quotations omitted).

Sanchez tries to fit this exception by claiming she suffered two distinct emotional injuries – one that was a workplace injury, and another that flowed from the alleged “retaliation and discrimination.” Appellant’s Br. at 18. This argument ignores the record. Sanchez specifically testified that all of her emotional distress flowed from her work as a Washroom Attendant, which was the *sole cause* of her alleged depression and anxiety:

Q. . . . Besides having to work in the bathroom as a washroom attendant, do you think anything else contributed to your depression and anxiety?

A. No.

[. . .]

Q. . . . Don’t you think the [July 2012] accident and the injuries caused by the

their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

accident then contributed to your depression and anxiety?

A. ***The depression and that, I got it when I was in the washroom. The anxiety and that was due to the work at the washroom.***

CP at 182; 183. Sanchez also testified she sought L&I compensation for these *specific* emotional injuries – anxiety and depression. CP at 206-207. And, in fact, L&I accepted her claim and is compensating her for these injuries – anxiety and depressive disorder. CP at 683.

Sanchez’s lawsuit therefore seeks to recover for the very same injuries (lost wages and emotional distress) caused by the same actions (being given light duty as a Washroom Attendant) for which she’s already being compensated under the IIA. Sanchez’s claim now that there were additional or separate emotional injuries for which she is not receiving L&I compensation (without specifying them or citing to the record) contradicts her sworn testimony. As a matter of law, Sanchez’s claims are precluded by the IIA. *See, e.g., Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200 (1997) (precluding claims for infliction of emotional distress that were “not of a different nature, did not arise at different times, and [did] not have different causal factors from the injury” already covered by the IIA).

2. There is No Evidence McDougall Intentionally Injured Sanchez.

Sanchez points out another exception to IIA exclusivity when the employer acted with “deliberate intention” to injure the worker, but Sanchez produces no evidence McDougall *intended* to injure her. RCW 51.24.020⁷. Under this element, Sanchez needs to show a specific intent to deliberately injure her. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 860–61, 904 P.2d 278 (1995). It is insufficient if McDougall’s actions were “merely carelessness or negligence, however gross,” or if McDougall’s actions had a “substantial certainty of producing injury,” or even if McDougall engaged in “serious and willful misconduct.” *Id.*; *Higley v. Weyerhaeuser Co.*, 13 Wn. App. 269, 271-72, 534 P.2d 596 (1975); *Winterroth v. Meats, Inc.*, 10 Wn. App. 7, 12–13, 516 P.2d 522 (1973). Instead, to meet the narrow exception to IIA exclusivity, McDougall “must have determined to injure [Sanchez] and used some means appropriate to that end.” *Birklid*, 127 Wn.2d at 860 (internal quotation marks omitted).

Sanchez offers no evidence that McDougall acted intentionally to injure Sanchez when it offered her a light-duty position as Washroom

⁷ RCW 51.24.020: 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.

Attendant. In fact, the evidence supports the opposite conclusion – that McDougall offered the position to *help* Sanchez continue to work by doing so in a light-duty position, which McDougall had done for over two-dozen employees before her. CP at 169. Sanchez speculates that because she found the Washroom Attendant position demeaning, McDougall *must* have placed her there to hurt her. This is speculation – not evidence – and it is also self-serving testimony that cannot defeat the undisputed facts.

Seven Gables Corp. 106 Wn.2d at 13.

The legal authority Sanchez cites also helps demonstrate why her claims do not fit the narrow exception to IIA exclusivity. The plaintiffs in most of these cases based their L&I claims *solely* on physical injuries caused at work – not on the emotional injuries, too, as Sanchez did here. *See Goodman v. Boeing Co.*, 127 Wn.2d 401, 403, 899 P.2d 1265 (1995), *as amended* (Sept. 26, 1995) (L&I claim was for wrist injury); *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 568, 829 P.2d 196 (1992), *rev'd*, 124 Wn.2d 634, 880 P.2d 29 (1994) (L&I claim for hand injury); *Crow v. The Boeing Co.*, 129 Wn. App. 318, 328, 118 P.3d 894 (2005) (L&I claim was for knee injury; court held the IIA preempted plaintiff's civil claims); *Hinman v. Yakima Sch. Dist. No. 7*, 69 Wn. App. 445, 452, 850 P.2d 536 (1993) (L&I claim was for chronic bronchitis); *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 572, 731 P.2d 497

(1987), *overruled on other grounds by Phillips v. City of Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989) (L&I claims were for foot injury and chronic bronchitis). Here, Sanchez actually applied for IIA benefits for her emotional injuries.

In the remaining cases cited by Sanchez, the plaintiffs did not have actual L&I claims, but the defendants sought to invoke IIA preemption to preclude civil claims for emotional injuries caused by workplace harassment and wrongful termination. *See Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 921, 726 P.2d 434 (1986); *Snyder v. Medical Service Corp. of Eastern Wash.*, 98 Wn. App. 315, 321, 988 P.2d 1023 (1999), *aff'd sub nom. Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 35 P.3d 1158 (2001). In those cases, the courts held that the plaintiffs' claimed emotional injuries were not "occupational injuries" under the IIA, which therefore did not preclude the civil claims. Here, L&I actually determined Sanchez's emotional injuries were caused by her occupation (as Sanchez herself testified), and Sanchez is actually receiving full compensation for these injuries under the IIA.

3. Sanchez's Evidentiary Objections Are Meritless.

After the trial court granted McDougall's summary judgment motion, Sanchez filed a belated motion to strike the supplemental declaration of Ana Chavez and the attached October 23, 2014 Notice of

Decision from L&I, which the trial court had requested at oral argument. CP at 702; 679; 683. Sanchez claimed this evidence was hearsay, and an expert opinion. As the trial court correctly held, these arguments were untimely and meritless.

Sanchez's evidentiary argument was untimely because Sanchez did not file it until *after* the trial court had decided the summary judgment motion and entered an order dismissing this case. If a party wishes to challenge evidence supporting a summary judgment motion, it must move to strike that evidence "*before* entry of summary judgment." *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998) (emphasis added; citing cases). McDougall filed and served the Supplemental Declaration of Ana Chavez at the trial court's request on October 10, 2017. CP at 678-682. Sanchez could have filed a motion to strike the evidence at any point over the next two months, but chose to wait until *after* the Court issued a December 5, 2017 decision granting the summary judgment motion, *after* the parties submitted a joint proposed order to Court on December 15, 2017, and *after* the Court signed the order dismissing the case on December 15, 2017. CP at 695; 698-700.

Even if it were timely, Sanchez's hearsay objection would still lack any merit. Sanchez is wrong that McDougall offered the Notice of Decision "in an attempt to prove that Sanchez was only injured by the on

the physical job injury of July 7, 2012, and not by the injuries suffered from” the alleged discrimination and retaliation. Appellant’s Br. at 19. McDougall offered the Notice of Decision – at the trial court’s request – to show that L&I had accepted a claim by Sanchez for anxiety and depressive disorder caused by her work at McDougall. Sanchez does not dispute that L&I accepted these conditions (a matter of public record that Sanchez herself affirmed in deposition), nor does Sanchez dispute the authenticity of the Notice of Decision. CP at 206-207.

There is also no merit to Sanchez’s claim this Notice of Decision was an “expert opinion” that conflicted with the opinion of her own expert, Dr. Arenas. Appellant’s Br. at 19-20. An expert opinion is an opinion based on “scientific, technical, or other specialized knowledge” expressed by someone with sufficient “knowledge, skill, experience, training, or education” to qualify as an expert on the subject at issue. Evid. R. 702⁸. The Notice of Decision simply states that L&I has accepted Sanchez’s claim for benefits based on anxiety and depressive disorder. These are not opinions, let alone expert opinion. They are statements of

⁸ If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

fact, which Sanchez does not dispute. It was *Sanchez* who testified that her anxiety and depressive disorder was caused solely by McDougall placing her in the Washroom Attendant position.

4. Sanchez’s Estoppel Argument Is Misplaced.

Sanchez also claims that Sanchez’s L&I pension has no “estoppel” effect precluding her civil claims. Appellant’s Br. at 20-22. But McDougall did not argue – and the trial court did not hold – that Sanchez was judicially estopped from asserting civil claims because of her L&I claim. Sanchez raised this argument for the first time in her motion for reconsideration, which is why the trial court properly rejected it. *See River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (trial court has discretion to “refus[e] to consider an argument raised for the first time on reconsideration absent a good excuse.”).

In any event, judicial estoppel is not the proper framework for evaluating the effect of Sanchez’s L&I claims on her ability to bring duplicative civil claims. The correct analysis is the preemption doctrine discussed above. *See* Argument Sections E.1-2, *supra*. This case presents the exact scenario the State intended to avoid when it made the IIA the sole and exclusive remedy for work-related injuries. Sanchez chose to utilize the State’s industrial insurance as her exclusive remedy for these

injuries. Washington law precludes a double recovery, and summary judgment is appropriate.

ATTORNEYS' FEES AND EXPENSES

McDougall was the prevailing party in the trial court. Pursuant to RAP 18.1, McDougall will request attorneys' fees and expenses caused by this appeal. *See Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48, 104–05, 231 P.3d 1211, 1241 (2010), *as corrected on denial of reconsideration* (Apr. 20, 2010) (“A party who substantially prevails on appeal [of WLAD claim] is entitled to award for attorneys’ fees on appeal.”).

CONCLUSION

For the reasons set forth above, McDougall respectfully requests that this Court affirm the trial court’s entry of summary judgment dismissing Sanchez’s claims.

RESPECTFULLY SUBMITTED this 14th day of May, 2018.

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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date, I caused to be served in the manner noted below, a copy of the Response Brief of McDougall & Sons, Inc. on the following:

Via E-file Notification

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Executed this 14th day of May, 2018, in Seattle, Washington.

s/ Heather Persun _____

Heather Persun

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