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COURT OF APPEALS, DIVISION THREE  
OF THE STATE OF WASHINGTON

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GLEND A KOENIG,

*Plaintiff-Appellant,*

and

CITY OF QUINCY,

*Defendant-Respondent.*

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ON APPEAL FROM GRANT COUNTY SUPERIOR COURT  
Cause No. 17-2-00993-4  
Honorable John D. Knodell

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

The problem for many people with disabilities is not that we are not able to work a certain number of hours a week. It's that no one will let us.

– Stella Young<sup>1</sup>

This appeal seeks reversal of the Superior Court's summary judgment dismissal of Ms. Koenig's PTSD accommodation claim against the City of Quincy under Washington's Law Against Discrimination (WLAD).

Ms. Koenig, a 17-year City employee, was subjected to continuing, escalating incidences of sexual harassment at the hands of a co-worker, Brock Laughlin. After she reported Mr. Laughlin's actions, the City took no permanent remedial action to stop Mr. Laughlin's harassing actions or to deter potential future harassers, even after Mr. Laughlin confessed his illegal behavior. Instead, the City kept the entire incident confidential from City staff, stood idle while Mr. Laughlin resigned voluntarily, and gave Mr. Laughlin a positive reference for his next job.

Ms. Koenig was diagnosed with PTSD caused by Mr. Laughlin's harassment and the City's actions and inaction. The City refused Ms. Koenig's requests for reasonable accommodation, including requests as simple as working temporarily in a different building or for the City to make

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<sup>1</sup> Stella Young (1982–2014) was a comedian, journalist, and disability rights activist.

changes to its sexual harassment policies and procedures—policies and procedures that the City admits failed Ms. Koenig and required improvement. Rather than accommodate Ms. Koenig and allow her to return to work, the City fired her via U.S. mail. Out of options and a job, Ms. Koenig sued for violations of Washington’s Law Against Discrimination.

On the City’s motion for summary judgment, the trial court dismissed Ms. Koenig’s WLAD claims, concluding that Ms. Koenig failed to establish that her requested accommodations were medically necessary—disregarding two doctor’s notes from her treating therapist establishing the necessity of those accommodations. The trial court’s dismissal is reversible error.

Ms. Koenig’s WLAD accommodation cause of action must survive summary judgment: genuine issues of material fact exist as to whether Ms. Koenig’s requested accommodations were medically necessary, as well as to other material elements of Ms. Koenig’s accommodation claim. The Court should reverse and remand this matter for trial.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in dismissing Ms. Koenig’s RCW 49.60.180 WLAD accommodation claim on summary judgment on October 5, 2018.

### **III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR**

**ISSUE 1:** In *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004), the Supreme Court held that in cases of PTSD accommodation, a doctor's note is all that is necessary to establish sufficient nexus between the disability and the requested accommodation to survive summary judgment. Here, Ms. Koenig provided the City with two notes from her treating therapist, establishing the medical necessity of Ms. Koenig's requested accommodations to (a) work temporarily in a different building and (b) have the City make changes to its sexual harassment policies and procedures. The question presented is:

Applying *Riehl v. Foodmaker, Inc.*, did the trial court erroneously conclude that Ms. Koenig failed to establish sufficient nexus between her requested accommodations and her PTSD disability?

**ISSUE 2:** This Court may affirm the trial court's summary judgment ruling on any basis supported by the record and the law. But the existence of a dispute as to any genuine material fact precludes summary judgment. Here, genuine issues of material fact exist as to whether (1) Ms. Koenig's requested accommodations were reasonable and whether the City's rejection of those requests was unreasonable, and (2) placing Ms. Koenig on unpaid medical leave was a reasonable accommodation. The question presented is:

Does the existence of these additional disputed material facts require reversal and remand of this matter for trial?

**ISSUE 3:** The Court's affirmative answer to **Issues 1** and **2** raises the following, final question:

Should the Court award Ms. Koenig her attorneys' fees and costs on appeal when RAP 18.1 and RCW 49.60.030 respectively provide for and authorize such an award?

If the Court answers **Issue 1** or **2** in the negative, it need not address **Issue 3**.

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural Prologue**

Without some initial context, this case's uncommon procedural history and the appellant's name change may make this appeal difficult to follow. Ms. Koenig originally brought suit against the City in the Eastern District of Washington Federal Court, alleging federal and state claims of sexual harassment/hostile work environment, WLAD disability discrimination, and breach of contract. One month before trial, the Eastern District dismissed Ms. Koenig's sex harassment and hostile work environment claims with prejudice at summary judgment, which the Ninth Circuit affirmed. *Stetner v. City of Quincy*, 728 Fed. Appx. 738 (9th Cir. 2018). The Eastern District declined to exercise supplemental jurisdiction

over the remaining WLAD disability and contract claims, dismissing those claims without prejudice. *Stetner v. City of Quincy*, No. 2:15-CV-210-RMP, 2016 WL 7411129, \*6 (E.D. Wash. Dec. 22, 2016). Much of the record before this Court was created during this federal litigation.

Ms. Koenig refiled her WLAD and contract claims with the Grant County Superior Court. At the time Ms. Koenig brought her initial federal action and at all times relevant to the facts underlying this current litigation, Ms. Koenig was married and her last name was “Stetner.” All references to “Glenda Stetner” or “Mrs. Stetner” in the record refer to the appellant, Ms. Koenig. Facts relevant to this appeal follow.

**B. A Co-Worker Sexually Harasses Ms. Koenig. The City Fails to Take Permanent, Remedial Action.**

Before the City of Quincy fired her in the spring of 2015, Ms. Koenig worked for the City for 17 years as a Secretary/Receptionist and more recently as the Administrative Assistant to the City Engineer. CP 230, 242–244, 261. In the spring and summer of 2014, Ms. Koenig’s co-worker-at-the-time, Brock Laughlin, subjected Ms. Koenig to continuing and escalating sexual harassment. CP 227–228, 231, 262–267, 275. The harassment began with lewd comments; grew into unwanted touching, both over and under Ms. Koenig’s clothing; and eventually climaxed with Mr. Laughlin exposing his erect penis to Ms. Koenig. *Id.*

Ms. Koenig reported Mr. Laughlin's actions to the City on August 11, 2014, immediately after Mr. Laughlin exposed himself. CP 227–228, 231–232. The City placed Mr. Laughlin on temporary, paid leave (CP 285, 288) and hired a third-party investigator, who within days had a full confession from Mr. Laughlin (CP 228).

With this confession in hand, the City did not discipline Mr. Laughlin in any way. CP 285–286, 294. It did not alter its sexual harassment training policies and procedures. *Id.*; CP 253, 287. It did not inform its staff that Mr. Laughlin's behavior was inappropriate and would not be tolerated by any other employee in the future. Instead, the City considered the situation “nobody's business” and “tried to keep it from being a big rumor going around town.” CP 251–252. In fact, City Administrator Tim Snead, whom the City designated as its CR 30(b)(6) witness to testify on its behalf regarding the City's sexual harassment and disability discrimination policies and practices (CP 350), testified that the entire investigation into Mr. Laughlin's actions was kept secret from the City's employees because the City is a “small town.” CP 353–354 (“I just didn't think that needed to be brought out about that in – even in the – it's a small town, so we felt it would – the confidentiality was important.”).

To maintain the status quo, the City did not even inform Ms. Koenig or Mr. Laughlin that it had determined that Mr. Laughlin's actions

constituted illegal sexual harassment. CP 285, 294. Instead, the City permitted Mr. Laughlin to continue to work “on a short leash” until he voluntarily resigned on October 1, 2014. CP 228, 251, 285–286, 294. The City then provided Mr. Laughlin with a positive reference for his next job. CP 292 (“Q: Were you given a reference from the City of Quincy? A: Yes. Q: Was it a positive reference? A: Yes.”).

**C. Ms. Koenig Suffers Trauma and is Diagnosed with PTSD. Ms. Koenig Informs the City. The City Expects Ms. Koenig to Return to Work but Does Not Offer Ms. Koenig any Accommodations.**

While Mr. Laughlin’s circumstances were unaffected and perhaps improved by his unlawful behavior, Ms. Koenig’s spiraled downward. After learning from her immediate supervisor, Mr. Worley, that the City intended to allow Mr. Laughlin to continue to work despite his admitted, illegal conduct, Ms. Koenig took a 30-day medical leave of absence at the direction of her treating ARNP at Quincy Valley Medical Center. CP 228, 234, 250–251. Ms. Koenig informed Mr. Worley that her leave was due to the fact that “she was very upset, traumatized with the things going on in her life,” including the events involving Mr. Laughlin. CP 250.

Ms. Koenig was diagnosed with PTSD by her treating counselor, Dr. Kristen Callison, caused by Mr. Laughlin’s actions and the City’s inaction. CP 299. The Independent Medical Examiner whom the City retained in the federal case, Dr. Ronald Klein, Ph.D., agreed that Ms. Koenig “sustained

psychological injury”: “Ms. [Koenig] does appear to have sustained psychological injury in response to the actions of Mr. Laughlin occurring during the course of her employment.” CP 357.

On October 3, 2014—two days after the City permitted Mr. Laughlin to voluntarily resign his position with the City—counsel for the City, Quentin Batjer, emailed Ms. Koenig’s counsel, stating that the City “expected” Ms. Koenig to return to work that coming Monday. CP 303. Mr. Batjer’s email contained no mention of accommodation or any indication that the City had concerns about Ms. Koenig’s health, despite the fact that the City was aware that Ms. Koenig was on medical leave due to the events involving Mr. Laughlin. *Id.* Ms. Koenig did not return to work that Monday.

Mr. Batjer sent another email to Ms. Koenig’s counsel five days later, again stating the City’s expectation that Ms. Koenig return to work. CP 304. Again, Mr. Batjer’s email contained no mention of any accommodation or indication that the City had concern for Ms. Koenig’s well-being after the trauma she endured and of which the City was well aware. *Id.* Again, Ms. Koenig did not return to work.

Instead, Ms. Koenig’s counsel delivered an October 13, 2014 letter to Mr. Batjer, reminding Mr. Batjer that Ms. Koenig “has suffered and continues to suffer mental and physical trauma stemming from (a) the

inappropriate conduct of a City employee [Brock Laughlin] acting within the scope of his employment and while on City property, as well as (b) the City's actions and inactions subsequent to its becoming aware of its employee's conduct." CP 305–307. Counsel enclosed with this letter a note from Ms. Koenig's treating counselor, Dr. Kristen Callison. *Id.* Dr. Callison confirmed that Ms. Koenig had suffered trauma as a result of Mr. Laughlin's actions and the City's (in)actions, and that due to that trauma, Ms. Koenig was unable to return to the workplace. CP 307. Dr. Callison further stated that even the thought of returning to the workplace triggered Ms. Koenig's trauma. *Id.* ("Despite her progress in treatment, Ms. [Koenig's] symptoms are triggered and worsen when she is faced with the idea of returning to the workplace.").

The City's demands continued unabated and without offer of reasonable accommodation. CP 308–309 (provide suggested accommodation no later than 10/20/14)); CP 310 (provide suggested other work Ms. Koenig can perform)); CP 315 (City will assume Ms. Koenig abandoned her job by January 20, 2015)); CP 316 (provide estimated date of return by April 6, 2015)).

Ms. Koenig's counsel sent Mr. Batjer multiple communications during this time, restating Ms. Koenig's condition, providing signed medical releases requested by the City, and reporting counsel's attempts to

work with the City to communicate with Dr. Callison. CP 323–327.

Stated otherwise, Ms. Koenig did everything she could to meet the City’s demands in hopes that the City would offer her reasonable accommodations to return to work.

**D. Ms. Koenig Requests Accommodations: To Work Temporarily in a Different Building and for the City to Make Improvements to Its Sexual Harassment Policies and Procedures. The City Rejects Ms. Koenig’s Requested Accommodations with No Mention of Undue Hardship.**

By the spring of 2015, it became clear that the City would continue its demands and had no intention of offering Ms. Koenig any accommodation—reasonable or otherwise. On April 1, 2015, Ms. Koenig’s counsel delivered a letter to Mr. Batjer, requesting answers to eleven questions regarding possible accommodations the City could make that Ms. Koenig considered reasonable. CP 301–302. For example, Ms. Koenig requested that she be restored to her previous administrative assistant position and that she be allowed to work in a different building. She also requested that changes be made to the City’s sexual harassment policies in light of the fact that those policies had failed her with regard to Mr. Laughlin:

1. Will [Ms. Koenig] be returning as an administrative assistant as she has served for the past several years?
2. Would [Ms. Koenig] be able to work at a different building such as the Public Works Building located at

21 A Street NE?

3. Will there be clear and concise sexual harassment policies in place that will make available fair and effective methods to report allegations of abuse to the City?
4. Have there been any improvements made to the City's sexual harassment training program or have any other training programs regarding sexual harassment been implemented? If so, please provide details of these changes and/or implementations.

*Id.*

The City answered each of Ms. Koenig's above questions in the negative. CP 328–330. Mr. Batjer responded on behalf of the City, informing Ms. Koenig that (1) she would not be reinstated to her previous position, (2) she could not work in a different building, (3) it was Ms. Koenig's responsibility to follow the City's existing sexual harassment policies; and (4) the City would make no changes to those policies:

1. When Ms. [Koenig] returns to work, she will resume the position of Secretary/Receptionist, the same position she left in August of 2014 when she went on unpaid leave.  
...
2. When Ms. [Koenig] returns to work, she would be located in the front office where her desk originally was located in the Public Services Building.  
...
3. These policies ... are already in place. It is the responsibility of the employee to report sexual harassment immediately.  
...
4. The sexual harassment training program is the same as when Ms. [Koenig] completed her sexual harassment training on myriskolutions.

CP 328.

The City offered its refusals without claiming undue hardship and despite its admissions that (1) the City does not know when it demoted Ms. Koenig from Administrative Assistant to Secretary/Receptionist, if at all; (2) the City's Secretary/Receptionists worked in buildings other than the Public Service Building; and (3) the City's sexual harassment policies and procedures needed improvement after those policies and procedures failed to protect Ms. Koenig.

**1. The City admits that it does not know when it demoted Ms. Koenig from Administrative Assistant to Secretary/Receptionist.**

The City designated Carl Worley as its Rule 30(b)(6) designee authorized to testify on behalf of the City regarding “the employment history for Glenda Koenig for the past 10 years.”<sup>2</sup> CP 331. Through Mr. Worley, the City testified that it could not identify the date it allegedly demoted Ms. Koenig from Administrative Assistant to the admittedly lesser role of “Secretary/Receptionist.” CP 243–244 (“I’m not clear on the time that it had been determined finally. This has been an ongoing ... discussion since, I believe back in 2011.”); CP 284 (“Q: And which would be considered the

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<sup>2</sup> Mr. Worley testified as both a fact and Rule 30(b)(6) witness. CP 238, 280, 331. During his testimony as the City's Rule 30(b)(6) designee, Mr. Worley confirmed that the answers he gave as a fact witness were truthful and would be no different if given as answers to those same questions as the City's Rule 30(b)(6) designee. CP 283 (“Q: Would your answers to any of those questions be different if I asked them to you in this deposition? A: Nope.”).

greater pay position? A: The administrative assistant. Specifically, in [Ms. Koenig's] situation.”).

Despite the City's conceded lack of knowledge of when it demoted Ms. Koenig, if at all, the City refused to permit Ms. Koenig to serve in an Administrative Assistant capacity upon her return. CP 328 (“When Ms. [Koenig] returns to work, she will resume the position of Secretary/Receptionist, the same position she left in August of 2014 when she went on unpaid leave.”).

**2. The City admits that its Secretary/Receptionists work in buildings other than the public service building.**

Taking as true the City's position that Ms. Koenig was a Secretary/Receptionist when she went on unpaid leave for the purposes of this appeal, the City testified through Mr. Worley that its Secretary/Receptionists worked in buildings other than the Public Service Building. CP 245 (“Q: Were there secretary/receptionist positions in any other buildings in the City? A: Yes. At City Hall.”).

Despite this fact, the City rejected Ms. Koenig's request that she be permitted to work in a different building upon her return to work. CP 328 (“she would be located ... where her desk originally was located in the Public Service Building.”).

The City's only contemporaneous explanation for its refusal to

permit Ms. Koenig to work as a Secretary/Receptionist in a different building was that Ms. Koenig's presence in the Public Services Building would "afford" citizens "the most efficient administration of city services." CP 328. The City later supplemented its explanation in April of 2018 via a declaration from Mr. Worley, stating only that "[i]t would have been very inefficient for [Ms. Koenig] to work in a different building" and that "there was no room at City Hall for additional employees." CP 138. Mr. Worley's declaration contains no mention of any undue hardship and does not preclude moving interchangeable staff around to other buildings. *See* CP 136–138.

**3. The City admits that its sexual harassment policies and procedures needed improvement.**

The City testified through Mr. Worley that it was reasonable for Ms. Koenig to request changes to the City's sexual harassment policies and procedures. At deposition, Mr. Worley was asked, "As a result of ... the alleged incident with Mr. Laughlin, was it reasonable for Ms. [Koenig] to request that those [sexual harassment] policies be improved?" CP 287. Mr. Worley responded in the affirmative, stating that the City could be "more on top of" and "proactive" with the City's voluntary online training mechanism, "My Risk Solutions," including confirming that employees completed and kept current with the voluntary training. *Id.* Mr. Worley confirmed his

assessment in his answer to a follow-up question:

Q: What I'm hearing – and please correct me if I'm wrong with that – is that it's your opinion that the enforcement of the existing policies could be improved as opposed to, say, the actual policies and procedures.

A: Right. Specific to – My Risk Solutions really is a good tool if it's used.... [S]ome people just get busy. They don't have the time.

*Id.*

Despite the City's knowledge that its sexual harassment policies and procedures needed improvement, the City refused to change those policies and procedures to accommodate Ms. Koenig. CP 328 (“The sexual harassment training program is the same as when Ms. [Koenig] completed her sexual harassment training on myriskolutions.”)).

**E. Ms. Koenig Responds to the City's Rejection.**

Ms. Koenig's counsel responded to the City's rejections via a letter dated April 8, 2015. CP 346–347. The letter restated both Ms. Koenig's PTSD diagnosis and its cause (“Brock Laughlin's acts of sexual harassment against Ms. [Koenig] and the City's insufficient and inappropriate response after Ms. [Koenig] notified the City of Mr. Laughlin's actions”). CP 346. The letter also made clear that until the City at least “strengthen[ed] its sexual harassment policies, procedures, training, and enforcement,” Ms. Koenig could not return to work. *Id.*

**F. The City Fires Ms. Koenig the Next Day.**

After rejecting Ms. Koenig’s requested accommodations and refusing to suggest accommodations of its own, the City mailed Ms. Koenig a letter dated April 9, 2015 “separating [her] from employment effective immediately.” CP 348. The City asserted in its termination letter that Ms. Koenig failed to provide the City with information regarding her medical condition or with requests for reasonable accommodations (CP 348), despite the fact that Ms. Koenig informed the City of her medical condition early and often (CP 301–302, 305–307, 323, 324, 349) and despite the fact that Ms. Koenig’s attorney reminded the City of Ms. Koenig’s PTSD diagnosis and its cause just the day before (CP 346–347).

**G. Ms. Koenig Sues the City. The Trial Court Dismisses on Summary Judgment. Ms. Koenig Appeals.**

Ms. Koenig filed this current action in Grant County in August of 2017, bringing claims of failure to accommodate under WLAD and breach of contract. CP 3, 11–12. The City moved for summary judgment, which the Court granted on October 5, 2018. CP 521–523. The trial court concluded that Ms. Koenig failed to establish that her “requested accommodations were medically necessary to enable her to return to work with the City.” CP 517. This timely appeal of the trial court’s October 5, 2018 Order followed. CP 518–524. Ms. Koenig seeks reversal of the trial

court's dismissal of her WLAD claim.

## V. STANDARD OF REVIEW

Summary judgment orders are reviewed de novo on appeal. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144, 94 P.3d 930 (2004) *abrogated on other grounds by Mikkelsen v. Public Utility District No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017). Summary judgment is proper only if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). The court must consider the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach but one conclusion from all the evidence. *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 410, 295 P.3d 201 (2013).

Here, genuine issues of material fact exist with regard to Ms. Koenig's WLAD accommodation claim. Specifically, (1) whether Ms. Koenig's requested accommodations were medically necessary, (2) whether Ms. Koenig's requested accommodations were reasonable and whether the City's rejection of those requests was unreasonable, and (3) whether placing Ms. Koenig on unpaid medical leave was a reasonable accommodation. Summary judgment dismissal of Ms. Koenig's WLAD

discrimination claim was improper. The Court should reverse and remand the matter for trial.

## VI. ARGUMENT

An employer's obligation to reasonably accommodate a handicapped employee is well-known and well-worn. *See Dean v. Mun. of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 632-33, 708 P.2d 393 (1985) (citing *Holland v. Boeing Co.*, 90 Wn.2d 384, 583 P.2d 621 (1978); RCW 49.60.180(1); WAC 162-22-025). Failure to reasonably accommodate a handicapped employee constitutes discrimination under RCW 49.60.180. *Dean*, 104 Wn.2d at 632. Whether a reasonable accommodation was made or whether the employee's requests placed an undue burden on the employer are generally questions of fact for the jury. *Snyder v. Medical Service Corp. of Eastern Wash.*, 98 Wn. App. 315, 327, 988 P.2d 1023 (1999), *affirmed* 145 Wn.2d 233, 35 P.3d 1158 (2001). Thus, "in employment discrimination cases summary judgment in favor of the employer **is seldom appropriate.**" *Riehl*, 152 Wn.2d at 144 (emphasis added).

To establish a prima facie case for failure to reasonably accommodate a disability under Washington law, a plaintiff must show that (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee

was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 192–93, 23 P.3d 440, (2001), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017).

Here, the record facts establish the first three *Hill* factors without issue. PTSD is a recognized disability afforded protection under WLAD. *See Riehl*, 152 Wn.2d at 148–49 (employer conceded that employee’s PTSD and depression were recognized disabilities). And Ms. Koenig provided the City with notice of her disability and its limitations. CP 305–307, 323, 346, 349.

Further, both Dr. Callison and the City’s Independent Medical Examiner, Dr. Klein, opined that Ms. Koenig was a “competent professional” (CP 349) with a “long a successful work history” (*id.*), “still capable of performing substantive gainful activity in a competitive workplace” (CP 358). And Ms. Koenig herself testified that she could perform her job if only she was permitted to work “in a different building for a while.” CP 268.

The trial court dismissed Ms. Koenig’s WLAD claim on grounds that implicate the fourth *Hill* factor. CP 516–517. However, genuine issues of material fact exist that render the trial court’s dismissal erroneous.

**A. Dr. Callison’s Notes Establish Sufficient Nexus Between Ms. Koenig’s Disability and Her Requested Accommodations to Survive Summary Judgment.**

The trial court dismissed Ms. Koenig’s accommodation claim because it concluded that Ms. Koenig failed to demonstrate that her requested accommodations to (a) work temporarily in a different building and (b) have the City make changes to its sexual harassment policies were medically necessary. CP 517. The record and Washington Supreme Court precedent establish the error of this conclusion.

The medical necessity of an accommodation can be demonstrated through “medical documentation” that establishes “a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.” RCW 49.60.040(7)(d)(ii). To survive summary judgment, the plaintiff must provide “competent evidence establishing a nexus between the disability and the need for accommodation.” *Riehl*, 152 Wn.2d at 147. **“This requirement is not burdensome;** it simply requires evidence in the record that a disability requires accommodation.” *Id.* at 148 (emphasis

added). “The employee must show **only** a medical nexus between the disability and the need for **any** accommodation” not “an accommodation.” *Id.* n. 4 (emphasis added).

The type of evidence necessary to establish the nexus will vary depending on “how obvious or subtle the symptoms of the disability are.” *Id.* When the disability is obvious, such as with a broken leg, no medical expert testimony is required. *Id.* But where the symptomology is less obvious, such as with PTSD, “a doctor’s note may be necessary to satisfy the plaintiff’s burden to show some accommodation is medically necessary.” *Id.* Again, because the “requirement is not burdensome,” the doctor need not prescribe a “specific form of accommodation”; rather the mere presence in the record of “a letter or note will provide a sufficient nexus between the disability and the need for accommodation.” *Id.*

Stated otherwise, summary judgment is inappropriate in the presence of a doctor’s note establishing a nexus between a plaintiff’s PTSD and the need for accommodation. So long as the note establishes that a “reasonable likelihood” exists that lack of accommodation “would aggravate” the PTSD (RCW 49.60.040(7)(d)(ii)), the nexus is established. Nothing more is required.

In *Riehl*, an employee who suffered from depression and PTSD sued his employer for failing to accommodate his disability. *Riehl*, 152

Wn.2d at 142. To accommodate his disabilities, the employer placed him on sick leave, promoted him, and in compliance with a doctor's note, restricted him to a six-hour work day. *Id.* at 143; 149 n. 6. The employer further accommodated the employee by paying him full salary, allowing him to leave early, and allowing him to take work home. *Id.* at 142. The doctor's note restricting the employee's work day to six hours was the only note the employee provided to the employer. *Id.* at 149 n. 6.

The trial court dismissed the employee's accommodation claims on summary judgment, which the Court of Appeals and Supreme Court affirmed. *Id.* All three courts concluded that the employee failed to establish a nexus between the employee's disability and the need for any additional accommodation. *Id.*

In *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001), *abrogated on other grounds by Mikkelsen v. Public Utility District No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017), which the trial court cited in its letter opinion (CP 517), an employee sued her employer for its alleged failure to transfer her to a different location to accommodate her asthma disability. *Id.* at 193. The trial court dismissed the employee's accommodation claim and the Supreme Court affirmed. *Id.* at 178, 193. Both the trial court and Supreme Court determined that the employee had failed to establish the medical necessity of her requested transfer. She had

been seeking transfer prior to her asthma diagnosis to be closer to her elderly mother (*id.* at 177), and uncontested expert medical testimony opined that there was no medical link between the requested transfer and the employee’s asthma (*id.* at 193).

Here, the facts are far different from those in *Riehl* or *Hill*. Dr. Callison’s two notes—one dated October 10, 2014, the other January 16, 2015—provide sufficient nexus between Ms. Koenig’s PTSD disability and the accommodations Ms. Koenig requested. The City received Dr. Callison’s October Note enclosed with Ms. Koenig’s counsel’s October 13, 2014 letter to Mr. Batjer. CP 305–307. The October Note made clear that Ms. Koenig suffered “active trauma” due to the “sexual assaults and harassment she experienced in the workplace” and that the thought of returning to where the trauma occurred—that is, the Public Services Building where she worked—“triggered” her symptoms. CP 307.

Dr. Callison’s January Note was more concise, expressly stating that Ms. Koenig suffered from PTSD and could not return to work until she felt “safe,” which required—at the very least—for the City to make changes to its sexual harassment policies and procedures:

**Ms. [Koenig’s] symptoms stem from criminal behavior that she was subject to at the hands of a male co-worker, in the work environment.** Given these circumstances, I believe a more fitting question is whether or not the City of Quincy has created **safety for employees by implementing**

**comprehensive anti-harassment/abuse training and response protocol that will be supported and enforced through a conscientious and routine human resources effort.**

...

**Until and unless such protocols are implemented and enforced,** I cannot recommend that Ms. [Koenig] return to work for the City of Quincy in any capacity.

CP 349.

Dr. Callison could not have been clearer: Ms. Koenig's PTSD required accommodation that made Ms. Koenig feel safe. Under *Riehl*, Dr. Callison was not required to identify the specific accommodation, only that an accommodation was necessary. *Riehl*, 152 Wn.2d at 148. Ms. Koenig's accommodation requests to work in a different building and for the City to improve its deficient sexual harassment policies and procedures flowed directly from her need to feel safe—a fact she testified to at deposition:

Q: Do you recall what sorts of accommodations you felt you needed in order to come back to work?

A: Well, I would have liked to have been in a different building for a while.

Q: Why is that?

A: Just to be away from where all this happened. It was uncomfortable, it didn't bring back good memories to be back in that area.

CP 268–269.

Ms. Koenig did not feel safe at work and the City refused to do anything about it. Thus, as distinguished from the employees in *Riehl* and

*Hill*, who did not provide a nexus between their disabilities and their need for accommodation, Ms. Koenig has established the medical necessity of her requested accommodations through Dr. Callison’s two doctor’s notes. The trial court’s contrary conclusion holds Ms. Koenig to an erroneously higher standard and denies Ms. Koenig her day in court. It also runs afoul of the Supreme Court’s desire to avoid “harmful effect[s] on employees” (*Riehl*, 152 Wn.2d at 147) as well as the Legislature’s express intent “to deter and eradicate discrimination in Washington.” *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 360, 20 P.3d 921 (2001) (citing RCW 49.60.010).

**B. Genuine Issues of Material Fact Exist with Regard to Whether Ms. Koenig’s Requested Accommodations were Reasonable and Whether the City’s Denial of Ms. Koenig’s Requests was Unreasonable.**

A Washington employer must “reasonably accommodate” the mental limitations of a disabled employee “unless the employer can demonstrate an undue hardship would result to the employer’s business.” *Snyder v. Medical Service Corp. of Eastern Wash.*, 98 Wn. App. 315, 326 (1999). Failure to reasonably accommodate is discrimination. *Id.*

The Washington Human Rights Commission promulgated WAC 162-22-065, which offers guidance to employers in fulfilling their obligations to handicapped employees. It provides “Possible examples of reasonable accommodation,” which “**may include**, but are not limited to”

**“Changes in the job setting or conditions of work.”** WAC 162-22-065(2)(b) (emphasis added). Other examples of reasonable accommodation also “may” include “appropriate **adjustment or modifications of examinations, training materials or policies.**” 42 U.S.C. § 12111(9) (emphasis added).<sup>3</sup>

By the express language of both State and Federal Code, “changes in job setting” and “appropriate adjustment or modification” of “training materials or policies” “may” constitute reasonable accommodation. Here, Ms. Koenig requested as accommodation (a) to be relocated temporarily to a different building (“changes in the job setting”) and (b) that the City make improvements to its existing sexual harassment policies and procedures (“adjustment or modification” of “training materials or policies”). A finder of fact at trial could therefore determine that Ms. Koenig’s requests for accommodation were reasonable.

The Human Rights Commission also promulgated WAC 162-22-075, which provides guidance regarding the limited circumstances under which an employer may avoid its affirmative obligation to accommodate a disabled employee such as Ms. Koenig. The WAC provides that an employer “must provide” reasonable accommodation unless it can “prove

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<sup>3</sup> “Washington courts still look to federal case law interpreting [Title VII, the ADA, and the ADEA] to guide our interpretation of the WLAD.” *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014); *id.* at n. 6 (citing 42 U.S.C. § 12111).

that the accommodation would impose an undue hardship” after considering three factors: (1) the size of and the resources available to the employer; (2) whether the cost can be included in planned remodeling or maintenance; and (3) the requirements of other laws and contracts, and other appropriate considerations. WAC 162-22-075(1)–(3).

Here, Ms. Koenig requested that (a) she be allowed to work in a different building—where, per the City’s testimony, other Secretary/Receptionists worked; and (b) the City improve its sexual harassment policies and procedures—policies and procedures the City testified required improvement. The City provided no justification as to why Ms. Koenig’s requested accommodations constituted an undue hardship. In fact, the City never uttered the words ‘undue hardship’, much less considered the three factors provided in WAC 162-22-075(1)–(3).

The City merely responded by claiming that Ms. Koenig’s presence in the Public Services Building would result in “the most efficient administration of city services.” CP 328. The City later submitted the Declaration of Carl Worley, which states: “It would have been very **inefficient** for Plaintiff to work in a different building.” CP 138 (emphasis added). ‘Inefficiency’ is not an element of “undue hardship” (see WAC 162-22-075), especially when considering all facts and inferences in favor of Ms. Koenig.

Genuine issues of material fact exist as to whether Ms. Koenig's request for accommodation were reasonable and whether the City's denials of those requests were unreasonable as a matter of law. Summary judgment is therefore inappropriate. *Phillips v. City of Seattle*, 111 Wn.2d 903, 911, 766 P.2d 1099 (1989) (“**It is a jury question** whether the employer's actions constituted a reasonable accommodation or whether the employee's requests would have placed an undue burden on the employer.”) (emphasis added).

**C. Genuine Issues of Material Fact Exist as to Whether Ms. Koenig's Unpaid Medical Leave was a Reasonable Accommodation.**

The trial court concluded that the City's placing Ms. Koenig on unpaid medical leave “was at a minimum a temporary, reasonable accommodation.” CP 517. The trial court's conclusion constitutes an erroneous weighing of facts. “On a motion for summary judgment, the trial court does not weigh evidence or assess witness credibility.” *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633, review denied 158 Wn.2d 1015 (2006).

In *Kries*, Division III reversed the trial court's summary judgment dismissal of an employee's disability discrimination claim, holding that whether the employer's provision of medical leave constituted a reasonable accommodation as a triable issue of fact: “A question of fact

exists as to whether allowing [the employee] further leave would be a reasonable accommodation.” *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 143, 362 P.3d 974 (2015). The *Kries* Court stated Washington law: “Providing unpaid medical leave **can** qualify as a reasonable accommodation.” *Id.* (emphasis added).

Washington law does not mandate dismissal upon proof of medical leave; it merely provides options. Although a reasonable trier of fact could conclude that the City’s provision of unpaid medical leave constituted a reasonable accommodation, that same trier of fact could also conclude that it did not. Where reasonable minds could disagree, summary judgment is not appropriate. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011) (genuine issue of material fact exists “when reasonable minds could differ on the facts controlling the outcome of the litigation.”).

## **VI. CITY’S VIOLATION OF RAP 9.12**

The City, through its December 3, 2018 “Defendant City’s Designation of Clerk’s Papers,” attempts to supplement the appellate record with 17 documents. With the exception of two duplicative filings already in the record (the 9/21/18 Court’s Decision and the 10/5/08 Order Granting Summary Judgment, designated respectively by Ms. Koenig as

CP 516–517 and CP 518–524), the City’s attempt violates RAP 9.12. The Court should not consider the City’s designated documents.

It is the appellate court’s task to review a ruling on a motion for summary judgment based solely on the record before the trial court. *Green v. Normandy Park*, 137 Wn. App. 665, 678, 151 P.3d 1038, review denied 163 Wn.2d 1003 (2008) (citing *Wash. Fed’n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993)). The purpose of RAP 9.12 “is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.” *Id.* (citing *Wash. Fed’n of State Employees*, 121 Wn.2d at 157). RAP 9.12 is “designed to make clear the composition of the record before the judge ruling on the motion. Its provisions are simple, easy to comply with, **and mandatory.**” *Green*, 137 Wn. App. at 679 (emphasis added).

“Pursuant to RAP 9.12, there are three ways—**and only three ways**—for a document or evidentiary item to properly be made part of the record on review: (1) the document or evidentiary item may be designated in the ‘order granting or denying the motion for summary judgment’; (2) the document or evidentiary item may be designated in a ‘supplemental order of the trial court’; or (3) counsel for all parties may stipulate that the document or evidentiary item was ‘called to the attention of the trial court.’” *Id.* (quoting RAP 9.12) (emphasis added).

Here, “as in most cases in our trial courts” (*Green*, 137 Wn. App. at 679), counsel for the prevailing party was afforded the opportunity to draft and present to the court the order granting summary judgment it wished the court to sign and enter. *See* CP 521–524 (Order drafted on City’s counsel’s pleading papers); thus, if the documents identified in the trial court’s summary judgment order were insufficient to support summary judgment, the insufficiency is a direct result of the City’s actions it took in preparing and submitting to the trial court the summary judgment order ultimately entered by the court.

The order granting summary judgment (CP 521–523) does not designate 15 of the City’s 17 documents (Sub Nos. 21, 22, 23, 24, 28, 30, 31, 32, 34, 35, 36, 38, 40, 42, 60) as having been called to the attention of the trial court during the summary judgment proceeding. No supplemental court-ordered designation exists and Ms. Koenig does not stipulate that these documents were called to the attention of the trial court. Thus, in the absence of a stipulation of the parties or a supplemental order from the trial court, these evidentiary items are not properly part of the record on review. The *Green* Court reached the same conclusion based on conceptually identical facts. *Green*, 137 Wn. App. at 678–81 (court ultimately struck the improper supplementations and awarded fees after

submitting party refused to withdraw the supplementations and cited to them in its briefing). This Court should reach the same conclusion.

**VII. RAP 18.1 FEE REQUEST**

Ms. Koenig requests an award of her fees and costs on appeal under RAP 18.1 and RCW 49.60.030. RAP 18.1(a) provides for an award of attorney fees where a statute authorizes such an award. *Martinez v. City of Tacoma*, 81 Wn. App. 228, 245, 914 P.2d 86, review denied, 130 Wn.2d 1010 (1996). RCW 49.60.030 so authorizes. *Martinez*, 81 Wn. App. at 245–46 (former employee who prevailed on his appeal in employment discrimination action entitled to award of reasonable attorney fees incurred on appeal) (citing RCW 49.60.030(2)).

**VIII. CONCLUSION**

The Court should (1) reverse the trial court’s summary judgment dismissal of Ms. Koenig’s WLAD accommodation claim, and (2) remand Ms. Koenig’s WLAD accommodation claim for trial. The Court should also (3) award Ms. Koenig her attorney fees and costs on appeal.

Respectfully submitted the 11th day of March, 2019.

**JEFFERS, DANIELSON, SONN AND AYLWARD, P.S.**

By   
\_\_\_\_\_  
H. Lee Lewis, WSBA No. 46478  
*Attorneys for Appellant, Glenda Koenig*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 11, 2019, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Court's Portal electronic filing System. Notice of this filing will be sent to the parties listed below by operation of the Court's e-filing system. Parties may access this filing through the Court's system.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED and DATED at Wenatchee, Chelan County, Washington,  
this 11th day of March, 2019.



TEISHA R. BRINCAT

**JEFFERS, DANIELSON, SONN, & AYLWARD P.S.**

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