

FILED
Court of Appeals
Division III
State of Washington
5/10/2019 4:06 PM

No. 36395-3

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

GLEND A KOENIG,

Plaintiff-Appellant,

vs.

CITY OF QUINCY,

Defendant-Respondent.

**RESPONDENT CITY OF QUINCY'S
RESPONSE TO APPELLANT'S OPENING BRIEF**

JERRY J. MOBERG, WSBA No. 5282

JAMES E. BAKER, WSBA No. 9459

jmoberg@jmlawps.com

jbaker@jmlawps.com

Attorneys for Respondent City of Quincy

P.O. Box 130 – 124 3rd Avenue S.W.

Ephrata, WA 98823

Phone: (509) 754 2356

Fax: (509) 754-4202

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF THE CASE.....4

III. ARGUMENT22

 A. Plaintiff failed to engage in the interactive Process22

 B. Plaintiff lacks medical evidence that her requested accommodations were medically necessary to avoid aggravation of her impairment26

 C. As a matter of law, Plaintiff’s requested accommodations were unreasonable and the City was not required to provide unreasonable accommodations30

 D. Working at the public services building was an essential function of Plaintiff’s job35

 E. Plaintiff’s unpaid medical leave was a reasonable accommodation37

 F. The City had a right to terminate Plaintiff’s employment because after many months she did not provide a reasonably definite date when she would return to work39

 G. Even if Plaintiff were to prevail in this appeal she would not have the right to an award of attorney fees on appeal.....41

 H. The City’s designation of documents not listed in the trial court’s order did not violate RAP 9.12.....43

IV. CONCLUSION.....46

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Brown v. Milwaukee Bd. of Sch. Directors, Inc.</i> , 855 F.3d 818 (7th Cir. 2017)	24
<i>Castellon v. Rodriguez</i> , 4 Wn.App.2d 8, 418 P.3d 804 (2018).....	42
<i>Church of the Divine Earth v. City of Tacoma</i> , 5 Wn.App.2d 471, 426 P.3d 268 (2018).....	1
<i>Clarke v. Shoreline Sch. Dist. No. 412</i> , 106 Wn.2d 102, 720 P.2d 793 (1986).....	37
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003).....	36
<i>Doe v. Boeing Co.</i> , 121 Wn.2d 8, 846 P.2d 531 (1993).....	38
<i>EEOC v. Kohl’s Dep’t Stores</i> , 774 F.3d 127 (1 st Cir. 2014).....	24
<i>Espindola v. Apple King</i> , 6 Wn.App.2d 244, 430 P.3d 663 (2018).....	42
<i>Fragada v. United Airlines, Inc.</i> , 747 Fed.Appx. 641 (9th Cir. 2019).....	24
<i>Frisno v. Seattle Sch. Dist. No. 1</i> , 160 Wn.App. 765, 249 P.3d 1044 (2011).....	25
<i>Fuller v. Frank</i> , 916 F.2d 558 (9th Cir. 1990)	39
<i>Garcia v. Cintas Corp. No. 3</i> , 2013 WL 1561116 (E.D. Wash. 2013)	27, 28
<i>Gardenhire v. Johns Manville</i> , 2017 WL 445506 (D.Kan. 2017)	39
<i>Gilmore v. Boeing Company</i> , 2018 WL 883875 (W.D. Wash. 2018).....	38
<i>Golafale v. Swedish Health Servs.</i> , 2016 WL 1367366 (W.D. Wash. 2016).....	23
<i>Goodman v. Boeing Co.</i> , 127 Wn.2d 401, 899 P.3d 1265 (1995).....	23
<i>Goodson v. Triumph Composite Systems</i> , 2014 WL 6908743 (E.D.Wash. 2014)	37, 38

<i>Grillasca-Pietri v. Portorican Am. Broadcasting Co., Inc.</i> , 233 F.Supp.2d 258 (D.P.R. 2002).....	31
<i>Hartleben v. Univ. of Wash.</i> , 194 Wn.App. 877, 378 P.3d (2016).....	30
<i>Havilina v Dept. of Transp.</i> , 142 Wn.App. 510, 178 P.3d 354 (2007).....	38
<i>Hwang v. Kansas St. Univ.</i> , 753 F.3d 1159 (10th Cir. 2014)	40
<i>Jensen v. Wells Fargo Bank</i> , 102 Cal.Rptr.2d 55 (Cal.App. 2000).....	40
<i>Kries v WA-SPOK Primary Care, LLC</i> , 190 Wn.App. 98, 362 P.3d 974 (2015).....	36, 37, 41
<i>Kvorjak v. Maine</i> , 259 F.3d 48 (1st Cir. 2001).....	30
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	1
<i>Loulseged v. Akzo Nobel, Inc.</i> , 178 F.3d 731 (5th Cir. 1999)	25
<i>Martinez v. City of Tacoma</i> , 81 Wn.App. 228, 914 P.3d 86 (1996).....	41
<i>McAlpin v. Nat’l Semiconductor</i> , 921 F.Supp. 1518 (N.D. Tex. 1996)	25
<i>Mikkelsen v. Public Utility Dist. No. 1 of Kittitas Cnty.</i> , 189 Wn.2d 516, 404 P.3d 464 (2017).....	29
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	29
<i>Robbins v. Mason Cnty. Title Ins. Co.</i> , 5 Wn.App.2d 68, 425 P.3d 885 (2018).....	42
<i>Snyder v. Med. Servs. Corp. of E. Wash.</i> , 145 Wn.2d 233, 35 P.3d 1158 (2001).....	31-33
<i>Specialty Asphalt & Constr., LLC v. Lincoln Cnty.</i> , 191 Wn.2d 182, 421 P.3d 925 (2018).....	42
<i>Stetner v. City of Quincy</i> , 728 Fed.Appx. 738 (9th Cir. 2018).....	3
<i>Stetner v. City of Quincy</i> , 2016 WL 7411129 (E.D. Wash. 2016)	3
<i>Stevenson v. Abbott Laboratories</i> , 639 Fed.Appx. 473 (9th Cir. 2016).....	40
<i>Studley v. The Boeing Co.</i> , 2016 WL6298773 (W.D. Wash. 2016).....	28

<i>Tadlock v. Marshall Cnty. MHA, LLC</i> , 2015 WL 11236847 (W.D. Okla. 2015)	40
<i>Taylor v. Pepsi-Cola Co.</i> , 196 F.3d 1106 (10th Cir. 1999)	40
<i>Waite v Gonzaga Univ.</i> , 2019 WL 544947 (E.D. Wash. 2019)	24
<i>Whitaker v. Wisconsin Dept. of Health Servs.</i> , 2016 WL 3693766 (E.D. Wis. 2016)	40
<i>Whitaker v. Wisconsin Dept. of Health Servs.</i> , 849 F.3d 681 (7th Cir. 2017)	40

STATUTES

42 U.S.C. § 2000e-2	2
RCW 49.60.040(7)	27, 28
RCW 49.60.040(7)(d)(ii)	26, 27
RCW 49.60.180	2

I. INTRODUCTION

There were numerous grounds upon which the trial court could dismiss Plaintiff's disability discrimination claim. The appellate court "may affirm the trial court's judgment on any grounds established by the pleadings and supported by the record, even if the trial court did not consider them." *Church of the Divine Earth v. City of Tacoma*, 5 Wn.App.2d 471, 486, 426 P.3d 268 (2018), citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

On Monday, Aug. 11, 2014, Plaintiff (then known as Glenda Stetner) reported to her supervisor that she had been sexually harassed by a co-employee. Plaintiff's therapist thereafter assessed Plaintiff as having post-traumatic stress disorder (PTSD). Plaintiff did not return to work after she reported the sexual harassment. After Plaintiff was on leave for more than seven months, the City was left with no choice but to separate Plaintiff from employment on April 9, 2015.

Plaintiff lacks evidence that the City denied her any reasonable accommodation relating to her PTSD, including any accommodation that was medically necessary. On numerous occasions the City provided questions for Plaintiff's therapist to answer or medical questionnaires for Plaintiff's therapist to complete in an attempt to determine what

reasonable accommodations, if any, were required for Plaintiff to return to work. The City was never provided with this information. The City allowed Ms. Plaintiff to take leave from August 2014 to April 2015 (more than seven months) before Plaintiff was separated from employment. At no time did Plaintiff inform the City when she expected to be able to return to work with or without reasonable accommodation.

The three accommodation arguably requested by Plaintiff cannot be considered to be “reasonable accommodations.” Plaintiff requested (1) that she be restored to her previous position of Administrative Assistant, (2) that she be relocated to a different building than where she was working at the time of the sexual harassment and (c) for the City to make improvements to its existing sexual harassment policies and procedures. None of the accommodations can be considered to be “reasonable accommodations.”

Plaintiff also brought a claim for breach of contract based upon the City’s personnel policies. The trial court dismissed this claim, which is not part of Plaintiff’s instant appeal.

Plaintiff originally filed her lawsuit in Grant County Superior Court. Plaintiff’s original lawsuit also included a claim for sexual harassment under federal law (Title VII – 42 U.S.C. § 2000e-2) and under state law (Washington Law Against Discrimination – RCW 49.60.180).

The City removed Plaintiff's lawsuit to federal court. The district court dismissed Plaintiff's federal and state law sexual harassment claims on summary judgment. *Stetner v. City of Quincy*, 2016 WL 7411129 (E.D. Wash. 2016).¹ The district court declined jurisdiction on Plaintiff's state law claim for disability discrimination and her state law claim for breach of contract. Plaintiff appealed the district court's opinion to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the district court. *Stetner v. City of Quincy*, 728 Fed.Appx. 738 (9th Cir. 2018).²

On Sept. 21, 2018, the Grant County Superior Court dismissed Plaintiff's state law claims for disability discrimination and breach of contract. In a two-page letter ruling, the trial court stated:

The City initiated communications with Ms. Koenig through her attorney, exploring the possibility of accommodating her disability and returning to work. . . . Ms. Koenig failed to respond to several other inquiries made thereafter regarding her condition. Her only

¹ As to the federal claim, the district court stated in part: "The City of Quincy acted promptly when Plaintiff reported sexual harassment at the hands of her co-worker, Brock Laughlin, by placing Laughlin on administrative leave three days later, beginning an investigation, reporting the allegations to the police, and ensuring that Laughlin did not come into contact with Plaintiff at work during the investigation. . . . Plaintiff fails to raise a genuine issue of material act regarding the adequacy of the City's response following notice of Laughlin's actions." 2016 WL 7411129, *5. As to the state law sexual harassment claim, the district court stated at *6: "In accordance with the analysis of Plaintiff's Title VII claim, the Court finds that Plaintiff fails to raise a genuine issue of material fact regarding the adequacy of Defendant's response, which the Court finds, as a matter of law for the reasons analyzed previously, was 'reasonably calculated to end the harassment.'"

² The Ninth Circuit stated in part: "[T]he City response was adequate as a matter of law. The City took immediate action, the harassment ended; and the City's response was likely to 'persuade potential harassers to refrain from unlawful conduct.'" 728 Fed.Appx. at 739.

suggestion of reasonable accommodation were a return of her original job title and relocation of her job site. Ms. Koenig has not presented any evidence that these requested accommodations were medically necessary to enable her to return to work with the City, nor does there appear any prospect that she will be able to do so in the future.

(CP 516-17.)

II. STATEMENT OF THE CASE

Employing the interactive process, the City repeatedly attempted to find out from Plaintiff what reasonable accommodations she would require to return to work. The City was stifled by Plaintiff's non-cooperation.

June 1997 – Plaintiff began her employment with the City and was a union employee. (Decl. of Carl E. Worley dated April 2018 ¶ 2 – CP 136.) Plaintiff worked in the front entrance of the Public Services Building with Nancy Miller. (*Id.* ¶ 3 – CP 136.) Due to friction between Plaintiff and Ms. Miller, Plaintiff's work station was relocated to a back office. (*Id.*)

Aug. 11, 2014 – Plaintiff reported to her supervisor that she was sexually harassed by Mr. Laughlin, a co-worker. (*Id.* ¶ 6, CP 137.) Plaintiff never returned to work after she made this report. (*Id.*)

Oct. 3, 2014 – Plaintiff’s lawyer was advised by the City’s lawyer, Quentin D. Batjer, that Mr. Laughlin was no longer employed by the City. (Decl. of Quentin D. Batjer ¶ 6 – CP 435.)

Oct. 8, 2014 – Mr. Batjer wrote an email to Plaintiff’s attorney. (*Id.* ¶ 8 and Exhibit B – CP 435-36, 449.) Mr. Batjer stated:

As you are aware, Ms. Stetner has been away from work since the middle of August and has exhausted accrued compensatory time and personal leave. Despite requests that she provide the City with a return date, she has not done so. Meanwhile, the City is operating short-staffed with no indication as to when Ms. Stetner might return to work.

(*Id.*) **This is the first documentation of Plaintiff’s failure to provide information requested by the City.**

Oct. 10, 2014 -- Plaintiff’s psychologist, Kristen Callison, Ph.D., provided a “To Whom It May Concern” letter. (*Id.* ¶ 9 and Exhibit C, CP 436, 451.) She stated that Plaintiff’s treatment was “to address trauma resulting from sexual assaults and harassment in the workplace.” She further stated that Plaintiff “currently experiences active trauma symptoms” and “she is not yet able to return to work.” (CP 451.) She further stated that Plaintiff’s “symptoms are triggered and worsen when she is faced with the idea of returning to the workplace” and “it is unclear

when she will be healthy and ready to return to work.”³ (*Id.*) **Plaintiff’s therapist did not provide any meaningful information as to when or how Plaintiff would be able to return to work.**

Oct. 13, 2014 -- Mr. Batjer wrote an email to Plaintiff’s attorney. (*Id.* ¶ 10 and Exhibit D, CP 436, 453.) Mr. Batjer stated that Dr. Callison’s letter dated Oct. 14, 2014 “represents the first time the City received anything detailing Ms. Steiner’s medical issues.” (CP 453.) Mr. Batjer stated: “The City wants to work with Ms. Stetner to determine whether she can perform the day-to-day functions of her job, with or without reasonable accommodation.” (*Id.*) Mr. Batjer further stated:

If she believes that she can perform the essential functions of her job, please describe what, if anything, would be required for her to [return] to her job. If she needs accommodations, please describe the accommodations that you think might allow her to perform the essential functions of her job.

If Ms. Stetner or her care-provider concludes that she cannot perform the essential functions of her job, even with reasonable accommodations, then we would like to know about the nature of work that she believes she can perform, including restrictions placed on her for doing that type of work.

(*Id.*) Mr. Batjer further stated:

³ The entirety of Dr. Callison’s opinions are set forth in this letter and in a letter dated Jan. 16, 2015. The letters did not set forth any “reasonable accommodations” including any accommodations that were said to be medically necessary.

To aid us in this evaluation, please have Ms. Stetner work with her care-provider to answer the following questions:

- When, exactly, do you anticipate Ms. Stetner will be able to return to work?
- Please provide the City with sufficient information about Ms. Stetner's condition to allow us to understand it and how it impacts or may impact her ability to perform (1) her job; (2) other types of jobs.
- Is Ms. Stetner released to work?
- If Ms. Stetner is released to work what type of restrictions, if any, are placed on her ability to work?
- Could Ms. Stetner perform the essential functions of her current position with or without reasonable accommodation?
- If you answered the previous question "Yes", what types of reasonable accommodations do you think would be necessary?
- If you do not believe that Ms. Stetner can perform the essential functions of her job, then please describe what other types of jobs she might be able to do, with or without some type of reasonable accommodation. In this regard, if you believe restrictions would apply for Ms. Stetner to do other types of work, please describe the restrictions, and the medically necessary accommodations that would allow her to perform that other type of work.

(*Id.*) Mr. Batjer asked Plaintiff's lawyer to respond to these questions by Oct. 20, 2015 "so that the City can determine the proper course of action."

(*Id.*)

Oct. 20, 2014 --Plaintiff's attorney wrote a letter to Mr. Batjer. (*Id.* ¶ 11 and Exhibit E, CP 437, 455.) Plaintiff's attorney referenced Dr. Callison's October 10 letter and stated: "Therefore, she is not released to work as she cannot perform the essential functions of her job." (CP 455.) Plaintiff's attorney stated:

At this point . . . there exists no other job offered by the City of Quincy which Mrs. Stetner can perform. As her treatment progresses and her situation improves, we expect she will be able to return to work for the City. For now, she is simply too traumatized.

(*Id.*) Plaintiff's attorney stated that "I suggest the parties agree to engage in a monthly reporting wherein Mrs. Stetner will provide the City with an update as to her condition and, when available, a proposed date to return."

(*Id.*) **Plaintiff did not provide any meaningful information as to when or how Plaintiff would be able to return to work.**

Oct. 24, 2014 -- Mr. Batjer wrote an email to Plaintiff's attorney. (*Id.* ¶ 11 and Exhibit F, CP 437, 457.) Mr. Batjer attached "a letter that the City would like to send to Dr. Callison and any other doctor providing care to Ms. Stetner." (CP 457.) Mr. Batjer further stated:

If her doctor says Ms. Stetner cannot return to work at her job, then you will notice that the City has asked her about other work Ms. Stetner might be able to perform for the City. In that regard, the City wants to evaluate her qualifications for such jobs. Please have Ms. Stetner provide the City with a document setting out in detail her educational qualifications, her work experience, and any

other type of experience that she believes might be relevant to help the City decide whether she is qualified for any positions that may become open.

(Id.) In this fourth instance, the City did not receive any information from Plaintiff's therapist in response to Mr. Batjer's letter. (Decl. of Mr. Batjer ¶ 15, CP 438.)

Nov. 17, 2014 --Tim S. Snead, the City Administrator, sent a letter to Dr. Callison. (*Id.* ¶ 14 and Exhibit H, CP 438, 464; Decl. of Tim S. Snead dated April 2018 ¶ 8 and Exhibit A, CP 64, 69-70.) The letter attached a medical questionnaire to help determine the extent of Plaintiff's condition and the expected duration of her condition. (CP 69-70.) **The City did not receive any information from Plaintiff's therapist.**

Jan. 6, 2015 --Mr. Batjer advised Plaintiff's counsel that no response was received from Dr. Callison to Mr. Snead's letter of Nov. 17, 2014. (Decl. of Mr. Batjer ¶ 15, CP 438.)

Jan. 13, 2015 --Mr. Batjer wrote an email to Plaintiff's attorney. (*Id.* ¶ 16 and Exhibit I, CP 438, 467.) Mr. Batjer noted that Dr. Callison did not respond to Mr. Snead's letter of Nov. 17, 2014. (CR 467.) Mr. Batjer again requested that Dr. Callison respond. (*Id.*) Mr. Batjer stated that if the City did not receive a response from Dr. Callison by Jan. 20, 2015 then "the City will assume that Ms. Stetner has abandoned her job

and will act accordingly. Please let me know if there are any issues which would prevent you from meeting this deadline.” (*Id.*)

Jan. 16, 2015 -- Dr. Callison wrote a “To Whom It May Concern” letter. (*Id.* ¶ 17 and Exhibit J, CP 469.) She stated that the City needed to implement “comprehensive anti-harassment/abuse training and response protocol that will be supported and enforced” (CP 469.) She concluded: “Unless and until such protocols are implemented and enforced, I cannot recommend that Mrs. Stetner return to work for the City of Quincy in any capacity, regardless of accommodation.” (*Id.*) **The City did not receive any meaningful information that was requested in the medical questionnaire.**

Jan. 26, 2015 -- Mr. Batjer wrote a letter to Dr. Callison in response to her letter of Jan. 16, 2015. (*Id.* ¶ 18 and Exhibit K, CP 439, 471-75.) Mr. Batjer provided a “Medical Provider Questionnaire” for her to fill out and a copy of the City’s sexual harassment policy. (CP 475.) Mr. Batjer stated:

Again, the City believes that it has robust anti-harassment protocol in place that will be available to Ms. Stetner when she returns to work. In addition, the City will make reasonable accommodations to make her integration more comfortable.

(CP 474.) Dr. Callison did not respond to Mr. Batjer’s letter. (CP 440.)

March 19, 2015 -- Mr. Batjer sent an email to Plaintiff's counsel. (*Id.* ¶ 19 and Exhibit L, CP 440, 477.) Mr. Batjer outlined what took place since Plaintiff went on medical leave during August 2014.(CP 477.) Mr. Batjer stated:

Her position has been temporarily filled by the City but the arrangement is not feasible for the long term. Therefore, the City submits this correspondence requesting an update on Ms. Stetner's status, including when she will return to work and what, if any, accommodations she would require to ease her transition back into the workplace.

(*Id.*) Mr. Batjer further stated:

Five months ago, you wrote that there were no then-existing jobs offered by the City which Ms. Stetner can perform. You added that “[a]s her treatment progresses and her situation improves, we expect she will be able to return to work for the City” You proposed sending monthly updates on Ms. Stetner's condition and a proposed date to return.

(*Id.*) Mr. Batjer further stated:

In the intervening months, the City sought from Ms. Stetner's treatment provider, Dr. Kristen Callison, responses to a questionnaire that would allow the City to know whether Ms. Stetner is physically capable of fulfilling her essential job duties and what accommodations, if any, she would require when she returns.

Two months following our letter, Dr. Callison responded by claiming that until the City's anti-harassment protocols are implemented and enforced, she could not recommend that Ms. Stetner return to work for the City in any capacity, regardless of accommodation. She closed her letter by

opining that Ms. Stetner's symptoms will persist "so long as she believes she is not working in a safe environment.

(*Id.*) Mr. Batjer further stated:

Since Dr. Callison seemed to be unaware of the protocols that the City does have in place, I sent a follow-up letter to her detailing the protocols that the City has in effect to combat harassment in the workplace. I attached to that letter a copy of the questionnaire, again seeking her opinion in light of the City's protocols. A copy of that letter is attached. To date, the City has not received a response.

(*Id.*) Mr. Batjer further stated:

As I mentioned earlier, the City cannot continue to fill Ms. Stetner's position with temporary workers indefinitely. In an earlier correspondence, you thought Ms. Stetner would be able to return to work for the City as her treatment progresses. Five months have now passed and neither you nor Ms. Stetner's doctor have offered any update to the City regarding her ability to return to work.

(*Id.*) Ms. Batjer requested "an update on Ms. Stetner's status and return date" by April 6, 2015 and concluded:

As always, the City wants to work with you to determine whether Ms. Stetner can perform the day-to-day functions of her job, with or without reasonable accommodation. Cooperatively working toward a solution is difficult as long as you fail to provide this fundamental information.

(*Id.*) **Plaintiff did not provide meaningful information to the City.**

Instead, Plaintiff's lawyer wanted the City to answer questions.

April 1, 2015 -- Plaintiff's lawyer wrote a letter to Mr. Batjer. (*Id.* ¶ 20 and Exhibit M, CP 441, 479-80.) Plaintiff's lawyer asked the City to respond to 11 questions. (CP 479-80.)

April 6, 2015 --Mr. Batjer responded to the 11 questions via email. (*Id.* ¶ 21 and Exhibit N, CP 442, 482-84.) Mr. Batjer's responses included:

1. When Ms. Stetner returns to work, she will resume the position of Secretary/Receptionist, the same position she left in August 2014 when she went on unpaid leave. . . .

2. When Ms. Stetner returns to work, she would be located in the front office where her desk was originally located in the Public Services Building ("PSB"). . . . Prior to Ms. Stetner's leave, the City consulted with its HR to formulate a plan for staffing and work areas. Through this process, it was determined that Ms. Stetner's desk would be moved to the PSB.

It is the City's position that, by locating Ms. Stetner in the PSB, citizens would be afforded the most efficient administration of city services. The City is open to reasonable accommodations with respect to her work station.

3. These policies (City of Quincy Personnel Policy 2.2 and 2.4) are currently in place. It is the responsibility of the employee to report sexual harassment immediately.

(CP 482.) Mr. Batjer concluded:

Please respond to this email with an update on Ms. Stetner's status, responses to the City's questions (which were due today) and an estimated return date by Wednesday, April 8th at 5:00 p.m. As always, the City wants to work with you to determine whether Ms. Stetner

can perform the day-to-day functions of her job, with or without reasonable accommodation.

(CP 483.)

April 8, 2015 -- Plaintiff's lawyer responded to Mr. Batjer's email of April 6, 2015. (*Id.* ¶ 22 and Exhibit O, CP 442, 486-87.) Plaintiff's lawyer stated that "the City's answers to Mrs. Stetner's questions make it clear that the City has chosen to maintain the status quo – a status unacceptable to Mrs. Stetner and detrimental to her recovery." (CP 486.) **Plaintiff did not provide the City with any meaningful information about when or how Plaintiff could return to work.**

April 9, 2015 -- Mr. Snead sent a letter to Plaintiff separating her from employment. (*Id.* ¶ 23, CP 443; Decl. of Mr. Snead ¶ 9 and Exhibit B, CP 64, 72.) Mr. Snead stated:

Over the course of the last seven months, the City of Quincy (City) has attempted to work with you, your doctor, and your attorney to engage in the interactive process to determine the nature and extent of your current limitations caused by your medical condition, and whether those limitations prevent you from performing the essential functions of your job, with or without reasonable accommodation. We sought, but did not obtain information about your qualifications so we could evaluate whether there were other jobs you could perform.

(CP 72.) Mr. Snead further stated:

Despite multiple requests, neither your doctor nor your attorney could or did provide the City with meaningful information with respect to whether there are any

reasonable accommodations that would allow you to perform the essential functions of your position at this time. In addition, neither your doctor nor your attorney would provide an estimated date when the City could expect you to return to work.

(Id.) Mr. Snead further stated:

The latest information provided by your attorney indicated you cannot at this time or at any reasonably foreseeable time, perform the essential functions of your position. The City has provided you with approximately seven months of leave in order to accommodate your medical limitations. Unfortunately, the City cannot continue to hold your position open indefinitely and therefore must regrettably fill it with someone else.

(Id.)

During Plaintiff's deposition, she testified that after she learned Mr. Laughlin left the employment of the City she did not return to work "[b]ecause I didn't feel comfortable after so many things had happened with the City, and their response." (Depo. of Plaintiff at 122-23, CP 147-48.) When asked why she did not feel comfortable, Plaintiff testified:

I had asked some questions about making it easier to report things, and I believe there was a list of 11 things that I had asked. Also, the City changed my job description, I was Administrative Assistant, and then they were referring to me as a secretary immediately when my attorney had asked for my job description.

(Id. at 123, CP 148.) Plaintiff was asked for the specific reasons she did not return to work after Mr. Laughlin resigned and she responded: "I didn't know if he had resigned, and I didn't know when." *(Id.* at 123-24,

CP 148-49.) Plaintiff testified that she “had no idea” whether Mr. Laughlin was no longer working for the City from the time she went on administrative leave until she was separated from employment. (*Id.* at 124, CP 149.)⁴

Plaintiff was asked to list all of the reasons she did not return to work other than the fact that she did not know whether Mr. Laughlin was still working for the City and she responded:

Again, they were not friendly towards me when I asked for time off. . . . I didn’t feel like it was going to be a very good environment to come back to. I had asked after a period of time – and I am not sure if it was once, or not – I had requested the City, they – in those requests they were going to put me back in the front office with Nancy Miller, they were going – I was going to be a secretary, not an administrative assistant. I would have to review the list again.

(*Id.* at 124, CP 149.) When asked what accommodations she felt she needed to return to work Plaintiff testified: “I would have liked to have been in a different building for a while . . . to be away from where all this happened. I was uncomfortable, it didn’t bring back good memories to be back in that area.” (*Id.* at 125-26, CP 150-51.) Plaintiff was asked what other accommodations she felt she needed and she responded: “I wanted

⁴ Plaintiff’s claimed ignorance is not credible. The City’s attorney advised Plaintiff’s attorney as early as Oct. 3, 2014 that Mr. Laughlin was no longer employed by the City. (Decl. of Mr. Batjer ¶ 6 and Exhibit A, CP 435, 447.) On Oct. 3, 2014, the City’s attorney stated in a memo to Mr. Worley: “Lee said that, even though Brock is no

to keep being an administrative assistant, and I didn't understand what the position was. I had not been informed that I was going to be a secretary, they were things like that.” (*Id.* at 126, CP 151.) Plaintiff acknowledged that the City asked her to return to work on Oct. 14, 2014 and testified that she did not return to work “[b]ecause I was still under care, and I was not feeling well. Emotionally spent.” (*Id.* at 129, CP 152.)

Plaintiff was shown an email dated Oct. 13, 2014 from Mr. Batjer to her attorney. (*Id.* at 133, CP 153.) Plaintiff testified she supposed she saw the email sometime after Oct. 13, 2014. (*Id.*) Plaintiff testified she was aware the City was asking specific questions about when she intended to return to work and the reasons why she could not work. (*Id.*) Plaintiff testified that as of Oct. 13, 2014 she was not able to perform the essential functions of her job. (*Id.* at 134, CP 154.) Plaintiff testified that by late fall 2015 she would have been able to return to work. (*Id.* at 135-36, CP 155-56.)

Plaintiff was asked why, given the opportunities she had to return to work, she did not return to work. (*Id.*) She testified “there were 11 questions that were discussed,” she wanted to work “in a different building for a while” and “that the sexual harassment [policy] be improved and

longer employed, she is traumatized by the ‘sexual assault’ and needs time to recover.” (CP 447.)

some things clarified in the policy.” (*Id.* at 136-37, CP 156-57.) Plaintiff was asked if the City changed the policy of sexual harassment enforcement whether she would have been able to return to work and perform the essential functions of her job. (*Id.* at 137, CP 157.) Plaintiff testified: “Again, there was a list of 11 things, and it would be the propensity all of those things, and discussing those things, and not just down to one question of why I did not go back.” (*Id.* at 138, CP 158.)

Plaintiff was shown an email dated Jan. 13, 2015 from the City’s attorney to her attorney stating that if Plaintiff did not provide certain information by Jan. 20, 2015 then it would be assumed that she had abandoned her job. (*Id.*) Plaintiff testified that her attorney was pretty good about timely providing communication with the City but she did not recall when she received the email. (*Id.*) Plaintiff testified that she does not recall whether, as of January 2015, she knew that Mr. Laughlin was no longer working for the City. (*Id.* at 139, CP 159.) Plaintiff testified that her best estimate of when she learned that Mr. Laughlin was no longer employed by the City was “[p]robably spring 2015, early spring.” (*Id.* at 140, CP 160.)

Plaintiff was asked whether she asked Dr. Callison to provide her psychological assessment about her ability to return to work. (*Id.*) Plaintiff testified: “I wanted her to provide it to my attorney, and then be

forwarded to the City as they requested.” (*Id.*) Plaintiff was asked about whether she spoke to her psychologist about what specific accommodations she would need at the City in order to return to work. (*Id.* at 141, CP 161.) Plaintiff testified: “I believe so. I don’t remember specifics. I know that I wanted a better environment. . . . I discussed – I’m not real detailed, I know that I felt that their procedures needed to be clearer.” (*Id.*) When asked if anything else was discussed with her psychologist Plaintiff testified: “Not – not specifically, no. I know that we discussed things I – definitely a lot of discussion going on.” (*Id.* at 142, CP 162.) Plaintiff was asked whether all 11 items on her list needed to be answered to her satisfaction before she would be able to perform the essential functions of her job. (*Id.*) Plaintiff testified: “No. That’s not what I said. . . . These were concerns that I had.” (*Id.*)

Plaintiff was asked whether Dr. Callison ever told her that she would have psychological problems if she returned to work in the same building. (*Id.* at 144, CP 164.) Plaintiff testified: “**I don’t think she said that I would have those problems. . . . I believe it was more of an understanding that that wouldn’t be uncommon to have these problems, if I recall.** I don’t know exactly what her verbiage was.” (*Id.*) (Emphasis added.)

Plaintiff was asked whether she was not going to return to work unless the City made improvements to its sexual harassment training. (*Id.* at 152, CP 165.) Plaintiff testified: “I would have liked to discuss that with them.” (*Id.*)

Plaintiff testified that she did “not necessarily” think that she could perform the essential functions of a full-time job as of April 2, 2015. (*Id.* at 155, CP 166.) **Plaintiff testified that she did not have in mind a date after April 8, 2015 when she would be able to return to work.** (*Id.* at 157, CP 168.)

Plaintiff testified that she reviewed the City’s responses to the 11 questions in the letter to the City from her lawyer. (*Id.* at 155, CP 166.) Plaintiff testified that after the questions were answered by the City’s attorney she still did not decide whether she would be able to return to work. (*Id.* at 156, CP 167.) Plaintiff was asked whether after discussing the City’s answers with her attorney and her counselor if she had decided that she was not going to return to work. (*Id.* at 157, CP 168.) Plaintiff testified: “I don’t know that I said that I was not going to at that point, but I did not – I felt what they were saying, with the status quo, just as my attorney said. In other words, they were not willing to do anything helpful to me.” (*Id.*)

Plaintiff did not provide any information as to any medically necessary accommodations to allow her to return to work. Dr. Callison stated in a “To Whom It May Concern” letter dated Oct. 10, 2014: “At this time, it is unclear when she will be healthy and ready to return to work.” (Decl. of Mr. Batjer ¶ 9 and Exhibit C, CP 436, 451.) Dr. Callison testified that other than her Oct. 10 letter she does not recall any other document she prepared expressing any opinion about Plaintiff’s ability to return to work. (Depo. of Dr. Callison at 76-77, CP 175-76.) Dr. Callison was asked if the offending co-worker was no longer employed by the City, and therefore not in the workplace, whether the conflict would have been removed and she testified: “I don’t have enough information to make that assessment.” (*Id.* at 40, CP 171.) **Dr. Callison was asked whether at any time she provide her advice with regard to any accommodation Plaintiff might need if she elected to return to work and she testified: “Not that’s indicated in my notes and not that I recall.”** (*Id.* at 73, CP 172.) (Emphasis added.) **Dr. Callison was asked to confirm that she did not formulate any opinions whether there were any accommodations Plaintiff would require to return to work for the City and she testified: “Typically, I do not provide workplace evaluations like that or evaluations for disability.”** (*Id.*) (Emphasis added.)

Dr. Callison wrote a “To Whom It May Concern” letter dated Jan. 16, 2015. (Decl. of Mr. Batjer ¶ 17 and Exhibit J, CP 439, 469.) Dr. Callison stated the City needed to implement “comprehensive anti-harassment/abuse training and response protocol that will be supporting and enforced” (*Id.*) Dr. Callison concluded: “**Unless and until such protocols are implemented and enforced, I cannot recommend that Mrs. Stetner return to work for the City of Quincy in any capacity, regardless of accommodation.**” (*Id.*) (Emphasis added.) By letter dated Jan. 26, 2015 the City’s attorney provided Dr. Callison with a copy of the City’s sexual harassment policy and stated:

You close your letter by saying . . . symptoms will continue to be present *so long as she believes* she is not working in a safe environment” [my emphasis]. It is, of course, difficult to change what Ms. Sterner believes. All the City can do is objectively present the above protocol which shows that the City takes workplace harassment seriously and will not tolerate it. Again, the City believes that it has a robust anti-harassment protocol in place and will be available to Ms. Stetner when she returns to work. In addition, the City will make reasonable accommodations to make her integration more comfortable.

(*Id.* ¶ 18 and Exhibit K, CP 439-40, 471.) Dr. Callison did not respond to the letter. (CP 440.)

III. ARGUMENT

A. PLAINTIFF FAILED TO ENGAGE IN THE INTERACTIVE PROCESS.

The record shows that the City engaged in a good faith and interactive process with Plaintiff and Plaintiff failed to engage in the interactive process. The City was stymied due to Plaintiff's failure to properly engage in the interactive process.

Once an employer is given notice of an employee's disability, the employer has a duty to inquire into the nature and extent of the disability and **the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications.** *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408-09, 899 P.3d 1265 (1995). "The employer's duty to inquire only arises after the employee has initiated the process by notice and extends only to assuring the employer sufficient information to accommodate the disability." *Id.* at 409.

If an employee fails to engage in the interactive process then the employee's accommodation claim must be dismissed. *Golafale v. Swedish Health Servs.*, 2016 WL 1367366 (W.D. Wash. 2016) is substantially similar to the case at bar. Because plaintiff failed to properly engage in the interactive process his accommodation claim was dismissed under WLAD and ADA. The district court stated at *13: "The evidence demonstrates that Swedish engaged in continuing good-faith efforts to accommodate Mr. Golafale. Those efforts were unfruitful because Mr.

Golafale was not ‘interactive’ in the process” Discussing the law, the district court stated at *11:

Once the employer is aware of a disability that may require accommodations, the ADA and the WLAD impose a duty on the employer and the employee to engage in a good faith, interactive process to identify and provide reasonable accommodations. . . . “[N]either side can delay or obstruct the process.” . . . “[T]he employee’s participation is equally important because he or she generally knows more about his or her capabilities, and “holds essential information for the assessment of the type of reasonable accommodation which would be effective.” . . . The employee, of course, retains a duty to cooperate with the employer’s efforts by explaining her disability and qualifications.”

In *Waite v Gonzaga Univ.*, 2019 WL 544947 (E.D. Wash. 2019), the district court cited *Goodman* and dismissed plaintiff’s accommodation claim on summary judgment. The district court stated at *7: “Plaintiff failed to fulfill her duty ‘to cooperate with the employer’s efforts by explaining her disability.” *See also Fragada v. United Airlines, Inc.*, 747 Fed.Appx. 641, 642 (9th Cir. 2019) (“The district court correctly granted summary judgment to Defendant on Plaintiff’s FEHA claims for failure to engage in the interactive process and failure to accommodate.”); *Brown v. Milwaukee Bd. of Sch. Directors, Inc.*, 855 F.3d 818, 821 (7th Cir. 2017) (if an employee “does not provide sufficient information to the employer to determine the necessary accommodations, the employer cannot be held liable for failing to accommodate the disabled employee.”); *EEOC v.*

Kohl's Dep't Stores, 774 F.3d 127, 132 (1st Cir. 2014) (if “the employee fails to cooperate in the process, then the employer cannot be held liable under the ADA for a failure to provide reasonable accommodations.”); *Loulseged v. Akzo Nobel, Inc.*, 178 F.3d 731, 736 (5th Cir. 1999) (“an employer cannot be found to have violated the ADA when responsibility for the breakdown of the ‘informal, interactive process’ is traceable to the employee and not the employer”); *McAlpin v. Nat’l Semiconductor*, 921 F.Supp. 1518, 1525 (N.D. Tex. 1996) (when the employer asks for reasonable documentation after an employee elicits assistance, but the employee will not cooperate, the employer cannot be held liable).

“A reasonable accommodation envisions an exchange between the employer and the employee where each seeks and shares information to achieve the best match between the employee’s capabilities and available positions.” *Frisno v. Seattle Sch. Dist. No. 1*, 160 Wn.App. 765, 779, 249 P.3d 1044 (2011), *rev. denied* 172 Wn.2d 1013, 259 P.3d 1109 (2011).

On Oct. 13, 2014, Mr. Batjer asked Plaintiff’s lawyer to obtain information from Dr. Callison as to what types of reasonable accommodations Plaintiff would require to return to work. Dr. Callison did not provide the information. On Nov. 17, 2014, Mr. Snead directly asked Dr. Callison to fill out a medical questionnaire so that the City could determine what types of reasonable accommodations Plaintiff would

require. Dr. Callison did not respond. On Jan. 26, 2015, Mr. Batjer directly asked Dr. Callison to fill out a medical questionnaire to assist in determining what, if any, reasonable accommodations might be required. Dr. Callison did not respond. On March 19, 2015, Mr. Batjer advised Plaintiff's counsel that Dr. Callison had not responded and that her information was necessary. Plaintiff's counsel thereafter did not provide any information from Dr. Callison.

Here, Plaintiff failed to cooperate with the City to establish a reasonable accommodation with regard to her PTSD. Therefore, the trial court properly dismissed Plaintiff's accommodation claim.

B. PLAINTIFF LACKS MEDICAL EVIDENCE THAT HER REQUESTED ACCOMMODATIONS WERE MEDICALLY NECESSARY TO AVOID AGGRAVATION OF HER IMPAIRMENT.

Plaintiff's alleged requests for accommodation were all made to prevent aggravation of her mental health condition. For purposes of qualifying for reasonable accommodation in employment, **“medical documentation must establish 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). (Emphasis added.)

[T]he duty to accommodate a potential aggravation under the WLAD arises only when the employee has notified the

employer of the existence of an impairment *and* has produced medical documentation “establish[ing] 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.”

Garcia v. Cintas Corp. No. 3, 2013 WL 1561116, *6 (E.D. Wash. 2013) (applying Washington law), *aff’d* 601 Fed.Appx. 531 (9th Cir. 2015). Moreover, an employee’s “subjective, non-expert opinion that her condition might be aggravated . . . does not satisfy the ‘reasonable likelihood’ standard for aggravation of an impairment under RCW 49.60.040(7)(d)(ii).” *Id.*

Here, Plaintiff provided no medical documentation that any failure to provide the accommodations requested by Plaintiff would exacerbate her mental health condition. The only medical documentation in the record is from Dr. Callison. Dr. Callison did not provide medical evidence that Plaintiff’s condition would be aggravated to the extent that it would create a substantially limiting effect if (a) Plaintiff’s job title was not restored, (b) Plaintiff was not reassigned to a different building or (c) if the City did not make changes in its policies.

Pursuant to RCW 49.60.040(7), the duty to accommodate arises in two general circumstances: (1) when the impairment has **a substantially limiting effect** on the employee’s ability to perform the duties of his or

her job or (2) when **there is medical evidence** that failure to accommodate will aggravate the impairment to the extent it would create a **substantially limiting effect**. RCW 49.60.040(7) states:

(d) Only **for the purposes of qualifying for reasonable accommodation in employment**, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a **substantially limiting effect upon the individual’s ability to perform his or her job . . . or**

(ii) The employee must have put the employer on notice of the existence of an impairment, and **medical documentation must establish that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.**

(Emphasis added.)

In *Studley v. The Boeing Co.*, 2016 WL 6298773 (W.D. Wash. 2016), a plaintiff’s WLAD accommodation claim was dismissed because plaintiff “had no medical documentation suggesting that engaging in her job functions without an accommodation would aggravate her depression or anxiety.” *Id.* at *4. “Having failed to show a need or request for on-going mental health accommodation [via medical documentation], this aspect of plaintiff’s claim [for failure to provide reasonable accommodation] fails.” *Id.*

Citing *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004), *abrogated in Mikkelsen v. Public Utility Dist. No. 1 of Kittitas Cnty.*, 189 Wn.2d 516, 404 P.3d 464 (2017), Plaintiff argued that Dr. Callison provided sufficient medical documentation. The *Riehl* court stated that “in case of depression or PTSD, a doctor’s note may be necessary to satisfy the plaintiff’s burden to show some accommodation is medically necessary.” 152 Wn.2d at 148. However, Mr. Riehl’s accommodation claim was dismissed on summary judgment because plaintiff “did not provide a [medical] nexus between his disabilities, depression and need for accommodation beyond what [defendant] provided.” *Id.* Defendant “had to provide accommodations to Riehl only if it was medically necessary to do so.” *Id.* at 149. Here, Plaintiff likewise did not provide a nexus between her disability and the need for the three alleged accommodations she requested.

Dr. Callison testified that she did not formulate an opinion whether there were any accommodations Plaintiff would require to return to work. Plaintiff provided no medical documentation that any failure to accommodate would exacerbate her medical condition. The only medical documentation in the record is from Dr. Callison. Dr. Callison did not provide medical evidence that Plaintiff’s condition would be aggravated to the extent that it would create a substantially limiting effect if (a)

Plaintiff's job title was not restored,⁵ (b) Plaintiff was not reassigned to a different building or (c) if the City did not make changes in its policies.

C. AS A MATTER OF LAW, PLAINTIFF'S REQUESTED ACCOMMODATIONS WERE UNREASONABLE AND THE CITY WAS NOT REQUIRED TO PROVIDE ACCOMMODATIONS THAT WERE UNREASONABLE.

There is no duty to provide an accommodation that is not reasonable. *Hartleben v. Univ. of Wash.*, 194 Wn.App. 877, 889, 378 P.3d 263 (2016), *rev. denied* 187 Wn.2d 1006, 386 P.3d 1088 (2017).

Plaintiff argued that there is a question of fact whether the accommodations requested by Plaintiff were reasonable and whether the City's denial of those requested accommodations was unreasonable. As noted above, Plaintiff identified her specific requests for accommodation.

The plaintiff bears the burden of proposing an accommodation that would enable [her] to perform the job effectively and is, at least on the face of things, reasonable. . . . This necessarily entails a showing that the accommodation 'would effectively enable [her] to perform [her] job.'

Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001). An accommodation claim should be dismissed on summary judgment if plaintiff "fails to explain how the accommodation [she] seeks would enable [her] to perform the functions of [her] job and whether such accommodations would be

⁵ Plaintiff cannot cite any legal authority that a change in an employee's job title can be considered a reasonable accommodation for a disability.

reasonable.” *Grillasca-Pietri v. Portorican Am. Broadcasting Co., Inc.*, 233 F.Supp.2d 258, 264 (D.P.R. 2002). It is unreasonable as a matter of law to require an employer to prevent stress-producing situations at the workplace. *Id.* “There is no duty for an employer to provide employees with a stress free workplace.” *Snyder v. Med. Servs. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).

Restoration to Administrative Assistant Position – This alleged accommodation was first raised in the “11 questions letter” dated April 1, 2015. (CP 441 ¶ 20, 479-80.) The City’s counsel responded: “For various reasons, her position was changed prior to her leave after consulting with her union representative, Armando Lopez. Please direct any questions in this regard to Mr. Lopez.” (CP 442 ¶ 21, 482-84.) Here, if Plaintiff claims she would have been able to work as an Administrative Assistant then she had no disability requiring accommodation. *See Snyder*, below, stating that if a disabled person can perform a job then “she has no disability requiring accommodation.” Plaintiff provided no medical documentation that by not restoring her to an administrative assistant position her mental health condition would be exacerbated.

Relocating Plaintiff to a Different Building – Plaintiff testified that she wanted to be relocated to a different building “[b]ecause it was away from where everything happened.” (CP 163.) Plaintiff was asked whether

Dr. Callison told her that if she returned to work in the same building whether she would have psychological problems and she responded: “I don’t think she said that I would have those problems, I think it was – I believe it was more of an understanding that wouldn’t be uncommon to have those problems, if I recall.” (CP 164.)

This alleged request to be moved to a different building was also first raised in the “11 questions letter.” The City’s attorney responded:

Ms. Stetner’s duties include taking applications for water, sewer and garbage, all of which is done in the PSB which is, in turn, in close proximity to City Hall where payments are received. . . . It is the City’s position that, by locating Ms. Stetner in the PSD, citizens would be afforded the most efficient administration of city services. The City is open to reasonable accommodations with respect to her work station.

(CP 442 ¶ 21, 482.)

In *Snyder*, plaintiff had PTSD. She claimed that her supervisor, Hall, caused her to suffer aggravation of her depression and PTSD symptoms. 145 Wn.2d at 253. Plaintiff claimed that Hall “triggered” her PTSD symptoms. *Id.* at 256. The Supreme Court held: “We . . . conclude that there is no duty under WLAD to reasonably accommodate an employee’s disability by providing her with a new supervisor.” *Id.* at 242.

The Court emphasized that:

Snyder claims she could continue to perform the essential functions of her position so long as she did not have to

report to Ms. Hall. However, **if Snyder can perform the job, then she has no disability requiring accommodation simply because she has a personality conflict with her supervisor.**

Id. at 241. (Emphasis added.) Here, relocating Plaintiff to a different building is not functionally different than reassigning an employee to a new supervisor. Thus, relocating Plaintiff to a different building was not a reasonable accommodation. Moreover, **because Plaintiff claims she could have been able to work in a different location she did not have a disability requiring accommodation.**

Implementation of Different Sexual Harassment Policies and Procedures – This alleged accommodation was first raised in Dr. Callison’s “To Whom It May Concern” letter dated Jan. 16, 2015. (CP 469.) She stated:

Until and unless the [revised] protocols are implemented and enforced, I cannot recommend that Ms. Stetner return to work for the City of Quincy in any capacity, regardless of accommodations.⁶

The City’s attorney responded to Dr. Callison in his letter dated Jan. 26, 2015, in which he described and quoted the City’s sexual harassment policies and stated: “Again, the City believes it has robust anti-harassment / abuse protocol in place that will be available to Ms. Stetner

⁶ Plaintiff lacks evidence to show that Dr. Callison, a psychologist, was qualified to comment on the adequacy of the City’s policies.

when she returns to work.” (CP 474.) Plaintiff cannot cite to any court opinion that required a governmental entity to change its policies as “reasonable accommodation” for a disabled employee.

Plaintiff was asked if the City changed the policies whether she would have been able to return and perform the essential functions of her job and she responded: “Again, there was a list of 11 things, and it would be the propensity [of] all of those things, and discussing those things, and not just down to one question why I did not go back.” (CP 157-58.) Plaintiff was asked whether she had any conversation with Dr. Callison about the accommodations she would need in order to return to work and she responded: “I discussed – I’m not real detailed. I know that I felt their procedures needed to be clearer.” (CP 164-65.) Plaintiff was asked whether she was not going to return unless the City improved its policies and she responded: “It was one of the things that in totality my decision on whether or not to return to the City was based on” and “I would have liked to discuss that with them.” (CP 165.)

Plaintiff testified that as of April 2015 she was not able to perform the essential functions of a full-time job. (CP 166.) Plaintiff testified that she did not have in mind any date when she might be able to return to work after April 8, 2015. (CP 168.)

As a matter of law, the three accommodations allegedly requested by Plaintiff were not “reasonable accommodations” the City was required to provide.

D. WORKING AT THE PUBLIC SERVICES BUILDING WAS AN ESSENTIAL FUNCTION OF PLAINTIFF’S JOB.

Plaintiff contends the City could have transferred her to another building away from the Public Services Building. Such an accommodation would not have been a reasonable accommodation because the City needed to have Plaintiff work in the Public Services Building – not City Hall. Therefore, Plaintiff has not created a genuine issue of material fact regarding whether the City failed to reasonably accommodate her disabilities.

Plaintiff did not request any “reasonable accommodation” and it is her burden to show there was a reasonable accommodation the City failed to implement. Working at her past work station was an essential function and employers do not have to assign essential functions to other employees. The City was not required to attempt to accommodate Plaintiff by changing her work station away from the Public Services Building. Additionally, Plaintiff lacks evidence there were alternative jobs for which she was qualified that did not involve working at the Public Services Building.

The City needed Plaintiff to perform the essential functions of her job at the Public Services Building. “The term essential functions means the *fundamental job duties* of the employment position the individual with a disability holds or desires.” *Kries v WA-SPOK Primary Care, LLC*, 190 Wn.App. 98, 125, 362 P.3d 974 (2015). (Emphasis in original.) “Essential function” is “a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.” *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533, 70 P.3d 126 (2003). In *Davis*, plaintiff had hepatitis C, which prevented him from working more than 40 hours a week. *Id.* at 525. The court held as a matter of law that Microsoft was entitled to summary judgment on plaintiff’s failure to accommodate claim. *Id.* at 535. Plaintiff’s job required working “well more than 40 hours per week” and required “flexible availability, frequent travel, and extended hours as discrete job requirements.” *Id.* “Because Davis’s disability limited him to a structured workweek of no more than 40 hours per week and 8 hours per day, he was unable to continue providing the job presence and service essential to the systems engineer position.” *Id.* “As a matter of law, Davis failed to establish the second element of his prima facie case – that he “was qualified to perform the essential functions of the job in question.” *Id.*

Plaintiff's work station at the Public Services Building was an essential function of Plaintiff's position. Plaintiff's duties could not reasonably be performed while working at City Hall. Re-locating Plaintiff to City Hall would amount to a fundamental alteration of the City's workforce.

“[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.” *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 119, 720 P.2d 793 (1986).

E. PLAINTIFF'S UNPAID MEDICAL LEAVE WAS A REASONABLE ACCOMMODATION.

The City provided a reasonable accommodation to Plaintiff by allowing her to go on leave for an extended period of time. “Providing unpaid medical leave can qualify as a reasonable accommodation.” *Kries v. WA-SPOK Primacy Care, LLC*, 190 Wn.App. 98, 143, 362 P.3d 947 (2015).

In *Goodson v. Triumph Composite Systems*, 2014 WL 6908743, *10 (E.D.Wash. 2014) (applying Washington law), plaintiff had a painful shoulder condition and arguably requested to take Hydrocodone either before or during work. *Id.* at 10. During one meeting with an HR representative, Plaintiff disclosed his Hydrocodone use and was informed

he could not be under the influence of Hydrocodone while at work. *Id.* The district court dismissed plaintiff's failure to accommodate claim and stated that "Plaintiff's disability was being sufficiently accommodated with leave and thus the need to explore different accommodations was unnecessary." *Id.* The district court further stated at *10:

Even if the evidence uncovers that Plaintiff did request permission to use pain medication before or during work, this type of reasonable accommodation is ultimately within the employer's discretion and does not need to be the specific accommodation the employee requests. Although Plaintiff would have preferred to take medication and come to work rather than taking leave, the decision is ultimately with the employer as to which accommodation to grant.

"An employer is not obligated to provide an employee with the accommodation he requests or prefers, the employer need only provide some reasonable accommodation." *Gilmore v. Boeing Company*, 2018 WL 883875, *6 (W.D. Wash. 2018). An employee is not entitled to the accommodation of her choice. *Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993); *Havilina v Dept. of Transp.*, 142 Wn.App. 510, 517, 178 P.3d 354 (2007). Permitting Plaintiff's long leave was a reasonable accommodation. Accordingly, Plaintiff fails to meet her burden of establishing a material fact that she was denied a reasonable accommodation.

F. THE CITY HAD A RIGHT TO TERMINATE PLAINTIFF'S EMPLOYMENT BECAUSE AFTER MANY MONTHS SHE

DID NOT PROVIDE A REASONABLY DEFINITE DATE WHEN SHE WOULD RETURN TO WORK.

Plaintiff did not advise the City of her expected date of return to work. The City allowed Plaintiff to stay on leave for more than seven months but ultimately had no choice but to separate Plaintiff from employment. If the date of return is not certain “an employee could conceivably forestall dismissal indefinitely” *Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1990).

An unpaid leave of absence for medical treatment when the date of a return to work is unknown or indefinite is not a reasonable accommodation. In *Gardenhire v. Johns Manville*, 2017 WL 445506 (D.Kan. 2017), *aff'd* 2018 WL 739379 (10th Cir. 2018), the district court dismissed plaintiff’s failure to accommodate claim on summary judgment and stated at *8:

While a “reasonable allowance of time for medical care” may constitute a reasonable accommodation, plaintiff already had received eight months of continuous leave when defendant terminated him. And when defendant terminated him . . . plaintiff had not given defendant any indication about the expected duration of his impairment. Defendant was not required to wait indefinitely for recovery. Under these circumstances, additional time for medical care was not a reasonable accommodation under the ADA. The court thus concludes that no reasonable jury could find plaintiff could perform the essential functions of the job, even with reasonable accommodations, when defendant fired him.

See also Stevenson v. Abbott Laboratories, 639 Fed.Appx. 473, 474 (9th Cir. 2016) (“California court do not require that medical leave be indefinite or that a job be held open indefinitely for a temporarily disabled employee”), *citing Jensen v. Wells Fargo Bank*, 102 Cal.Rptr.2d 55, 68 (Cal.App. 2000) (“if the employer does not know when the employee will be able to return to duty, the employer is not required to grant an indefinite and lengthy leave”); *Whitaker v. Wisconsin Dept. of Health Servs.*, 2016 WL 3693766, *5 (E.D. Wis. 2016) (“Plaintiff’s failure-to-accommodate claim also fails because the record indicates that continuing plaintiff’s medical leave was not a reasonable accommodation. No employer is required to implement an accommodation that would impose an undue hardship.”), *aff’d* 849 F.3d 681 (7th Cir. 2017) (plaintiff’s evidence “does not provide sufficient evidence to allow a trier of fact to find that, if the Department had given her additional unpaid leave, she likely would have been able to return to work on a regular basis”); *Tadlock v. Marshall Cnty. MHA, LLC*, 2015 WL 11236847, *5 (W.D. Okla. 2015) (“an indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment”), *quoting Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1110 (10th Cir. 1999); *Hwang v. Kansas St. Univ.*, 753 F.3d 1159, 1161, 1162 (10th Cir. 2014) (“It perhaps goes without saying that an employee who isn’t capable of working for so

long [six months] isn't an employee capable of performing a job's essential functions – and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation.”).

Plaintiff relied on *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn.App. 98, 362 P.3d 947 (2015), which stated, *under the specific facts of that case*: “A question of fact exists as to whether allowing [plaintiff] further leave would be a reasonable accommodation.” 190 Wn.App. at 143. In *Kries*, the employer knew that plaintiff would be able to return to work after the healing of her infectious wound and plaintiff provided frequent updates on her condition. Here, the City was provided with absolutely no information as to when Plaintiff might be able to return to work. In *Kries*, the court noted: “Providing unpaid leave can qualify as a reasonable accommodation.” 190 Wn.App. at 143.

G. EVEN IF PLAINTIFF WERE TO PREVAIL IN THIS APPEAL SHE WOULD NOT HAVE A RIGHT TO AN AWARD OF ATTORNEY FEES ON APPEAL.

Plaintiff claims an entitlement to an award of attorney fees under *Martinez v. City of Tacoma*, 81 Wn.App. 228, 914 P.3d 86 (1996), *rev. denied* 130 Wn.2d 1010, 928 P.2d 415 (1996). After a trial, the jury found in favor of *plaintiff*. Plaintiff appealed on the ground that the trial court improperly limited the amount of plaintiff's attorney fees. The court of

appeals agreed and held that plaintiff was entitled to an award of attorney fees incurred on appeal.

Here, Plaintiff did not prevail at the trial court level. It is premature to award fees to Plaintiff in this case because she has not yet prevailed in this case. In *Specialty Asphalt & Constr., LLC v. Lincoln Cnty.*, 191 Wn.2d 182, 421 P.3d 925 (2018), plaintiff's claims for discrimination were dismissed on summary judgment. The Supreme Court reversed and remanded. The Court also held that plaintiff was not entitled to attorney fees on appeal and stated at 201 n. 14:

But Specialty's request [for attorney fees] is premature. Specialty may recover attorney fees if the trial court finds that the County violated WLAD on remand.

See also Espindola v. Apple King, 6 Wn.App.2d 244, 262, 430 P.3d 663 (2018) ("Because Ms. Espindola has not yet succeeded on her claim against Apple King, we are not in a position to award attorney fees."); *Robbins v. Mason Cnty. Title Ins. Co.*, 5 Wn.App.2d 68, 85, 425 P.3d 885 (2018) ("Because the merits of [defendant's] affirmative defenses are not yet decided, any decision on attorney fees and costs is premature."); *Castellon v. Rodriguez*, 4 Wn.App.2d 8, 19, 418 P.3d 804 (2018) ("This request [for attorney fees on appeal] is premature, as Mr. Rodriguez has not yet prevailed.").

H. THE CITY'S DESIGNATION OF DOCUMENTS NOT LISTED IN THE TRIAL COURT'S ORDER DID NOT VIOLATE RAP 9.12.

Plaintiff argued that certain documents designated by the City were not considered by the trial court so should not have been designated by the City. (Plaintiff's brief at 32.) The City did not use these documents as substantive evidence. The documents were designated by the City to give the Court a history of what took place leading up to summary judgment. For various reasons, the motion was noted to be heard on four separate occasions.

Plaintiff may be most concerned with five declarations filed by the City beginning at CR 587, 633, 641, 637 and 918. (It is difficult for Plaintiff to argue that the six pleadings filed by Plaintiff are of any consequence to Plaintiff.) The City's five declarations all began by stating: "I am [job description], I am competent to testify, and I make these statements to the best of my personal knowledge and belief." All of the declaration ultimately considered by the Court stated: "I am [job description], I am competent to testify, and I make these statements on personal knowledge." *See, e.g.*, Mr. Batjer declaration dated May 25, 2018, which was designated by Plaintiff. (CP 434-92.) Mr. Batjer's declaration dated April 24, 2018 (CP 918-976) is the same as his

declaration dated May 25, 2018 except for the “personal knowledge” language.

Plaintiff noted that the declaration of Mr. Batjer dated April 24, 2018 was crossed out in the Court’s Order Granting Defendant City’s Motion for Summary Judgment. (CP 521.) The City’s lawyer designated the declaration of Mr. Batjer dated April 24, 2018 to show why the City’s motion was noted on multiple dates. This was primarily due to the trial court’s ruling that a declaration made “to the best of my personal knowledge and belief” is somehow inadmissible. (See further discussion below.)

Two declarations of Plaintiff’s counsel (beginning at CP 733 and 782) were also designated by the City’s attorney but were not listed on the Court’s order on summary judgment. (*Id.*) Plaintiff’s counsel attached exhibits that he later argued were non-admissible. The City’s lawyer designated the declarations of Plaintiff’s counsel to show that Plaintiff’s argument as to the non-admissibility of certain documents was unreasonable given the fact that Plaintiff’s counsel offered the exhibits as admissible evidence. **Significantly, in Plaintiff’s brief she does not argue that the trial court relied on any inadmissible evidence.** When the City designated Clerk’s Papers it did not know whether Plaintiff would argue that inadmissible evidence was considered by the trial court.

The City initially noted its motion for summary judgment to be heard on Feb. 2, 2018. Plaintiff's counsel advised that this this date was unavailable to him so the City re-noted the motion for March 29, 2019. Before oral argument, Plaintiff's counsel asserted that the City's declarations were defective because they stated at the beginning: "I am the [job description of declarant], I am competent to testify and I make these statements to the best of my personal knowledge and belief." (Each declaration also stated at the bottom: "I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.") At the beginning of oral argument, the trial court concluded that "to the best of my personal knowledge and belief" did not meet the requirements of CR 56(e) stating that "affidavits shall be made on personal knowledge" Therefore, the hearing was stricken to allow the City to change the personal knowledge wording. At the time the City's lawyer stated:

A declaration made "to the best of my personal knowledge and belief" meets the requirements of CR 56(e). The undersigned has been preparing declarations for summary judgment on a regular basis during his more than 38 years of law practice. The undersigned customarily begins a declaration by stating "I am competent to testify and I make these statements to the best of my personal knowledge and belief." Plaintiff's attorney is *the first and only lawyer* who has ever had an objection to this format.

(CP 382.) (Emphasis in original.)

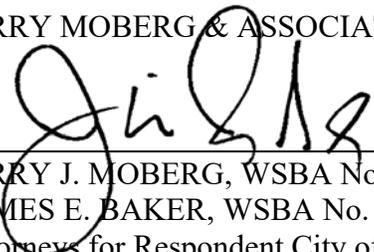
The City revised its summary judgment pleadings and re-noted the motion to be heard on May 23, 2018. All of the City's declarations stated except for one stated: "I am [job description of declarant], I am competent to testify and I make these statements on personal knowledge." Unfortunately, the declaration of Mr. Batjer continued to state that "I make these statements to the best of my personal knowledge and belief." The undersigned simply prepared Mr. Batjer's declaration in this fashion due to his long-standing habit of using the phrase "to the best of my personal knowledge and belief." Understandably, this caused some embarrassment to the undersigned. Upon recognizing this error, the undersigned struck the May 23 hearing and re-noted it for July 26, 2018. With a red face, the undersigned revised Mr. Batjer's declaration to read that "I make these statements on personal knowledge. (CP 434.)"

IV. CONCLUSION

For the reasons set forth above, the Court should affirm the dismissal of Plaintiff's case on summary judgment.

RESPECTFULLY SUBMITTED this 10th day of May, 2019.

JERRY MOBERG & ASSOCIATES, P.S.



JERRY J. MOBERG, WSBA No. 5282
JAMES E. BAKER, WSBA No. 9459
Attorneys for Respondent City of Quincy

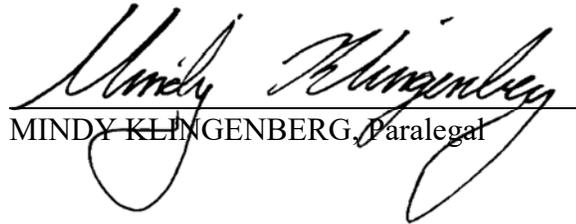
CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Appellate Court Portal electronic filing system. Notice of this filing will be sent to the following individuals by the Court's e-filing system:

H. Lee Lewis
leel@jdsalaw.com

DATED this 10th day of May, 2019 at Ephrata, Washington.

JERRY MOBERG & ASSOCIATES, P.S.


MINDY KLINGENBERG, Paralegal

JERRY MOBERG & ASSOCIATES, P.S.

May 10, 2019 - 4:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36395-3
Appellate Court Case Title: Glenda Koenig v. City of Quincy
Superior Court Case Number: 17-2-00993-4

The following documents have been uploaded:

- 363953_Briefs_20190510160511D3418312_5925.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Koenig Respondent Brief.pdf

A copy of the uploaded files will be sent to:

- jmoberg@jmlawps.com
- leel@jdsalaw.com

Comments:

Sender Name: Mindy Klingenberg - Email: mklingenberg@jmlawps.com

Filing on Behalf of: James Edyrn Baker - Email: jbaker@jmlawps.com (Alternate Email:)

Address:
PO Box 130
Ephrata, WA, 98823
Phone: (509) 754-2356

Note: The Filing Id is 20190510160511D3418312