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Court of Appeals Case No. 33174-8-II

**SUPREME COURT
OF THE STATE OF WASHINGTON**

LONGVIEW FIBRE COMPANY, INC.,

Petitioner

v.

STACY L. HEGWINE,

Respondent.

PETITION FOR REVIEW

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**IDENTITY OF THE PETITIONER AND THE COURT OF
APPEALS DECISION TO BE REVIEWED**

The Petitioner is Longview Fibre Company, Inc. ("Fibre"). Fibre seeks review of *Hegwine v. Longview Fibre Co. Inc.*, a published Court of Appeals decision filed by Division Two of the Court of Appeals on April 25, 2006, No. 33174-8-II (hereinafter cited as "*Hegwine*"). A copy of the slip opinion is attached in the Appendix as Exhibit A.

ISSUES PRESENTED FOR REVIEW¹

1. Did the Court of Appeals err in concluding that an accommodation analysis similar to that in disability claims is inappropriate when a job applicant's pregnancy-related health conditions temporarily prevent her from performing essential functions of the position applied for?
2. Did the Court of Appeals err in concluding that WAC 162-30-020 requires an employer to hire a pregnant applicant who cannot perform elements of the position applied for?
3. If an accommodation analysis is inapplicable and WAC 162-30-020 requires an employer to hire a pregnant applicant who cannot perform aspects of the position applied for, does the regulation

¹ Although Fibre presents a broad list of issues to be addressed on discretionary review, it only briefs here the bases on which the Court should grant review.

conflict with RCW 49.60.180 and, therefore, exceed the authority of the Washington State Human Rights Commission, which promulgated the regulation?

4. Did the Court of Appeals err in concluding that substantial evidence did not support the trial court's Finding of Fact 8, that an essential function of the Order Checker Clerk was lifting up to 60 pounds?

5. Did the Court of Appeals err in concluding that substantial evidence did not support the trial court's Finding of Fact 11, that the position could not be modified to accommodate Hegwine's pregnancy-related lifting restriction other than by hiring her and immediately placing her on maternity leave?

6. Did the Court of Appeals err in concluding that, following a conditional offer of employment, an employer may not as part of a mandatory physical examination inquire about the applicant's medical conditions and associated restrictions that may prevent her from safely performing the job?

7. Did the Court of Appeals err in concluding without considering, and contrary to Washington Supreme Court authority, that the business necessity exception to liability under WAC 162-30-020(3)(b) was an affirmative defense on which Fibre bore the burden of proof?

8. Even if business necessity under WAC 162-30-020(3)(b) is an affirmative defense, did the Court of Appeals err in concluding that Fibre waived business necessity by not affirmatively pleading it, even though Fibre made essentially the same argument under RCW 49.60.180 and presented evidence, and the trial court evaluated and entered findings and conclusions on the issue?

9. Did the Court of Appeals err in concluding that Fibre had not shown business necessity under WAC 162-30-020(3)(b)?

STATEMENT OF THE CASE

Stacy L. Hegwine applied for the clerical position of Order Checker Clerk at Fibre. Clerk's Papers ("CP") 21, Finding of Fact ("FF") 1. She was offered the position *contingent* up passing a physical exam. *Id.* During the physical exam, Ms. Hegwine disclosed that she was pregnant. CP 21, FF 2. At that point, the Fibre physician, Dr. Ostrander, asked Ms. Hegwine to obtain a release from her own doctor, who imposed lifting restrictions. *See* CP 21-22, FF 2, 4-6. Fibre then evaluated the job requirements of the Order Checker Clerk position and determined that the job required lifting up boxes of reports weighing up to 60 pounds, carrying them 15-30 feet and down 3-4 steps, and distributing them with a hand

truck.² CP 22-23, FF 7. The job's lifting requirement could not be amended or modified because the task was solely the responsibility of the Order Checker Clerk and had to be done before most other employees arrived at work. *See* CP 23, FF 8, 11; *see also* Verbatim Report of Proceedings (3/15) 77:14-16; 79:15-25; 101:12-13; Deposition of Ronald Samples at 16:25-17:3; 18:16-18. Because Ms. Hegwine could not lift up to 60 pounds, an essential function of the position, and her restriction could not be reasonably accommodated, Fibre withdrew its offer of employment. *See* CP 23-24, FF 12-14.

The trial court concluded that because lifting up to 60 pounds was an essential function of the Order Checker Clerk position and Ms. Hegwine's lifting restriction could not be accommodated, Fibre was not required to hire her only to immediately put her on maternity leave.

² Ms. Hegwine did not challenge on appeal Finding of Fact 7, on which this assertion is based. The Court of Appeals also recognized that Ms. Hegwine challenged only Findings of Fact 8 and 11 (and, the court found, part of Findings of Fact 14). *Hegwine*, slip op. at 8 n.11 . Findings of fact not challenged on appeal are deemed verities. *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999). Therefore, because the Court of Appeals agreed that Ms. Hegwine did not challenge Finding of Fact 7 and agreed that unchallenged findings are verities on appeal, it mistakenly recharacterized the lifting restrictions as merely lifting the boxes on and off a hand truck and in and out of a pickup truck, rather than the requirements described in Finding of Fact 7, carrying the boxes 15-30 feet and down 3-4 steps. *Hegwine*, slip op. at 17 n.19.

CP 24-25, Conclusions of Law 1-3.³ On appeal, the Court of Appeals held that a disability analysis was wholly inappropriate for pregnant applicants or employees, concluding that the trial court erred in treating the case as a disability discrimination claim. *Hegwine*, slip op. at 15. The Court of Appeals held that because Fibre rescinded its employment offer to Ms. Hegwine based on pregnancy-related lifting restrictions, it violated WAC 162-30-020. *Id.* at 16, 18-19. Those conclusions conflict with the intent and text of WAC 162-30-020(3)(b) and RCW 49.60.180(1), as well as common sense. The trial court did not hold and Fibre has not argued that this is a case of disability discrimination. Instead, the trial court merely recognized that where an applicant is unable to perform duties of the position applied for due to pregnancy-related conditions, there must be a mechanism by which prospective employers can evaluate the applicant's limitations. A reasonable mechanism, as the trial court essentially concluded, is an accommodation analysis similar to that involved in disability claims.

³ The trial court's Findings of Fact and Conclusions of Law may be found at CP 21-25. Because Ms. Hegwine challenged only findings 8 and 11 on appeal, the others are deemed verities. *Dumas*, 137 Wn.2d at 280. The Court of Appeals' effort to reframe unchallenged findings was incorrect and misleading. Furthermore, the court erred in concluding that substantial evidence did not support Findings of Fact 8 and 11.

ARGUMENT⁴

I. This Court Should Accept Review Because Whether an Employer Must Hire a Pregnant Applicant Who Cannot Perform Duties of the Position Without Conducting an Accommodation Analysis Is a Matter of First Impression and an Issue of Substantial Public Importance.

In evaluating the trial court's analysis, the Court of Appeals held that "disability discrimination analysis is inapplicable here because pregnancy and pregnancy related conditions are not considered 'disabilities' under Washington law." *Hegwine*, slip op. at 15. But employers must have some mechanism through which to address an applicant's physical limitations related to pregnancy. If pregnancy-related conditions are never considered disabilities and no accommodation-type analysis is applied, then the logical result of the Court of Appeals' conclusion is that either: (1) pregnant applicants and employees must

⁴ Petitioner Fibre seeks review by this Court under RAP 13.4(b)(1) and (4).

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Review under RAP 13.4(b)(4) will be addressed first, followed by review under RAP 13.4(b)(1).

perform their job responsibilities despite physical limitations related to pregnancy or, as the Court of Appeals in essence held, (2) employers must hire pregnant applicants who cannot perform essential functions of the jobs applied for, even with reasonable accommodation, and either put those applicants directly on maternity leave or reassign the essential functions.

The Court of Appeals' explicit holding and the implications thereof conflict with the text of WAC 162-30-020 and RCW 49.60.180 by denying employers the ability to require applicants to be capable of performing the essential functions of the position in question.⁵ The holding also conflicts with the purpose of pregnancy regulations and common sense—the pregnancy regulations protect women from discrimination because pregnancy will sometimes interfere with their ability to perform their jobs. By ignoring the physical realities of pregnancy, the court actually *decreases* protections for pregnant women. Finally, the Court of Appeals' subsequent analysis illustrates the difficulty in making pregnancy "discrimination" a formulaic analysis separate from disability discrimination and will serve to further confuse employers. This

⁵ WAC 162-30-020 and RCW 49.60.180 are attached in the Appendix as Exhibits B and C, respectively.

Court should grant review to clarify the appropriate analysis and to educate employers while reaffirming protection of pregnant women.

A. The Court of Appeals' Holding Undermines the Purpose and Text of WAC 162-30-020 and Common Sense.

A purpose of Washington's law against discrimination in employment practices, RCW 49.60.180, is to "equalize employment opportunity for men and women."⁶ WAC 162-30-020(1). To that end, the pregnancy regulation, WAC 162-30-020, "explains how the law applies to employment practices that disadvantage women because of pregnancy or childbirth." *Id.* Therefore, the regulation declares it an unfair practice for an employer to refuse to hire an employee because of pregnancy or childbirth. WAC 162-30-020(3)(a)(i). Before the Court of Appeals decision here, no published Washington opinion addressed application of this regulation to a pregnant applicant whose physical limitations prevented her from performing key aspects of the job applied for.

⁶ RCW 49.60.180(1) states that it is an unfair practice for any employer:

To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such

Although both parties and the Court of Appeals apparently agree that pregnancy is not a per se disability, Ms. Hegwine does not dispute, but in fact embraces, the basic fact that pregnancy sometimes causes temporary physical limitations. Reply Brief of Appellant ("Appellant Reply Br.") at 10; *see also Hegwine*, slip op. at 14-15. Indeed, the regulation at issue explicitly considers pregnancy-induced temporary disabilities in its leave protections:

An employer shall provide a woman a leave of absence for the period of time that she is sick or *temporarily disabled* because of pregnancy or childbirth. Employers must treat a woman on pregnancy-related leave the same as other employees on leave for sickness or other temporary disabilities.

WAC 162-30-020(4)(a) (emphasis added).

The Court of Appeals' holding therefore contradicted the very text of the regulation by concluding that "pregnancy and any related condition is not a disability under Washington law." *Hegwine*, slip op. at 15. The Court of Appeals went on to conclude that the record did not support Fibre's reason for rescinding Ms. Hegwine's offer of employment, and Ms. Hegwine therefore prevailed on her sex discrimination claim. *Id.* at 18-19.

The Court of Appeals' analysis also runs counter to the purpose of the regulation. The Washington Human Rights Commission ("HRC")

disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

adopted the pregnancy regulations because it *recognized* that pregnancy may prevent women from working or from performing all aspects of their responsibilities. If that were not the case, the regulations would not be necessary—equalization between men and women based on pregnancy would not be needed. But the HRC realized that pregnancy would create limitations for women and sought to ensure that they were not subject to discrimination on that basis. Indeed, as noted above, WAC 162-30-020(4)(a) explicitly requires employers to grant leave when an employee is "*temporarily disabled because of pregnancy or childbirth.*" (Emphasis added).

The Court of Appeals failed to discuss how employers should address pregnancy-related physical restrictions, whether through accommodation or otherwise. Instead, the Court of Appeals essentially concluded that any consideration of pregnancy-related conditions in hiring violates the regulation and employers therefore must hire pregnant applicants who cannot perform the position applied for and either immediately put them on leave or reassign the duties they are unable to perform. Alternatively, under the Court of Appeals' holding, employers could arguably force pregnant applicants to perform duties beyond their pregnancy-related physical limitations. But the regulation is intended to "equalize employment opportunity for men and women," not to force

women to work despite physically limiting pregnancy-related conditions, nor to give pregnant applicants a job entitlement while ignoring the physical realities of pregnancy. *See* WAC 162-30-020(1). Therefore, in addition to making it extraordinarily difficult and confusing for employers to decide how to deal with pregnant applicants with physical restrictions, the Court of Appeals' interpretation would alter the purpose of the regulation and contravene common sense.

B. If the Court of Appeals' Interpretation of WAC 162-30-020 Is Correct, the Regulation Exceeds Its Statutory Authority.

Washington law protects workers with temporary disabilities. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 643, 9 P.3d 787 (2000). For the purposes of accommodation analysis, assertion of a disability requires showing that "(1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual's ability to perform his or her job." *Id.* at 641. The abnormality requirement may be satisfied by showing that one "has a condition that is medically cognizable or diagnosable, or exists as a record or history." *Id.*

Pregnant women may in some instances be temporarily disabled. As Ms. Hegwine attests, "[p]regnancy is indisputably a medically cognizable condition which results in physical limitations," Appellant

Reply Br. at 10, and may affect a woman's ability to perform her job. *See Pulcino*, 141 Wn.2d at 641. If the Court of Appeals' conclusion is correct—that an employer must hire a pregnant applicant even if she is unable to perform the job due to pregnancy-related conditions because accommodation analysis does not apply—the regulation contradicts RCW 49.60.180(1) and therefore exceeds the HRC's authority.

RCW 49.60.180(1) states that "the prohibition against discrimination because of . . . disability shall not apply if the particular disability prevents the proper performance of the particular worker involved." The Court of Appeals' application of WAC 162-30-020 and refusal to consider temporary disabilities associated with pregnancy would prevent application of that statutory exception and require employers to hire pregnant applicants who cannot perform aspects of the job due to pregnancy-related temporary disabilities.⁷

If the Court of Appeals' application of the pregnancy regulation stands, WAC 162-30-020 will essentially be allowed to rewrite the express

⁷ The regulation has an exception to liability for business necessity, which is discussed in the following section. But employers should not have to resort to business necessity to receive the express protection of RCW 49.60.180(1). Moreover, based on the Court of Appeals' application of business necessity here (also discussed subsequently), it appears unlikely that asserting that an employee is unable to perform her job due to a pregnancy-related temporary disability would be sufficient to establish business necessity.

language of RCW 49.60.180(1) to eliminate application of the proviso to employment decisions based on pregnancy-related temporary disabilities. But "[a]n administrative agency cannot modify or amend a statute by regulation. Indeed, a rule that conflicts with a statute is beyond an agency's authority and invalidation of the rule is proper." *H&H Partnership v. State*, 115 Wn. App. 164, 170, 62 P.3d 510 (2003) (footnote omitted); *see also Gugin v. Sonico, Inc.*, 68 Wn. App. 826, 831, 846 P.2d 571 (1993) ("The administrative agency's power to promulgate rules did not include the power to legislate."). Therefore, if the Court of Appeals' interpretation of WAC 162-30-020 is correct, it contradicts and conflicts with RCW 49.60.180(1) and should be invalidated.

II. This Court Should Grant Review Because the Court of Appeals' Application of the Business Necessity Exception to Liability Conflicts with Decisions of the Washington Supreme Court.

WAC 162-30-020(3)(b) states that the "sole exception" to the prohibition on refusing to hire a woman because of pregnancy is:

if any employer can demonstrate business necessity for the employment action. For example, an employer hiring workers into a training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during those first two months.

The court concluded that because "[f]or the first time on appeal, Fibre argues that its business needs required it to rescind its offer of employment

to Hegwine[,]" Fibre waived the "affirmative defense." *Hegwine*, slip op. at 19. That conclusion conflicts with this Court's interpretation of affirmative defenses.

A. Business Necessity Is Not an Affirmative Defense.

The Court of Appeals incorrectly concluded without analysis that business necessity is an affirmative defense that Fibre waived by not affirmatively pleading it. *See Hegwine*, slip op. at 19. That conclusion conflicts with this Court's interpretation of affirmative defenses in the employment discrimination context. In *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 493-94, 859 P.2d 26 (1993), *amended*, 122 Wn.2d 483, 865 P.2d 507 (1994), the court addressed the business necessity exception to liability under former WAC 162-16-150 (addressing discrimination based on marital status). This regulation stated:

However, there are certain circumstances where business necessity may justify action on the basis of what the spouse does, and where this is so the action will be considered to come within the bona fide occupational qualification exception to the general rule of nondiscrimination. "Business necessity" for purposes of this section includes those circumstances where an employer's actions are based upon a compelling and essential need to avoid business-related conflicts of interest, or to avoid the reality or appearance of improper influence or favor.

WAC 162-16-150(2) (1999).⁸ The *Kastanis* court reasoned that:

In determining whether a statutory exception such as "business necessity" is an affirmative defense, the court looks to (1) whether the statute reflects a legislative intent to treat absence of the exception or the existence of a justification as one of the elements of a cause of action or (2) whether the justification negates an element of the action which the plaintiff must prove.

122 Wn.2d at 493. The court then applied the reasoning to conclude that because a bona fide occupational qualification was a "statutory justification for discrimination" and "the ultimate burden to prove discrimination rests with the plaintiff," the plaintiff bore the burden to prove the absence of the business necessity justification. *Id.*; *see also Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 183, 930 P.2d 307 (1997) ("At trial, [plaintiff] retains the burden of proving her discharge was not the result of a business necessity.").

Here, like the business necessity exception under former WAC 162-16-150, business necessity is a *justification* for failure to hire or promote or for termination or demotion because of pregnancy or childbirth. *See* WAC 162-30-020(3)(b). Under this Court's reasoning in *Kastanis*, because business necessity is a justification for discrimination and because the plaintiff at all times maintains the ultimate burden to

⁸ Former WAC 162-16-150 is attached in the Appendix as Exhibit D.

prove discrimination, the plaintiff also bears the burden to prove the absence of business necessity. *See Kastanis*, 122 Wn.2d at 493.

Therefore, not only did Fibre not need to affirmatively plead business necessity, but *Ms. Hegwine* bore the burden to prove that business necessity *did not justify* Fibre's decision to rescind her offer of employment. Not only did *Ms. Hegwine* *not* satisfy her burden, but as discussed below, Fibre has established business necessity.

B. Even if This Court Concludes that Business Necessity Is an Affirmative Defense, Fibre Is Not Barred From Asserting It.

Failure to affirmatively plead a defense does not necessarily bar assertion of the defense. Where failure to plead a defense does not cause surprise to the opposing party or affect the substantial rights of the parties, it may be deemed harmless.⁹ *Mahoney v. Tingley*, 85 Wn.2d 95, 100-01, 529 P.2d 1068 (1975); *Hogan v. Sacred Heart Med. Ctr.*, 101 Wn. App. 43, 54, 2 P.3d 968 (2000) (concluding that failure to plead an explicit

⁹ Furthermore, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." CR 15(b). As discussed in the body of this section, Fibre presented evidence that based on *Ms. Hegwine's* pregnancy-related lifting restrictions, she could not perform essential functions of the Order Checker Clerk position, and that no accommodation could be made. By analogizing to the example given by the regulation, Fibre implicitly asserted that business necessity justified its decision to rescind *Ms. Hegwine's* offer of employment because she

release from liability did not waive the defense because the argument was raised in the party's trial brief and the opposing party therefore could not claim it was surprised that the party planned to make the argument).

Here, Fibre has consistently asserted that the reason it rescinded Ms. Hegwine's offer of employment was because she could not perform one of the key responsibilities of the Order Checker Clerk position because of temporary physical limitations caused by her pregnancy. *See* CP 22-24, FF 6-14. Further, Fibre has consistently argued that it could not reasonably accommodate Ms. Hegwine's restrictions. *See* CP 23, FF 11. Thus, to hire Ms. Hegwine for the position with her restriction would force Fibre to pay an additional employee to come in early to assist Ms. Hegwine with the task or to place Ms. Hegwine directly on maternity leave and hire another employee to perform the Order Checker Clerk responsibilities. Although Fibre did not originally label its argument "business necessity," Ms. Hegwine cannot claim surprise or injury by Fibre's assertion of business necessity on appeal because she was aware of its underlying argument.

could not perform important aspects of the position applied for, and Fibre presented extensive evidence on this issue.

C. The Court of Appeals' Eventual Application of the Defense Contravenes the Explicit Language of the Regulation as Well as Its Intent.

Additionally, even when the Court of Appeals claims to have considered the defense, it incorrectly concluded that there was no evidence of business necessity because "Hegwine's delivery date was not until mid-June 2001, over three months after her orientation date of March 1, 2001, and [Hegwine's physician] released Hegwine to work up to a week or two prior to her delivery date." *Hegwine*, slip op. at 20. The Court of Appeals failed even to address whether the fact that Ms. Hegwine could not perform a duty of the position applied for, and that Fibre would therefore have to employ an additional worker to complete the lifting tasks, qualified as a business necessity justifying rescinding its offer.

But the very *text* of the regulation offers as an example of business necessity the situation where an employer hires workers that must participate in a training program for two months that cannot accommodate absences, and where a pregnant applicant has a due date during that two-month period and therefore could not complete the required training program. WAC 162-30-020(3)(b). In that situation, a mandatory training program that required consistent attendance was an essential element of the job and employers could lawfully refuse to hire pregnant employees who could not satisfy the attendance requirements of the training program.

See id. Like the training program, delivering the reports is a mandatory aspect of the Order Checker Clerk position, and just as—in the regulation's example—attendance was a prerequisite to participation in the training program, lifting up to 60 pounds was a prerequisite to the Fibre position's requirement of delivering the reports. Inability to lift up to 60 pounds prevents a worker from performing a mandatory element of the position and would satisfy the business necessity exception, permitting Fibre's lawful withdrawal of its offer of employment to a pregnant applicant who could not lift the required weight due to temporary restrictions caused by pregnancy-related conditions. But the Court of Appeals summarily concluded that because Ms. Hegwine's delivery date was not imminent, Fibre could not satisfy the defense, as if the exception *only* applied to attendance issues.

The Court of Appeals' application (or lack thereof) of the business necessity defense contravened the text of the regulation. The court's interpretation of the business necessity exception also failed to consider the purpose of the regulation—to equalize the opportunities of male and female workers—not to protect pregnant applicants above all others by requiring that a pregnant applicant be hired even though she could not perform the job.

CONCLUSION

Because (1) application of WAC 162-30-020 to a pregnant applicant unable to perform aspects of the job applied for is an issue of first impression; (2) whether an accommodation analysis is appropriate where a pregnancy-related temporary disability prevents a pregnant applicant from completing aspects of the job applied for involves an issue of substantial public importance; and (3) the Court of Appeals decision in part conflicts with this Court's case law on affirmative defenses, Fibre respectfully asks this Court to grant discretionary review.

DATED: May 25, 2006.

PERKINS COIE LLP

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APPENDIX

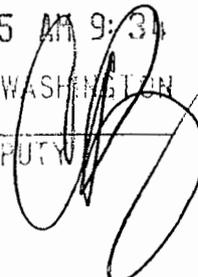
EXHIBIT A

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STATE OF WASHINGTON

BY _____
DEPUTY



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STACY L. HEGWINE,

Appellant,

v.

LONGVIEW FIBRE COMPANY, INC., a
Washington corporation,

Respondent.

No. 33174-8-II

PUBLISHED OPINION

VAN DEREN, J. — Stacy Hegwine sued Longview Fibre Company (Fibre) in Cowlitz County Superior Court alleging that Fibre discharged her from employment based on her gender and pregnancy in violation of RCW 49.60.180, the Washington Law Against Discrimination (WLAD). A bench trial resulted in a judgment for Fibre based on a disability accommodation analysis. We reverse and remand for determination of Hegwine's damages, holding that disability accommodation analysis does not apply and that Fibre impermissibly assumed that her pregnancy constituted a temporary disability that it could not accommodate and wrongly fired Hegwine in violation of RCW 49.60.180 and WAC 162-30-020 because she was pregnant.

FACTS

Hegwine applied for the customer service clerk/order checker position in Fibre's customer service department in late 2000. The newspaper advertisement for the job indicated that Fibre was accepting applications for clerical work and that it preferred "2 years full-time related experience of [sic] equivalent education," personal computer abilities, and demonstrated communication skills. Exhibit 1. It mentioned no lifting requirements.

Carlene Cox and Ron Samples¹ interviewed Hegwine on February 16, 2001. Fibre had no documented job description for the position when Hegwine interviewed. During the interview, however, Ron Samples explained to Hegwine that the job included a 25 pound lifting requirement.²

Cox offered Hegwine the position on February 21, 2001, contingent upon Hegwine's successful completion of a physical examination. Cox did not define what "successful" completion of the physical entailed. Hegwine accepted the offer over the telephone and told Cox that she was quitting her current job to take the order checker position. Cox then gave Hegwine a start date of March 1, 2001.

Hegwine completed her physical at the office of Dr. Ostrander, Fibre's Corporate Medical Director, on February 23, 2001. During the physical, ostensibly through a questionnaire given to Hegwine that asked, among other things, if she were pregnant, Ostrander learned that

¹ At the time of the interview, Carlene Cox worked in Fibre's human resources department and Ron Samples worked as manager of the customer service department.

² But Samples testified at trial that the job description written after Hegwine's interview indicated a 60 pound lifting requirement and that he agreed with that description. Further, Samples testified that the order checker was required to lift four to six boxes a day weighing between 30 and 60 pounds.

Hegwine was pregnant and informed her that she would need her attending physician, Dr. Herron, to provide medical clearance before she could begin working at Fibre.³

Hegwine reported for orientation on March 1, 2001. In addition to watching a series of videos about employment at Fibre, she was also given a variety of documents outlining Fibre's employment policy, vacation and sick leave, employer-provided healthcare benefits, pension benefits, and 401(k) plan information. Hegwine also completed a W-4 tax form and received a payroll number.

During orientation, Cox explained that Fibre had a maternity leave policy. Hegwine disclosed to Cox that she was pregnant. After learning this fact, Cox had the customer service department's supervisor escort Hegwine to Samples' office to review her job duties. While Samples occupied Hegwine, Cox contacted Ostrander's office to determine the status of Hegwine's physical examination. Ostrander's office told Cox that Hegwine's physicians had not provided Fibre with medical clearance regarding her pregnancy.⁴

Cox then told Hegwine to leave Fibre's premises while the situation was resolved because Hegwine had not successfully completed her physical. Cox contacted Herron's

³ Ostrander also determined that Hegwine had a gall bladder condition requiring medical clearance. Fibre received this medical clearance and it is not relevant here.

⁴ Herron testified that he faxed a completed medical clearance form to Fibre on February 23, 2001. But Ostrander testified that his office did not receive the form until March 1.

office and requested Hegwine's completed medical clearance form.⁵ Thereafter, Cox informed Hegwine that she had lifting restrictions, that Herron had released her to lift only 20 pounds, and that Fibre would be in touch once proper documentation had been submitted. Cox's representations to Hegwine did not comport with Herron's actual statements to Fibre.

After Hegwine left Fibre at Cox's direction, she called Herron's office to explain what had happened at Fibre and that she had been told the lifting requirement was 25 pounds. Even though his first form exceeded the stated lifting requirement, she asked that Herron increase the lifting restrictions listed on the original medical release form. Herron's office asked Hegwine to contact Fibre to determine what the actual lifting requirements were. Hegwine talked to Marilyn Sapp in Ostrander's office. Based on information Hegwine obtained from Sapp, Herron submitted a revised medical clearance form on March 1, stating that Hegwine could lift up to 40 pounds to her waist, shoulders, and overhead for up to two hours a day.⁶ Herron assumed that this revision would be sufficient for Hegwine to begin work at Fibre.

Because the two medical clearance forms differed, Ostrander contacted Herron on March 5 to determine which form properly identified Hegwine's limitations. The doctors clarified the restrictions in a third form, clearing Hegwine to lift 20 pounds frequently, 40 pounds

⁵ The form stated that Hegwine was capable of lifting 30 pounds to her waist, and 20 pounds to shoulder height and overhead for up to two hours per day. The form also stated that Hegwine would be capable of working up to one to two weeks before her scheduled delivery date of June 16, 2001. Herron testified that these figures were not based on his knowledge of the lifting requirements for Hegwine's order checker position but that they were conservative numbers based on past experience of what would be perfectly safe for Hegwine. He further explained that he cleared only "perfectly safe" numbers at that time in order to limit liability. Report of Proceedings (Mar. 14, 2005) (RP) at 190.

⁶ Bob Arkell, Fibre's Senior Vice President/Industrial Relations and General Counsel, testified that Sapp advised Hegwine that the order checker lifting requirement was 40 pounds.

occasionally to infrequently, and to stand for four to six hours at a time.⁷ At trial, Herron testified that if he had been informed that the position's lifting requirement was 60 pounds, he may have provided medical clearance, depending on the nature and frequency of the lifting.⁸

After receiving the third medical clearance form, Fibre directed its Equal Employment Opportunity Coordinator (EEOC), Margaret Rhodes, to conduct an analysis of the order checker position to establish the position's essential job functions. Rhodes analyzed the order checker position generally and addressed whether Hegwine was capable of carrying out the essential functions of the order checker position given the limitations listed in her medical clearance form.

Rhodes determined that an order checker must be able to lift boxes weighing up to 60 pounds, carry them 15 to 30 feet and down three or four steps, load them onto the back of a small Daihatsu truck, drive them to another building, unload them onto a hand truck, and pull them to another location.⁹

When evaluating whether Hegwine could perform the order checker position, Rhodes relied on the information in Herron's third medical clearance form and did not (1) inform Hegwine or Herron that the job now had a 60 pound lifting requirement; or (2) inquire whether

⁷ The evidence demonstrates that neither the doctors nor Fibre knew what the order checker position's actual lifting requirements were on March 5, 2001.

⁸ Herron further testified that he would have approved "putting a [60 pound] box off a low truck onto a hand truck," the type of lifting required by the order checker position. RP at 206.

⁹ Ron Samples testified that there were from four to six boxes weighing up to 60 pounds and that the process of transporting the boxes would take about 30 minutes. Similarly, Fibre customer service supervisor, Debi Manavian, testified that there were usually three or four bins and that the process took "maybe forty-five minutes," and that it took place between 7:30 A.M. and 8:00 A.M. RP (Mar. 13, 2005) at 31. Finally, Fibre order checker, Jodi Smith, testified that there could be between 5 and 15 bins, that she completed the process herself, and that the process would take about 30 to 45 minutes.

Hegwine could in fact meet this new requirement. Based on the 40 pound lifting limitation in the third medical report, Rhodes wrote a final report stating that Hegwine did not meet the order checker position's mandatory requirements because her pregnancy temporarily limited her lifting ability.

Rhodes' trial testimony contradicted the written report she submitted. She testified that it would have been appropriate, given Hegwine's pregnancy, to temporarily transfer her to a sedentary relief clerk position as that had been Fibre's past practice.¹⁰ Further, Rhodes testified that Fibre could reasonably accommodate Hegwine to assist her in performing the lifting functions of the order checker position and that Fibre could do so without significant difficulty, disruption, or expense. Rhodes then testified that she prepared a handwritten version of the final, typewritten report but did not enter this latter information into the final typewritten report because "it was determined [by leadership], beyond my area of expertise," that Hegwine's temporary disability due to pregnancy prevented her from performing an essential function of the order checker position, and therefore, no further analysis needed to be conducted. RP (Mar. 14, 2005) at 131. Rhodes testified that Arkell directed that accommodations for Hegwine not be considered.

But Arkell testified that he considered whether Fibre could accommodate Hegwine and determined that it could not. He further testified that although he did not have Rhodes' earlier handwritten form outlining her accommodation recommendations, he would have considered it irrelevant anyway and that he would have disregarded her opinion on both the accommodations

¹⁰ Rhodes also testified that it is necessary that there be a "sedentary relief clerk" position available before an employer is required to transfer an employee to such a position due to disability. RP at 153.

and whether the “law required something more.” RP (Mar. 15, 2005) at 219. He also did not agree that it was Fibre’s past practice to provide temporary sedentary work for those with temporary disabilities.

Arkell made the final decision to rescind Hegwine’s offer of employment, based on her alleged lifting restriction. On March 16, 2001, Cox called Hegwine to inform her that Fibre was “withdrawing [its] offer of employment” because her “availability” disallowed her to perform the job. Clerk’s Papers (CP) at 17; Exhibit 11. As directed by her superiors, Cox kept the conversation short and in conformity with a drafted script.

It is not contested that Hegwine’s potential lifting restriction was temporary and due solely to her pregnancy. It is also not contested that Hegwine did not inform Fibre of any disability, nor did she ask for accommodation.

Hegwine sued Fibre alleging, among other things, that Fibre discharged her from employment because of her gender and pregnancy in violation of RCW 49.60.180 (WLAD). The trial court granted a judgment in favor of Fibre based on the disability accommodation analysis Fibre argued. It concluded that Fibre could not accommodate Hegwine’s pregnancy-related temporary lifting restriction.

Hegwine appeals.

ANALYSIS

I. STANDARD OF REVIEW

When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court’s conclusions of law. *Keever & Assocs. v. Randall*, 129 Wn. App.

733, 737, 119 P.3d 926 (2005). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 100 P.3d 805 (2004). We review only those findings to which appellants assign error; unchallenged findings are verities on appeal.¹¹ *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). On appeal, we view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

We review questions of law and conclusions of law *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Further, we review conclusions of law erroneously labeled as findings of fact *de novo*. *Keever*, 129 Wn. App. at 738.

II. GENDER DISCRIMINATION

On appeal, the parties agree that Hegwine established a prima facie case of gender discrimination because the evidence was clear that (1) she belongs to a protected class; (2) she suffered an adverse employment action; and (3) the adverse employment action was due to her pregnancy.

Hegwine argues that Fibre ended her employment because of a temporary, pregnancy-related lifting restriction and that this contravened RCW 49.60.180 and WAC 162-30-020. She

¹¹ Hegwine's assignments of error and subsequent argument dispute findings of fact 8, 11, and a portion of finding of fact 14, in addition to all three conclusions of law.

asserts that substantial evidence does not support the trial court's finding of fact number eight,¹² that the ability to lift 60 pounds was an essential function of the job, or the trial court's finding of fact number 11¹³ that the position could not be modified to accommodate her pregnancy related lifting restriction.¹⁴

Fibre maintains that it did not rescind its offer of employment because of Hegwine's pregnancy but, rather, because Hegwine was unable to perform an essential function of the order checker position. But Cox's scripted notes for the telephone conversation with Hegwine state that it was Hegwine's "availability" that made them withdraw the offer. Exhibit 11. And

¹² The trial court's findings of fact and conclusions of law incorrectly denote the findings as conclusions of law. We treat them as findings of fact. Finding of fact eight states:

This lifting requirement was not one that could be amended or modified. Single reports could fill an entire 60-pound bin. The Order Checker Clerk was not permitted nor qualified to break up those reports into smaller, lighter bundles. The ability to lift and carry 60 pounds was an essential element of the job.

CP at 23.

¹³ Finding of fact 11 states:

The job of Order Checker Clerk could not be modified to accommodate Ms. Hegwine's temporary lifting restriction. At that time there was no other light-duty position available as a temporary assignment until the restriction had been lifted. The only possible accommodation that could have been given to Ms. Hegwine would have been to hire her as the Order Checker Clerk and then immediately place her on maternity leave. Such leave was available to company employees, as opposed to new hires.

CP at 23.

¹⁴ Its conclusion of law number one states:

Mrs. Hegwine's lifting restriction was a "pregnancy-related condition" as that term is defined in WAC 162-30-020(2)(b). Fibre had an obligation to accommodate that temporary disability unless it caused Ms. Hegwine to be unable to perform an essential function of the job. The only accommodation available was to give her a leave of absence until her pregnancy ended and the temporary restriction ceased.

CP at 24.

Hegwine's complaint to the EEOC stated that she was told that it was her "time limitations" that made Fibre withdraw the job offer. Exhibit 12.

For the first time on appeal, Fibre contends that an employer may refuse to hire any person who has a temporary disability that Fibre deems prevents them from completing an essential function of the job, that it has no duty to explore accommodation of that disability and, thus, its refusal to continue Hegwine's employment due to her pregnancy was an example of treating both sexes equally. Fibre maintained at the trial court that pregnancy was a temporary disability. On appeal, however, Fibre acknowledges that pregnancy is not a disability. Also on appeal, Fibre argues for the first time that any action Fibre may have taken in response to Hegwine's pregnancy falls under the "business necessity" exception in WAC 162-30-020(3)(b). Br. of Resp't at 24.

A. RCW 49.60.180

RCW 49.60.180, or WLAD, prohibits employers from refusing to hire or terminating the employment of any person because of sex. RCW 49.60.180(1) and (2).¹⁵ RCW 49.60.030(1) declares:

¹⁵ RCW 49.60.180 states:

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.

The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental or physical disability . . . is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination.

WLAD's provisions are liberally construed and exceptions narrowly confined. RCW 49.60.020; *Phillips v. Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989). Our Supreme Court has stated:

that the purpose of the law is to deter and to eradicate discrimination in Washington, *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-10, 898 P.2d 284 (1995); *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994), and has stated that a plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority. This state's strong policy against sex discrimination is further evidenced by its enactment of the Equal Rights Amendment to the state constitution. CONST. art. XXXI, §§ 1-2 (amend. 61).

Marquis v. Spokane, 130 Wn.2d 97, 109, 922 P.2d 43 (1996) (citation omitted).

RCW 49.60.180 does not set out the criteria for establishing a claim of sex or disability discrimination. For this reason, our courts have considered interpretations of analogous federal law in discrimination cases. *Marquis*, 130 Wn.2d at 113 (sex discrimination); *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 844 P.2d 389 (1993) (accent and national origin discrimination); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988) (age discrimination).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the United States Supreme Court established the elements of a prima facie case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and allocated the procedural burdens of the parties in such a case. In the employment context those burdens are (1) a prima facie showing of discrimination by the employee or potential employee; (2) followed by the

employer's articulation of a legitimate, nondiscriminatory reason for its actions toward the employee; and (3) finally, the employee's rebuttal, showing that the employer's stated reasons are mere pretext for what, in fact, is a discriminatory purpose. *Grimwood*, 110 Wn.2d at 363-64 (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011-12, 1014-15 (1st Cir. 1979)).

Although these steps are recognized as the proper procedure for the trial of age discrimination cases, our Supreme Court has also adopted the cautionary view expressed in *Loeb* that *McDonnell Douglas* "should not be viewed as providing a format into which all cases of discrimination must somehow fit." *Grimwood*, 110 Wn.2d at 363 (quoting *Loeb*, 600 F.2d at 1016-17).

The Supreme Court has made it abundantly clear that *McDonnell Douglas* was intended to be neither "rigid, mechanized, or ritualistic," *Furnco [Constr. Corp. v. Waters]*, 438 U.S. [567] at 577, 98 S. Ct. 2943 [57 L. Ed. 2d 957 (1978)], nor the exclusive method for proving a claim of discrimination, [*Int'l Bhd. of Teamsters [v. United States]*, 431 U.S. [324] at 358, 97 S. Ct. 1843, [52 L. Ed. 2d 396 (1977)].

Loeb, 600 F.2d at 1017.

B. WAC 162-30-020

Neither party cites authority interpreting the interplay between RCW 49.60.180 as it relates to sex discrimination and chapter 162-30 WAC (the specific Washington regulations defining unfair employment practices based on pregnancy), and RCW 49.60.180's proscription of disability discrimination. We do note, however, that certain biological and legal principles clearly apply in this case--only women get pregnant and pregnancy is not legally defined as a disability in Washington. WAC 162-30-020(2).

The Washington State Human Rights Commission (WHRC) promulgated chapter 162-30 WAC to deal expressly with sex discrimination. WAC 162-30-020 specifically deals with issues

related to pregnancy, childbirth, and pregnancy related conditions.¹⁶ We interpret administrative regulations under the rules of statutory construction. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003). When engaging in statutory construction, our primary objective is to ascertain and give effect to the legislature's intent and purpose in creating the statute.

Weyerhaeuser, 123 Wn. App. at 65. Where a statute uses plain language and defines essential terms, the statute is not ambiguous. *McFreeze Corp. v. Dep't of Revenue*, 102 Wn. App. 196, 199 n.1, 6 P.3d 1187 (2000). Thus, we must apply the statute as written if the statutory language is clear; we may not look beyond that language or consider legislative history but should glean legislative intent through the language of the statute itself. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); *C.J.C. v. Corp. of the Catholic Bishop*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). Furthermore, "[a] court must give great weight to the statute's interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent." *Marquis*, 130 Wn.2d at 111 (citing *Washington Water Power Co. v. Washington State Human Rights Comm'n*, 91 Wn.2d 62, 68-69, 586 P.2d 1149 (1978)).

WAC 162-30-020(2)(a) states that "Pregnancy" includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions." "Pregnancy related conditions" include related medical conditions. WAC 162-30-020(2)(b). Under WAC 162-30-020(3), it is an unfair practice for an employer to refuse to hire or to terminate a woman's employment because of pregnancy. It is also an unfair labor practice to base employment

¹⁶ RCW 49.60.120(3) authorizes the WHRC to adopt and promulgate rules and regulations to carry out WLAD's provisions, as well as policies and practices in connection therewith.

decisions on negative assumptions about pregnant women. WAC 162-30-020(3)(c). In addition to these identified unfair labor practices, an employer may not ask questions about pregnancy before hiring. WAC 162-12-140(3)(n).

WAC 162-30-020(3)(b) states that:

The sole exception to (a) of this subsection is if an employer can demonstrate business necessity for the employment action. For example, an employer hiring workers into a training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during those first two months.

At trial, Hegwine argued that it was improper for Fibre to assert that the court had to determine whether Fibre could reasonably accommodate Hegwine's lifting restrictions. Fibre insisted that the issue of accommodation was essential to protect employers from having to hire temporarily disabled persons and then immediately put them on leave.

On appeal, Fibre now argues that a disability analysis is inappropriate because pregnancy is not a disability. It states, "[t]o the contrary, pregnancy is a normal, expectable incident in the life of a woman." Br. of Resp't at 27 (citing WAC 162-30-020(2)). But in response to the trial court's treatment of her case as one involving disability discrimination, Hegwine now argues that Fibre's rescission of its offer of employment constituted disability discrimination under RCW 49.60.180 and that Fibre failed to provide available accommodations to assist her in meeting the lifting requirement of the order checker position during her temporary lifting restriction time frame.

We agree that disability discrimination analysis is inapplicable here because pregnancy and pregnancy related conditions are not considered "disabilities" under Washington law. *See* chapter 162-30 WAC. Pursuant to authority delegated by the legislature in RCW 49.60.120(3) to

carry out WLAD's provisions, WHRC defines "pregnancy" and "pregnancy related conditions" under chapter 162-30 WAC, entitled "Sex Discrimination." In contrast, WHRC defines "disability" under chapters 162-22 and 162-26 WAC, entitled "Employment--Handicapped Persons" and "Public Accommodations, Disability Discrimination." That WHRC defines these terms in its chapter dealing with sex discrimination and not under its chapters dealing with handicapped persons and disability discrimination indicates intent to not treat pregnancy or any related condition as a disability. *See State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005) (quoting *In re Det. of Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990)) ("[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference of legislative intent.").

In short, pregnancy and any related condition is not a disability under Washington law and, therefore, the trial court erred in considering this claim to be a disability discrimination claim.¹⁷ Thus, we review the evidence under the standards applicable to a sex discrimination

¹⁷ Fibre's claim that it could not accommodate Hegwine's pregnancy fails even when reviewed.

Rhodes, Fibre's EEOC coordinator, testified that accommodations could reasonably be made to assist Hegwine in performing the essential lifting functions of the order checker position and that Fibre could do so without significant difficulty, disruption, or expense.

But the record demonstrates that there is insufficient evidence that Fibre took any affirmative steps to accommodate Hegwine's temporary lifting restriction or that reasonable accommodations were unavailable. Jerry Dow, Fibre's Human Resources Manager, testified that he never discussed accommodation recommendations with Rhodes and that he conducted no independent investigation of whether Washington law required Fibre to provide pregnant women with temporary accommodations. Michael Fitzpatrick, Fibre's Human Resources Director, testified that he did not discuss accommodation recommendations with Rhodes, that his discussions with Arkell consisted only of whether Hegwine could perform the essential functions of the job, given her temporary lifting restriction, and that the investigation of whether Fibre could accommodate Hegwine ended with the determination that Hegwine could not perform an essential function of the job. The only evidence supporting the trial court's finding that Fibre could not reasonably accommodate Hegwine was Arkell's bald assertion that he considered accommodations during discussions with Michael Fitzpatrick, and that they could not be made.

case as pled by Hegwine.

Here, Fibre hired Hegwine, subject to the completion of a physical examination that entailed answering extensive medical questionnaires. The background medical questionnaire, asked if Hegwine was pregnant. Exhibit 18. Hegwine answered truthfully. When Fibre learned that Hegwine was pregnant, it immediately sent her home from the jobsite. It also required Hegwine to obtain a release from her doctor even though Hegwine neither claimed any disability related to her pregnancy nor requested any accommodation. Instead, Hegwine was compelled to respond to Fibre's immediate assumption that she was disabled due to the pregnancy. This assumption violated WAC 162-30-020(3)(c), while the pregnancy question violated WAC 162-12-140. Likewise, Fibre's refusal to hire (or termination of) Hegwine, whether because of her "availability" or because of any pregnancy related condition, violated WAC 162-30-020(3)(a).¹⁸

Furthermore, only after March 1, 2001, did Fibre undertake a job analysis of the order checker position. At no time did Fibre communicate a greater lifting requirement to Hegwine, a

But in light of all the evidence, this assertion alone is insufficient to show that Fibre took any steps to address whether Hegwine could actually do the job. Indeed, Fibre's final report on Hegwine's ability to perform her job indicates that Fibre did not consider potential accommodations for Hegwine because it determined first that she was incapable, without accommodation, of performing an essential function of the job. Moreover, Arkell, Fitzpatrick, and Dow all testified that they did not discuss the accommodation recommendations Rhodes made. Finally, there was no exchange of information between Fibre and Hegwine to determine what, if any, accommodations were necessary or could be made. Reasonable accommodation envisions an information exchange between the employer and employee. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 536, 70 P.3d 126 (2003); *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408-09, 899 P.2d 1265 (1995). The evidence here shows that Fibre made no attempt to seek or share information once it learned Hegwine was pregnant. Thus, it is clear that Fibre took no necessary affirmative steps to satisfy its obligation to avoid firing an employee solely based on pregnancy. *See Davis*, 149 Wn.2d at 536-37.

¹⁸ It is an unfair practice for an employer to refuse to hire or terminate a woman because of pregnancy. WAC 162-30-020(3)(a).

lack of communication Fibre maintains is appropriate. It was not until 16 days after Cox told Hegwine to leave Fibre's property and terminated her orientation for the job, that Fibre informed Hegwine that the offer was withdrawn because her "availability" disallowed her to perform the job. Exhibit 11.

Similarly, only after she sued Fibre in 2003 did Fibre reveal that it had determined that the order checker job might occasionally require that the employee lift 60 pounds. Although several Fibre employees testified about the 60 pound occasional lifting requirement in 2004, the evidence is unrefuted that there was not a 60 pound lifting requirement for the order checker job before Hegwine revealed her pregnancy. The evidence is unclear when Fibre settled on the requirement. It is thus insufficient to support the trial court's factual conclusion that the 60 pound lifting requirement was a job requirement when Hegwine began orientation on March 1, 2001. That it later became a requirement is irrelevant to Fibre's conduct in terminating Hegwine upon learning of her pregnancy.¹⁹

Moreover, although Hegwine pled her claim as a sex discrimination case due to the

¹⁹ When the evidence is interpreted in Fibre's favor, at best, it establishes that, without accommodation, the order checker would lift 60 pounds only infrequently and for very brief periods of time. People who had done the job described how they did it and the varying weight of the bins the order checker lifted. But their testimony only showed that the lifting required about one minute from building to truck, that a hand truck could be used, and that the lifting was to and from the hand truck in and out of the back of the pick-up truck. The total time involved in the bin delivery was 30 to 45 minutes a day. And the evidence revealed that those doing the order checker job asked for and got help from other employees when the bins were heavy.

Essential job functions do not include marginal functions of the position. *Davis*, 149 Wn.2d at 533. But the manner of performance of a job function is not the proper focus when determining what the essential job functions are; the proper focus is the task to be performed. *See Davis*, 149 Wn.2d at 533; *see also Easley v. Sea-Land Service, Inc.*, 99 Wn. App. 459, 994 P.2d 271 (2000). The job position was order checker. Fibre has never contended that Hegwine could not check orders.

termination of her employment due to her pregnancy, the trial court treated it as a disability discrimination case based on Fibre's arguments at trial. Absent a showing that Hegwine was disabled due to her pregnancy, the trial court's legal conclusion that Hegwine suffered from a "pregnancy-related disability" is erroneous and its finding of fact 11 that Fibre could not accommodate a lifting restriction, elicited at Fibre's direction from Hegwine's doctor, was not supported by the relevant facts.

Thus, the record shows that Fibre failed to demonstrate the existence of a valid nondiscriminatory reason for not hiring or retaining Hegwine on March 1, 2001. Even though it responded to her lawsuit with a facially nondiscriminatory reason, the record contains evidence sufficient to show that it was a pretext to avoid hiring a pregnant woman: (1) the job advertisement listed no lifting requirements; (2) in the interview only 25 pounds was mentioned as a lifting requirement; (3) Hegwine never suggested any pregnancy related limitations to Fibre or its doctor; (4) when Fibre learned Hegwine was pregnant through its mandatory physical, it immediately assumed she had restrictions that her doctor would have to identify; (5) when Hegwine's doctor's permission exceeded the 25 pound lifting requirement, Fibre changed the requirement and told her it was 40 pounds; (6) when Hegwine's doctor submitted a second form responding to the new 40 pound lifting requirement, Fibre's doctor talked to Hegwine's doctor and obtained a third form, still allowing lifting adequate to do the job as explained by Fibre; (7) Fibre then told Hegwine to leave its premises and not return until it had the alleged situation all sorted out; (8) only after Hegwine was removed did Fibre undertake a job analysis that resulted in an even greater lifting requirement--60 pounds; (9) Fibre did not communicate this new

requirement to either Hegwine or her doctor; (10) instead, it told Hegwine that her “availability” precluded her from performing the job and therefore “rescinded” her job offer; and finally (11) Fibre altered its position and argued at trial that it rescinded its offer, not because of Hegwine’s “availability,” but because she could allegedly not perform an essential function of the job that was determined after it rescinded its offer.

Any lifting limitation related to Hegwine’s pregnancy was not relevant to the job on March 1, 2001, and the trial court erred in concluding that Hegwine was disabled by a lifting restriction that prevented her from performing the order checker job and that Fibre need not have hired or retained her. Because the evidence does not support Fibre’s stated reason for “rescinding” Hegwine’s employment, she prevails on her sex discrimination claim.

C. Business Necessity Affirmative Defense - WAC 162-30-020(3)(b)

For the first time on appeal, Fibre argues that its business needs required it to rescind its offer of employment to Hegwine, basing its argument on Washington’s regulation stating that an employer under limited circumstances may terminate or refuse to hire a pregnant woman if its business necessities so require. WAC 162-30-020(3)(b).

“Business necessity” is an affirmative defense to the claim of failure to hire or a claim of wrongful firing for pregnancy related conditions and if it is not pled, it is waived. CR 8(c). Fibre did not plead or argue business necessity at the trial court; thus, it waived the defense. But even if we were to reach this issue, Fibre presented no evidence at trial supporting a conclusion that business necessity precluded it from hiring a pregnant woman to fill the order checker position. WLAD’s provisions are liberally construed and exceptions narrowly confined.

Phillips, 111 Wn.2d at 908. Here, Hegwine's delivery date was not until mid-June 2001, over three months after her orientation date of March 1, 2001, and Herron released Hegwine to work up to a week or two prior to her delivery date.²⁰

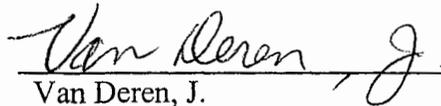
²⁰ The parties disagree about whether it matters if Fibre withdrew its offer of employment to Hegwine after she started work, or whether it fired her after she began her employment because Fibre discovered that she was pregnant. Whether Fibre withdrew its offer of employment or fired Hegwine after she began working is inconsequential to our conclusion. The legal effect of Fibre's "decision to withdraw the offer of employment" was to impermissibly discriminate against Hegwine *either* by refusing to hire her or by terminating her employment. RCW 49.60.180; WAC 162-30-020(3)(a) and (3)(c). Fibre's decision to alter the terms of its employment offer by repeatedly changing the lifting requirements after learning of Hegwine's pregnancy on March 1, 2001 is not a legal basis to conclude either that she failed the physical examination, the only contingency Fibre specified when Cox offered her the job, or that her "availability" precluded her hiring. Applying the plain language of RCW 49.60.180 and WAC 162-30-020(3)(a), we hold that Fibre either wrongly refused to hire or wrongly terminated Hegwine's nascent employment (1) due to a lifting restriction that was not an inherent job requirement at the time of her hiring and that, should it have become an issue, was both temporary and due solely to her pregnancy; or (2) due to a conclusion unsupported by the evidence, that her "availability" was such that she could not perform the job. Thus, we conclude that Fibre violated RCW 49.60.180 and WAC 162-30-020(3)(a).

The parties also disagree on Hegwine's entitlement to maternity leave. Hegwine argues that, absent another reasonable accommodation, she was entitled to maternity leave under WAC 162-30-020(4), that states "[a]n employer shall provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth." Fibre responds that Hegwine was never an employee and therefore not entitled to maternity leave. Because the trial court erroneously considered the accommodation issue, we need not address the merits of this claim on appeal. The evidence here shows, however, that Fibre refused to consider any accommodation for Hegwine's pregnancy. Given the evidence that her doctor may have approved an adequate weight limitation and that other accommodations were possible, Fibre would not necessarily have been compelled to place Hegwine on maternity leave. Whether that was necessary or desirable depended on the outcome of an interactive process between Fibre and Hegwine that never occurred. The evidence on this issue is insufficient to support the trial court's finding of fact 11 that the only possible accommodation was for Fibre to place Hegwine on maternity leave.

III. ATTORNEY FEES ON APPEAL

Hegwine requests attorney fees under RAP 18.1, which provides for attorney fees and expenses to the prevailing party on appeal if applicable law authorizes such an award. RCW 49.60.030(2) does not specifically authorize an award of attorney fees and expenses to the prevailing party on review, but it has been interpreted by our Supreme Court as granting prevailing parties attorney fees and expenses on appeal. *Allison v. Hous. Auth.*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991). And unlike the plaintiff in *McClarty v. Totem Electric*, Hegwine is the prevailing party on the merits of her claim and remand is solely to determine her damages. 119 Wn. App. 453, 472-73, 81 P.3d 916 (2003). Thus, as the prevailing party, she is entitled to attorney fees and expenses upon compliance with RAP 18.1.

We remand for determination of damages to Hegwine as a result of Fibre's unlawful discrimination and unfair labor practice in its hiring process based on Hegwine's pregnancy.

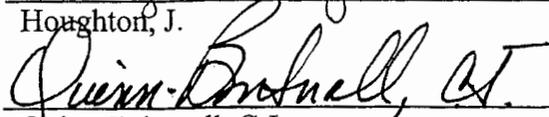


Van Deren, J.

We concur:



Houghton, J.



Quinn-Brintnall, C.J.

EXHIBIT B

162-30-010 << 162-30-020 >> End of Chapter

WAC 162-30-020

Pregnancy, childbirth, and pregnancy related conditions.

(1) **Purposes.** The overall purpose of the law against discrimination in employment because of sex is to equalize employment opportunity for men and women. This regulation explains how the law applies to employment practices that disadvantage women because of pregnancy or childbirth.

(2) **Findings and definitions.** Pregnancy is an expectable incident in the life of a woman. Discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.

(a) "Pregnancy" includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions.

(b) "Pregnancy related conditions" include, but are not limited to, related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy.

(3) Unfair practices.

(a) It is an unfair practice for an employer, because of pregnancy or childbirth, to:

- (i) Refuse to hire or promote, terminate, or demote, a woman;
- (ii) Impose different terms and conditions of employment on a woman.

(b) The sole exception to (a) of this subsection is if an employer can demonstrate business necessity for the employment action. For example, an employer hiring workers into a training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during those first two months.

(c) It is an unfair practice to base employment decisions or actions on negative assumptions about pregnant women, such as:

- (i) Pregnant women do not return to the job after childbirth;
- (ii) The time away from work required for childbearing will increase the employer's costs;
- (iii) The disability period for childbirth will be unreasonably long;
- (iv) Pregnant women are frequently absent from work due to illness;
- (v) Clients, co-workers, or customers object to pregnant women on the job;
- (vi) The terms or conditions of the job may expose an unborn fetus to risk of harm.

(4) Leave policies.

(a) An employer shall provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth. Employers must treat a woman on pregnancy related leave the same as other employees on leave for sickness or other temporary disabilities. For example:

(i) If an employer provides paid leave for sickness, or other temporary disabilities, the employer should provide paid leave for pregnancy related sickness or disabilities;

(ii) If the uniform policy requires a physician's statement to verify the leave period, a physician's statement may be required to verify the leave period relating to pregnancy or childbirth.

(iii) If the uniform policy permits the retention and accrual of benefits, such as seniority, retirement, and pension rights, during the leave period for other temporary disabilities, the policy must also permit it during leave for pregnancy related temporary disabilities.

(iv) If the employer permits extensions of leave time (e.g., use of vacation or leave without pay) for sickness or other temporary disabilities, the employer should permit such extensions for pregnancy related sickness or disabilities.

(b) There may be circumstances when the application of the employer's general leave policy to pregnancy or childbirth will not afford equal opportunity for women and men. One circumstance would be where the employer allows no leave for any sickness or other disability by any employee, or so little leave time that a pregnant woman must terminate employment. Because such a leave policy has a disparate impact on women, it is an unfair practice, unless the policy is justified by business necessity.

(c) An employer shall allow a woman to return to the same job, or a similar job of at least the same pay, if she has taken a leave of absence only for the actual period of disability relating to pregnancy or childbirth. Refusal to do so must be justified by adequate facts concerning business necessity.

(d) Employers may be required to provide family medical leave, in addition to leave under this chapter. Please see appropriate federal and state family and medical leave laws and regulations.

(5) **Employee benefits.** Employee benefits provided in part or in whole by the employer must be equal for male and female employees. For example, it is an unfair practice to:

(a) Provide full health insurance coverage to male employees but fail to provide full health insurance coverage, including pregnancy and childbirth, to female employees.

(b) Provide maternity insurance to the wives of male employees but fail to provide the same coverage to female employees.

(6) **Marital status immaterial.** The provisions of this chapter apply irrespective of marital status.

(7) **Labor unions and employment agencies.** The provisions of this chapter apply equally to employers, labor unions, and employment agencies.

[Statutory Authority: RCW 49.60.120(3). 99-15-025, § 162-30-020, filed 7/12/99, effective 8/12/99; Order 15, § 162-30-020, filed 9/28/73; Order 11, § 162-30-020, filed 6/26/72.]

EXHIBIT C

RCW 49.60.180 Unfair practices of employers.

*** CHANGE IN 2006 *** (SEE 2661-S.SL) ***

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

[1997 c 271 § 10; 1993 c 510 § 12; 1985 c 185 § 16; 1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

Notes:

Severability -- 1993 c 510: See note following RCW 49.60.010.

Effective date -- 1971 ex.s. c 81: See note following RCW 49.60.120.

Element of age not to affect apprenticeship agreements: RCW 49.04.910.

Employment rights of persons serving in uniformed services: RCW 73.16.032.

Labor -- Prohibited practices: Chapter 49.44 RCW.

Unfair practices in employment because of age of employee or applicant: RCW 49.44.090.

EXHIBIT D

basis of race, color, creed, national origin, sex, marital status, age, or the presence of any sensory, mental or physical handicap, unless the heading designation or segregation relates solely to employment for which a BFOQ applies as provided for in WAC 162-16-130 below.

(2) It is not an unfair practice for any newspaper or other advertising medium to print, publish, or circulate employment advertisements expressing the wording of the advertisement, or subtly, directly or indirectly a preference, specification or limitation on the basis of race, color, creed, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap, provided the newspaper or other advertising medium furnishes, on request of a duly authorized representative of the commission, the name and address of the person who submitted the advertisement for publication.

(3) The commission encourages advertising media which circulate employment advertisements to maintain lists of discriminatory job titles and terms and suggested substitutes, as compiled by the commission, to instruct their ad-takers to advise employers and employment agencies of these terms and to have copies of this regulation available for distribution to advertisers on request.

[Order 20, § 162-16-120, filed 1/20/75.]

WAC 162-16-130 Bona fide occupational qualification. The commission believes that the BFOQ should be applied narrowly to jobs for which a particular quality of sex, race, age, etc. . . ., is essential to the accomplishment of the purposes of the job.

Where it is necessary for the purpose of authenticity or genuineness (e.g., model, actor, actress) or maintaining conventional standards of sexual privacy (e.g., lockerroom attendant, intimate apparel fitter), the commission will consider sex to be a BFOQ. Any other type of BFOQ should be very carefully considered. To be safe, the employer should request a BFOQ ruling from the Washington state human rights commission and cite the ruling in the employment advertisement.

Anytime that an employment advertisement or notice expresses a preference, limitation, or discrimination based on sex, marital status, race, color, creed, age, national origin, or the presence of any physical, sensory, or mental handicaps, the burden shall be on the employer to prove that the expression is justified by a BFOQ. In the absence of proof, the advertisement will be considered an unfair practice under the law. (For further guidance on the meaning of BFOQ, see WAC 162-16-020.)

[Order 20, § 162-16-130, filed 1/20/75.]

WAC 162-16-140 Affirmative action. Employers should encourage minorities, women and the handicapped, to apply for jobs where they have been traditionally excluded or where they are currently underrepresented in the employer's business. Such a recruitment effort is called "affirmative action."

Advertisements used to accomplish affirmative action may contain nonexclusionary phrases, such as: "Minorities, women, and/or handicapped persons are encouraged to apply."

[Title 162 WAC—p. 32]

IT IS NOT PERMISSIBLE, however, to express or exercise a hiring preference based on sex, race, handicap, etc. . . . unless the employer has a court order to do so or an authorization from the Washington state human rights commission or another governmental agency of competent authority and jurisdiction.

Anytime an advertisement or notice encourages minorities, women, or handicapped persons to apply, the burden shall be on the employer to prove that the purpose is to accomplish affirmative action. Employers and employment agencies are encouraged to seek advice from the commission staff before placing affirmative action advertisements.

[Order 20, § 162-16-140, filed 1/20/75.]

WAC 162-16-150 Discrimination because of spouse.

(1) **Authority.** This section implements RCW 49.60.180, 49.60.190 and 49.60.200, which declare that discrimination because of marital status or sex is an unfair practice of employers, labor unions, and employment agencies, respectively.

(2) **General rule and exception.** In general, discrimination against an employee or applicant for employment because of (a) what a person's marital status is; (b) who his or her spouse is; or (c) what the spouse does, is an unfair practice because the action is based on the person's marital status. It may also be an unfair practice because of sex, where it burdens women much more than men, or men much more than women. However, there are certain circumstances where business necessity may justify action on the basis of what the spouse does, and where this is so the action will be considered to come within the bona fide occupational qualification exception to the general rule of nondiscrimination. "Business necessity" for purposes of this section includes those circumstances where an employer's actions are based upon a compelling and essential need to avoid business-related conflicts of interest, or to avoid the reality or appearance of improper influence or favor.

(3) **Examples.**

(a) The following are examples of actions which are unfair practices within the general rule against discrimination because of marital status or sex:

(i) Refusal to hire a person because her or his spouse has a job and is "making good money."

(ii) Refusal to hire a person because his or her spouse is already employed by the same employer, except for particular positions where business necessity requires exclusion of relatives, consistently with this section.

(iii) Discharge of a person because he or she has married another employee of the same employer, unless the spouses occupy positions where business necessity requires the exclusion of relatives, consistent with this regulation, and neither spouse can be transferred to a position where the business necessity reason doesn't apply.

(b) The following are examples of business necessity situations where it is not an unfair practice for an employer to impose rules limiting the employment of spouses:

(i) Where one spouse would have the authority or practical power to supervise, appoint, remove, or discipline the other;

WAC 162-12-150 Required inquiries. An employer or employment agency may ask applicants about protected status to the extent that the employer is required to do so by the Washington state or the United States government or a federal or state court decree. When the applicant data are required by the court or government, the information shall be acquired by means other than inquiry to the applicants, unless the court or government expressly requires the inquiries or unless the inquiries are made in conformity with WAC 162-12-160 and 162-12-170.

[Statutory Authority: RCW 49.60.120(3), 00-01-177, § 162-12-150, filed 12/21/99, effective 1/21/00; 96-21-054, § 162-12-150, filed 10/14/96, effective 11/14/96; Order 16, § 162-12-150, filed 5/22/74; Order 9, § 162-12-150, filed 9/23/71; § 162-12-150, filed 10/23/67.]

WAC 162-12-160 Data for legitimate purposes. (1) An employer or employment agency may make inquiries as to race, sex, national origin, or disability for purposes of affirmative action, when the inquiries are made in the manner provided in WAC 162-12-170.

(2) Data on protected status shall not be recorded on any record that is kept in the applicant's preemployment file, nor shall such data be kept in any other place or form where it is available to those who process the application. Application records that identify the protected status of a particular person shall be kept confidential, except to the extent necessary to implement an affirmative action program as authorized by law, to permit the compilation of statistics, and to permit verification of the statistics by top management of the employer, or by the Washington state human rights commission.

[Statutory Authority: RCW 49.60.120(3), 00-01-177, § 162-12-160, filed 12/21/99, effective 1/21/00; 96-21-054, § 162-12-160, filed 10/14/96, effective 11/14/96; Order 18, § 162-12-160, filed 1/20/75; Order 16, § 162-12-160, filed 5/22/74; Order 9, § 162-12-160, filed 9/23/71; § 162-12-160, filed 10/23/67.]

WAC 162-12-170 Conditions for inquiries to applicants. An employer or employment agency may ask an applicant to voluntarily state his or her protected status for reasons stated in WAC 162-12-150 and 162-12-160 only if it has satisfied all of the following conditions:

(1) The employer shall have adopted a written equal employment policy which authorizes the inquiries as a means of monitoring its enforcement, and which sets out detailed procedures for keeping the responses confidential and separate from other records relating to applicants, in fulfillment of the requirements of WAC 162-12-160(2); and

(2) The form on which the question appears contains statements clearly informing the applicant the information is strictly voluntary, the reasons for asking for the information, the uses to which the information will be put, and the safeguards that will prevent use of the information by those who will process the application.

[Statutory Authority: RCW 49.60.120(3), 00-01-177, § 162-12-170, filed 12/21/99, effective 1/21/00; 96-21-054, § 162-12-170, filed 10/14/96, effective 11/14/96; Order 18, § 162-12-170, filed 1/20/75; Order 16, § 162-12-170, filed 5/22/74; Order 9, § 162-12-170, filed 9/23/71; § 162-12-170, filed 10/23/67.]

WAC 162-12-180 Post employment records. RCW 49.60.180 and 49.60.200 and these rules do not prohibit mak-

[2000 WAC Supp—page 206]

ing or keeping records of the protected status of persons after they are employed, unless the records are used for the purpose of discrimination. To prevent improper use, records of an employee's protected status must be maintained in a manner accessible only on a need to know basis.

[Statutory Authority: RCW 49.60.120(3), 00-01-177, § 162-12-180, filed 12/21/99, effective 1/21/00; 96-21-054, § 162-12-180, filed 10/14/96, effective 11/14/96; Order 16, § 162-12-180, filed 5/22/74; Order 9, § 162-12-180, filed 9/23/71; § 162-12-180, filed 10/23/67.]

Chapter 162-16 WAC EMPLOYMENT

WAC

| | |
|------------|--|
| 162-16-020 | Repealed. |
| 162-16-030 | Repealed. |
| 162-16-040 | Repealed. |
| 162-16-050 | Repealed. |
| 162-16-060 | Repealed. |
| 162-16-070 | Repealed. |
| 162-16-080 | Repealed. |
| 162-16-090 | Repealed. |
| 162-16-100 | Repealed. |
| 162-16-110 | Repealed. |
| 162-16-120 | Repealed. |
| 162-16-130 | Repealed. |
| 162-16-140 | Repealed. |
| 162-16-150 | Repealed. |
| 162-16-160 | Repealed. |
| 162-16-170 | Repealed. |
| 162-16-200 | General purpose and definitions. |
| 162-16-210 | Advice of commission. |
| 162-16-220 | Jurisdiction—Counting the number of persons employed. |
| 162-16-230 | Jurisdiction—Independent contractors. |
| 162-16-240 | Bona fide occupational qualification. |
| 162-16-250 | Discrimination because of marital status. |
| 162-16-260 | Discriminatory language in advertising and recruiting. |
| 162-16-270 | Employment agencies. |
| 162-16-280 | Newspapers and other advertising media. |
| 162-16-290 | Recruiting statements. |

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

| | |
|------------|--|
| 162-16-020 | Bona fide occupational qualification defined. [Order 16, § 162-16-020, filed 5/22/74; Order 9, § 162-16-020, filed 9/23/71; Order 8, § 162-16-020, filed 6/22/70.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3). |
| 162-16-030 | Advice of commission. [Order 16, § 162-16-030, filed 5/22/74; Order 9, § 162-16-030, filed 9/23/71; Order 8, § 162-16-030, filed 6/22/70.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3). |
| 162-16-040 | Identification in use. [Order 16, § 162-16-040, filed 5/22/74; Order 9, § 162-16-040, filed 9/23/71; Order 8, § 162-16-040, filed 6/22/70.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3). |
| 162-16-050 | Discrimination in employment because of arrests. [Order 19, § 162-16-050, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3). |
| 162-16-060 | Discrimination in employment because of convictions. [Order 19, § 162-16-060, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3). |
| 162-16-070 | Applicability of WAC 162-16-050 and 162-16-060 to nonminorities. [Order 19, § 162-16-070, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3). |
| 162-16-080 | Purpose. [Order 20, § 162-16-080, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3). |
| 162-16-090 | Job titles. [Order 20, § 162-16-090, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3). |

- 162-16-100 Discriminatory language. [Order 20, § 162-16-100, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
- 162-16-110 Employment agencies. [Order 20, § 162-16-110, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
- 162-16-120 Newspapers and other advertising media. [Order 20, § 162-16-120, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
- 162-16-130 Bona fide occupational qualification. [Order 20, § 162-16-130, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
- 162-16-140 Affirmative action. [Order 20, § 162-16-140, filed 1/20/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
- 162-16-150 Discrimination because of spouse. [Order 21, § 162-16-150, filed 4/18/75.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
- 162-16-160 "Employer"—Jurisdictional count of number of persons employed. [Statutory Authority: RCW 49.60.120(3). 82-19-072 (Order 42), § 162-16-160, filed 9/20/82.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).
- 162-16-170 Employee distinguished from independent contractor. [Statutory Authority: RCW 49.60.120(3). 82-19-072 (Order 42), § 162-16-170, filed 9/20/82.] Repealed by 99-15-025, filed 7/12/99, effective 8/12/99. Statutory Authority: RCW 49.60.120(3).

WAC 162-16-020 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-030 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-040 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-050 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-060 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-070 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-080 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-090 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-100 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-110 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-120 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-130 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-140 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-150 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-160 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-170 Repealed. See Disposition Table at beginning of this chapter.

WAC 162-16-200 General purpose and definitions.
The law against discrimination protects persons from discrimination in employment (RCW 49.60.180, 49.60.190, and 49.60.200). Persons are also protected from discrimination as provided in RCW 49.60.172 (unfair practices with respect to HIV infection), RCW 49.60.174 (actual or perceived HIV infection), and RCW 49.60.210 (unfair to discriminate against person opposing unfair practice).

(1) The commission's first objective in writing the rules in this chapter and in making future decisions on questions not addressed in this chapter is to eliminate and prevent discrimination. This is the overall purpose of the law against discrimination.

(2) Other objectives in writing these rules are:

(a) To be consistent with interpretations of federal anti-discrimination law and the antidiscrimination laws of other states, where these are comparable to Washington law, and where the commission does not find that a different rule would better serve the state of Washington.

(b) To avoid the uncritical adoption of definitions from areas of law other than antidiscrimination law. It is appropriate to define employment differently in different areas of the law to carry out the separate purpose of each area of law.

(c) To give effect to the purposes of the exemption of employers of less than eight from public enforcement of the law against discrimination, as identified in RCW 49.60.040.

(d) The public and commission staff need standards that are certain and that are easy to understand and apply. Therefore we must sometimes simply draw a line, although reasonable persons could differ as to where the line should be drawn.

(3) The state law against discrimination covers employers with eight or more employees. Persons should also educate themselves on relevant local or federal antidiscrimination laws.

(4) Definition:

In this chapter, the following words are used in the meaning given, unless the context clearly indicates another meaning.

"Protected status" is short for the phrase, "age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person," and means the full phrase (see RCW 49.60.180).

[Statutory Authority: RCW 49.60.120(3). 99-15-025, § 162-16-200, filed 7/12/99, effective 8/12/99.]

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2006, I caused to be delivered by co-counsel William L. Dowell a copy of Petitioner's Petition for Review on the following counsel of record:

Mark S. Brumbaugh
Walstead Mertsching P.S.
1000 Twelfth Avenue, Suite Two
Longview, WA 98632-7934

DATED May 25, 2006 at Seattle, Washington,



Janet Jenssen