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Supreme Court No. 78728-0  
Court of Appeals Case No. 33174-8-II

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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LONGVIEW FIBRE COMPANY, INC.,

Petitioner,

v.

STACY L. HEGWINE,

Respondent.

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SUPPLEMENTAL BRIEF OF RESPONDENT  
STACY L. HEGWINE

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LONGVIEW FIBRE COMPANY, INC.,

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v.

STACY L. HEGWINE,

Respondent.

**I. INTRODUCTION**

It is understood that this Court has accepted review on two issues: (1) whether pregnancy is a condition subject to accommodation analysis in an employment discrimination suit, and (2) whether “business necessity” under WAC 162-30-020(3)(b) is an affirmative defense to an employment discrimination suit that is waived if not pleaded. Stacy Hegwine urges this Court to affirm the Court of Appeals holdings in this case as the decision is consistent with Washington law, the regulations promulgated by the Washington Human Rights Commission (WHRC), and the evidence presented at trial.

## II. STATEMENT OF CASE

Hegwine relies upon the Statement of Facts set forth in the Brief of Appellant and Answer to Petition for Review, and those facts identified by the Court in *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546 (2006), (hereinafter cited as “Hegwine”).<sup>1</sup> In summary:

Ms. Hegwine applied for a position in the Longview Fibre Company (“Fibre”) customer service department as a “customer service clerk/order checker.” The primary duties of the Fibre customer service department are to write orders, schedule shipments, and invoice shipments. No lifting requirements were specified in the job listing.

During Hegwine’s interview, she was told that the lifting requirement for the Order Checker position was 25 pounds. She was selected as the successful applicant and was offered the position on February 21, 2001. Hegwine accepted the offer on the same day and was given a start date of March 1, 2001.

On February 23, 2001, at the direction of Fibre, Hegwine submitted to a physical examination by Dr. Ostrander, Fibre’s Corporate Medical Director. In response to a questionnaire, Hegwine disclosed she was

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<sup>1</sup> For consistency, subsequent references to the decision will cite to the slip opinion.

pregnant. Ostrander immediately directed Hegwine to obtain a medical clearance from her doctor.

On March 1, 2001, Hegwine reported to work and was instructed to watch a series of videos. In addition, she was given information on health insurance plans, Longview Fibre Company mill rules, general employee benefits, employee pension plans, a parking sticker, and a payroll number. In addition, she filled out a W-4 form. After Hegwine asked about pregnancy leave, she was asked to leave the mill site. <sup>2</sup>

Hegwine's obstetrician, Daniel Herron, provided a release dated February 23, 2001, indicating she could lift 30 pounds to her waist and 20 pounds to her shoulders and overhead, up to two hours each day. Subsequently, Carlene Cox of Fibre's Human Resources Department spoke to Fibre nurse Marilyn Sapp regarding Hegwine's issue. Sapp later advised Dr. Herron's office that Fibre now required Hegwine to be able to lift 40 pounds. In response, Dr. Herron faxed a revised release to Fibre allowing Hegwine to lift up to 40 pounds (to her waist, to her shoulders and overhead) up to two hours each day.

On March 5, 2001, Dr. Ostrander spoke directly to Dr. Herron and

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<sup>2</sup> Fibre subsequently refused to pay Hegwine for work performed on March 1, 2001, claiming she was not an employee. She eventually secured payment with the assistance of the Washington Human Rights Commission and the Washington Department of Labor and Industries, RP (3/14) 42:11-24.

was again advised that Hegwine was capable of lifting 20 pounds frequently and 40 pounds occasionally to infrequently.

Fibre subsequently involved its Equal Employment Opportunity Coordinator, Margaret Rhodes. Rhodes was advised by her superiors that Hegwine potentially had a temporary disability due to pregnancy, in the form of a lifting restriction. She investigated the possibility of accommodating a temporary lifting restriction. Rhodes concluded that Hegwine could perform the job of Order Checker with available accommodations. Rhodes further concluded that accommodation could be provided without significant difficulty or expense and testified that the accommodations were not undue. She estimated the cost of accommodating Ms. Hegwine at less than \$5,000.00 and recommended that Hegwine in fact be accommodated. Rhodes' superiors, however, advised that they would not make any accommodation for Hegwine's pregnancy.

The ultimate decision regarding Hegwine's employment was made by Robert Arkell, Fibre's Senior Vice President of Industrial Relations and General Counsel. He conceded that, other than lifting restrictions due to pregnancy, Hegwine was in every way qualified to perform the Order Checker position. Despite the recommendation of his EEO Coordinator, Arkell admitted that he never considered providing pregnancy leave to Hegwine. He further testified that he considered Rhodes' opinions and

recommendations to be “irrelevant.”

Ultimately, Carlene Cox was instructed by her superiors to contact Hegwine and read from a prepared script. On March 16, 2001, Hegwine was told that she had never been hired and Fibre was withdrawing the offer of employment. The stated reason was that Hegwine’s “availability” prevented her from performing the job.

At trial, Fibre contended that an Order Checker would be required to lift 60 pounds to perform the essential functions of the position. Neither Hegwine nor Dr. Herron was ever advised by anyone at Fibre of a supposed 60 pound lifting requirement until after the commencement of litigation.

Dr. Herron testified that had he been aware that Hegwine’s job was dependent upon the ability to lift 60 pounds, he likely would have provided his approval to perform the job even without accommodation. In fact, Dr. Herron testified that he regularly provides work approval to his pregnant patients despite the need to lift as much as 60 pounds.

The Court of Appeals summarized the pertinent facts as follows:

(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.

*Hegwine*, slip op. at 18-19.

### III. ARGUMENT

#### A. **An Adverse Employment Decision Against a Pregnant Woman Cannot Be Justified by an Inability to Accommodate.**

As noted by the Court of Appeals, Hegwine's Complaint alleged, *inter alia*, that Fibre discharged her from employment because of her gender and her pregnancy, in violation of RCW 49.60 and Washington public policy. *Hegwine*, slip op. at 7-8. She did not allege disability discrimination.

Consistent with the positions of both parties on appeal, the Court of Appeals concluded that "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." *Hegwine*, slip

op. at 15.<sup>3</sup>

The Court noted that the regulatory scheme for pregnancy discrimination (WAC 162-30) is entirely separate from that for disability discrimination (WAC 162-22 and 162-26). *Hegwine*, slip op. at 14-15. Unlike conditions previously recognized as “disabilities”, pregnancy is always a temporary condition and one which enjoys special protection under Washington law. In fact, the legislature has specifically declared that discrimination against families with children “menaces the institutions and foundation of a free democratic state.” RCW 49.60.010; *Kuest v. Regent Assisted Living*, 111 Wn. App. 36, 43, 43 P.3d 23 (2002). The strong public policy against sex discrimination in particular is evidenced by Washington’s Equal Rights Amendment (ERA). Const. art. XXXI, §§ 1.2 (amend. 61) (equality of right shall not be denied or abridged on account of sex and the legislature has the power to enforce the provisions of the amendment by appropriate legislation).

The resulting prohibition of sex discrimination is near-absolute.

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<sup>3</sup>On appeal, Fibre conceded that a disability discrimination analysis was inappropriate in the pregnancy context, acknowledging:

A plaintiff claiming disability discrimination based on a failure to accommodate under RCW 49.60.180 must first demonstrate that she has a sensory, mental or physical *abnormality*. [Citations omitted.] Pregnancy, even though it inevitably carries with it some degree of physical incapacity, is not an abnormal condition. To the contrary, pregnancy is a normal, “expectable incident in the life of a woman.” WAC 162-30-020(2).

Brief of Respondent, at 26-27.

Exceptions, if any, created under RCW 49.60 or regulations promulgated thereunder are irrelevant to the ERA, which permits no exceptions. See *Darrin v. Gould*, 85 Wn.2d 859, 870, 540 P.2d 882 (1975). This Court has previously stated, “[t]he ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional ‘strict scrutiny.’” *Southwest Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County*, 100 Wn.2d 109, 127, 667 P.2d 1092 (1983) (citing *Darrin*, 85 Wn.2d at 872).

In light of this strong policy, the WHRC declined to provide for an accommodation analysis in WAC 162-30 and, instead, required an employer to provide a leave of absence when a woman is unable to work due to pregnancy or childbirth. <sup>4</sup> WAC 162-30-020(4)(a) provides in relevant part: “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.” The use of the term “woman” rather than “employee” in these provisions is notable. Clearly, the HRC intended to extend the regulations to both existing employees and applicants. This reading is consistent with the remainder of the regulation which declares it an unfair practice to refuse to hire or terminate a woman because of pregnancy. WAC 162-30-020(3)(a).

As a result, Fibre’s alleged (but factually unsupported) inability to

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<sup>4</sup> This fact dispels Fibre’s argument that, absent an accommodation analysis, a pregnant woman could be “required to perform their job responsibilities despite physical limitations related to pregnancy.” Petition for Review at 6-7.

accommodate Ms. Hegwine is immaterial. Neither the Washington Law Against Discrimination (WLAD) nor the pregnancy regulations permit an employer to take adverse action against a pregnant employee upon a showing of an inability to accommodate. Absent accommodation, an employer is expressly required to provide a leave of absence.

Presumably, an employer would be required to provide reasonable accommodations to a pregnant employee *upon request*.<sup>5</sup> This would provide an opportunity for a pregnant employee to delay leave and the accompanying loss of wages and would provide pregnant workers with the same protection against discrimination as enjoyed by workers with previously recognized disabilities. However, under no rational interpretation of the WLAD or WAC 162-30-020 would an employer be justified in adversely affecting a pregnant worker's employment by a real or imagined inability to accommodate. To hold otherwise, would render the leave provisions of WAC 162-30-020(4)(a) meaningless.

Notably, Fibre does not contend that it complied with the existing regulations. Nor does Fibre contend that the Court of Appeals misapplied existing law. Instead, Fibre asks the Court to disregard the existing law and permit an employer to discharge a pregnant woman upon a showing of an inability to accommodate. The Court should decline Fibre's invitation to

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<sup>5</sup>Here, at no time did Ms. Hegwine claim an inability to perform any aspect of her job or request any accommodation. *Hegwine*, slip op. p. 7.

legislate. The appellate court was appropriately deferential to the regulations promulgated by the WHRC, stating: “[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.” *Hegwine*, slip op. at 13 (quoting, *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996)). Here, the agency’s regulations further the statutory mandate that the Washington Law Against Discrimination (WLAD) be liberally construed to achieve its purpose of “eliminating and preventing discrimination.” RCW 49.60.020; *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) (statutory provisions against discrimination are liberally construed and exceptions narrowly confined); *Curtis v. Security Bank of Wash.*, 69 Wn. App. 12, 15, 847 P.2d 507 (1993).

**B. Fibre Unlawfully Discriminated Regardless of a Duty to Accommodate.**

Even if the Court were to permit termination of a pregnant worker upon a showing of inability to accommodate, the substantive result in the present case would not change. This is true because the appellate court correctly held that Fibre committed discrimination, *irrespective of whether there was a duty to accommodate*. In fact, the appellate court found that Fibre unlawfully discriminated in virtually all aspects of its interaction with Hegwine.

Fibre takes no issue with the appellate court's conclusion that it discriminated against Ms. Hegwine in two different respects *even before any alleged duty to accommodate would have arisen*. First, Fibre impermissibly inquired into Hegwine's pregnancy. Second, once learning of the pregnancy, Fibre impermissibly assumed that the pregnancy resulted in a temporary disability. Central to the decision of the Court of Appeals was the recognition that Hegwine never suggested she had any disability or requested any accommodation. *Hegwine*, slip op. p. 7. Yet Fibre immediately treated her as though she were disabled. Notably, these actions would constitute unlawful discrimination even if Ms. Hegwine had possessed a recognized disability.

An employer is prohibited by WAC 162-12-140(3)(n) from asking questions about pregnancy prior to hiring. At trial, Fibre did not dispute that it required Hegwine to complete extensive medical questionnaires which clearly violated this regulation by requiring her to disclose whether she was pregnant. *Hegwine*, slip op. at 14 and 16.

Further, it is an unfair labor practice to base employment decisions on negative assumptions about pregnant women. WAC 162-30-020(3)(c). Fibre does not dispute that it unlawfully assumed that Hegwine's pregnancy resulted in a disability and the evidence was un rebutted. Instead of putting her to work, Fibre required Hegwine to obtain a release from her doctor even though she neither claimed disability nor requested accommodation. Fibre

violated the clear language of the regulation by compelling Hegwine to respond to the assumption that she was disabled due to pregnancy. *Hegwine*, slip op. at 16. As a result, even if the Court were to newly create an accommodation element in pregnancy discrimination actions, it would not change the substantive result of the present case.

**C. Fibre Failed to Accommodate Ms. Hegwine.**

The Court of Appeals properly concluded that “Fibre’s claim that it could not accommodate Hegwine’s pregnancy fails even when reviewed.” *Hegwine*, slip op. at 15-16, fn. 17. The appellate court’s meticulous review of the record revealed “insufficient evidence that Fibre took any affirmative steps to accommodate Hegwine’s temporary lifting restriction or that reasonable accommodations were unavailable.” *Id.* Fibre asks the Court to apply an accommodation analysis “similar to that in disability claims.” Petition for Review, p. 1. Under such an analysis, an employer would be required to explore and extend such accommodations which would permit her to perform the essential functions of the job. Otherwise, pregnant women would enjoy less protection than workers with recognized disabilities. See, *Easley v. Sea-Land Service, Inc.*, 99 Wn. App. 459, 468, 994 P.2d 271 (2000); *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533, 70 P.3d 126 (2003) (“A disabled individual is qualified for an employment position if, *with or without* reasonable accommodation, he 'can perform the essential functions

of the employment position' at issue.”) (emphasis added).<sup>6</sup> Significantly, the Court of Appeals noted that Fibre’s own final report indicates that no potential accommodations were considered following the decision that she was incapable, *without accommodation*, of performing essential job functions. *Hegwine*, slip op. at 15-16, fn. 17.

The appellate court also accurately points out that Fibre did not fulfill its obligation to seek and share information once it learned Hegwine was pregnant. *Id.* In fact, the Court of Appeals concluded that Fibre actively avoided communication with Hegwine by not informing her of the alleged change in lifting requirements.

In short, even if the Court were to conclude that an accommodation analysis is appropriate, Fibre failed to produce sufficient evidence that accommodations were properly considered before making the adverse employment decision.

**D. Hegwine Was Capable of Performing the Job Even Without Accommodation.**

As set forth in the Brief of Appellant, had Fibre sought to accommodate Ms. Hegwine for her perceived disability, it would have found that she did not require any accommodation at all. This is true even if lifting 60 pounds infrequently is properly characterized as an essential function of

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<sup>6</sup>In this respect, the trial court unquestionably erred in concluding that under a disability accommodation analysis: “Fibre had an obligation to accommodate [Ms. Hegwine’s temporary pregnancy-related lifting restriction] *unless* it caused Ms. Hegwine to be unable to perform an essential function of the job.” CP 17 (emphasis added).

the job. The undisputed testimony at trial established that Ms. Hegwine was in fact capable of lifting 60 pounds. Fibre could have easily ascertained this fact had it fulfilled its obligation to exchange pertinent information with Ms. Hegwine. Rather than provide accurate information to Ms. Hegwine or her doctor, Fibre continued to increase the lifting “requirements” of the job as Ms. Hegwine established her ability to meet them. Ultimately, Fibre settled on a 60-pound minimum and, rather than engage in an interactive process and risk the possibility that Ms. Hegwine would be released to perform the work, chose to conceal this fact and simply terminate her.

**E. Fibre’s Claim of “Business Necessity” was Properly Rejected by the Court of Appeals.**

The sole exception to the prohibition against pregnancy discrimination is where an employer can demonstrate a business necessity for the decision. WAC 162-30-020(3)(b).

Fibre contends that the Appellate Court incorrectly concluded that business necessity is an affirmative defense which Fibre waived by failing to plead. Fibre concedes that the defense was not pled, but relies upon *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 859 P.2d 26 (1993), *amended*, 122 Wn.2d 483, 865 P.2d 507 (1994), for the proposition that business necessity is not an affirmative defense. The reasoning of *Kastanis* is in conflict with federal law and has been disavowed by the courts.

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1. Business Necessity is an Affirmative Defense Which Must be Pled

In a claim of marital status discrimination, *Kastanis* held that “the burden of proof on the issue of business necessity . . . rests with the plaintiff . . . “. *Kastanis*, 122 Wn.2d at 492. The Court cited to the criminal case of *State v. McCullom*, 98 Wn.2d 484, 656 P.2d 1064 (1983):

In determining whether 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.

*Kastanis*, 122 Wn.2d at 493. However, the Washington Supreme Court had earlier disavowed this reasoning:

Turning next to the constitutional part of the burden-of-proof analysis, in prior cases we have inquired whether or not an element of the defense "negates" an element of the crime charged. For example, noting that the "lawfulness" element of self-defense negates the intent element of murder, the knowledge element of assault, and the recklessness element of manslaughter, we have held that the State bears the burden of disproving self-defense in murder, assault and manslaughter cases. *State v. McCullom*, 98 Wn.2d at 494-96, 656 P.2d 1064; *State v. Acosta*, 101 Wn.2d at 616-19, 683 P.2d 1069; *State v. Hanton*, 94 Wn.2d 129, 133, 614 P.2d 1280, *cert. denied*, 449 U.S. 1035, 101 S.Ct. 611, 66 L.Ed.2d 497 (1980). Applying this same "negates" analysis in *State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984), we held that the prosecution must disprove the defense of good faith claim to title in a robbery case because that defense negates intent.

In light of a recent decision by the United States Supreme Court, we have substantial doubt about the correctness of this "negates" analysis and thus decline to apply it in this case. In

*Martin v. Ohio*, 480 U.S. 228, 230, 107 S.Ct. 1098, 1100, 94 L.Ed.2d 267 (1987), the Supreme Court upheld an Ohio law assigning the burden of proving self-defense to the defendant in the context of a prosecution for aggravated murder (defined as "purposely, and with prior calculation and design, caus[ing] the death of another"). Acknowledging an overlap between self-defense and the elements of purpose and prior calculation and design, the Court nevertheless held that the State's burden to prove the elements of the crime was unrelieved.

Following *Martin*, it appears that assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense "negates" an element of a crime. Thus, while there is a conceptual overlap between the consent defense to rape and the rape crime's element of forcible compulsion, we cannot hold that for that reason alone the burden of proof on consent must rest with the State. Rather, we now hold that that burden lies, as we understand the Legislature to have intended, with the defendant.

*State v. Camara*, 113 Wn.2d 631, 639-40, 781 P.2d 483 (1989). The holding in *Camara* was recently followed by this Court in *State v. Gregory*, 158 Wn.2d 759, 801-804, 147 P.3d 1201 (2006).

In addition, to the extent that *Kastanis* may have been consistent with federal law at the time, this is certainly no longer the case. The *Kastanis* Court noted that its decision was in line with the United States Supreme Court position in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). *Kastanis*, 122 Wn.2d at 493-94. However, in response to the *Wards* decision, Congress amended Title VII by enacting the Civil Rights Act of 1991 ("1991 Act"). Congress set out, *inter alia*, to "codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28

L.Ed.2d 158 (1971), and in the other Supreme Court decisions [issued] prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989)." See Civil Rights Act of 1991, Pub.L. No. 102-166, S. 1745, 105 Stat. 1071 (1991). Prior to *Wards*, *Griggs* had indicated that an employer bears the burden of "showing" its business necessity. Thereafter, that term was interpreted to mean that an employer assumes the burden of persuasion on this point. See *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 1000-11, 108 S.Ct. 2777, 2792-97 (1988) (Blackmun, J., concurring). In the 1991 Act, Congress effectively overruled that portion of *Wards* upon which *Kastanis* relied: that an employer bears only the burden of production, not the burden of persuasion, as to its business necessity. As a result, federal law imposes on the employer both the burden of production and persuasion on the issue of business necessity in disparate impact cases and the defense is wholly unavailable in cases involving disparate treatment.

42 USC §2000 e-2(k) provides in relevant part:

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if --

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin *and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . .*

\* \* \*

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter. (emphasis added).

The 1991 Act codified the higher *Griggs* burden, imposing on the employer both the burden of production and persuasion on the issue.

2. Fibre Failed to Produce Evidence of a Business Necessity Justifying Discrimination.

Even if Washington law did require Ms. Hegwine to prove Fibre lacked a business necessity justifying discrimination, the appellate decision is properly affirmed. In *Kastanis* it was undisputed that the defendant produced sufficient evidence of business necessity to raise a question of fact. *Kastanis*, 122 Wn.2d at 492. As a result, the jury was given a business necessity instruction. *Kastanis*, 122 Wn.2d at 493, fn. 5. In the present case, Fibre failed to do so.

As the appellate court noted, Fibre raised the business necessity justification for the first time on appeal. *Hegwine*, slip op. at 19. As a result, the term “business necessity” appears nowhere in the trial court’s Findings of Fact and Conclusions of Law. CP 14-18. To establish business necessity, an employer “has the burden of producing evidence that its employment practices are based on 'legitimate business reasons,' and of proving that legitimate goals are 'significantly served by' the practice at issue.” *Johnson v. Goodyear Tire & Rubber Co.*, 790 F.Supp. 1516, 1523 (E.D. Wash., 1992) (quoting *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 997-98, 108 S.Ct.

2777, 2790, 101 L.Ed.2d 827 (1988)). After reviewing the trial transcript, the Court of Appeals correctly concluded that, “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.” *Hegwine*, slip op. at 19.

Hegwine, on the other hand, presented the testimony of Fibre’s own Equal Employment Coordinator, Margaret Rhodes. Through her investigation, Ms. Rhodes concluded that, even assuming the existence of a disability, Ms. Hegwine could perform the essential functions of the Order Checker position with available accommodations. RP (3/14) 170:17-21. It was Ms. Rhodes’ opinion that the accommodation could be provided without significant difficulty or expense. Ex. 13, p. 10. She recommended that Ms. Hegwine in fact be accommodated. RP (3/14) 132:1-5. Ms. Rhodes’ superiors, however, advised that they would not make any accommodation for Ms. Hegwine’s pregnancy. RP (3/14) 133:8-13.

Fibre presented no substantive evidence to refute Ms. Rhodes’ testimony. According to Jerry Dow, Fibre’s Human Resources Manager, he made no effort to determine whether or not a pregnant woman in Washington must be accommodated for pregnancy-related disabilities. RP (3/14) 244:12-17, RP (3/14) 247:20-21.

As a result, it ultimately makes no difference under the facts of this case whether “business necessity” is characterized as an affirmative defense.

Regardless, the appellate court properly concluded that Fibre had failed to raise an issue of fact on the issue. *Hegwine*, slip op. at 15-16, fn. 17.

#### IV. REQUEST FOR ATTORNEY FEES

This portion of the brief is submitted to comply with the requirements of RAP 18.1(b).

RAP 18.1 provides for an award of attorney fees on review where a statute authorizes such an award. Although RCW 49.60.030(2) does not expressly provide for attorney fees on review, it has been interpreted as authorizing such an award. *Allison v. Housing Auth.*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991). As a result, attorney fees are properly awarded to a prevailing plaintiff in a discrimination appeal. *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 844 P.2d 389 (1993). Further, Ms. Hegwine's claim seeks recovery of unpaid wages. In the event that Ms. Hegwine is successful in recovering wages, RCW 49.48.030 provides for an award of reasonable attorney fees against the employer.

#### V. CONCLUSION

Respondent Hegwine respectfully requests that the decision of the Court of Appeals be affirmed and that the case be remanded to the trial court for an award of appropriate damages.

DATED: March 1, 2007.



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MARK S. BRUMBAUGH  
Of Attorneys for Respondent

CERTIFICATE

I certify that on this day I caused a copy of the foregoing Supplemental Brief of Respondent Stacy Hegwine to be served on Petitioner's attorneys as follows:

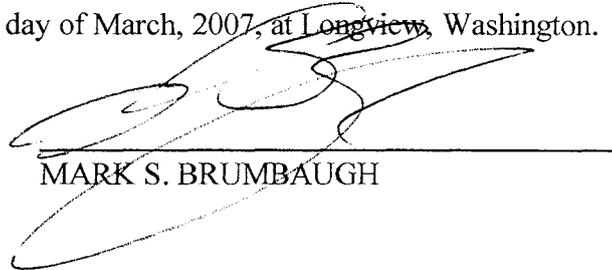
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MARK S. BRUMBAUGH