

NO. 41955-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GARRETT HARRELL,

Appellant,

v.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES, JACK GIBSON, AND
HENRY RICHARDS

Respondents.

MR. HARRELL'S SUPPLEMENTAL BRIEF

JOAN K. MELL, WSBA #21319

Attorneys for Appellant

III BRANCHES LAW, PLLC

1033 Regents Blvd. Ste. 101

Fircrest, WA 98466

joan@3brancheslaw.com

253-566-2510 ph.

281-664-4643 fx.

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After oral argument, the Court requested the parties supplement their briefing. The Court identifies three issues for analysis. The issues focus on the application of federal disability law to this case. Mr. Harrell addresses each issue respectively as presented.

I. Whether, in light of RCW 4.92.010, the Eleventh Amendment renders the State immune from Garrett Harrell's ADA claims against state agencies in state court?

A. Eleventh Amendment Does Not Apply

In state court, the State cannot claim Eleventh Amendment immunity from suit.¹ The Eleventh Amendment does not apply in state courts. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63-64, 109 S. Ct. 2304, 2308, (1989). Federalism is not invoked where the state sovereign appears in state court. The Eleventh Amendment restricts federal judicial power to protect a state sovereign from an appearance against its will in federal court. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117, 104 S. Ct. 900, 917 (1984). The doctrine does not operate to bar federal claims against the state in state court. *Id.* at 122, 919.

Congress specifically applies the protections of the American's with Disabilities Act (ADA) to the states. 42 U.S.C. § 12202. In 2001,

¹ In fact, the state never even claimed 11th Amendment immunity until the day of trial, despite being asked in discovery. CP 704.

the U.S. Supreme Court examined this statute and held suits in federal court by state employees to recover money damages by reason of the State's failure to comply with Title I of the ADA are barred by the Eleventh Amendment. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001). This decision has no application here where the relief is being requested in state court.²

The Courts recognize state employers' liability under the ADA. In fact, the courts have gone out of their way to find a common law exception to the application of the Eleventh Amendment to allow for relief under the ADA in both state and federal courts against a state. *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. N.D. Cal. 1997), *Lovell v. Chandler*, 303 F. 3d 1039 (9th Cir. Hawaii 2002). The Supreme Court has said the ADA applies specifically to state detention facilities. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952 (1998).

There is absolutely no legal authority to support the trial court's dismissal of Mr. Harrell's ADA claims against the State. Further there are no factual grounds either because the State has agreed to follow the ADA.

² Mr. Harrell made the appropriate objection to the trial court; pointing out the 11th Amendment did not apply to state cases. RP 1389. The trial court relied upon the *Alabama* case to dismiss Mr. Harrell's ADA case over Mr. Harrell's objections. VRP 1389-1392. The trial court appeared to confuse the Section 1983 case law that precludes action against the state in state court because the state is not a "person" under Section 1983 with 11th Amendment immunity doctrine. RP 1391.

B. The State Promises to Follow the ADA In Its Collective Bargaining Agreement, By Executive Order, and in State Policy

1. The State's Contractual Obligation to Follow the ADA

The State references its collective bargaining agreement (CBA) in this case to argue undue hardship. Of significance, the CBA contractually obligates the State to comply with the ADA:

“The Employer and the Union will comply with all relevant **federal** and state laws, regulations and executive orders providing reasonable accommodations to qualified individuals with disabilities.” CP 212 (emphasis added), RP 746.

By contract, the State commits to accommodating Garrett Harrell in compliance with the ADA.

This contractual obligation includes the duty to look for an available position prior to separating the employee. *Id.* Further, if an employee is separated because there is no available alternative position, the employee must be placed in the General Government Transition Pool Program. *Id.* No one ever looked for an available position for Garrett Harrell before terminating him. Mr. Harrell was never placed in the General Government Transition Pool Program. The State failed to follow any of its own contractual obligations to accommodate Garrett Harrell as promised under federal law. The state never provided any accommodation even though it was contractually obligated to do so.

2. The State's Policy of Compliance with the ADA

The State's Policy Guidelines on Reasonable Accommodation of Persons with Disabilities cites to the ADA as the authority for the policy. CP 481-485. The State adopted the ADA by Executive Order in 1996. Ex. Order 96-04. In his order, Governor Mike Lowry says the ADA "strengthens and clarifies the rights of the over half a million Washingtonians with disabilities by further opening the doors of opportunity and inclusion." The State has agreed to abide by the ADA by executive order.

3. DSHS Says It Complies with the ADA.

In addition to the CBA, DSHS, the particular state agency involved in this case, adopted specific policies committing itself to comply with the ADA. CP Ex. 64.

"Administrative Policy N. 18.26

2. When must an employer provide reasonable accommodation? (WAC 357-26-010) An employer must reasonably accommodate a known disability of a qualified candidate or employee as required by chapter 49.60 and the federal Americans with Disabilities Act."

DSHS' internal training materials include specific reference to the ADA. CP 450. Lester Dickson repeatedly references the ADA in his testimony. RP 755, 770, 822.

The State may not claim the ADA does not apply to it without violating its own contract, executive order, state and agency policies, and its Personnel Administrator's belief the ADA applied. The better result is to apply the ADA as promised and expected. Because the ADA applies, State superior court is the proper venue to enforce compliance.

C. *Washington Consents to Superior Court Jurisdiction*

Washington expressly abrogated its sovereign immunity, so that it may be sued. RCW 4.92.090. Washington identifies state superior court as the proper venue to pursue claims sounding in tort against the state. RCW 4.92.010. Discrimination is considered a tort, in part due to the personal insult and injury associated with the misconduct. *Anderson v. Pantages Theater Co.*, 114 Wn. 2d, 194 P. 813 (1921). Discrimination claims trigger the pre-filing claim form requirements under the state's abrogation of its sovereign immunity because liability arises from "tort-like" misconduct. *Valdez-Zontek v. Eastmont School Dist.*, 154 Wn. App. 147, 225 P.3d 339 (2010). Discrimination is a tort actionable against the state in state court. *Blair v. Washington State University*, 108 Wn.2d 558, 740 P.2d 1379 (1987). This state has expressly waived sovereign immunity so that its citizens may sue it for damages and hold it accountable. Mr. Harrell properly pursued relief from the state's tortious misconduct when he filed his ADA claim in state court.

D. The State Estopped From Claiming Immunity From ADA Liability

Mr. Harrell requests relief under the ADA in his original complaint and in his amended complaints. CP 6, CP 18-21, CP 814 -815. He cites to it and relied upon it when he petitioned the trial court for a preliminary injunction. CP 571.

The State never asserted Eleventh Amendment immunity in its answer, nor when Mr. Harrell asked it to identify any factual basis for either absolute and qualified immunity by interrogatory. CP 13, CP 704. Following discovery on summary judgment, the State suggested the ADA applies to it when it cited to the *Vinson* case. The State's argument under *Vinson* is that the ADA provides the exclusive remedy for constitutional violations based upon disability, thus precluding any relief under the more general 42 U.S.C. § 1983. CP 40. The State's position that the ADA does not apply is inconsistent with its argument based upon *Vinson*.

The first time the State asserted Eleventh Amendment immunity was the day of trial. The State's timing is too late: "Such conduct undermines the integrity of the judicial system." *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir. Cal. 1999). The State

waited too long to raise the defense.³ The State waived the defense by waiting until the last minute, which prejudiced Mr. Harrell.

II. Whether the jury's special verdict on Harrell's WLAD claims decided common dispositive issues relating to Harrell's ADA claims?

The jury could not decide common dispositive issues because the ADA and WLAD are distinct claims. The Legislature admonished the Supreme Court when it failed to recognize Washington's laws against discrimination (WLAD) are "wholly independent of those afforded by the federal Americans with disabilities act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act." RCW 49.60.040 Finding -- 2007 c 317. Thus, WLAD and the ADA may not be merged into one theory of recovery. The jury's special verdict fails to address the apparent differences between WLAD and the ADA.⁴

A. *The ADA Defines Discrimination as a Failure to Accommodate, When WLAD Does Not*

Under the federal law, the proscription against discrimination includes a separate and distinct enumeration on accommodation. 42 U.S.C. 12112 (b)(5). Discrimination means a failure to make reasonable

³ Mr. Harrell had a limited opportunity to brief the court on the question. VRP 1389.

⁴ Mr. Harrell's proposed special verdict form required the jury to decide his ADA claim separate from his WLAD claim. He kept the theories distinct. VRP 1391-1392. The final verdict form the trial court sent to the jury was not the form proposed by either side. CP 866. Mr. Harrell could not use his form when the court dismissed his ADA claim.

accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an employee. 42 U.S.C. § 12112 (b)(5)(A). The federal statute further describes what a reasonable accommodation may include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111 (9).

Under state law, discrimination based upon the failure to accommodate is not statutorily proscribed. In fact, the failure to accommodate is not mentioned in the statutory description of unfair employment practices. RCW 49.60.180. Adding additional ambiguity, the Legislature has not described any criteria for a plaintiff to rely upon to prove an employer has failed to provide an accommodation.

The only mention of an accommodation at all is in the definition of disability, which is distinct from the federal definition of disability. *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009). Thus, a verdict under WLAD does not equate to a verdict under the ADA.

B. Burden Shift Under WLAD Not Modified, and Fails to Eliminate Burden of Proving Discriminatory Animus

While WLAD does not equate discrimination to a failure to accommodate in statute, state case law discusses the employer's affirmative obligation to reasonably accommodate. *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993). However, the state common law analysis does not clearly equate to the federal reasonable accommodation analysis that is derived from the ADA.

State discrimination law consistently references the federal *McDonnell-Douglas* burden-shifting protocol in discrimination cases under WLAD where the plaintiff lacks direct evidence of discriminatory animus. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001)(reversed on definition of disability). In *Hill*, the court describes the protocol and applies it first to a discrimination claim and secondarily to the failure to accommodate claim. *Id.* at 187 and 191. In addition, the *Hill* court applies a four part prima facie analysis to the reasonable accommodation theory. The *Hill* court explains that the burden shifting analysis does not mean the plaintiff does not carry a burden of proving a specific discriminatory animus. The *Hill* court held that the employee carries the “ultimate” burden of presenting evidence “sufficient for a trier of fact to reasonably conclude that the alleged unlawfully discriminatory

animus was more likely than not a substantial factor in the adverse employment action.” Id. at 187. In an earlier appellate level decision, the court pointed out the issue of express discriminatory animus in a state failure to accommodate discrimination case had yet to be decided dispositively. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 877 P.2d 703 (1994). If the *Hill* decision is dispositive on the question, under state law the employee would be required to rebut the employer’s arguments on undue burden with further evidence of the employer’s express discriminatory animus. This is an added burden from the federal requirements.

The prima facie elements differ under a reasonable accommodation theory from the classic *McDonnell-Douglass* burden shifting analysis applicable to a disparate treatment theory. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. Id. 2004). Under a federal accommodation theory that modifies the *McDonnell-Douglas* burden-shifting protocol, the burden never shifts back to the employee to prove the employer has presented a pretextual reason that the employee’s possible accommodation is not possible due to an undue hardship. The burden remains on the employer because undue hardship is not an element of the claim. Undue hardship is an affirmative defense that the employer must prove. The *Hill*

court does not clearly modify the protocol in an accommodation case, nor does any other court in a published state decision.

Express discriminatory animus is not a requisite element to show an employer discriminates unlawfully when it fails to reasonably accommodate the employee under the ADA. *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 911 P.2d 1319 (1996) (“In contrast to Washington's vague standards, the federal standards for treatment of the disabled are specific; they are more in the nature of entitlements. ADA's protection is not even conditioned upon a finding of “discrimination,” as is true under RCW 49.60.”) Congress recognized in crafting the ADA that often the most damaging instances in which rights of persons with disabilities are denied occur because of benevolent inaction when action is required, rather than as the result of malice or discriminatory intent. *Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134, 1136 (N.D. Cal. 1998). Under the federal law, if the employee identifies a possible accommodation, the employee has met his burden. *Kim v. Potter*, 474 F. Supp. 2d 1175 (9th Cir. Central Dist. Cal. 2007). The jury then decides whether the employer meets its burden of proving the possible accommodation is in fact not possible because it presents an undue burden on the employer.

C. *Different Number of Prima Facie Elements - Causation Distinct*

State case law identifies four prima facie elements under WLAD.

Federal case law identifies three prima facie elements under the ADA.

The Four elements to a prima facie failure to accommodate case under WLAD are the following: (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.” *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003).

A reasonable accommodation case under federal law has only three elements. To present a *prima facie* case of employment discrimination under the ADA for failure to accommodate a disabled employee, the plaintiff must show proof of three elements: (1) he is a disabled person within the meaning of the ADA; (2) he is qualified, that is, he is able to perform the essential functions of the job with reasonable accommodation; and (3) he suffered an adverse employment action because of his disability. *Hoang v. Wells Fargo Bank, N.A.*, 724 F. Supp. 2d 1094

(2010); *Moore v. Computer Associates Intern., Inc.*, 653 F. Supp. 2d 955 (9th Cir. D. Ariz. 2009). An employee establishes the third element by showing he sustained a materially adverse change in the terms and conditions of employment motivated in part by his request for an accommodation. *Hoang*, 724 F. Supp. at 1104.

Under WLAD, the courts describe the causation requirement as a “substantial factor” in the employer’s decision making. *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 244 P.3d 438 (2010). “But for” causation has been specifically rejected, in a case that also references the federal motivating factor standard. *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991). The federal motivating factor standard equates to a “to any degree” standard, which has not been approved by the state courts. *Allison*, 118 Wn.2d at 92, *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1063-66 (9th Cir. Wash. 2005).

Under WLAD there is no case explicitly modifying the burden shifting analysis to eliminate the burden on plaintiff to show discriminatory animus element and there are no cases holding that the plaintiff’s burden is to show the employee’s request for an accommodation was a motivating factor rather than a substantial factor that precipitated the adverse change in employment. There is no clear identity of issues between WLAD and the ADA.

D. Specific Undue Burden Criteria under ADA

Federal law identifies very specific criteria for the jury to apply to the employer's burden of proving undue burden. The same criteria are not permitted under WLAD.

The federal statute defines "undue hardship," when WLAD does not. *See*, 42 U.S.C. § 12111(10) & RCW 49.60.040. An undue hardship means action requiring significant difficulty or expense in light of specific factors set forth in statute:

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. 42 U.S.C. § 12111(10).

Under WLAD, reliance upon any criteria not specified in statute constitutes reversible error: "Nowhere is there a hint that the size of the employer's business is a relevant factor in determining whether there has

been discrimination against a handicapped person.” *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 708 P.2d 393 (1985).

The explicit federal definition and the specific criteria are helpful when analyzing an accommodation. Without the guidance of the statutory definitions and express proscription in writing, the important and determinative facts may be overlooked or weighed as less significant than they should be.⁵

In this case, the jury was instructed that undue hardship is measured by a reasonableness standard: “An accommodation is an undue hardship if the cost or difficulty is unreasonable.” Under the federal instruction, the jury would have understood an undue hardship requires the employer prove “significant difficulty or expense”. They would have had the benefit of seven different criteria to evaluate the employer’s action or inaction. “Significant difficulty or expense” has a different emphasis on the employer’s conduct that the more generic term of “unreasonable.” Significant difficulty or expense is more exacting and subjective to the

⁵ The jury instruction given on undue hardship is very different from the federal pattern instruction. CP 857, WPI 330.36, and 9th cir. Model Civil Jury Instructions 12.9. Mr. Harrell and the State both offered the standard WPI 330.36, which is the instruction the court gave. In the case of *Erwin v. Roundup Corp.*, 110 Wn. App. 308, 313, 40 P.3d 675 (2002) there is reference to WPI 330.36 formerly using the term “unreasonably high” to characterize the cost or difficulty, rather than “unreasonable.” State cases appear to equate undue burden to the inverse of reasonable accommodation; thus the reference to “unreasonable.” *Easley v. Sea-Land Service, Inc.*, 99 Wn. App. 459, 994 P.2d 271 (2000). The ADA with its statutory standard does not rely upon the same inverse juxtaposition between the concepts because both are defined in statute.

employer's business. Unreasonable is more neutral and objective. See, *Strickland v. Washington*, 466 U.S. 668, 669, 104 S.Ct. 2052 (1984). Mr. Harrell never had the opportunity to show the jury the federal statute and walk them through the applicable analysis to prove the State failed to provide Mr. Harrell a reasonable accommodation in violation of his federal civil rights spelled out in the ADA.

E. Failure to Engage in the Interactive Process Mandatory under the ADA

In *Barnett v. U.S. Air Inc.*, 228 F.3d 1105 (9th Cir. N. Dist. Cal. 2000), the court held that engaging in the interactive process is mandatory under the ADA and that "employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. N. Dist. Cal. 2000) *vacated sub nom. U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002). In *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1139 (9th Cir. Me. 2001), the court applied *Barnett* to hold that the rejection of an accommodation request and failure to explore the possibility of other accommodations violated the duty regarding the mandatory interactive process. State case law does not expressly find that

the failure to engage in the interactive process is a distinct basis for liability.⁶

The emphasis applied under the ADA is important in this case where the State never provided a formal accommodation. They never opened or maintained a file and they never referred the matter to the reasonable accommodation unit. They never followed their own policy. The officials took no more than eleven minutes on the phone to tell Mr. Harrell his only accommodation was to call-in for left over day shift assignments. On the second call, the state knew the accommodation was not working; yet it failed to meet with him or engage in any interactive process, ever. Under the ADA the State is per se liable.

III. What is the proper remedy if the State is not immune from Harrell's claims?

The Court properly remedies the trial court's erroneous dismissal Mr. Harrell's ADA claim by applying the law to the facts and holding the State failed to accommodate Mr. Harrell, in fact and as a matter of law. Mr. Harrell's case should be remanded to the trial court for a new trial on damages only. Further, the State should be enjoined from any further violations, and should be ordered to accommodate him. Garrett Harrell

⁶ The State argued on summary judgment it had no duty to engage in an interactive process. CP 39. The State relied upon an early opinion in the *Barnett* case that was reversed as referenced above.

should be working for the State, rather than dependant upon it. The State should be ordered to pay his attorney's fees and costs. 42 U.S.C. § 12205.

A. Mr. Harrell Proved the State Failed to Accommodate Him

1. Mr. Harrell Requested An Accommodation Due to His Disability.

In an ADA accommodation case, the plaintiff must prove that he requested an accommodation due to a disability. Ninth Cir. Model Civil Jury Instructions 12.8 DA - Reasonable Accommodation. The fact that Mr. Harrell requested an accommodation was never disputed. Resp. Br. at 1, 6-7. The State acknowledges Mr. Harrell requested an accommodation.⁷

2. Mr. Harrell Proved that the State Could Have Accommodated Mr. Harrell.

In an ADA accommodation case, the plaintiff must prove that the employer could have made a reasonable accommodation that would have enabled the plaintiff to perform the essential functions of the job. Ninth Cir. Model Civil Jury Instructions 12.8 DA - Reasonable Accommodation.

⁷ The State admits Mr. Harrell asked to work dayshift as an accommodation. The State disputes the substantial evidence that shows Mr. Harrell also asked to work in the kitchen or at any other post where there were lighted conditions. RP 370 - 371, 819-820, CP Ex. 12, CP Ex 29. The specific nature of his requested accommodation is not dispositive because the State may offer him an accommodation of its choosing, not his. This Court may independently examine the evidence and find that there is substantial evidence showing the State failed to assign him to dayshift as an accommodation and that the State failed to offer him any other accommodation.

The State concedes it offered Mr. Harrell one and only one accommodation of its choosing. RP 752-754, 821-837. The State's one accommodation was to take him off the schedule and allow him to call in for leftover day shift assignments. Despite Mr. Harrell calling in four days in a row at precisely the right time, the State never allowed him to work even one dayshift. He never worked again in any capacity for the State.

a. Priority Placement on Dayshift

Mr. Harrell showed that his employer was required to initiate an investigation into his reasonable accommodation within thirty days and send him written notification of that fact. CP 212. Mr. Harrell proved his employer did not follow the CBA or agency policy. He was not provided written notice in thirty days. RP 752. In addition, Mr. Harrell proved that his employer did nothing to place him on dayshift for more than thirty days. His employer admits it could have given him priority placement on day shift assignments, but it did not do so until mid-December. Even after it did so, the employer never offered him any dayshift assignment.

The State's argument that Mr. Harrell did not call in enough is not credible. Not one state official offered any documentation of offering Mr. Harrell a dayshift assignment despite having spoken to him directly. Mr. Gibson never offered him any. RP 395, CP Ex. 12. Mr. Dickson never offered him any. RP 717. Mr. Pecheos never offered him any. CP

Ex. 17. Mr. Martinez never offered him any. CP Ex. 162. Mr. Harrell's phone records are replete with calls to the facility. At least, 28 times in November. CP Ex. 154. At least, 22 times in December. CP Ex. 154. Yet, his supervisors never assigned him any work. Jack Gibson prescheduled other on-call staff to dayshift 136 times in November and 104 times in December. RP 341-342. Mr. Harrell should have been prescheduled as well.

The facts show Jack Gibson moved him to call-in status, below on-call status, leaving him at the bottom of the roster until he was finally terminated. CP D. Ex. 140.⁸ His employer never reached out to him to make sure he was getting work assigned to him. Thus, the State never accommodated him. Allowing an employee not to work for more than a year without reconciling why the accommodation is not successful is not an accommodation because the employee is not enjoying the benefits of gainful employment.

b. Pre-scheduled Dayshifts Every Third Month

Mr. Harrell proved his employer was pre-scheduling on-call staff every third month on dayshift with consent from the Union. RP 821. Mr. Harrell also proved that his supervisors refused to pre-schedule him

⁸ Defendant's Exhibit 140 is the roster showing Garrett Harrell at the bottom on the second page under the category "Call-In Status." At oral argument the plaintiff exhibit numbers were referenced, P Ex. 74 and P Ex. 146. D Ex. 140 is the same document.

for dayshift assignments available to and as his supervisor was doing for other non-disabled on-call staff. RP 341-342, 750.

c. Lighted Post

Mr. Harrell proved his employer could have assigned him to a lighted post. RP 386-387, 835.

d. Improved Outdoor Lighting

Mr. Harrell proved the lighting could have been fixed to accommodate him. RP 1300-1302, CP Ex. 178 pg. 13-14. According to his coworker, the lighting changes lit the grounds up like a football field. CP Ex. 178 pg. 15 (Video only). These changes were made after he was gone. The State never asked him to come back under the new well-lighted conditions even though they were hiring RRC 1s. CP Ex. 59 and 60.

3. Pre-scheduled Dayshift Assignments and Other Accommodations Were Not An Undue Hardship on the State.

In an ADA accommodation case, the employer must prove that an accommodation would impose an undue hardship. Ninth Cir. Model Civil Jury Instructions 12.9A - Undue Hardship. The state's only hardship argument was that prescheduled dayshift assignments were "limited by the governing collective bargaining agreement to permanent employees." Resp. Br. at 1. The undisputed facts in evidence do not support the State's position. RP 821. The practice at the facility was to pre-schedule on-call

staff. RP 1123, 1288, 1314. This practice was accepted by the union. RP1316. The employer never sought a specific exception for Mr. Harrell to accommodate his particular disability. His supervisors refused to pre-schedule him like the other on-call staff. They never sought out any volunteers who would have traded him shifts. They did nothing to make dayshifts available to him.

The state's argument that the collective bargaining agreement contained a seniority system requirement that precluded him from getting dayshift assignments was not supported by any testimony or the CBA. A seniority requirement must directly conflict with the proposed accommodation to show an accommodation presents an undue hardship. *Willis v. Pacific Maritime Ass'n*, 236 F.3d 1160 (9th Cir. N. Dist. Cal). An employee may present evidence of special circumstances that makes exception to the seniority rule reasonable under particular facts. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516 (2002).

Here the provisions within the CBA on seniority apply to permanent staff who can bid for certain posts, not on-call staff. Among on-call staff, no one had seniority applicable to shift assignments. RP 347. All on-call staff rotated out of day shift every time Mr. Gibson changed the schedule. RP 591. On-call staff who did not have a disability were expected to work any shift without preference based upon seniority. Resp.

Br. at 8. Thus, seniority never qualified under the CBA as grounds for undue hardship.

B. The State Ignored the Express Provisions of the CBA

The State never followed the CBA provisions regarding reasonable accommodation. It never conducted a “diligent review and search for possible accommodations within the agency.” CP 212. It never placed Mr. Harrell in the General Transition Pool Program. CP 212.

C. State Never Notified Mr. Harrell of Available Positions that He Was Qualified to Fill.

Under the ADA, an employer has an affirmative obligation in the interactive process to identify alternative jobs for the employee to fill if he cannot be accommodated in his own position. A reasonable accommodation includes reassignment to a vacant position the disabled employee can fill. *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. Or. 2006). Vacant positions to which a disabled employee may be reassigned include those that the employer reasonably anticipates will become vacant. *Id.*

Lester Dickson, the personnel management administrator, testified clearly that he did nothing to assist Mr. Harrell in finding other positions that he was qualified to fill. RP 754-755, 764. He referred him to the

internet: "Mr. Harrell knows his qualifications and it was not my responsibility to determine if Mr. Harrell met other job classes." RP 755.

During discovery and right before trial when pressed on its duty to search for other available positions for Mr. Harrell, the State ultimately supplemented its interrogatories in August of 2009. The State identified four separate positions that Mr. Harrell was qualified to fill. CP 595. The State never notified him of any opening in any of these four positions. The State conceded a custodial position was open before the State terminated him, but it never offered him the position, nor did it notify him that the position was available. *Id.* In short, the State failed to reasonably accommodate Garrett Harrell.

IV. Conclusion

Mr. Harrell has rights enforceable against the State under the ADA. Eleventh Amendment immunity does not apply in state court. The jury did not decide common issues under the ADA and WLAD. They are separate causes of action. Any issues that the State may argue as common issues are not supported by substantial evidence in its favor. The undisputed facts show the State failed to accommodate Mr. Harrell. The State failed to show any an undue hardship. Most importantly the State failed to assign him any work. The State never gave him any dayshift work for over a year, yet it contends the one accommodation offered was

to allow him to call-in to work dayshift. When he called in, he was never given a dayshift. The State denied Mr. Harrell a reasonable accommodation as a matter of law. This case should be remanded to state court for a damages determination under the ADA. This court should award Mr. Harrell injunctive relief. The Court should order the State to accommodate Mr. Harrell. Finally, the Court should award Mr. Harrell attorney's fees and costs in the underlying action and on appeal under the applicable provisions of the ADA.

Respectfully submitted this 27th day of June 2012.

III BRANCHES LAW, PLLC



Joan K. Mell, WSBA 21319

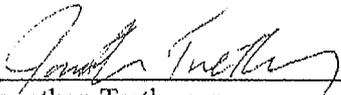
CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the forgoing Mr. Harrell's Supplemental Brief on all parties or their counsel of recorded by electronic mail on the date below as follows:

Matthew T. Kuehn, Assistant Attorney General
Torts Division
1250 Pacific Ave. Ste. 105
Tacoma, WA 98401
mattk2@atg.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Date this 27th day of June 2012 at Fircrest, Washington.



Jonathan Trethewey
Paralegal

III BRANCHES LAW

June 27, 2012 - 3:48 PM

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