

NO. 87933-8

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 41955-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GARRETT HARRELL,

Petitioner,

v.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Mr. Garrett Harrell asks this Court to accept review of the Court of Appeals decision designated in Section II of this petition.

II. CITATION TO COURT OF APPEAL'S DECISION

Mr. Harrell seeks review of the decision of the Court of Appeals, Division II, filed on August 28th, 2012, that affirms dismissal of Mr. Harrell's claims under the American's with Disabilities Act (ADA) based upon sovereign immunity and affirms the trial court's denial of his motion to set aside the jury's verdict because it was neither legally nor factually sufficient. Appendix A is a copy of the Court of Appeals' decision.

III. ISSUES PRESENTED FOR REVIEW

1. Is a failure to accommodate "tortious conduct" for purposes of the state's waiver of sovereign immunity?
2. If DSHS' acts and omissions prohibited under the ADA are "tortious conduct," was Mr. Harrell denied his right to prove DSHS failed to accommodate him when the Court of Appeals dismissed his ADA case?
3. Did the Court of Appeals commit error when it did not address DSHS' liability for its failure to comply with the employer's duties described in the *Davis v. Microsoft* case?

4. Should Mr. Harrell recover attorney's fees and costs at the trial level and on appeal?

IV. STATEMENT OF THE CASE

In 2006, Garrett Harrell was a very young man looking for a career opportunity working for the state. RP 363, CP Ex. 62. He applied for a job as a residential rehabilitation counselor (RRC) at the Special Commitment Center at McNeil Island, which was operated by DSHS. An RRC monitors the activities of the sex offenders housed at the facility. CP 605-606. DSHS hired him knowing he suffered from a disability. RP 352, CP Ex. 1. He has Retinitis Pigmentosa, a genetic condition that affects his ability to see in the dark. CP Ex. 90, RP 207-208, 219-220, 962, 1299. In the light, he is able to perform the job. RP 963.

After Mr. Harrell started and he completed his training, including defensive tactics coursework, his supervisor scheduled him to work outside at night on the perimeter where the lighting was insufficient. RP 986. When he asked his supervisor for a reasonable accommodation to include working the prescheduled shifts assigned to on-call staff during the day, his supervisor took him off the schedule and never assigned him another shift. RP 385, 595, 990. No one ever assigned him another shift. DSHS relegated him to call-in status, where he could call in daily to see if any pre-scheduled shifts became available. Despite his repeated calls,

DSHS never assigned him any more work. DSHS never offered him any other work, nor did anyone help him find other available positions that he was qualified to perform. RP 712. DSHS never processed a formal reasonable accommodation for Mr. Harrell. RP 729, 753. DSHS violated its own accommodation policies with Mr. Harrell. CP Ex. 64.

Mr. Harrell pursued his claims that DSHS failed to accommodate him under the American's with Disabilities Act (ADA) through trial. When he rested, DSHS moved to dismiss his ADA case, asserting immunity under the 11th Amendment. The trial court dismissed his ADA claims on 11th Amendment immunity grounds, even though the case was in state court. Then, the jury decided against him on his failure to accommodate claim under Washington's Laws Against Discrimination (WLAD).

Mr. Harrell asked the court of appeals to reinstate his ADA claim and decide he was denied a reasonable accommodation as a matter of law. The appellate court denied his request, ruling he could not enforce his ADA rights against the state because of sovereign immunity. The trial court also decided to defer to the jury's verdict without addressing Mr. Harrel's complaint that DSHS failed to follow its reasonable accommodation duties under *Davis v. Microsoft*.

Mr. Harrell requests further review. He asks this court to accept review and decide that he may enforce his ADA rights against a state agency and that the state agency he went to work for violated these rights.

V. ARGUMENT

A. *The Application of Sovereign Immunity to Bar ADA Claims Against The State Presents A Constitutional Question of First Impression*

The appellate court's reliance upon sovereign immunity to avoid application of the American's with Disabilities Act (ADA) against DSHS in state court warrants Supreme Court review. Its decision raises significant questions of law under the State and Federal Constitutions. Its decision raises a legal question of first impression.

The appellate court applied sovereign immunity to affirm the trial court's erroneous dismissal of Mr. Harrell's ADA claims. App. A at 17-19. The trial court incorrectly accepted DSHS' argument for immunity under the 11th Amendment, a federal constitutional claim that has no application in state court. App. A at 19, RP 1400, CP 671, 678-679. The appellate court noted the error, but did not reverse. Instead, it reached the same result by relying upon sovereign immunity. App. A at 19. The decision does not clearly identify the source of the sovereign immunity the Court of Appeals relies upon. It never references the state source for

sovereign immunity at WASH. CONST. ART. II § 26. The Court of Appeals cites to a federal case interpreting the federal government's waiver of its own sovereign immunity, which really has no application here. App. A at 16. *F.A.A. v. Cooper*, ___ U.S. ___, 132 S. Ct. 1441, 1448, 2012.

Notably, DSHS never raised sovereign immunity under the state constitution or the federal constitution or state or federal common law as a defense throughout the case, even when asked in discovery. CP 704, RP 1389 - 1390. DSHS first raised sovereign immunity in its Statement of Additional Authorities filed after oral argument and after supplemental briefing on appeal. See DSHS's Statement of Additional Authorities at 1 ("The State here is asserting sovereign immunity, not 11th Amendment immunity"). In its pleading, DSHS cited to a Virginia case for its authority. *Id.*

Earlier in the case on appeal and after oral argument, the appellate court asked the parties to provide supplemental briefing to address DSHS's 11th Amendment immunity claim. At that time, DSHS raised another new basis for immunity under the 10th Amendment to the federal constitution. *See*, Order Requiring Supplemental Briefing on Eleventh Amendment immunity and Supplemental Brief of Respondents at 20. The appellate court did not address DSHS' 10th Amendment argument. It

did not apparently rely upon that theory. The appellate court's ambiguous application of constitutional doctrine warrants further review.

***B. Irreconcilable Conflict Created If WLAD Claims Are Torts,
But ADA Claims Are Not***

The appellate court based its decision upon an opinion DSHS cited. *Rains v. State*, 100 Wn.2d 660, 672 P.2d 165 (1983). In *Rains*, this court decided the state did not consent to suits brought under 42 U.S.C. § 1983. The appellate court disregarded and made no effort to reconcile the *Rains* decision with the later decisions Mr. Harrell cited to of *Valdez-Zontek v. Eastmont School Dist.*, 154 Wn. App. 147, 225 P.3d 339 (2010) and *Blair v. Washington State University*, 108 Wn.2d 559, 740 P.2d 1379 (1987). In *Valdez-Zontek* the appellate court recognizes discrimination cases against a public entity are cases of "tortious conduct" as that term is used in the state's waiver of its sovereign immunity. *Valdez-Zontek*, 154 Wn. App. at 175. *Valdez-Zontek* is consistent with this court's prior decision in *Blair*. The *Blair* case involved violations under the federal Equal Rights Amendment and Washington's Laws Against Discrimination (WLAD). The Supreme Court decided discrimination claims are a tort, and are "tortious conduct" for purposes of RCW 4.92.110 the claim form filing prerequisite to this state's waiver of sovereign immunity under RCW 4.92.090. *Blair* at 576. Both sections in the chapter comprise the

legislatively enacted conditions of this state's waiver of its sovereign immunity. Both sections use the same term "tortious conduct."

Despite the common statutory language, the appellate court decided RCW 4.92.090, lacks the desired specificity needed to allow Mr. Harrell to enforce the ADA against the state agency that hired him. The court did not discuss the executive branch promises of compliance with the ADA. Mr. Harrell worked in an agency subject to an executive order mandating all agencies comply with the ADA. Appendix B, Gov. Lowry Ex. Order 96-04. And, the agency promised to comply with the ADA in its union contract and in agency issued policies. CP 212, CP 481-485.

If the appellate court is correct in its application of sovereign immunity, then Mr. Harrell is left with no remedy. He has no enforcement mechanism for either his state or federal rights. WLAD does not include a specific statutory waiver of sovereign immunity either other than that expressed in RCW 4.92.090. The appellate court did not articulate any legal grounds for treating the state's discrimination under WLAD as "tortious conduct", but not the state's discrimination under the ADA. The resulting consequence of the appellate court decision is that persons with disabilities may not enforce their civil rights against the state in any court. This result is untenable particularly when the state is one of the largest

employers in Washington. The result is highly prejudicial to Mr. Harrell who invested considerable resources in a case he apparently never had the ability to bring at its inception.

The result appears inconsistent with the decisions of the courts where ADA liability against the state and local government, including DSHS are analyzed. *Lynn v. Washington State Dept. of Social and Health Services*, WL 3869928, -- P.3d -- (2012); *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 911 P.2d 1319 (1996) *Becker v. Washington State University*, 165 Wn. App. 235, 266 P.3d 893 (2011).

The decision of the appellate court requires further review to reconcile the inconsistent application of the state's waiver of sovereign immunity in the various court decisions.

C. An Inability To Enforce The ADA Against the State Violates Public Policy

This court should accept review of this case because the public has a substantial interest in enforcement of the ADA against the state. The public interest in the ADA is clearly expressed in the Executive Order that requires state agencies comply with the ADA. Appendix B. If the appellate court decision becomes final, the decision would ameliorate the Governor's executive order. DSHS would not be subject to any judicial remedy for its failure to comply. Yet, state agencies such as the Human

Rights Commission would be enforcing through judicial remedies the ADA against private corporations and small businesses that may lack the same wealth of resources the state has to include a variety of jobs that make ADA compliance possible. ADA compliance keeps persons with disabilities employed and financially independent.

Mr. Harrell is a perfect example. He is ready, willing, and able to work even at the undesirable location of McNeil Island at the Special Commitment Center. Rather than enjoying the benefits of gainful employment, he depends upon state and family support simply because DSHS refused to prescheduled him to dayshift like other on-call staff. DSHS never assigned him a lighted post, and never tried to find him another position he was qualified to fill.

The Court of Appeals decision should not become the final decision in this case. The decision sets poor precedent with regard to the state's express policy interest in compliance with the ADA. This court should accept review.

D. An Itemization of Tort Claims By Title In RCW 4.92.090 Violates The Legislative Intent And Creates Separation of Power Problems

An additional deleterious consequence of the appellate court opinion is to force the Legislature to adopt an itemized checklist of claims that equate to tortious conduct each time a duty is established after the

enactment of the Legislature's waiver of sovereign immunity. Every time Congress or the Legislature or the courts impose a new statutory duty sufficiently specific to create a duty to a particular person or group of persons as is necessary to avoid application of the sovereign immunity principal described as the public duty doctrine, then it will also be necessary to amend RCW 4.92 so as to ensure this duty may be enforced if the court of appeals is correct that the tort claim that arises by statute must be identified in RCW 4.92 by the title of the bill. *See*, RCW 5.40.050 describing the effect of duties described in statute and *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 784, 954 P.2d 237 (1998)("Duty owed to all is a duty owed to none."), *Wright v. Terrell*, 135 Wn. App. 722, 145 P.3d 1230 (2006)(Tort of negligence requires plaintiff show a statutory or common-law rule that imposes a duty upon defendant), and *Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988) citing to *J & B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 305, 669 P.2d 468 (1983)(plaintiff must establish a breach of a duty, which insures that the government's tortious conduct is treated the same as that of a private citizen.)

There are legitimate policy reasons against creating a laundry list of torts in statute. The Legislature may not reconcile the statute each session with every new type of tort claim recognized in the common law, or created by the Legislature or Congress setting forth specific duties in

statute. The Legislature would have to amend its waiver annually at the end of session, creating a running list of recognized tort claims. The Legislative process is neither that predictable, nor dependable.

The concept that the Legislature has to self proscribe each waiver by naming the specific tort claim presents the risk of violating separation of powers. The Legislature would have to identify a tort before the judiciary could recognize the waiver in any case. If the Legislature fails to update the statute in a session then some claimants would be denied the benefit others may later be afforded. Such a result is entirely arbitrary and not equitable.

E. Washington's Tortious Conduct Under the ADA Not Subject to Sovereign Immunity

The appellate court stopped its analysis prematurely when it decided to look only for reference to the ADA by the title of the Act in the statute. When the Legislature waived its sovereign immunity it did not do so by naming individual torts or causes of action by title of the enactment. For instance there is no waiver to sue the state for "Actions for Injuries Resulting From Health Care", the medical malpractice statute, yet state doctors may be sued for medical malpractice. *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577 (1996). Another example is the cases brought against the Department of Corrections and DSHS for negligent

supervision. *Gilliam v. DSHS*, 89 Wn. App. 569, 950 P.2d 20 (1998). There is no waiver to sue the state for “negligent supervision,” but the state gets sued and has paid claims for negligent supervision.

The Legislature uses the phrase “tortious conduct”, rather than tort claim to describe its waiver. The Legislature focuses on the conduct of the state, rather than a description of the claim. The phrase “tortious conduct” indicates the Legislature intended the courts to evaluate state sovereign immunity and any waiver of it by considering the specificity of the duties described in the legislative enactment. Violations of the duties associated with anti-discrimination laws have long been recognized as tortious. *Anderson v. Pantages Theater Co.*, 114 Wash. 2d, 194 P. 813 (1921). This is true at both the state and federal levels.

Under the ADA, Congress set forth specific duties for an employer. An employer may not discriminate on the basis of disability. An employer breaches this duty if the employer fails to provide a reasonable accommodation. 42 U.S.C. 12112(b)(5). An employer’s duties described in the ADA are much more clearly articulated than in WLAD. See, Mr. Harrell’s Supplemental Brief at 7-17 and *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 628, 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.”) The duties developing under the more ambiguous WLAD are derived from the common law application of federal law to WLAD claims. *MacSuga v. County of Spokane*, 97 Wn. App. 435, 983 P. 2d 1167 (1999).

If the appellate court had looked for more than the title of the Act, and had analyzed both the state statute and the ADA, the appellate court would have recognized that an ADA case can be distinguished from a Section 1983 case for purposes of distinguishing the *Rains* case it relied upon.

Section 1983 is an enforcement mechanism for intentional misconduct in violation of the broad range of constitutional rights afforded under the federal constitution to the public generally. Thus, Section 1983 lacks the requisite specificity to trigger the waiver. The appellate court failed to engage in the deeper analysis the Legislature invited when it articulated in its waiver of sovereign immunity that its waiver applied to all “tortious conduct” not just specific tort claims. The Legislature did provide sufficient specificity to express its intent that it may be sued just as any private entity when it breaches the duties it owes to a particular person or class of persons as described in statute even as those statutory duties change over time.

The Legislature's use of the term "tortious" is not defined in the state's waiver of sovereign immunity. Undefined terms are given their ordinary meaning, which may be derived from reference to the dictionary definition. *State v. Silva*, 106 Wn. App. 586, 24 P.3d 477 (2001). The dictionary definition of "tortious" is wrongful. Black's Law Dictionary (9th ed. 2009). When DSHS failed to accommodate Mr. Harrell, it was engaged in tortious misconduct as proscribed in the ADA.

Another distinguishing characteristic the appellate court failed to recognize in its reliance upon the *Rains* case is the plaintiff in that case was afforded a cause of action against the state officials under Section 1983 for violating her rights, which she could collect against the state under the indemnification provisions of RCW 4.92. Thus, the Supreme Court did not leave the plaintiff without a remedy to enforce her Section 1983 rights. Here, the appellate court has denied Mr. Harrell any means for enforcement of his rights afforded under federal law. Based upon its application of sovereign immunity, it has also established precedent to deny him the ability to enforce his state's rights as well. The appellate court's decision should not become final because it denies Mr. Harrell any avenue of relief.

F. The State's Duties To Accommodate Under Davis v. Microsoft Never Recognized

An employer has an obligation to take affirmative steps to assist an employee who requests a reasonable accommodation in an internal job search by determining the extent of the employee's disability, by inviting the employee to receive personal help from the employer's personnel office, and by sharing with the employee all job openings in the company. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003). The appellate court recites facts in its opinion to the effect that it recognized Mr. Harrell sought reassignment as a reasonable accommodation. App. A at 3 and 6. Yet, the appellate court failed to apply the *Davis* criteria to DSHS. DSHS escaped all liability when the undisputed facts show it did nothing to reassign Mr. Harrell. In fact, Lester Dickson told him to look for another position on his own on the internet, which is precisely what this court said Microsoft could not do in *Davis*. RP 754-755, 764. DSHS' failure to comply with the standards articulated in *Davis* should be reconciled by this court because the appellate court failed to do so even though Mr. Harrell addressed it in his briefs. Appeal Brief at 25, Supplemental Brief at 23.

G. *Garrett Harrell Requests Attorney's Fees On Appeal and for Trial*

1. Appellate Fees

Mr. Harrell requests an award of attorney's fees and costs on appeal. His request is based upon WLAD and the Civil Rights Act and the ADA. RCW 49.60.030 and 42 U.S.C. §§ 1988 and 12205. Under WLAD, a person deeming himself injured by any act in violation of his rights under WLAD may recover attorney's fees and costs. Under federal law, a prevailing party may recover costs and attorney's fees. 42 U.S.C. §§ 1988 and 12205. Mr. Harrell has incurred significant costs and attorney's fees on appeal. He requests the opportunity to submit a cost bill and attorney's fees affidavit upon entry of an opinion reversing the decision of the Court of Appeals.

2. Based upon the same statutory grounds that provide for an award of attorney's fees and costs on appeal, Mr. Harrell requests recovery of his attorney's fees and costs incurred in pursuing his rights at the trial level.

VI. CONCLUSION

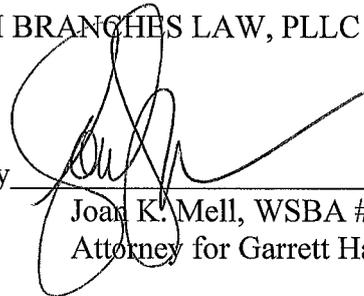
This Court should accept review of the appellate decision because sovereign immunity is a constitutional principal that has been misapplied such that Mr. Harrell has no ability to enforce his federal or in the future

his state rights. The decision conflicts with supreme court and appellate court decisions that describe discrimination as tortious conduct when applying the state's provisions that govern its waiver of sovereign immunity. Enforcement of the ADA against the state is a matter of substantial public interest as are the duties attributable to an employer under the Supreme Court decision of *Davis v. Microsoft*.

DATED this 27th day of September 2012.

III BRANCHES LAW, PLLC

By



Joak K. Mell, WSBA #21319
Attorney for Garrett Harrell

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the forgoing Mr. Harrell's Petition for Review 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.

Dated this 27th Day of September 2012 at Fircrest, WA.



Jonathan Trethewey
Paralegal

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STATE OF WASHINGTON
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DEPUTY

Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON
BY _____
DEPUTY

GARRETT HARRELL, an individual,

No. 41955-6-II

Appellant,

v.

WASHINGTON STATE, acting through the Department of Social Health Services, Special Commitment Center; and JACK GIBSON, individually and in his official capacity; and HENRY RICHARDS, individually and in his official capacity,

PUBLISHED OPINION

Respondents.

JOHANSON, J. — Garrett Harrell sued the Washington Department of Social and Health Services (DSHS) for discrimination under state and federal law, claiming that, as a matter of law, DSHS failed to reasonably accommodate his night blindness. The trial court denied his summary judgment motion and dismissed his federal claims, but it allowed trial of his state law claims. The jury found in DSHS's favor. Harrell appeals the trial court's denial of his summary judgment and new trial motions as well as its dismissal of his federal law claims. We affirm because issues of material fact existed to preclude summary judgment, sovereign immunity bars the federal law claims, and substantial evidence supports the jury's verdict.

FACTS

Residential rehabilitation counselors provide 24-hour security at the McNeil Island Special Commitment Center (the Center), a facility operated by DSHS that provides specialized mental health treatment for sexual offenders who are civilly committed as "sexually violent predators." Clerk's Papers (CP) at 605. On-call counselors are not permanent staff but instead

may be summoned to fill any shift when permanent staff members are unavailable. When the Center hires on-call counselors, it offers them prescheduled rotating-monthly shifts or call-in shifts at times convenient for them. All counselors, including on-call counselors, are covered under a collective bargaining agreement (CBA) between the State and the public employees union. Under the CBA, Center supervisors scheduled counselors "sporadically and not in any particular permanent manner." Verbatim Report of Proceedings (VRP) (March 8, 2011) at 343. Counselor schedule supervisor, Jack Gibson, gave on-call counselors the option to be prescheduled into the same shifts for one month and to then be rotated to another shift the following month, so on-call counselors were never prescheduled to the same shift two consecutive months. The Center believed the CBA prohibited prescheduling on-call counselors to the same prescheduled shifts over consecutive months because that would constitute "repetitive" scheduling. VRP (March 8, 2011) at 346.

In October 2006, Garrett Harrell interviewed for an on-call counselor position at the Center. Harrell told the interview panel, including Gibson, that although he suffered from night blindness,¹ he could work any of the three daily shifts. Gibson declined to hire Harrell because he perceived Harrell as too immature. Harrell applied for the same on-call counselor position in 2007, again indicating that he had vision issues. This time, Gibson hired Harrell as an on-call counselor, and Harrell began work on October 1, 2007.

Harrell successfully completed a new employee orientation. He then shadowed permanent counselors during different shifts on multiple occasions. On October 27, he worked a solo swing shift and realized that the dark areas along the outer perimeter of the Center created

¹ Harrell's condition is known as retinitis pigmentosa.

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problems with his night blindness. The following day, Harrell worked a solo day shift and stayed to work the swing shift. Harrell had difficulty seeing during the swing shift, but he did not alert anybody to his issues.

On October 29, Harrell was scheduled to work the swing shift again, but because he had concerns with his ability to see certain areas along his assigned security zone, he talked to a supervisor, who directed Harrell to take his concerns to Gibson. On October 30, Harrell was scheduled to work swing shift again, but he felt working may jeopardize his safety; so, he called in to say he would not be coming in that day. Harrell spoke with Gibson by phone on October 31 and told him that though he had indicated during the job interview that his disability would allow him to work any on-call shift, he realized after working night hours that he could work only day shift. Harrell requested a reasonable accommodation—that Gibson assign him to the day shift or a kitchen position. Gibson told Harrell that he could not assign him to a kitchen position because counselors and kitchen personnel were of different classifications; and, Gibson could not preschedule Harrell exclusively to day shift because that would violate the terms of the CBA and would be unfair to other staff seeking the popular day shift. Gibson had prescheduled Harrell to work swing shifts during November, so Gibson instructed Harrell to call in sick to his prescheduled swing shift positions until Gibson could rearrange Harrell's schedule to accommodate him.²

Gibson then suggested that Harrell switch from prescheduled to call-in status so that he could call in to the on-site administrator daily and ask if the Center had any day shift openings. Gibson told Harrell that if he desired, he could work 40 hours a week calling in each day to

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check for day shift cancellations. Finally, Gibson directed Harrell to submit to him a letter explaining his medical needs and desired accommodation, as well as medical documentation of his disability. Gibson believed shifting Harrell to call-in status would allow him greater flexibility to work only day shifts and to enjoy a temporary reasonable accommodation pending his submission of paperwork that would initiate DSHS's formal determination of whether Harrell required a more permanent reasonable accommodation.

That same day, October 31, Gibson wrote an informational report to his supervisor, David O'Connor, detailing his conversation with Harrell, reflecting that Harrell desired to "be assigned only Day Shift or to work in the kitchen." CP at 68. Gibson never received the medical documentation he requested from Harrell; so, on November 9, Gibson left Harrell a voice mail again requesting the documentation. In litigation, Harrell produced a fax receipt showing that he had faxed the medical documentation to Gibson's fax number on November 1 though Gibson claims he never received it.

On November 20, Lester Dickson, the Center's personnel management administrator, received a November 19 letter from Harrell's attorney, Sue Sampson. The letter explained that Harrell "found that he needs to work a daylight shift because of the night blindness" and that "he has provided you his doctor's statement attesting to his need for that accommodation." CP at 338. The letter asserted that Harrell "has been removed from the schedule and is now suffering a salary loss." CP at 338. The letter also asked what legal basis the Center had for declining to accommodate Harrell's disability. In addition, it stated that the Center must inform Harrell of

² Gibson's supervisor, David O'Connor, alerted Gibson that he could not have Harrell call in sick when Harrell was not actually sick.

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other available positions that he could work with reasonable accommodation. Dickson attempted to contact Harrell the following day to follow up and left a message. On December 4, Gibson sent an e-mail to on-site administrators Mario Martinez and Hardy Awadjie, stating, "we want to make every effort to make any day shift On-call assignments available to [Harrell]. If there is any need for [a counselor] for the Day shift, [Counselor] Garrett Harrell is to be called." CP at 70. The e-mail went on, "We will not create work for [Counselor] Harrell, but we do want to afford [Counselor] Harrell every opportunity to work up to 40 hours per week as is offered to regular On-calls." CP at 70. O'Connor reiterated Gibson's e-mail, advising on-site administrators that "the effort needs to be done to be able to give [Harrell] an opportunity to be able to work day shift." VRP (March 14, 2011) at 946.

Dickson spoke with Harrell on December 5 and again requested Harrell to fax in his medical documentation. Harrell restated his desire to work day shifts only. Harrell also expressed interest in working as a cook or in human resources, but Dickson advised Harrell that he would need to apply separately to work in those departments. Harrell also told Dickson that he was no longer interested in working as a counselor at this point.

That same day, Harrell faxed to Dickson his medical documentation. The documentation stated that because of his disability, "nighttime hours are not possible, but with the daytime hours, there are no work limitations." CP at 341. Based on Harrell's requests and documentation, Center employees understood that Harrell sought a reasonable accommodation of prescheduled day shifts. But Dickson believed that the Center could not schedule Harrell to permanent prescheduled day shifts because 42 U.S.C. §§ 12111-12117, Title I of the Americans with Disabilities Act of 1990 (ADA), and the CBA preclude an employer from displacing one

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employee in order to accommodate another. The Center did not have a vacant permanent day shift position in which to place Harrell, so the Center continued to let him call in for day shift openings.

Records show that on at least six occasions, on-site administrators called Harrell to offer him day shift work and either left a message or otherwise could not reach him. On-site administrator Mario Martinez telephoned Harrell on at least 15 separate days to offer him day shift work, but he never reached Harrell and just left messages. On December 18, Harrell returned a message left by on-site administrator Randy Pecheos, alerting Pecheos that he had a new telephone number. Pecheos advised Harrell that, to find a day shift opening, he should call the Center "a couple hours before" the scheduled start of day shift because that would be when permanent staff would be calling in sick. VRP (March 14, 2011) at 903.

Phone records show that, in November and December 2007, Harrell called McNeil Island dozens of times, either to the Center or to the prison, where his father worked. In November, Harrell called McNeil Island during morning hours on just two days, both days well after the day shift already began. And records show that on just three December mornings did he phone the Center in the early morning, when Pecheos advised Harrell he would be most likely to find a day shift opening.

In December 2007, Harrell filed an Equal Employment Opportunity complaint against the Center. On March 1, 2008, the complaint was transferred to the Washington Human Rights Commission (Commission), and his complaint stated that Harrell sought a day shift position. The Commission processed Harrell's complaint after one year and, ultimately, the Center declined to change its position on Harrell's accommodation.

In early 2009, the State mandated budget cuts at the Center. The Center laid off roughly 60 employees, permanent and on-call staff, including Harrell. Harrell had not worked a shift since October 2007 and had not called in for work since December 2007.

Harrell sued DSHS—which operates the Center—and Superintendent Henry Richards and Gibson, individually and in their official capacities. Harrell claimed that the defendants discriminated against him based on his disability, violating RCW 49.60.180, part of Washington's Law Against Discrimination (WLAD), as well as the ADA. He also claimed that they wrongfully terminated him, violating the WLAD and his constitutional rights under 42 U.S.C. § 1983.

DSHS sought summary judgment, and Harrell responded seeking partial summary judgment in a cross motion, but the trial court denied the motions. Following both sides' presentation of evidence, DSHS filed a CR 50 motion for judgment as a matter of law on all claims. After briefing on the matter and hearing arguments, the trial court dismissed Harrell's ADA and § 1983 claims. The parties argued the remaining WLAD claims to the jury, and the jury found that Harrell failed to prove that DSHS, Gibson, or Richards had discriminated or retaliated against him.

Following the jury's verdict, Harrell moved for a new trial, claiming the jury contravened the law, evidence did not support the verdict, and the verdict failed to provide substantial justice. Harrell appeals³ the trial court's denial of his partial summary judgment motion, its order partially granting DSHS's motion, and its denial of his motion.

³ We solicited supplemental briefing that we found helpful in analyzing the issues here.

ANALYSIS

I. HARRELL'S SUMMARY JUDGMENT MOTION ON REASONABLE ACCOMMODATION

Harrell asserts that DSHS failed to reasonably accommodate his disability as a matter of law, and thus the trial court should have granted his summary judgment motion because (1) DSHS essentially demoted Harrell by assigning him to call-in status, (2) DSHS did not provide an effective accommodation, and (3) DSHS failed to engage Harrell in an interactive process to reach a reasonable accommodation. But the trial court properly denied Harrell's motion for summary judgment because, when the evidence is taken in a light most favorable to DSHS, genuine issues of material fact exist on the issue of reasonable accommodation.

A. Standard of Review and Rules of Law

We review the denial of summary judgment de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). In discrimination cases, summary judgment is often inappropriate because the WLAD mandates liberal construction. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 777, 249 P.3d 1044, *review denied*, 172 Wn.2d 1013 (2011).

An employer that fails to reasonably accommodate the sensory, mental, or physical limitations of a disabled employee discriminates under the WLAD unless the employer can demonstrate that such an accommodation would result in an undue hardship to the employer's

business. *Pulcino*, 141 Wn.2d at 639. And an employer need not necessarily grant an employee's specific request for accommodation but, rather, an employer need only reasonably accommodate the disability. *Pulcino*, 141 Wn.2d at 643. An employer is not required to reassign an employee to a position that is already occupied, to create a new position, to alter the fundamental nature of the job, or eliminate or reassign essential job functions. *Pulcino*, 141 Wn.2d at 644. And generally, whether an employer made reasonable accommodations or whether an employee's request placed an undue burden on the employer is a question of fact for the jury. *Pulcino*, 141 Wn.2d at 644.

A reasonable accommodation requires an employer to take "positive steps" to accommodate an employee's disability. *Goodman v. The Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995) (quoting *Holland v. The Boeing Co.*, 90 Wn.2d 384, 389, 583 P.2d 621 (1978)). To reach a reasonable accommodation, employers and employees should seek and share information with each other "to achieve the best match between the employee's capabilities and available positions." *Goodman*, 127 Wn.2d at 409. Where many potential modes of accommodation exist, the employer is entitled to select the mode; not the employee. *Frisino*, 160 Wn. App. at 779. A demotion or adverse transfer, or a hostile work environment, may amount to an adverse employment action. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004), *review denied*, 154 Wn.2d 1007 (2005).

B. Discussion

Reasonable accommodation claims often involve disputed facts best left for a jury to decide. In *Frisino*, for example, a teacher with a respiratory sensitivity to molds and other environmental toxins, sought from her employer school district a reasonable accommodation—a move to a different classroom. 160 Wn. App. at 771. Frisino declined the school's offer to move her to one of the classrooms the district provided. *Frisino*, 160 Wn. App. at 771-72. The district then hired a toxicology consultant and mold removal company to identify the mold problem and remove mold from the building. *Frisino*, 160 Wn. App. at 772. Frisino, though, refused to return to work, claiming that the district's remediation measures failed to remove all the mold. *Frisino*, 160 Wn. App. at 774. The school district eventually terminated Frisino for failing to return to work. *Frisino*, 160 Wn. App. at 776. The trial court granted summary judgment in favor of the school district. On appeal, Division One of this court reversed the trial court's granting of summary judgment, noting that questions of fact remained, particularly, whether Frisino had returned to the school at any point after remediation and experienced mold-related symptoms; and if so, whether she communicated the ineffectiveness of the district's remediation accommodation in addressing her mold sensitivities. *Frisino*, 160 Wn. App. at 784.

Like *Frisino*, this case involves questions regarding whether an employer's accommodations were reasonable in the context of an employee's disability. These questions involved whether Harrell's removal from prescheduled swing shifts, and exemption from any night hours, to call-in status constituted a reasonable accommodation, and, why Harrell could not work any shifts following his removal from the prescheduled calendar. Accordingly, both cases

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involved questions of fact such that they should survive summary judgment. Harrell still asserts that, as a matter of law, the trial court improperly denied him summary judgment.

First, Harrell characterizes his status change from prescheduled to swing shifts in November 2007 to assigned call-in status, a demotion, not a reasonable accommodation as a matter of law, because he wanted to work any shift so long as it was well lit. But Harrell did not ask to work any shift so long as it was well lit.

Harrell told Gibson that he sought a reasonable accommodation to the day shift or the kitchen. In the letter he sent that same day to his supervisor, O'Conner, Gibson reiterated his understanding that Harrell sought a day shift: "[Counselor] Harrell advised me that it would be unsafe for him to work in an environment without light due to his night blindness and wanted [to] be assigned only Day Shift or to work in the kitchen." CP at 68. Harrell's doctor provided documentation that "nighttime hours are not possible, but with the daytime hours, there are no work limitations." CP at 341. Even the letter from Harrell's attorney states, "[H]e needs to work a daylight shift because of the night blindness." CP at 338.

When viewed in a light most favorable to DSHS, genuine issues of material fact existed: What was the scope of Harrell's reasonable accommodation request? And did moving Harrell from a prescheduled swing shift schedule to call-in status constitute a demotion, as Harrell claims, or a reasonable accommodation as the Center claims? These disputes of material fact are sufficient to sustain the trial court's denial of Harrell's summary judgment motion.

Gibson hired Harrell to work as an on-call counselor, a position with no promise of any prescheduled shifts. The official counselor position description describes the hours as "Intermittent" and "Non-Permanent." CP at 52. Upon hire, on-call counselors understand that

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they are expected to work any of the three shifts, and they have no expectation to work any set amount of hours, as on-call counselors work strictly on an as-needed basis.

But because of the high turnover and volume of permanent and on-call counselors required daily to staff the Center, Gibson prescheduled on-call counselors to certain shifts in order to staff the security detail. Gibson prescheduled Harrell to work swing shifts in November 2007, and, upon learning that Harrell could not work night hours, Gibson removed him from the schedule and instead shifted his status from prescheduled on-call to call-in. Gibson explained that, because Harrell had already set the prescheduled on-call counselor schedule, Gibson could not remove an on-call counselor prescheduled for day shift in order to accommodate Harrell for prescheduled day shift work. And the CBA prevented Gibson from permanently prescheduling Harrell to day shift. Again, these circumstances create a genuine issue of material fact regarding the scope of Harrell's reasonable accommodation request.

Second, Harrell claims that DSHS failed to provide him an effective accommodation because Gibson did not assign Harrell to available day shifts. But Gibson had already prescheduled other on-call counselors to the available November day shifts. And Gibson was not required to reassign another prescheduled counselor on the day shift in order to create a position for Harrell. *See Pulcino*, 141 Wn.2d at 644. Before learning that Harrell's disability would prevent his working night hours, Gibson prescheduled Harrell to the swing shift in November. Then, per Gibson's rotating on-call schedule, counselors prescheduled for swing shift in November would be prescheduled to work the graveyard shift in December and the day shift in January. Gibson could not easily or immediately assign Harrell to a day shift. Gibson arguably provided Harrell an opportunity to continue as a counselor, to avoid working swing and

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graveyard shifts, and to work only day shifts. Viewing the evidence in a light most favorable to DSHS, Gibson may have provided Harrell an effective accommodation, a genuine issue of fact that the jury was entitled to decide.

Third, Harrell claims that DSHS violated the law as well as its own policies when it failed to engage Harrell in an interactive process to reach a reasonable accommodation. But Gibson and Dickson spoke with Harrell to acquire his medical records and set up a reasonable accommodation, and Center personnel reached out to Harrell to offer him day shift opportunities, even though Harrell was then a call-in counselor. Employees at DSHS contacted Harrell and, with Harrell's guidance, set up his reasonable accommodation. Viewing this evidence in a light most favorable to DSHS, a genuine issue of material fact exists whether DSHS failed to engage in an interactive process with Harrell to set up a reasonable accommodation.

Here, viewing the record in a light most favorable to the non-moving party, genuine issues of material facts exist. Accordingly, the trial court properly denied Harrell's summary judgment motion.

II. ADA CLAIMS

Harrell next claims that the trial court erred in dismissing his ADA claims because DSHS does not enjoy immunity from ADA claims brought in state court. He cites RCW 4.92.090 as waiving Washington's sovereign immunity to tort claims. But, RCW 4.92.090 does not expressly waive sovereign immunity, and its general language does not allow federal ADA claims against DSHS in state court.

A. Standard of Review and Rules of Law

The Eleventh Amendment prohibits suits against unconsenting states in federal court. *Alden v. Maine*, 527 U.S. 706, 712, 732, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). And the “sovereign immunity” doctrine prohibits suits against unconsenting states in state court. *Alden*, 527 U.S. at 731-32. The one exception to these immunities is that Congress may subject an unconsenting state to suit in federal or state court “when it does so pursuant to a valid exercise of its § 5 [of the Fourteenth Amendment] power.” *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 364, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). Though Congress attempted to abrogate the states’ Eleventh Amendment and sovereign immunities when it passed the ADA, the Supreme Court held that it lacked authority to do so under the Fourteenth Amendment. *Garrett*, 531 U.S. at 374.

So, whether Washington maintains its sovereign immunity for purposes of Harrell’s action here depends on whether it has waived this immunity to ADA claims in state court. And, “a waiver of sovereign immunity must be ‘unequivocally expressed’ in statutory text.” *Fed. Aviation Admin. v. Cooper*, ___ U.S. ___, 132 S. Ct. 1441, 1448, 182 L. Ed. 2d 497 (2012). We construe ambiguities in the statutory language in favor of immunity, so as not to enlarge the Government’s consent to be sued beyond what a fair reading of the text allows. *Cooper*, 132 S. Ct. at 1448. General statutory statements that a state has consented are insufficient. For example, in *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 66 S. Ct. 745, 90 L. Ed. 862 (1946), the United States Supreme Court held that a Utah statute that subjected Utah to being sued in “any court of competent jurisdiction” for tax recovery actions was not a “clear

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declaration” of Utah’s consent to being sued in federal court. *Kennecott*, 327 U.S. at 578-79.

The Washington statute at issue here, RCW 4.92.090, uses similarly vague language.

B. Discussion

Harrell brought his ADA discrimination claims against DSHS, and Gibson and Richards—in their official and individual capacities—under Title I of the ADA, claiming that they refused to reasonably accommodate him.⁴ Specifically, Harrell asserts that Washington has expressly waived its sovereign immunity through RCW 4.92.090: “The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.” Harrell misplaces his reliance on this statute, though, as the statute’s general language does not constitute an unequivocal expression purporting to waive sovereign immunity. *See Rains v. State*, 100 Wn.2d 660, 668, 674 P.2d 165 (1983) (holding that the general language of RCW 4.92 does not waive Washington’s sovereign immunity to tort claims).⁵ The Washington Legislature, too, has waived Washington’s sovereign immunity under certain federal causes of action, just not

⁴ Harrell does not brief the trial court’s ruling dismissing his ADA claims against Gibson and Richards, individually, for failure to train or supervise. Therefore, as Harrell does not brief this issue, we do not address it. RAP 10.3(a)(6). *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

⁵ Minnesota, in contrast, has expressly waived its sovereign immunity with regard to ADA claims in state court. *See* MINN. STAT. § 1.05, subdiv. 4 (“An employee, former employee, or prospective employee of the state who is aggrieved by the state’s violation of the Americans with Disabilities Act of 1990, United States Code, title 42, section 12101, as amended, may bring a civil action against the state in federal court or in any other court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.”).

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the ADA under RCW 4.92.090.⁶ Unlike these statutes that expressly waive sovereign immunity to federal claims, the general language of RCW 4.92.090 does not expressly waive Washington's sovereign immunity to ADA claims filed in state court.

The trial court erred when it cited the *Eleventh Amendment* in dismissing Harrell's ADA claims. But the trial court did not err in its decision to dismiss the ADA claims because DSHS enjoyed *sovereign immunity* from ADA claims brought in state court. Because the trial court did not err in dismissing the ADA claims, and because we may affirm a trial court for any reason the record supports, we affirm the dismissal order. *See Hendrickson v. King County*, 101 Wn. App. 258, 266, 2 P.3d 1006 (2000).

III. CONSTITUTIONAL CLAIMS UNDER 42 U.S.C. § 1983

Harrell next claims that the trial court improperly granted DSHS's CR 50 motion for judgment as a matter of law and dismissed his two constitutional claims brought under 42 U.S.C. § 1983. Specifically, he claims that DSHS, Gibson, and Richards failed to train and supervise Center staff and that they retaliated against Harrell after he exercised his First Amendment rights in reporting unsafe lighting conditions at the Center. But Washington and its entities enjoy sovereign immunity from 42 U.S.C. § 1983 claims, while persons sued in their individual capacity enjoy qualified immunity.

⁶ RCW 47.60.210 states, for example, in waiving sovereign immunity to Jones Act claims in state court, "The state consents to suits against the department by seamen for injuries occurring upon vessels of the department in accordance with the provisions of section 688, title 46, of the United States code." *See also* RCW 49.60.030(2) ("Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988.")

A. Standard of Review and Rules of Law

The sovereign immunity doctrine prohibits suits against unconsenting states in state court. *Alden*, 527 U.S. at 730. And while a state may waive its sovereign immunity and consent to suit under § 1983 in a state court, Washington has not done so. *Dunning v. Pacerelli*, 63 Wn. App. 232, 237 n.2, 818 P.2d 34 (1991), *review denied*, 118 Wn.2d 1024 (1992).

Similarly, suits against state officials in their official capacities are treated as suits against the state. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). And state officials performing discretionary functions are shielded from liability for civil damages in if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Defendants may establish their entitlement to qualified immunity as a matter of law on a motion for summary judgment or for a directed verdict. *Walden v. City of Seattle*, 77 Wn. App. 784, 788, 892 P.2d 745 (1995).

In evaluating whether an individual enjoys qualified immunity, we apply the two-part *Saucier* test where, first, we decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Second, if the plaintiff satisfied the first part, we decide whether the right at issue was “clearly established” at the time of the defendant’s alleged misconduct. *Saucier*, 533 U.S. at 201. Since *Saucier*, the Supreme Court has held that a reviewing court may apply *Saucier’s* two-part test in any order. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right. *Pearson*, 555 U.S. at 232. And, in fact, “[a]s

the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

To qualify for First Amendment protection, an employee must show that his questionable speech is actually entitled to constitutional protection. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). If a public employee speaks as a citizen on a matter of public concern, then the speech may be protected by the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). If the speech is not a matter of public concern, but rather private concern, then the employee’s speech has no First Amendment protections. *Garcetti*, 547 U.S. at 418.

Whether speech relates to an issue of public concern is an issue for the trial court to determine as a matter of law. *Wilson v. Washington*, 84 Wn. App. 332, 341, 929 P.2d 448 (1996), *review denied*, 131 Wn.2d 1022, *cert. denied*, 522 U.S. 949 (1997). The content, form, and context of the speech, as revealed by the full record, bear on the court’s decision about whether the speech touches on a public concern. *Wilson*, 84 Wn. App. at 342. Also, the court should consider the speaker’s intent and whether the speaker intended to raise an issue of public concern or simply intended to further a personal interest. *Wilson*, 84 Wn. App. at 342.

We must determine whether a plaintiff employee’s speech touches on a matter of public concern. *See Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). If a plaintiff establishes that her speech was a matter of public concern, then she must prove that such protected speech was a substantial or motivating factor resulting in an adverse employment action taken against her. *See Doyle*, 429 U.S. at 287. Individual personnel disputes do not

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amount to matters of public concern. *See Desrochers v. City of San Bernardino*, 572 F.3d 703, 710 (9th Cir, 2009).

B. Analysis

Because DSHS, a state agency, enjoys sovereign immunity from Section 1983 law suits, the trial court properly dismissed Harrell's civil rights claims against DSHS. *See Alden*, 527 U.S. at 730. Similarly, the trial court properly dismissed those claims levied against Gibson and Richards in their official capacities, as they too enjoyed immunity in those roles. *See Hafer*, 502 U.S. at 25. Whether Harrell's suit against Gibson and Richards, in their personal capacities, was shielded by their qualified immunity requires further analysis.

Harrell claims that the trial court erred in granting DSHS's motion dismissing his free speech claim on the grounds that the speech was not of public interest. He asserts that he reported unsafe lighting conditions on the outer perimeter at the Center—a matter of public concern, relating to the safety of employees, residents, and the general public, and that the Center used his protected speech as a substantial or motivating factor in its decision to remove him from the November 2007 schedule. But the trial court correctly determined that Harrell raised the lighting concerns, not out of concern for public safety, but rather in the specific context of his asking for a personal reasonable accommodation.

Rather than alerting Center supervisors to deficient lighting as a public safety concern, Harrell simply told Gibson and Dickson that the Center's lighting was deficient such that *he* could not perform *his* counselor duties along the perimeter because of *his* night blindness. As Harrell raised a personnel issue, he fails to carry his burden to demonstrate that his speech touched on a matter of public concern. *See Desrochers*, 572 F.3d at 710. Therefore, as a matter

of law, the First Amendment does not protect Harrell's speech.⁷ So, as Harrell's removal from the prescheduled calendar was not clearly contrary to his specific, constitutional rights, then Gibson and Richards enjoyed qualified immunity. *See Pearson*, 555 U.S. at 232.

IV. MOTION FOR A NEW TRIAL

Harrell next argues that the trial court improperly denied his motion for a new trial because the jury reached a verdict contrary to law.⁸ But not only did Harrell improperly characterize the standard of review as de novo, substantial evidence supported the jury's verdict, and the trial court properly instructed the jury.

A. Standard of Review and Rules of Law

A strong policy favors the finality of judgments on the merits. *Stanley v. Cole*, 157 Wn. App. 873, 887, 239 P.3d 611 (2010). We review for an abuse of discretion the grant or denial of a motion for a new trial where the motion is not based on an allegation of legal error. *Edwards v. Le Duc*, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010), *review denied*, 170 Wn.2d 1024 (2011). We review de novo a trial court's rejection of a motion for a new trial based on a question of law. *Ramey v. Knorr*, 130 Wn. App. 672, 686, 124 P.3d 314 (2005), *review denied*, 157 Wn.2d 1024 (2006).

⁷ Moreover, if Harrell claimed the State retaliated against him when it removed him from his November 2007 prescheduled shifts, he would have to reconcile that argument with the fact that he asked that Gibson remove him from those shifts. If Harrell claims retaliation in the form of his termination, then he must explain why the State waited until February 2009 to terminate him.

⁸ Harrell did not object to the jury instructions, and he now confines his argument relating to improper jury instructions to just one footnote without citation to authority or support in the record. Given the inadequate briefing, we do not analyze the propriety of the jury instructions. RAP 10.3(a)(6). *See Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

Whether an employer has made a reasonable accommodation is generally a question of fact. *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 31, 244 P.3d 438 (2010), *review denied*, 171 Wn.2d 1020 (2011). And so long as the facts articulated in the course of trial are based on substantial evidence and support the verdict, we cannot overturn the verdict. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 817-18, 733 P.2d 969 (1987).

B. Analysis

The question at trial was whether DSHS provided Harrell a reasonable accommodation. This issue involves questions of fact. *See Johnson*, 159 Wn. App. at 31. Therefore, we review for an abuse of discretion the trial court's rejection of Harrell's motion for a new trial. *See Edwards*, 157 Wn. App. at 459. And we will not overturn the jury's verdict so long as substantial evidence, viewed in a light most favorable to the defendants, supports the jury's verdict. *See Campbell*, 107 Wn.2d at 818.

Here, the jury heard evidence that Harrell confined his request strictly to day shifts at the Center; and, he provided a doctor's note, his attorney's letter to the Center, his own Human Rights Commission complaint, as well as the testimony of various witnesses who corroborated Harrell's request. Various employees and administrators at the Center—including Gibson, Richards, Dickson, O'Connor, and associate superintendant of resident programming and security operations, Cathi Harris—testified that the Center accommodated Harrell as an on-call counselor by offering to allow him to call in to work only dayshifts. DSHS offered evidence, including Harrell's own admissions, that Harrell failed to take advantage of his reasonable accommodation and that he did not regularly call in to secure work or make himself available to work when the Center called him. Dickson, Gibson, and Harris each testified about why the

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Center could not provide Harrell a day shift on-call counselor position, as it would create an undue burden on the Center; and, prescheduling him to day shift as an on-call counselor would violate the CBA. Harrell even acknowledged that his request would be incompatible with the position for which he was hired. Given the strong policy favoring the finality of judgments on the merits and the substantial evidence supporting the jury's verdict, the trial court did not abuse its discretion in denying Harrell's motion for a new trial. *See Stanley*, 157 Wn. App. at 887; *Edwards*, 157 Wn. App. at 459.

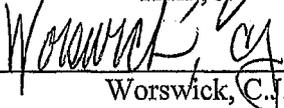
ATTORNEY FEES

Harrell seeks attorney fees and costs stemming from both trial and appeal. He bases his request on the WLAD, Civil Rights Act, and ADA. Under the WLAD, a person injured by any act in violation of his rights under the WLAD may recover attorney fees and costs. RCW 49.60.030. Similarly, a prevailing party may recover costs and attorney fees under federal law in civil rights matters. 42 U.S.C. §§ 1988, 12205. Because Harrell suffered no injury by any act in violation of the WLAD, and because he was not the prevailing party, we do not award Harrell attorney fees or costs.

We affirm.

We concur:



Hunt, J.


Worswick, C.J.



Johanson, J.

Appendix B

EXECUTIVE ORDER 96-04

**IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT
AND SUPERSEDING 93-03**

WHEREAS, Washington has a strong history of protecting the rights of people with disabilities through such laws and regulations as the Washington State Law Against Discrimination and the Barrier Free Design Standards; and

WHEREAS, the Americans with Disabilities Act strengthens and clarifies the rights of the over half a million Washingtonians with disabilities by further opening the doors of opportunity and inclusion; and

WHEREAS, the Americans with Disabilities Act requires that all services, programs, and activities, when viewed in their entirety, be readily accessible to and usable by people with disabilities, whether such services and programs are directly provided by state agencies or through purchase agreements or other contracts; and

WHEREAS, Washington will not be meeting its most basic responsibility until all Washingtonians can equally participate in and enjoy the benefits of state services and programs;

NOW, THEREFORE, I, Mike Lowry, Governor of the State of Washington, by virtue of the power invested in me, do hereby order and direct as follows:

1. No state agency, board, or commission under the executive branch shall discriminate against an individual on the basis of disability. Individuals with disabilities, whether state employees, applicants, clients of state services, or members of the general public, shall be treated with respect and dignity and provided meaningful access to state services, programs, activities, and employment opportunities.
2. Each executive branch agency, board and commission shall appoint an ADA coordinator to execute a self-evaluation and transition plan and oversee implementation of the ADA.
3. Executive-branch agencies, boards and commissions shall ensure that public meetings, hearings, and conferences are held in locations free of mobility barriers, and that sign language interpreters, assistive devices, and information in alternate forms (Braille, large print, or audio tapes) shall be provided upon request.
4. In communicating with employees, applicants, clients of services, or the general public, all state agencies, boards and commissions shall ensure that Teletypewriters (TTYs), sign language interpreters, assistive devices, and information in alternate formats shall be provided upon request.
5. Each executive branch agency, board and commission shall review its use of information technology, including computers, video conferencing, kiosks, telephone information systems, etc. and identify barriers, that employees or members of the public with disabilities experience in utilizing these systems. Agencies shall consult with persons with disabilities in identifying barriers and developing solutions to such barriers. As agencies develop, design, or redesign new technology systems, the agency director shall assure that the agency has taken reasonable steps to eliminate barriers that current users with disabilities face in utilizing these systems. The agency shall develop a plan to eliminate additional barriers should the need arise in the future. The Office of Financial Management, the Department of Information Services, and the Information Services Board and other appropriate agencies shall assist agencies to identify solutions through technical assistance and consultation.
6. The director of the Department of General Administration shall ensure that all newly-constructed buildings

or those undergoing major renovation in excess of \$5 million over which the director has authority comply fully with the state barrier free code, The director shall convene a panel representing persons with disabilities, the state Building Code Council, and the Governor's Committee on Disability Issues and Employment to review architectural design development plans for said projects prior to final approval. The panel shall provide barrie-free access review for plans submitted by the Department of Transportation, natural resource agencies, and institutions of higher education.

7. The Governor's ADA coordinator shall establish a task force to assist state agencies to meet the objectives of this executive order. The task force shall develop consistent policies on the provision of reasonable accommodation and sign language interpreters, the location of TTYs and Braille printers, and other policies that affect all state agencies. The task force shall be comprised of state employees and citizens with expertise in particular ADA issues and shall be convened by the Governor's ADA coordinator as needed.

8. This executive order supersedes Executive Order 93-03, which is hereby rescinded.

IN WITNESS WHEREOF, I have hereunto set
my hand and caused the seal of the State of
Washington to be affixed at Olympia this
22nd day of March A.D., Nineteen hundred and ninety-six.

Mike Lowry
Governor of Washington

BY THE GOVERNOR:

Secretary of State

Appendix C

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Effective: October 19, 1996

Currentness

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Credits

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Notes of Decisions (4998)

42 U.S.C.A. § 1983, 42 USCA § 1983

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1988

§ 1988. Proceedings in vindication of civil rights

Effective: September 22, 2000
Currentness

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

Credits

(R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330; Pub.L. 102-166, Title I, §§ 103, 113(a), Nov. 21, 1991, 105 Stat. 1074, 1079; Pub.L. 103-141, § 4(a), Nov. 16, 1993, 107 Stat. 1489; Pub.L. 103-322, Title IV, § 40303, Sept. 13, 1994, 108 Stat. 1942; Pub.L. 104-317, Title III, § 309(b), Oct. 19, 1996, 110 Stat. 3853; Pub.L. 106-274, § 4(d), Sept. 22, 2000, 114 Stat. 804.)

Notes of Decisions (3243)

42 U.S.C.A. § 1988, 42 USCA § 1988

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter IV. Miscellaneous Provisions

42 U.S.C.A. § 12205

§ 12205. Attorney's fees

Currentness

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Credits

(Pub.L. 101-336, Title V, § 505, July 26, 1990, 104 Stat. 371.)

Notes of Decisions (190)

42 U.S.C.A. § 12205, 42 USCA § 12205

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter I. Employment (Refs & Annos)

42 U.S.C.A. § 12112

§ 12112. Discrimination

Effective: January 1, 2009

Currentness

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term “discriminate against a qualified individual on the basis of disability” includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

- (i) the interrelation of operations;
- (ii) the common management;
- (iii) the centralized control of labor relations; and
- (iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Credits

(Pub.L. 101-336, Title I, § 102, July 26, 1990, 104 Stat. 331; Pub.L. 102-166, Title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077; Pub.L. 110-325, § 5(a), Sept. 25, 2008, 122 Stat. 3557.)

Notes of Decisions (2003)

42 U.S.C.A. § 12112, 42 USCA § 12112

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.92. Actions and Claims Against State (Refs & Annos)

West's RCWA 4.92.090

4.92.090. Tortious conduct of state--Liability for damages

Currentness

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

Credits

[1963 c 159 § 2; 1961 c 136 § 1.]

Notes of Decisions (121)

West's RCWA 4.92.090, WA ST 4.92.090

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.92. Actions and Claims Against State (Refs & Annos)

West's RCWA 4.92.110

4.92.110. Tortious conduct of state or its agents--Presentment and filing of claim prerequisite to suit

Currentness

No action subject to the claim filing requirements of RCW 4.92.100 shall be commenced against the state, or against any state officer, employee, or volunteer, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim is presented to the risk management division. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty calendar day period. For the purposes of the applicable period of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed.

Credits

[2009 c 433 § 3, eff. July 26, 2009; 2006 c 82 § 2, eff. June 7, 2006; 2002 c 332 § 13; 1989 c 419 § 14; 1986 c 126 § 8; 1979 c 151 § 4; 1977 ex.s. c 144 § 3; 1963 c 159 § 4.]

Notes of Decisions (30)

West's RCWA 4.92.110, WA ST 4.92.110

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West's Revised Code of Washington Annotated
Title 49. Labor Regulations (Refs & Annos)
Chapter 49.60. Discrimination--Human Rights Commission (Refs & Annos)

West's RCWA 49.60.030

49.60.030. Freedom from discrimination--Declaration of civil rights

Currentness

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a 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;
- (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
- (c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;
- (d) The right to engage in credit transactions without discrimination;
- (e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph;
- (f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and
- (g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW 49.60.225 contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

Credits

[2009 c 164 § 1, eff. July 26, 2009; 2007 c 187 § 3, eff. July 22, 2007; 2006 c 4 § 3, eff. June 8, 2006; 1997 c 271 § 2; 1995 c 135 § 3. Prior: 1993 c 510 § 3; 1993 c 69 § 1; 1984 c 32 § 2; 1979 c 127 § 2; 1977 ex.s. c 192 § 1; 1974 ex.s. c 32 § 1; 1973 1st ex.s. c 214 § 3; 1973 c 141 § 3; 1969 ex.s. c 167 § 2; 1957 c 37 § 3; 1949 c 183 § 2; Rem. Supp. 1949 § 7614-21.]

Notes of Decisions (426)

West's RCWA 49.60.030, WA ST 49.60.030

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West's Revised Code of Washington Annotated
Title 5, Evidence (Refs & Annos)
Chapter 5.40. Proof--General Provisions (Refs & Annos)

West's RCWA 5.40.050

5.40.050. Breach of duty--Evidence of negligence--Negligence per se

Currentness

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to: (1) Electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW 70.54.350, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

Credits

[2009 c 412 § 20, eff. July 1, 2010; 2001 c 194 § 5; 1986 c 305 § 901.]

Notes of Decisions (28)

West's RCWA 5.40.050, WA ST 5.40.050

Current with all Legislation from the 2011 2nd Special Session and all 2012 Legislation

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 2. Legislative Department (Refs & Annos)

West's RCWA Const. Art. 2, § 26

§ 26. Suits Against the State

Currentness

The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.

Credits

Adopted 1889.

Notes of Decisions (37)

West's RCWA Const. Art. 2, § 26, WA CONST Art. 2, § 26
Current through amendments approved 11-8-2011

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