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I. SUMMARY OF REPLY

Garrett Harrell never worked another shift after he requested accommodation. In order for an accommodation to be reasonable, it must be effective. The undisputed facts show DSHS failed to meet its burden.

DSHS concedes Mr. Harrell never worked after he made his request. If DSHS offered Mr. Harrell work at least once, the verdict may have a scintilla of evidentiary support. But here, DSHS never offered Mr. Harrell even one dayshift or other work. For reasons unsupported by the facts and contrary to the law, the jury did not understand DSHS discriminated against Mr. Harrell when it failed to provide him a reasonable accommodation. As a matter of law, the only accommodation DSHS offered was not reasonable. As a matter of fact, it was not an accommodation, but rather a demotion from his prescheduled on-call status to call-in status for work if available.

In addition to being denied appropriate relief under Washington's Laws Against Discrimination (WLAD), Mr. Harrell was denied relief under the American's with Disabilities Act (ADA). He requests the court set aside the jury verdict and grant him a new trial on damages.

Respondents are liable as a matter of law.¹

II. REPLY FACTS

A. *Undisputed Facts Regarding No Dayshift Assignment*

1. Jack Gibson And Shift Supervisors Never Assigned Mr. Harrell One Dayshift.

Assuming DSHS' argument that dayshift was the only requested accommodation, DSHS did not bother to give Mr. Harrell even one dayshift assignment. DSHS argues it did not assign Garrett Harrell a dayshift because Mr. Harrell did not call Jack Gibson enough after he requested an accommodation on October 31st. Resp'ts' Br. at 7. Mr. Harrell's telephone records show calls to Mr. Gibson's number on November 2nd and December 6th. CP Ex. 154 ("Calls from Garrett Harrell to SCC"). These are just the calls documented on his cellular records. He also made calls from home. RP 1169. DSHS characterizes this evidence as "virtually no effort" by Mr. Harrell to reach Mr. Gibson. Resp'ts' Br. at 7. Respondents' Briefing fails to identify any documented calls by DSHS to Mr. Harrell where Mr. Harrell was actually offered a dayshift that he refused to accept.

Mr. Gibson offered no phone records or any log entries to document

¹ Mr. Harrell properly appealed the jury's verdict by referencing the Verdict and Judgment on the Jury Verdict in his Notice of Appeal. CP 910. Mr. Harrell assigns error to the court's denial of his CR 59 motion to set aside the jury's verdict and grant him a new trial.

that he tried to call Mr. Harrell. Just the opposite, his rosters show no calls to Mr. Harrell throughout November and most of December. CP Ex. 160 and 169. Mr. Gibson spoke to Mr. Harrell for six minutes on October 31st, that is it. RP 395, CP Ex 12 (Oct. 31st Memo). After that, he never spoke to him again. Id. He lost Mr. Harrell's medical documentation. RP 457. He never asked to meet with him. He never sent him a letter. He did not initiate an investigation or inquire as to his whereabouts. He did nothing to get Garrett Harrell back to work. CP 460-461. Mr. Gibson showed little respect to on-call staff such as Mr. Harrell.²

Jack Gibson was the supervisor who took Mr. Harrell off the schedule and told him to call in sick. RP 385. Mr. Gibson's instruction violated agency sick policy. RP 862. Mr. Harrell did not agree to calling in sick, he wanted to work. RP 1011, 1036. So, he called in repeatedly for work. CP 1121-1122. His telephone records show he called the facility twenty-eight additional times in November and was never put to work. CP Ex. 154 ("Calls from Garrett Harrell to SCC"). His telephone records show he called in twenty-two more times in December. Id. Again he never received work.

² He said "they are too stupid to know any better." - his reference to shorting on-call staff compensation. RP 227-228. Jack Gibson shorted Mr. Harrell's pay. RP 423, 1015. After Mr. Harrell sued him, Mr. Gibson harassed Mr. Harrell in the parking lot in Steilacoom. RP 1028-1029.

DSHS argues Jack Gibson was the scheduler who Mr. Harrell should have been calling for work. Resp'ts' Br. at 7. However, Jack Gibson was pre-scheduling all on-call work "at least two weeks in advance," except for Garrett Harrell. RP 560. Jack Gibson never had any available shifts for Garrett Harrell because he prescheduled the shifts with other on-call staff. RP 591-592. The prescheduled on-call staff were not disabled, but were the same classification of on-call staff as Mr. Harrell. They too were required to work any shift any time regardless of seniority. RP 467, 591, 1173. Jack Gibson rotated everyone every two months to dayshift, but he would not put Mr. Harrell into the rotation. RP 347. Throughout 2007, Jack Gibson had as many as six on-call staff working on pre-assigned dayshifts at any given time. RP 341. In November, he filled 136 shifts with on-call staff other than Garrett Harrell. RP 341. In December, he filled 104 dayshifts with on-call staff other than Garrett Harrell. RP 342.

DSHS disregards all of Mr. Harrell's documented calls made to the facility after 5:00 a.m. or so in the morning. Jack Gibson was not at work until 8:00 a.m. in the morning. RP 402. Jack Gibson came to work after the time DSHS' contends was the "time that would have even arguably permitted him to work a dayshift." Resp'ts' Br. at 31 n.14. Calling Jack Gibson at 5:00 a.m. was impossible. It was also contrary to his training instructions. Garrett Harrell was instructed to call central

control for a shift supervisor. RP 374, 1162.

The shift supervisors who were at work at 5:00 a.m. were never told to prioritize Mr. Harrell for dayshift availability until December 4th. CP Ex. 16. That was over a month after he requested accommodation. Even after being put on notice, the shift supervisors did not give Mr. Harrell the available dayshifts. Mario Martinez would hold over staff to cover a shift rather than contact Mr. Harrell. CP Ex 66 (E-mail Dec. 13, 2007 from Gibson to Martinez). His e-mail confirms he was receiving calls from Mr. Harrell, but did not give him a shift:

“During my shift I have received calls but the dayshift roster was all ready full prior to me coming on shift ... I take volunteers who are already her[sic] because of the short notice.” Id. CP Ex. 162.

DSHS relies upon testimony from Mario Martinez at RP 1255 wherein he says he does not recall having any contact with Mr. Harrell; however the above e-mail and one other contradict his poor recollection: “APSM Martinez also had contact with him this morning and he too reinforced what I had told him.” CP Ex. 12.

Another supervisor, Randy Pecheos spoke to Garrett Harrell early in the morning on December 19th, but he did not give him any work either. CP Ex. 17. He encouraged Mr. Harrell to call again early in the morning, which Mr. Harrell did for the next three days. CP Ex. 154. He still did

not get one assignment even though he called at precisely the right time.

DSHS represents Mr. Harrell could not name a single individual who refused him any work, while citing to the record where Mr. Harrell testified he spoke to Randy Pecheos and did not get any work. Resp'ts' Br. at 11, RP 1128. DSHS cites to various parts of the verbatim report that show the opposite of what it asserts. Mr. Harrell was trying to get work from a scheduler and anyone else who would fix the problem. He did not testify that he was not calling in. RP 1122-1123, 1129-1130, 1252-1253. Martinez, Pecheos, and Gibson never assigned any work to Garrett Harrell.

2. Lester Dickson Never Assigned Garrett Harrell Any Work

Other than the six-minute call with Jack Gibson, the only interaction with Garrett Harrell about an accommodation came from Lester Dickson. Lester Dickson spoke to him two times. RP 718, 725 - 728, CP Ex. 158 (Call List) CP Ex. 124, 154. Once he told him he could not speak to him because he was busy. RP 722-723. The second time he had at best a five-minute telephone call with him.³ In that short call, he did not give him any dayshift assignments, nor did he arrange for any dayshift assignments or other work. RP 717. He knew the accommodation was not working for

³ Mr. Harrell's phone records show an incoming call at 11:51 a.m. for five minutes on Dec. 5th at 11:51 a.m. CP Ex. 124.

Mr. Harrell. RP 718-19, 730.

The total interactive process offered Garrett Harrell consisted of eleven minutes on the telephone. Twelve, if you count the one minute Lester Dickson told Mr. Harrell he could not speak to him. No one ever testified to offering a shift to Garrett Harrell. No one got him back to work.⁴

3. Trial Testimony Affirmed Summary Judgment Testimony Exaggerated.

Lester Dickson and Mario Martinez filed declarations in support of summary judgment that overstated their contact with Garrett Harrell:

(i) Lester Dickson's declaration filed on summary judgment:

"I spoke to Mr. Harrell by phone several times in November and December of 2007 regarding his request for accommodation." CP 116.

(ii) Lester Dickson's trial testimony:

Q: Now, in the representations you've made to this Court under oath, you've represented that you spoke with Mr. Harrell by phone several times in November and December of 2007 regarding his request for accommodation. Is that correct?

A: Correct.

Q: And isn't it true that that is an incorrect statement, you did not speak to Mr. Harrell several times in November and December of 2007?

A: That's correct. I attempted to make contact with Mr.

⁴ By December, Mr. Harrell filed his claim with the EEOC/Human Rights Commission and was working with counsel, which explains why his calls tapered off by the first part of 2008. RP 1135.

Harrell during those times.⁵ RP 740

(iii) Mario Martinez' declaration filed on summary judgment:

"During October and November of 2007, I remember reviewing the RRC on-call list several times to find on-call staff for dayshift openings. Garrett Harrell was listed on the on-call roster as available for "Dayshift only work. I called the personal phone number listed for Mr. Harrell and left a voice message on an answering machine. Mr. Harrell did not return my phone calls by the end of graveyard shift and so I had to call other on-call staff to get the opening covered.....I called Garrett Harrell at least fifteen more separate days to offer him dayshift work. Each time my call was answered only by an answering machine and each time I left a message offering Mr. Harrell dayshift work. Each time Mr. Harrell failed to return my call..." CP 514.

(iv) Mario Martinez' trial testimony:

Q: So, fair to say that prior to December 4th, 2007, you had no idea who Mr. Harrell even was?

A: Yes. Yes. RP 1216-1217, Ex 16.

Q: You don't have any specific recollection of ever having called Mr. Harrell in the month of November 2007, do you?

A: No.

⁵ Mr. Dickson's notes indicate Mr. Dickson "attempted" to call Mr. Harrell three times on one day, November 30th and two times on November 21st the day before Thanksgiving. CP 56. He made only one other attempt on December 4th. CP 56. Mr. Harrell's records show that Mr. Harrell called Mr. Dickson back. There are five calls logged to the facility on November 30th. CP 154. In December, Mr. Harrell's records show Mr. Harrell called the facility for one minute on December 4th, and two minutes on December 5th. CP 154. Mr. Harrell's records show one incoming call on December 5th for five minutes. CP 124. Mr. Dickson does not record any other attempts or calls. His total "attempts" are five attempts in two days in November, and one attempt in December. The total time he ever spoke to Mr. Harrell was for a minute Nov. 30th and five minutes on Dec. 5th.

- Q: You don't have any documentation to show that you did call Mr. Harrell in November of 2007, do you?
- A: I do not. RP 1229.
- Q: You have never gone back and tried to document when you called Mr. Harrell or when he called you?
- A: No, because I didn't want to seem like it was -- no, absolutely, I haven't looked at anything. RP 1233
- Q: Do you see any other calls other than a one minute call at 10:31 p.m. on December 27th that you could possible have made?
- A: No. No. No, I can't. I don't. RP 1245.
- Q: Is your declaration incorrect? You think you didn't call him in October and November?
- A: Yeah, I wouldn't be able to recall on the October, November. RP 1248.
- A: So yeah, I do remember calling him like I'm saying 15, 15 times. I would have to actually look at records. I definitely know it was more than five....
- Q: Under penalty of perjury you said?
- A: At least 15.
- Q: At least 15 more separate days to offer him dayshift work?
- A: Once again, I would have to absolutely look at records like the OSAR records and actual the phone records also to show that I actually attempted to call him.
- Q: You didn't bother to do that when you completed this declaration, did you?
- A: To look at the records, no, I didn't. RP 1248-1249.⁶

The undisputed facts show no one ever offered Mr. Harrell any

⁶ Mr. Harrell worked throughout October on the schedule, thus Mr. Martinez never called him in October. CP Ex. 167. In November, the roster has no calls logged to Mr. Harrell. CP Ex. 169. Martinez did not even know to call until Dec, and did not agree to call him until Dec. 12th. CP Exs. 12, 162. There is only one possible, yet unlikely, call logged on the Dec. roster that could have been from Martinez to Harrell for a dayshift assignment late in Dec. right at the very start of Martinez' shift. RP 1245, CP Ex. 160. No one testified to actually recording the "message" notations on the roster recorded after Dec. 16th. Mr. Harrell's phone records show Mr. Harrell calling in on most the dates where there is a "message" notation without being assigned any work. CP. Ex. 124.

work. DSHS tried to create the impression that it made an effort for the court on summary judgment. Similarly here, DSHS cites to general assertions of undocumented attempts to reach Mr. Harrell when the undisputed facts show DSHS never offered him any work.

B. Undisputed Facts Regarding Ineffectiveness of Accommodation

The undisputed facts show Mr. Harrell sought an effective accommodation, to include lighted conditions.

1. Lighted Conditions on Swing or Night Shifts Not Offered.

Once Garrett Harrell had the opportunity to work outside on the perimeter at night alone, he recognized the facility was not well lighted. RP 989. From October 31st, the date Mr. Harrell requested an accommodation from Jack Gibson, DSHS knew what he needed was work in lighted conditions. Jack Gibson testified that Mr. Harrell made it clear that he needed lighted conditions:

Q: You didn't ask him what his needs were, right?

A: He told me what he[sic] needs were, that he needed to be in a lighted situation. RP 370.

Jack Gibson further testified that Mr. Harrell asked to work dayshift or in the kitchen where it was well lighted. RP 370-371. Jack Gibson's testimony is consistent with his documentation wherein Gibson reported to his supervisor the following:

“RRC Harrell advised me that it would be unsafe for

him to work in an environment without light due to his night blindness and wanted be[sic] assigned only Dayshift or to work in the kitchen.” CP Ex. 12 (Oct. 31st, 2007 Memo from Gibson to O’Connor).

Gibson documented his response to Mr. Harrell as follows:

“I advised him I could not assign him to the kitchen but he could apply to the kitchen if that is where he wanted to work and that he could apply for a reasonable accommodation but I did not know whether or not an On-call would be entitled to one.” CP Ex. 29 (March 18th, 2008 Memo from Gibson to O’Connor).

Gibson made no effort to assign Garrett Harrell a lighted post.

Lester Dickson conceded he knew that Mr. Harrell sought work in lighted conditions without question by the time he reviewed the claim form filed by Mr. Harrell. RP 848. Yet he did nothing to assign Mr. Harrell to a lighted post inside during dark hours. He explored no other options. RP 837, RP 752-754. Lester Dickson failed to explore any number of win-win solutions for Mr. Harrell. Id. and RP 821-836. Mr. Dickson considered Mr. Harrell accommodated even though Mr. Harrell had not returned to work. RP 844. He testified Mr. Harrell cooperated in the process. RP 838. He insists Mr. Harrell was provided a reasonable accommodation. RP 838.

The Superintendent testified Mr. Harrell was never given a reasonable accommodation. RP 654.

2. No Notice or Offer of Other Available Positions for Which He Was Qualified

In Mr. Harrell's five minute call with Lester Dickson in December he clearly expressed an interest in other available positions. RP 718. The offer to call in for work was not working for him, and he asked to work in the kitchen and for help in getting another position. RP 720. Despite Mr. Harrell's objections and his lack of work, DSHS treated the matter as closed. RP 754. Mr. Dickson made it very clear he would not assist Mr. Harrell in finding work:

Q: And you did not notify him other positions that he was qualified to fill, correct?

A: Mr. Harrell knows of his qualification and it was not my responsibility to determine if Mr. Harrell met other job classes. But I did inform him that he can certainly go out on the Internet and look at various job classes and you can apply for those for which you're qualified for. RP 754-755.

DSHS knew Mr. Harrell never worked as an RRC after requesting an accommodation. RP 756. DSHS knew when it terminated Mr. Harrell that he was requesting a different accommodation. RP 756. DSHS did nothing to find him work.

C. No Undue Hardship Under The Collective Bargaining Agreement (CBA)

DSHS cites to select portions of its CBA to argue undue hardship. Neither provision in the CBA preclude prescheduled shift assignments to on-call staff. DSHS ignores other provisions in the CBA supportive of

Mr. Harrell.

DSHS first references a subsection on types of appointment that describes on-call employment. Resp'ts' Br. at 6, CP 147. The CBA does not restrict advance scheduling of on-call staff. Scheduling is not discussed. On-call staff were prescheduled routinely. RP 1123, 1288, 1314. In fact, the union approved the pre-scheduling of on-call staff. RP 1316, 1317.

DSHS also referenced a CBA provision on seniority consideration for assignment to a permanent position. Resp'ts' Br. at 33, CP 143. Mr. Harrell did not bid on a permanent position opening. He did not ask for assignment to a permanent post. Mr. Harrell requested priority assignment to dayshift among on-call dayshifts available. Hundreds of dayshifts were prescheduled to on-call staff. On-call staff assignments were made without consideration of seniority status. RP 347. All on-call staff were expected to work any shift any time. Resp'ts' Br. at 8. Mr. Harrell was the only on-call staff person denied pre-scheduled dayshift assignments. RP 821-822.

The CBA prohibits discrimination and allows for consideration of "bona fide occupational qualifications" based upon a disability. CP 139. DSHS never recognized priority pre-scheduling of Mr. Harrell to available dayshifts a permissible practice under this section of the CBA. DSHS

never sought out any union support of an accommodation, or a legal determination regarding the CBA application to the situation with Garrett Harrell. RP 1335-1339. DSHS never informed Mr. Harrell of its position that the CBA presented an undue hardship. RP 823-824, 859-886, 1339. Mr. Dickson refused to communicate with Mr. Harrell's attorney. RP 752, 770. He did not respond to her correspondence requesting an explanation from the superintendent. RP 822-824, 1340. Garrett Harrell was never told why he was not offered other work.

The CBA mandates annual employee evaluations. CP 153. DSHS failed to follow the CBA mandates with Mr. Harrell. RP 1333. No one engaged Mr. Harrell in any interactive process to assess why he was not getting any shift assignments. RP 825-827, 832-833. In fact, DSHS refused to reconsider its position even after Mr. Harrell prompted review by the Human Rights Commission. RP 739. DSHS further refused to reconsider after Mr. Harrell filed his claim form and requested further assistance.

D. No Offer To Return to Work

His applications for employment with DSHS have been denied. CP Ex. 61 and RP 1019. He has never been advised of any openings, and DSHS continues to hire into his position. RP 1307-1308. His job was exempt from the state hiring freeze. CP Ex. 155. He should be working.

III. LEGAL ARGUMENT

The courts characterize disability discrimination as an “evil” that “threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free and democratic state.” *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 731 P.2d 497 (1987). RCW 49.60.010. It is a dignitary tort that has far-reaching social, political, and economic implications. *Id.* at 569. Garrett Harrell suffered disability discrimination when DSHS refused him a reasonable accommodation. DSHS took no “affirmative action” as evidenced by the undisputed facts. The purposes of the laws against discrimination have not been achieved in this case. Garrett Harrell is a dependent adult who has been denied the benefits of self sufficiency and self worth that come from gainful employment.

A. No Genuine Issue of Material Facts On Summary Judgment

DSHS argues disputed facts necessitated a jury determination of whether Mr. Harrell received a reasonable accommodation. Resp’ts’ Br. at 17. Disputed facts must be material to necessitate trial. DSHS argues the following facts are material: 1) what the accommodation was that Garrett Harrell requested; 2) whether the CBA prevented prescheduled dayshift assignment; and 3) whether Garrett Harrell failed to request shift assignments. Resp’ts’ Br. at 17. The answers to these questions are not

material to demonstrating DSHS failed to offer a reasonable accommodation as a matter of law.

1. The Accommodation Mr. Harrell Requested Not Material

Mr. Harrell's requested accommodation is not material because the employer determines the accommodation. *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993), *citing to Barron v. Safeway Stores, Inc.*, 704 F. Supp. 1555, 1567 (E.D. Wash. 1988)("The Act does not require an employer to offer the employee the precise accommodation he or she requests"). Here, DSHS selected one accommodation. DSHS took him off the schedule and relegated him to call-in status for dayshift. The parties agree upon what the employer offered, but disagree as to the legal effect.

Garrett Harrell contends the accommodation was a demotion, not an accommodation as a matter of law. An accommodation enables an employee with a disability to enjoy equal benefits and privileges of employment. WAC 162-22-065. When DSHS took the work away, it denied Mr. Harrell the benefits of employment.

2. When DSHS Offers Dayshift Assignment as the Accommodation, DSHS Must Show It Assigned Him Dayshift Work

DSHS confuses two separate legal concepts to make its factual issue argument. DSHS suggests the reasonableness of the accommodation is

measured by the undue hardship on the employer. Resp'ts' Br. at 17. Mr. Harrell contends the undue hardship analysis does not apply to an accommodation actually offered by the employer, but rather is a measure applied to alternative proposals suggested by the employee. An employer does not offer an accommodation that is an undue hardship. The appropriate initial analysis is whether the offered accommodation was reasonable as a matter of law. Mr. Harrell contends it was not. The undue hardship question is secondary to reasonableness and applies only to his proposed alternatives, which DSHS never considered. The employer offered one accommodation that was not reasonable and therefore was not an accommodation as a matter of law.

The best evidence that DSHS' accommodation was not reasonable as a matter of law is the fact that it was not effective. A reasonable accommodation is one that is adequate, meaning the employee enjoys the benefits of employment the same as non-disabled employees. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000), *Frisino v. Seattle School District No. 1*, 160 Wn. App. 765, 249 P.3d 1044 (2011). When Lester Dickson spoke to Mr. Harrell on December 5th, more than a month after his request, Mr. Dickson understood Mr. Harrell was not working and the offered accommodation was not getting him back to work. RP 718-719. He did not offer him any work, and he refused to help

him find an alternative position. On summary judgment and at trial, DSHS never offered any evidence that Mr. Harrell was assigned a dayshift. He was not. Thus, he was never offered an accommodation that was reasonable.

DSHS' offered accommodation did not require DSHS to take any affirmative steps to get him work. DSHS relegated the entire burden to Garrett Harrell. He had to call in to get work. A reasonable accommodation does not shift the burden of achieving the accommodation exclusively to the employee. The employer "must take steps to help the disabled employee continue working at the existing position or attempt to find a position compatible with the limitations." *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 442, 45 P.3d 589 (2002). DSHS had to actually offer Garrett Harrell work in order to argue it provided a reasonable accommodation.

3. Positive Steps Require Actual Assignment of Work

DSHS contends there was a factual dispute about the frequency of DSHS' attempts to contact Mr. Harrell for work. Indeed, Mr. Harrell proved at trial that DSHS did not make the efforts to call him for work that DSHS claimed it had on summary judgment. Regardless, the frequency of calls placed to him by DSHS or the number of times he actually called in for work are not material to deciding DSHS failed to accommodate him as

a matter of law. The undisputed facts shown at summary judgment and at trial are that Jack Gibson, Lester Dickson, and the shift supervisors never gave him any work.

The offered accommodation to call in for dayshift assignments failed. DSHS' knew it was not working within a month of Mr. Harrell's request, yet it never reached out to him to meet face-to-face and it never offered another accommodation. DSHS assumed liability when it chose to blame him for the failed accommodation without meeting with him and without considering other alternatives. The fact that DSHS knew the accommodation failed and chose not to take any corrective action is the material fact that warrants summary judgment as a matter of law.

B. Verdict Contrary To The Law

For the same reasons argued above with respect to summary judgment, Mr. Harrell should have been granted a new trial because the jury reached a verdict that contravenes the law. The question of whether DSHS offered a reasonable accommodation as a matter of law was clearly before the trial court on Mr. Harrell's motion for a new trial. CP 882, 893, and CR 59 Oral Argument.⁷

DSHS concedes the applicable standard of review for an issue of law is de novo. Resp'ts' Br. at 19. *See also, Schneider v. City of Seattle*, 24

⁷ See Supplemental Statement of Arrangements

Wn. App. 251, 600 P.2d 666 (1979).

Whether an accommodation is reasonable may be decided as a matter of law. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000). Here the offered accommodation was not a reasonable accommodation by definition. WAC 162-22-065. A reasonable accommodation **enables** an employee to do the work and enjoy the benefits, privileges, or terms and conditions of employment. Here DSHS took away work. Mr. Harrell never asked to stay home. He wanted to work. DSHS pre-scheduled all of his co-workers who did not have disabilities and left him to call in for any work left over. When he called in for that work none was available. DSHS concedes he called in four days in a row without success. Resp'ts' Br. at 11. DSHS could never show that it offered him work even when he did exactly as he was instructed. DSHS could have asked him to come in for a face-to-face meeting. DSHS could have sent him a letter asking him to come in to discuss the fact that he was not at work. He received his letter of termination DSHS sent him, but DSHS never sent him any letter to precipitate an interactive process prior to terminating him. DSHS never sent him the letter by policy it was required to send notifying him that his request was received and was being investigated. RP 648-649, 752.

Mr. Harrell was never offered a reasonable accommodation as a

matter of law.

C. Verdict Not Supported By Substantial Fact

The jury rendered an erroneous verdict unsupported by substantial evidence. The trial court failed to remedy the jury's error when it denied Mr. Harrell's motion for a new trial. Under *Sommer v. Department of Social and Health Services*, 104 Wn. App. 160, 15 P.3d 664 (2001), the appellate court may decide the disputed facts do not support a verdict: "it is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence." Upon review of the evidence, the court may conclude DSHS failed to offer a reasonable accommodation as a matter of law and remand the case for a new trial on the issue of damages only. *Id.* at 175.

1. The Accommodation Request: No Substantial Fact To Support DSHS' Argument That Dayshift The Only Accommodation Requested

DSHS contends it offered substantial evidence that Garrett Harrell only requested dayshift assignment. However, the evidence it offers requires a narrow interpretation inconsistent with WLAD's principals of statutory construction. WLAD shall be construed liberally for the accomplishment of its purposes. RCW 49.60.020. DSHS argues its duty to accommodate did not extend beyond what Mr. Harrell specifically requested as an accommodation. Its position is not legally correct.

There is substantial evidence DSHS knew Mr. Harrell needed lighted conditions. These excerpts from the record have been set forth in the factual summary above. The most basic example is Jack Gibson's concession that Garrett Harrell told him he needed lighted conditions. Garrett Harrell asked both Jack Gibson and Lester Dickson for assignment to the kitchen and he did not insist upon it being a dayshift assignment. Despite his repeated requests, no one ever explored any opportunity to provide Garrett Harrell light, other than to assign him to dayshift.

Its offered accommodation of dayshift only did not comport with the medical restrictions provided. Garrett Harrell's doctor described his condition as requiring "daytime hours" to be distinguished from "nighttime hours." CP Ex. 90. The doctor explained the disability as "night blindness." It is incredibly disingenuous for DSHS to contend dayshift accommodated his medical condition when dayshift starts at 6:30 in the morning. RP 300. For much of the year he would be working in the dark on dayshift. Several lighted post inside were available. RP 342-343, 386. Thus, its offered accommodation was not an accommodation. What he needed was light. When it failed to offer him work in lighted conditions, DSHS failed to reasonably accommodate him.

2. The Reasonableness of His Request: No Substantial Fact to Support DSHS' Undue Hardship Argument

The CBA was never a barrier to prescheduling Mr. Harrell for two reasons. First, the CBA by its terms precludes disability discrimination. Discrimination in favor of a person because of the person's disability is not an unfair practice. WAC 162-22-035. Jack Gibson made a clearly erroneous decision when he refused Garrett Harrell pre-scheduled shift rotation because he thought it would not be "fair to the other staff." RP 369.

Second, on-call staff were routinely prescheduled on dayshift. RP 1288, 1314. Gibson rotated all on-call staff regardless of seniority to dayshift every third month. RP 347. DSHS simply refused to let Garrett Harrell into the rotation. Top officials never looked into it. RP 1316-1317.

DSHS could have and should have accommodated him by rotating him into the dayshift scheduled work for on-call staff.

3. Failure to Assign Work: No Substantial Fact to Support DSHS's Claim That It Offered Mr. Harrell Work

There is not even a scintilla of evidence that DSHS actually offered Garrett Harrell any work. Nowhere in DSHS' brief does it cite to testimony or documentation of an actual offer of dayshift assignment to Garrett Harrell. Resp'ts' Br. at 24. At best, late in December a few

messages may have been left for him, but no one ever testified to actually speaking to Garrett Harrell and offering him work. Garrett Harrell's phone records document repeated calls to the facility. Yet, no one ever offered him any work.

DSHS cites to RP 1115, wherein Mr. Harrell testifies that he did make calls to the SCC, to include calls at varying times. DSHS cites to RP 1119-20, wherein Mr. Harrell testifies on cross to making calls. DSHS cites to RP 1126-29, wherein Mr. Harrell confirms he spoke to Randy Pecheos, called in as instructed, and still did not get work.

There is no evidence to support DSHS' argument that it offered dayshift work to Mr. Harrell. He was never offered a reasonable accommodation.

D. ADA Defines Reasonable Accommodation

Mr. Harrell was denied any relief under the ADA. DSHS never addressed whether the trial court's dismissal of that cause was in error. DSHS has waived any argument on this point. As indicated in Mr. Harrell's briefing, the state may not assert sovereign immunity in state court. The state has authorized tort liability and enforcement of civil rights protections against it. RCWs 4.92.090 and 49.60.030 (2).

Unlike state law, the federal law provides a definition for reasonable accommodation. 29 C.F.R. § 1630.2. The obligations of the employer are

well articulated to include a duty to identify the precise limitations resulting from the disability and potential accommodations that could overcome those limitations.

Mr. Harrell never had the opportunity to prove his case under the stringent requirements of the ADA. He was denied relief that should have been afforded to him.

IV. CONCLUSION

DSHS denied Mr. Harrell a reasonable accommodation as a matter of law. The offered accommodation was not reasonable. Neither the law nor the facts support the verdict. Undue hardship was never established or supported by substantial fact. Mr. Harrell's ADA claim was proper and should not have been dismissed. Mr. Harrell respectfully requests the court find DSHS failed to accommodate him under state and federal law. He further requests a new trial on damages.

Respectful submitted this 14th day of November, 2011.

III BRANCHES LAW, PLLC

By



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

COURT REPORTER
DATE

CERTIFICATE OF SERVICE

11 NOV 11 PM 9:40

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

STATE OF WASHINGTON
BY _____
DEPUTY

Appeal Brief on all parties or their counsel of recorded by electronic mail

on the date below as follows:

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

Date this 14th day of November 2011 at Fircrest, Washington.



Jonathan Trethewey
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