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I. INTRODUCTION

Garrett Harrell was hired in October 2007 to work as a Residential Rehabilitation Counselor (RRC) at the Department of Social and Health Services Special Commitment Center (Center) on McNeil Island. After working a month as an accommodation for a vision disability, he requested to be scheduled for only day shift positions. Because permanent dayshift positions were limited by the governing collective bargaining agreement to permanent employees, the Center accommodated Mr. Harrell by having him call in for day shift openings.

The crux of this case is whether the call in procedure set up by the defendants was a reasonable accommodation. A jury found that it was. That jury's verdict is supported by abundant evidence and is consistent with the instructions given by the court.¹

The only claim that is not precluded by this finding is the dismissal of Mr. Harrell's § 1983 First Amendment claim, which is based on his complaint that the perimeter lighting at the Center was insufficient. Mr. Harrell claims that his request for accommodation and to be removed from swing or graveyard shifts was, in actuality, a veiled critique of the perimeter lighting at the Special Commitment Center. The trial court

¹ In addition to the reasonable accommodation claim, the plaintiff presented evidence of retaliation contrary to Washington State Law Against Discrimination. The jury also rejected this claim. The plaintiff does not appeal the outcome of the WLAD retaliation claim.

properly found that this was speech Mr. Harrell engaged in as a public employee, not as a public citizen, and that his speech was motivated by personal, not public concerns. Accordingly, the trial court's dismissal of this claim on the State's CR 50 motion was proper.

The plaintiff filed suit against Washington State, Department of Social and Health Services (DSHS), the Superintendent of the Center, Dr. Henry Richards, and Mr. Harrell's direct supervisor, Jack Gibson, alleging Washington Law Against Discrimination (WLAD) violations by all of the defendants for disability discrimination through failing to accommodate a disability and retaliation for engaging in protected activity in violation of RCW 49.60.210. Plaintiff also alleged causes of action under 42 U.S.C. § 1983 by all of the defendants for violation of his First Amendment right to free speech, failures to train and supervise DSHS employees, and violations of the Americans with Disabilities Act (ADA).

In October 2010, the trial court denied the plaintiff's motion for partial summary judgment as to liability for the WLAD reasonable accommodation claim. Trial began on March 1, 2011. On March 17, 2011, the trial court entered judgment as a matter of law in favor of the defendants on the plaintiff's Civil Rights claims based upon § 1983. On March 21, 2011, a twelve-person jury concluded that none of the defendants were liable for disability discrimination or retaliation.

The jury's verdict accurately reflects the evidence presented at trial. As it is supported by substantial evidence, the verdict must not be disturbed by this Court.

II. RESTATEMENT OF ISSUES

The plaintiff does not appeal the decision of the jury. Only the legal decisions made by the trial court are at issue here. The issues associated with those arguments are:

1. Whether the trial court properly denied plaintiff's motion for summary judgment on his failure to accommodate claim when genuine issues and material fact existed as to whether the State's accommodation of Mr. Harrell was reasonable.

2. Whether the jury's verdict in favor of the defendant was supported by substantial evidence that the State's accommodation of plaintiff was reasonable and consistent with the governing collective bargaining agreement.

3. Whether the trial court abused its discretion in denying plaintiff's CR 59 motion for a new trial on the issue of reasonable accommodation.

4. Whether the trial court properly concluded that Mr. Harrell could not litigate a federal ADA claim against individual defendants as a

§ 1983 Civil Right claim based on *Vincent v. Thomas*, 288 F.3d 1145 (9th Cir. 2002).

5. Whether the trial court properly concluded that the individual defendants were entitled to qualified immunity on Mr. Harrell's § 1983 due process claim because there is no clearly established due process right to have employers properly trained and supervised on the issue of reasonable accommodation.

6. Whether all claims raised by Mr. Harrell related to the State's accommodation of his vision disability are precluded based on his failure to challenge the jury's finding that the State's accommodation of his disability was reasonable.

7. Whether the trial court properly concluded that Mr. Harrell's complaints about work place lighting conditions was speech he made as a public employee, and was motivated by personal, not public concerns and therefore did not constitute protected speech under the First Amendment.

III. STATEMENT OF FACTS

A. The Special Commitment Center

The Center is a DSHS-run institution located on McNeil Island, in Pierce County, Washington. It provides specialized mental health treatment for civilly committed sex offenders who have completed their

prison sentences, but have been judged by the courts to still pose a risk to the community as sexually violent predators. CP 45, 114; RP 1277. Residents of the Center are confined against their will and are considered to be unsafe to be released to the community. CP 45, 114; RP 1277.

To ensure security in this setting, DSHS employs Residential Rehabilitation Counselors (RRCs). CP 45, Ex. 101; RP 1278. RRCs are the primary source of manned security within the institution. CP 45-46. RRCs are scheduled in large numbers, every day, around the clock. CP 46; RP 299-300, 304, 1278-80. To ensure guaranteed RRC staffing, it is necessary for DSHS to employ a large number of on-call RRCs, who fill in for permanent RRCs who are unable to work their scheduled shifts. CP 46; RP 299-300, 304, 1278-80; RP 1279-80. Since permanent RRCs fill all the positions, on-calls work only as needed, and have no expectation of specific scheduling. RP 659-60, 1055.

On-call RRCs fill a specific and distinct role in acting as a constantly available and flexible source of RRCs in an environment where constant staffing is required for public safety. RP 464-68, 473-83. Since the Center is located on an island and accessible only by a thirty minute ferry ride, a person calling in sick or otherwise unavailable is a matter of significant complication. RP 255-56, 320-21, 1235. For this reason,

having a dependable source of available RRCs who are able to fill in where and when needed, even on short notice, is essential.

All RRC positions are unionized through the Washington Federation of State Employees (WFSE). RP 663-64. The duties of on-call RRCs are explained to applicants and new hires in both their appointment letters and in the terms of a Collective Bargaining Agreement (CBA). RP 658-59, 1053-54; CP Ex. 105, 143. Appointment letters quote the terms of the CBA, which states that:

The Employer may fill a position with an on-call appointment where the work is intermittent in nature, in sporadic and it does not fit a particular pattern. The Employer may end on-call employment at any time by giving notice to the employee.

CP 147, Ex. 143; RP 665.

Based upon the terms of the CBA, long-term employment of on-call RRCs in place of permanent RRCs was a prohibited condition negotiated by the union with the State. RP 1287-88.

B. Garrett Harrell

The plaintiff, Garrett Harrell, was hired effective October 1, 2007, by the defendant DSHS as an on-call RRC at the Center. Mr. Harrell has a vision disability, but indicated prior to being hired that he could work all shifts. RP 357. After one month of employment, on October 31, 2007, he informed Jack Gibson, on-call RRC supervisor, that he was not able to see

on swing and night shifts and that he needed a reasonable accommodation to assign him to dayshifts. RP 356.

In response to this disclosure, Mr. Harrell received an accommodation which excused him from working swing and graveyard shifts in return for being allowed to call in for work during day shifts. Mr. Harrell objects to having been told to call in and claims he should have been scheduled into a position. RP 1031, 1173. Because he was an on-call employee, the defendants could not provide a scheduled dayshift to Mr. Harrell. RP 1288-90.

Mr. Harrell never worked following the request. He concedes that he made virtually no effort after October 31, 2007, to contact Jack Gibson – the on-call RRC scheduler and Mr. Harrell’s direct supervisor – or anyone else who would have typically scheduled him, and Mr. Harrell can document only four calls, made in a clear attempt to call in for dayshift work. After those calls, there are no further undisputed attempts to call for work.

Despite the lack of calls, Mr. Harrell remained on the on-call roster for nearly a year and a half. On February 13, 2009, Mr. Harrell was laid off, as part of large scale staffing cuts by DSHS. Mr. Harrell filed suit against the defendants, claiming that he not been accommodated.

C. Facts Presented to Jury

The question of whether Mr. Harrell was reasonably accommodated was presented to a Pierce County jury in March 2011. Over two weeks of testimony, the defendants were able to present substantial evidence to the jury that Mr. Harrell was reasonably accommodated. This substantial evidence supports upholding the jury's verdict.

In Mr. Harrell's application for employment, he had indicated that he had a disability, but that he could work any and all shifts. RP 270, 491, 534, 961, 1041-43; CP Ex. 62, 103. Mr. Harrell interviewed twice at the Center, and while he stated that he had vision issues, he again specifically indicated that he could work all shifts. RP 963, 1010, 1043-46. During Mr. Harrell's training period he was scheduled and worked multiple swing and night shifts. CP Ex. 125. Mr. Harrell did not raise any objection before or after these shifts. RP 1065.

Mr. Harrell was under no misconception about the role of on-call RRCs before accepting application as an on-call RRC and he acknowledges that on-calls are not entitled to a set shift. RP 1055-56. The duties of on-call RRCs were set out specifically to Mr. Harrell in his appointment letter and in the terms of the CBA. RP 658-59, 1053-54; CP Ex. 105, 143. Mr. Harrell's appointment letter stated that the on-call

appointment is “intermittent in nature, is sporadic, and does not fit a particular pattern.” CP Ex. 105, 143. The plaintiff was aware that each of those conditions of employment existed at the point he took the position. RP at 1054-56.

After less than one month of employment, on October 31, 2007, Mr. Harrell told his supervisor, Jack Gibson, that he could not work swing or graveyard shifts, because he had a vision disability. RP 365, 367-370, 548. Based upon the request, Mr. Gibson excused Mr. Harrell from working the two weeks of swing shifts that he had already been scheduled to work in early November 2007. RP 365, 369; CP Ex. 12. Mr. Gibson testified that Mr. Harrell did not ask to be put in lit conditions, and that the request was only to be excused from swing and graveyard shifts.² RP 548. Mr. Gibson directed Mr. Harrell to provide medical documentation and to call for openings on the dayshift. RP 372-73, 562, 1185. Mr. Gibson then referred the request and the associated concerns to his supervisor, David O’Connor. RP 365; CP Ex. 12.

² Mr. Harrell is also documented as having requested to work in the kitchen. RP 548. There is no permanent RRC duty in the kitchen. RP 576-78. There are no on-call jobs in the kitchen. RP 602. Mr. Gibson could not assign Mr. Harrell to be a cook. RP 548-49. DSHS was under no obligation to promote Mr. Harrell to accommodate him or to find a new job for him if he could be accommodated in his assigned job. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002); *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003).

After being reviewed by O'Connor and other Center officials, it was decided that Mr. Harrell was fully accommodated within his position through the provisions made by Mr. Gibson. RP 933-36, 942-43. Because of the nature of Mr. Harrell's on-call job position and his request to work day shifts, the accommodation allowed him to continue to work on an on-call basis and permitted him to work only dayshifts. RP 936, 945-46, 1282-84. This decision was further justified by the recognition within upper management that providing a prescheduled dayshift position was contrary to the proper usage of on-call employees and in conflict with the WFSE labor union's expectations of who would fill scheduled positions.³ RP 347-50, 650, 1284-85, 1289.

³ Mr. Harrell shies away from explicitly describing his request as being for a "prescheduled dayshift," but based on the evidence, that was the request. The best proof of this is the initial written request for accommodation; the letter provided by Mr. Harrell and dated the day after Mr. Harrell refused his swing shift assignment on October 31, 2007. The letter stated:

RE: Garrett Harrell

DOB: 03-24-1983

To whom it concerns:

Garrett has an eye condition called Retinitis Pigmentosa. This is a progressive retinal degeneration, in both eyes. Night blindness develops usually in childhood, followed by the loss of peripheral visual fields, progressing over many years to tunnel vision, and finally blindness.

Secondary to his night blindness and decreased peripheral visual fields, nighttime hours are not possible, but with the daytime hours, there are no work limitations.

Any questions concerning this, you may contact our office.

Sincerely,

Joseph T. Pham, M.D.

CP Ex. 90 (emphasis added).

Mr. Harrell did not work following the request. RP 1056. Mr. Harrell claims that he called in repeatedly looking for work, but he cannot name a single individual who refused him an on-call shift. RP 1128-29, 1133-34. Mr. Harrell concedes that he was not contacting Mr. Gibson or any other RRC scheduler. RP 374-75, 1115, 1122-23, 1129-30, 1252-53, 1255.

Center schedulers repeatedly called Mr. Harrell during this time period.⁴ RP 1126-29, 1253. When Randy Pecheos spoke to Mr. Harrell in December 2007, he directed Mr. Harrell to call in daily, prior to the start of the dayshift, to give him the best chance to get work. RP 902-03. Mr. Harrell complied with this suggestion for just four days. RP 1126-27.

Mr. Harrell testified that he already knew to call in the early morning. RP 1119, 1126. Nevertheless, the four phone calls on consecutive days in December 2007 would be the only days in Mr. Harrell's entire state employment that he would ever call in the morning hours, prior to the start of a day shift. CP Ex. 124.

Following this letter, Mr. Harrell's lawyer requested a day shift, CP Ex. 23, and, from the outset of litigation, Mr. Harrell himself has argued that the defendants' refusal to schedule Mr. Harrell was *the* inappropriate act of the defendants. CP 2-3 (Plaintiff's Complaint for Damages). The sum of these requests and objections is a clearly stated desire by the plaintiff to be prescheduled on dayshifts.

⁴ Setting aside that this question of fact must be viewed in a light most favorable to the defendant, it strains credulity that schedulers were calling Mr. Harrell for any other purpose other than attempting to induce him to work, as Mr. Harrell claims.

In November and December of 2007, Mr. Harrell was also being contacted by Lester Dickson, at the direction of the Center's Superintendent Dr. Henry Richards. RP 766, 771-78. The purpose of his call was to investigate whether the plaintiff needed additional accommodation. RP 779-80. After several attempts to contact Mr. Harrell, Mr. Dickson finally spoke with Mr. Harrell on December 5, 2007. RP 782. In that conversation, Mr. Harrell requested a scheduled dayshift position, and, if that could not be provided, Mr. Harrell wanted to be placed into a different position, as a cook. RP 783-84. Mr. Dickson requested medical documentation to support such an accommodation. RP 782.

In response, Mr. Harrell sent a letter from his treating physician, Dr. Joseph Pham.⁵ RP 785-86; CP Ex. 90. Mr. Dickson reviewed this letter and Mr. Harrell's request to be scheduled during days. RP 783. Mr. Dickson informed the plaintiff that based upon the letter and the requested accommodation; the October 31, 2007, accommodation already was meeting Mr. Harrell's stated needs. RP 783. Mr. Harrell did not

⁵ Based upon the date of the letter and fax receipts, it appears that Mr. Harrell likely had sent this letter on November 1, 2007, upon Mr. Gibson's October 31, 2007, request for medical documentation. The fact that Dr. Pham's letter was not received for a month does not alter this case, however, because the defendants had already provided the reasonable accommodation that was consistent with Mr. Harrell's request. The letter did not alter the underlying request, and the date of receipt would only be relevant had the defendants been waiting on the letter to provide accommodation.

supplement his previous request following this, and never again made any attempt to contact Mr. Dickson. RP 793-94, 851-52. Without further information, Mr. Dickson was incapable of doing anything further to assist Mr. Harrell. RP 796.

Mr. Harrell never called the Center, for any reason, after February 2008. RP 375, 1115, 1122-23, 1129-30, 1252-53, 1255; CP Ex. 124. The testimony of Mr. Gibson indicates that, despite Mr. Harrell's failure to contact the Center to work, had Mr. Harrell called in at any point up to the date of his layoff to ask for a shift, he would have been provided work, presuming a shift was open. RP 560.

In early 2009, due to revenue shortfalls in the state budget, significant cuts to DSHS were ordered. RP 667, 668, 1295. Ultimately, the layoffs at the Center would encompass approximately 60 individuals, and include individuals from many job categories, including managers. RP 667, 1291-92. Many on-call RRCs were laid off. RP 669-70, 1292. On February 13, 2009, Mr. Harrell became part of these widespread DSHS layoffs. RP 1295; CP Ex. 118. He was laid off consistent with the terms of the CBA. RP 1295. These terms permitted DSHS to end on-call employment "at any time" by simply giving notice to the on-call employee. RP 671-72; CP Ex. 118.

Mr. Harrell filed suit in 2009, in which he claimed that he had requested a “lit position,” rather than a specific day shift. Mr. Harrell acknowledges that prior to the lawsuit he never submitted any specific request in writing that would confirm that he was merely requesting a “lit position.” RP 1048-50. This is confirmed by Jack Gibson, who testified regarding Mr. Harrell’s October 31, 2007, request.

Q (Mr. Kuehn): Did (Mr. Harrell) ask to be put on the swing shift in lit conditions?

A (Mr. Gibson): No.

Q: Never made that particular request to you?

A: He told me he could not work swing shift or graveyard shift.

RP 548.

Mr. Dickson, who contacted Mr. Harrell in late November and early December 2007, received an identical request from Mr. Harrell:

Q: (D)id Mr. Harrell, in the entire time this case was going on, ask to be placed in lit conditions on a separate shift?

A: No, he did not ask to be placed in a lit condition on a separate, on a shift other than day shift.

Q: Is the first time you have heard Mr. Harrell request a shift other than day shift been in the context of this litigation?

A: That’s correct.

RP 789

Mr. Harrell submitted several documents that confirm that he requested only a dayshift. These include Mr. Harrell’s note from his doctor, CP Ex. 90; Mr. Harrell’s letter from his attorney, CP Ex. 23; and emails between Mr. Harrell’s father and the Center. RP 246-48; CP Ex.

15. Additionally, in a sworn submission to the Human Rights Commission made in March 2008, Mr. Harrell stated under oath that his disability was an inability to work at night and his requested accommodation was to work only day shifts. RP 1081-86; CP Ex. 30. Despite this, Mr. Harrell maintains that his request was for a lit position.

IV. PROCEDURAL POSTURE

Mr. Harrell's suit against the State, DSHS, Dr. Richards and Mr. Gibson was initially assigned to Judge Vicki Hogan. Judge Hogan received the plaintiff's cross-motion for partial summary judgment, and heard oral argument on October 1, 2010. Judge Hogan denied the plaintiff's motion. CP 566-68.

Due to court congestion, the matter was reassigned to Judge Edmund Murphy. Trial began on March 1, and lasted until March 17, 2011. On March 16, 2011, the State filed a CR 50 motion for judgment as a matter of law as to all claims. CP 669-84. The plaintiff filed a response to State's motion. CP 685-93. On March 17, 2011, following briefing and argument, the court dismissed the plaintiff's ADA and § 1983 claims. CP 694-95; RP 1364-1401.

The remaining RCW 49.60 WLAD claims were argued to the jury on the afternoon of the same day. The twelve-person jury returned with a verdict on March 21, 2011, finding that Mr. Harrell had not proved that

DSHS, Mr. Gibson and Dr. Richards had discriminated or retaliated against Mr. Harrell. CP 865-66; RP 1459-60.

On March 24, 2011, Mr. Harrell moved the trial court for a new trial, pursuant to CR 59(a)(7) and (9). The motion claimed the jury verdict contravened the law, was unsupported by evidence and failed to provide substantial justice. CP 882. Following oral argument, Judge Murphy denied the motion for new trial. CP 919-20. This denial of CR 59 relief is now appealed before this Court, as is the denial of the CR 56 motion for partial summary judgment and the CR 50 dismissal of the plaintiff's federal claims.

V. LAW AND ARGUMENT

A. Trial Court Properly Denied Plaintiff's CR 56 Motion For Summary Judgment On Claim Of Failure To Accommodate Because, In A Light Most Favorable To The State, Genuine Issues Of Fact Existed

When reviewing the denial of summary judgment, the appellate court conducts the same inquiry as the trial court. *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 non-moving 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. Federal Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000).

The trial court properly denied the plaintiff's motion for summary judgment. CP 566-68. There are genuine questions of material fact as to the contention that Mr. Harrell's accommodation was unreasonable. Only if there were *no* question could summary judgment be appropriate.

The questions of material fact in this case are clear. Both sides presented evidence for purposes of summary judgment that were in conflict on key issues. These issues were:

- Mr. Harrell specific accommodation request. The plaintiff provided a declaration asserting he requested a "lit position." CP 430-34. The defendant offered contrary evidence and declarations, asserting Mr. Harrell's request was only for a dayshift. CP 48-50, 68, 74, 116-118, 341.
- Whether the request was reasonable. Mr. Harrell claimed that because on-calls were often scheduled on dayshifts, that he should have been entitled to being scheduled on a dayshift as an on-call as a form of accommodation. CP 351, 358-59, 377. The defendants provided evidence that scheduling on-call workers for dayshift duties alone was contrary to the CBA. CP 34, 115-18, 120-23, 145-53.
- Mr. Harrell's failure to work after October 2007. The plaintiff claimed that he had made efforts to work, while the Center rebuffed or ignored him. CP 68, 70, 72, 354, 430-34. The defendants claimed

that Mr. Harrell had been contacted to work repeatedly and without success. CP 27, 50, 69-78, 103-06.

These issues clearly collectively represent questions of fact that had to be resolved by a jury. There is no doubt, based upon the record of the summary judgment motion, that the trial court judge's denial of the plaintiff's motion for summary judgment was proper. There is no error in the CR 56 decision of the court. Appeal over this issue must be denied.

B. Trial Court Properly Denied Plaintiff's CR 59 Motion For New Trial On Claim Of Failure To Accommodate

Following a trial in excess of two weeks, the plaintiff moved for a new trial after the jury's verdict. The grounds for this motion were CR 59(a)(7), that there was no evidence or reasonable inference from the evidence justifying the verdict, or that the verdict is contrary to law, and CR 59(a)(9), that substantial justice had not been done. The plaintiff now only alleges error with regard to the denial of a new trial on reasonable accommodation and then, only based on his belief that the verdict was contrary to law under CR 59(a)(7). Mr. Harrell's Appeal Brief (Appellant's Br. at 20.)

1. Overturning Trial Court's Ruling To Deny CR 59 Motion Requires Abuse Of Discretion By Trial Court

The plaintiff incorrectly argues that the Court should review this matter de novo. Abuse of discretion is the proper standard of review for an

order denying a motion for new trial. *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 170, 15 P.3d 664 (2001), *review denied*, 144 Wn.2d 1007 (2001). Despite relying extensively on *Sommer*, the plaintiff fails to acknowledge *Sommer*'s holding, that a factual review is required to determine whether a verdict is supported by substantial evidence. *Id.* at 172.

To achieve a de novo review requires the court rejecting a motion for new trial because of a question of law. *Ramey v. Knorr*, 130 Wn. App. 672, 686, 124 P.3d 314 (2005). The question of law here, the plaintiff argues is “whether relegating a prescheduled on-call employee to the status of non-scheduled call-in employee who is never assigned any more work meets the legal standard for a reasonable accommodation.” Appellant’s Br. at 20.

This entirely misstates the question before the Court on appeal and the ruling of the Court at the CR 59 motion.⁶ The best evidence of the reasons for the ruling of the court can be found in the plaintiff’s March 24, 2011, motion for new trial. CP 882-901. The plaintiff believed the verdict to be contrary to law, but the plaintiff argues only that the verdict was contrary to law because the accommodation was ineffective as a matter of law based upon *Frisino v. Seattle Sch. Dist. No.1*, 160 Wn. App. 765, 249

⁶ The plaintiff does not include the April 1, 2011, transcript of the argument of this issue. This plaintiff can only request review of an argument made in the lower court. There is no evidence that the lower court made a ruling on the expansive question of law that is appealed here. There is ample evidence that it ruled on the questions posed by the plaintiff’s CR 59 brief.

P.3d 1044 (2011). CP 893-94. While the plaintiff continues to argue that *Frisino* demands a different result in this case, the plaintiff's appeal now has vastly expanded the "question of law" that the trial court supposedly decided at the CR 59 motion. Appellant's Br. at 20. Now the question, according to the plaintiff, is based on a notion that Mr. Harrell was entitled to a reasonable accommodation different than the one he was provided as a matter of law.

This is not a discrete legal question under *Ramey*. In fact, it is no different than generally (and incorrectly) saying whether a reasonable accommodation was provided is a question of law. The "question of law" posed here by Mr. Harrell is only a question of law if that question contains only undisputed material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 265 (1986). The question here clearly contains a variety of disputed facts. The plaintiff cannot simply proclaim his reasonable accommodation claim is question of law, while waiving away valid factual questions. The variety of disputed facts in this case cannot be ignored.

The plaintiff's effort to alchemize fact into law finds no support in the larger body of reasonable accommodation case law, either. In addition to *Sommer, Johnson v. Chevron*, 159 Wn. App. 18, 244 P.3d 438 (2010) specifically states that whether an employer has made a reasonable accommodation is generally a question of fact for the jury. *Id.* at 31 citing *Pulcino* 141 Wn.2d at 644. The plaintiff provides no support for swimming

against the tide of these cases. With the narrow exception of whether *Frisino's* standards should have been applied to this case, the proper standard of review for the decision to reject the plaintiff's motion for new trial on reasonable accommodation is *Sommer's* abuse of discretion standard. *See Sommer* 104 Wn. App. 160 (2001); *Ramey* 130 Wn. App. at 686

2. This Jury Verdict Was Supported By Substantial Evidence And Should Be Upheld

Several factual disputes were presented to the jury on the issue of reasonable accommodation. These disputes involve the terms of the accommodation request made; the extent of accommodation based upon the request; the reasons for Mr. Harrell not working after the request; and whether the request was an undue hardship on the employer.

A twelve-person jury heard evidence on each of these issues, was instructed fully of reasonable accommodation, and found that the plaintiff could not prove his disability discrimination case. CP 842-64, 865-66. Factual decisions supported by substantial evidence must be upheld. *In re Marriage of Fahey*, __ P.3d __, WL 4366794 (2011). Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.*

All evidence must be viewed in the light most favorable to the party against whom the motion is made. *Sommer* 104 Wn. App. at 172, *citing*,

Palmer v. Jensen, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997). In other words, all inferences and benefits of the doubt in viewing the evidence must, in this case, be made in favor of the State of Washington, DSHS, Dr. Richards and Mr. Gibson. The plaintiff's brief is replete with factual interpretations that are inconsistent with this burden. *See* Appellant's Br. at 2-19.

For instance, the plaintiff claims he lacked the benefits of union representation throughout the course of his accommodation process. Appellant's Br. at 4 n.3, 13. Mr. Harrell alleges he discovered in a December 2007 phone call to WFSE that the union was refusing to assist or represent him because of a combination of a probationary period and unpaid union dues. RP 1169-70, 1177. His only proof of this conversation is a note made in his own handwriting on a letter welcoming him as a member of the WFSE union. RP 199, 1002, 1169-70, 1193-95; CP Ex. 173. He offered no other evidence to support his being unrepresented.

The defendants presented evidence that Mr. Harrell did, actually, enjoy WFSE representation throughout his State employment. In addition to the letter recognizing his WFSE membership, his appointment letter, his position description, and his CBA provided proof of his membership throughout his employment. CP Ex. 101, 105, 143, 173. Dr. Richards, Ms. Harris and Mr. Gibson all testified they believed he was represented.

RP 486, 659, 674-75, 1179-81, 1195-98. Because of the importance of the CBA in this case, the question of Mr. Harrell's union membership is deeply fundamental. If he is represented by WFSE, he has grievance options for any violation of the CBA, including his failure to be accommodated. *See* CP 198-210, 212-13.

The plaintiff is not allowed to argue that he was unrepresented, as he does in his briefing. For the plaintiff to establish error in this appeal for the CR 56 and 59 decisions, the Court must view all evidence in a light most favorable to the the defendants. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). This means that Mr. Harrell must overcome a factual presumption that he had union representation, as well as other factual presumptions, such as whether his request was for lit conditions or a day shift. Mr. Harrell cannot establish that he deserves to prevail in this matter based on these standards.

Based upon this, substantial evidence was provided by the defendants supporting the verdict. Based upon the disputed questions regarding Mr. Harrell's accommodation listed *supra p. 17-18*, this substantial evidence was:

- The State offered evidence that Mr. Harrell's request was confined to working a day shift. This evidence was Mr. Harrell's doctor's note, CP Ex. 90; his lawyer's letter to the Center, CP Ex. 23; his father's

email to Center, RP 246-48; CP Ex. 15; and Mr. Harrell's own Human Rights Commission Complaint, RP 1081-86; CP Ex. 30. Mr. Harrell also acknowledged that he provided no known written notice of a request for "lit positions." RP 1048-50. Mr. Dickson testified that in his discussions with Mr. Harrell, the requests made were limited to a request for a day shift or for a completely separate job. RP 789-91.

- The State offered evidence that Mr. Harrell was accommodated as an on-call by being able to call in to work dayshifts only. Mr. Gibson testified to this, RP 558; Dr. Richards testified to this, RP 690; Mr. Dickson testified to this, RP 791-92, 794-95, 827; Mr. O'Connor testified to this, RP 943; and Ms. Harris testified to this, RP 1283-84.
- The State offered evidence that Mr. Harrell failed to regularly call in for work or make himself available to work when called. This includes the evidence cited, *supra*, RP 559, 834, 870, 903-04, 1248-49, 1253, along with admissions by Mr. Harrell himself. RP 1115, 1119-20, 1126-29. Mr. Gibson testified that even after a year and a half of not working, had Mr. Harrell called in and a shift been open, he would have been assigned to work. RP 560.
- The State offered evidence that the dayshift only position requested by Mr. Harrell was an undue burden for employer because it would

waive essential functions of on-call position. Mr. Dickson testified to this, RP 741, 791; as did Mr. Gibson, RP 474-75, 485-86; CP Ex. 101; and Ms. Harris, RP 1283-84.

- The State offered evidence that pre-scheduling an on-call would violate the CBA. Dr. Richards testified to this, RP 658-59, 690; CP Ex. 105; as did Mr. Dickson, RP 741, 795; Mr. Gibson, RP 343, 385, 478-79; and Ms. Harris confirmed that long-term on-call scheduling violated the CBA. RP 1288-89. Finally, Mr. Harrell's own testimony supports that what he requested was contrary to the CBA. RP 1053-55; CP Ex. 105.

There is no denying that this is "substantial evidence." *Sommer* is distinguishable, because the defendants in *Sommer* did not provide similar evidence. *Sommer*, 104 Wn. App. at 174-75. The defendants in *Sommer* never disputed the areas in which they were inactive in the face of an accommodation request. *Id.*

As can be seen above, that was not the case for DSHS in Mr. Harrell's case. Mr. Harrell requested an accommodation, and DSHS, indisputably, reacted to that request. This alone distinguishes *Sommer*.

Beyond that, so long as the facts articulated in the course of trial are based upon substantial evidence the verdict of the jury cannot be overturned. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 817-18, 733 P.2d 969

(1987); *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). The verdict of the jury was not based on theory, speculation or prejudice: It was based upon the facts presented to the jury over two weeks of trial.

3. Jury Was Properly Instructed

The jury was instructed on the law by the court. CP 842-64. The plaintiff took no exceptions to the jury instructions during trial. RP 1415.⁷ The failure to take exceptions to jury instructions precludes any later argument that they were denied substantial justice. *Estate of Stalkup v. Vancouver Clinic, Inc. P.S.*, 145 Wn. App. 572, 588, 187 P.3d 291 (2007). The instructions that the jury did receive were entirely proper.

Instructions for analyzing the essential functions of the RRC position were provided in Jury Instruction 8. Instruction 8 stated, in part: “You must consider the employer’s judgment as to what functions of a job are essential,” and goes on to enumerate nine factors that may bear upon whether a job function is essential. One of these factors are the terms of any collective bargaining agreement.⁸ CP 853-54. This instruction

⁷ The “Law of the Case Doctrine” gives binding effect to jury instructions given without objection. See *State v. Guttierrez*, 92 Wn. App. 343, 348, P.2d 974 (1998) citing *Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992).

⁸ The specific instruction chosen by the court was the plaintiff’s version of an “essential function” instruction, taken from the Ninth Circuit Model Civil Jury Instruction 12.7, with the exception of a single modification proposed by the State. RP 1411-14. That modification led to a “written job descriptions” clause being moved from the second paragraph to being one of the nine enumerated factors.

specifically and properly told the jury to consider the CBA in understanding what functions of a job are essential.

The standards for how to provide an accommodation were provided in Jury Instruction 10.⁹ Instruction 10 states, in part, that “an employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer.” CP 856.¹⁰ This instruction specifically and properly told the jury that not all accommodation requests must be fulfilled.

The jury was then given Instruction 11, which explained that the jury should consider the requirements of the CBA in determining whether an accommodation was a hardship. Instruction 11 stated, in part, that employers are “not required to accommodate an employee’s disability if it would impose an undue hardship on the operation of the employer’s business,” and that an accommodation is a hardship “if the cost or difficulty is unreasonable, considering . . . (3) The requirements of contract.” CP 857. This instruction specifically and properly told the jury that the terms of a CBA can create an undue hardship to providing an accommodation.

⁹ The specific instruction chosen by the court was proposed by the plaintiff. RP 1409-10

¹⁰ The instruction is directly copied from Washington Pattern Instruction 330.34. RP 1409-10.

The jury determined, based upon application of the facts to the law that the defendants had not discriminated against the plaintiff through a failure to accommodate. So long as that decision is supported by substantial evidence, the appellate court must not interfere with the jury's decision. *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 708, 64 P.3d 1 (2003); *Keever & Assocs. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005).¹¹ As has been discussed, ample evidence supports the jury's finding.

4. *Frisino v. Seattle Sch. Dist. No. 1* Does Not Support Overturning Jury Verdict

The plaintiff argues that an ineffective accommodation cannot be reasonable as a matter of law. The basis of this argument is *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 249 P.3d 1044 (2011). *Frisino* does not support the plaintiff's specific contention that a new trial is appropriate, and is fully distinguishable from Mr. Harrell's case.

a. *Frisino* Procedurally Distinguishable

Frisino's holding achieves a procedural goal completely opposite of the relief sought by Mr. Harrell. *Frisino* reversed summary judgment in favor of the Seattle School District because while an employer provided an employee accommodation, there was evidence that the accommodation

¹¹ The jury's decision was only, generally, that the plaintiff had failed to prove disability discrimination. The plaintiff cannot cite this as error either, since the proposed verdict form was the plaintiff's. RP 1415-16. The State took exception to this decision at the time. The plaintiff did not.

provided was ineffective. *Id.* at 784. As a result, questions of fact existed that required the reversal of summary judgment in favor of the employers, so that a jury could hear the facts of the case. *Id.* The plaintiff here is not requesting that a finding of summary judgment dismissing his reasonable accommodation claim be overturned, as the plaintiff was in *Frisino*. The relief that Ms. Frisino sought – access to a jury trial – was already made available to Mr. Harrell by the trial court, when the defendants’ motion for summary judgment was denied. CP 566-67.

The basic holding of *Frisino* is not novel. The concept of a “reasonable” accommodation having to be effective derives from *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002). The plaintiff cited this case and holding in his trial brief. CP 873. Consequently, the plaintiff cannot argue that *Frisino* was not considered by the judge or jury. The case it was based upon was specifically cited in his trial brief. The jury was instructed as to reasonable accommodation and its terms with instructions for which no exceptions were taken. RP 1415. Finally, the specific instruction at issue here (Instruction 10) was offered by the plaintiff himself. RP 1409-10.

Frisino is fundamentally nothing more than an interpretation of circumstances where a question of fact is found in the accommodation process, not a statement on what is *per se* considered to be a reasonable

accommodation under RCW 49.60.¹² Mr. Harrell's jury was given the relevant and proper instructions necessary to determine whether Mr. Harrell was discriminated against in the reasonable accommodation process.

b. *Frisino* Factually Distinguishable

The facts of *Frisino* also distinguish it from Mr. Harrell's situation. In *Frisino*, the Seattle School District provided accommodations, but those accommodations still left a teacher with documented mold sensitivities with no option but to work in an environment that was indisputably moldy. *Frisino* at 770-776. This was found to have been an ineffective accommodation. *Id.* at 779-782.

Mr. Harrell, on the other hand, requested to work on a dayshift.¹³ Mr. Harrell was allowed to work only dayshifts, even though exempting Mr. Harrell from working swing and graveyard shifts was a hardship to his employer and was contrary to the purpose of having on-call employees, RP 551, 591, 908-09. It was permitted because there was a need for on-call workers. RP 551.

¹² *Frisino* would only be arguably applicable had the trial court granted a motion for summary judgment by the defendants. The court heard such a motion and denied summary judgment, a decision which is thoroughly in keeping with *Frisino*.

¹³ Viewing, as is necessary, the facts in a light most favorable to the non-moving party.

Mr. Harrell's rationale for his accommodation being ineffective is quite different from the reason for Ms. Frisino's potentially being ineffective. In Ms. Frisino's case, it was undisputed that Ms. Frisino was not going to be allowed to work apart from mold. Mr. Harrell, on the other hand, was allowed to work only day shifts.

Mr. Harrell did not work after his request, though, and he claims this to be the proof of the ineffectiveness of the accommodation. See Appellant's Br. at 24. If he worked prior to the request, the plaintiff argues, but never worked after the request, then surely the accommodation was ineffective. This is a classic *post hoc ergo propter hoc* fallacy. The fact that Mr. Harrell did not work after requesting the accommodation proves nothing about the accommodation itself, and is certainly not proof of an unreasonable accommodation. The evidence presented to the jury does not suggest that Mr. Harrell's accommodation was ineffective; it suggests Mr. Harrell made no effort to take advantage of the accommodation that was provided to him. He was fully eligible to work only during the daytime, but chose not to work again.¹⁴ Mr. Harrell's case is clearly distinguishable from a situation where

¹⁴ If the claims of not having work made available to him were undisputed, then it may be true that his accommodation was ineffective, but the plaintiff cannot offer evidence of being actually prevented from working by DSHS. At trial, Mr. Harrell could document only four phone calls made at a time that would have even arguably permitted him to work a dayshift. He could not name a single person who he spoke to at DSHS who denied him a shift after October 31, 2007. He also was inarguably being called by more than one Center scheduler, both of whom testified that the purpose of their call was to get Mr. Harrell to come to McNeil Island and work.

a teacher was obligated to either quit or suffer the effects of mold in her workplace.

c. *Frisino* Legally Distinguishable

Mr. Harrell's case is also legally distinguishable from *Frisino* because the State has raised the defense that Mr. Harrell's chosen accommodation is an undue burden. *Frisino* deals with a situation where an employer's motion for summary judgment was denied by the trial court, because the employer could only offer evidence of a single accommodation to a disability and that accommodation is ineffective. The *Frisino* court explicitly refuses to reach questions of undue burden, stating that those issues were not sufficiently developed in the lower court.¹⁵ *Frisino* at 782.

Unlike in *Frisino*, the State offered evidence that even if exemption from swing and graveyard shifts was not an accommodation, Mr. Harrell's requested accommodation was an undue hardship. RP 1435-36.¹⁶ The undue hardship created by the plaintiff's request was argued and was fully developed before the jury in this matter. The jury was provided evidence

¹⁵ This is unsurprising, as whether an undue burden existed is typically a question of fact. *Pulcino* at 644. As discussed, *supra*, one of the paramount distinctions between this case and *Frisino* is that Ms. Frisino's matter was dismissed at summary judgment and she was requesting a trial, while Mr. Harrell received his day in court, but now he wants to prevail.

¹⁶ The defendants did not have to establish an undue burden to support a defense verdict, since an employer need only select one reasonable accommodation for an employee. Where an employer has already accommodated an employee, the employer need not further show that each of the employee's alternative accommodations would result in hardships. *Ansonia Bd. of Educ., v. Philbrook*, 479 U.S. 60, 68-69, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986).

that Mr. Harrell's request to work dayshifts would cause him to no longer perform essential functions of his assigned job. RP 474-75, 485-86, 741, 791; CP Ex. 101. Removing essential functions of an employee's job is an unreasonable accommodation and may be an undue burden on an employer. *Erwin v. Roundup Corp.*, 110 Wn. App. 308, 317, 40 P.3d 675 (2002).

The jury also was provided evidence that the CBA would not permit assignment to a dayshift. RP 343, 385, 478-79, 658-59, 690, 741, 795, 1053-55, 1288-89; CP Ex. 105, 143. An employer must provide reasonable accommodation unless it can prove that the accommodation would impose an undue hardship. An accommodation is an undue burden if the cost or difficulty is unreasonable in view of the requirements of other laws and contracts. Wash. Admin. Code 162-22-075(3). The United States Supreme Court has indicated that a seniority-based employee bidding system cannot be ignored in favor of an employee's accommodation request. *U.S. Airways Inc. v. Barnett*, 535 U.S. 391, 402-406 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).

Mr. Harrell's request was directly opposed to the seniority system at the Center.¹⁷ RP 466-67, 741-43; CP Ex. 143. In reasonable accommodation matters, "it will ordinarily be unreasonable" for an

¹⁷ The seniority system at Center carries the added complication of being part of a union Collective Bargaining Agreement. The seniority system in *U.S. Airways* was entirely of the employer's design. *U.S. Airways* at 391.

assignment contrary to seniority rules to be permitted. *U.S. Airways* at 403. To rule otherwise, the court found, “might well undermine the employees’ expectations of consistent, uniform treatment – expectations upon which the seniority system’s benefits depend.” *Id.* at 404.

Consequently, even had the plaintiff established that he was not provided a reasonable accommodation, the employer was able to indicate that his request of a prescheduled dayshift was an undue burden and could not be provided as a result of the Collective Bargaining Agreement. The jury’s decision on reasonable accommodation was based on substantial evidence and must stand.

C. Trial Court Properly Entered CR 50 Judgment As A Matter Of Law Dismissing Plaintiff’s 42 U.S.C. § 1983 Civil Rights Claims

The plaintiff raised causes of action against all of the named defendants under 42 U.S.C. § 1983. CP 1-7, 15-21; Appellant’s Br. at 29-37. These claims allege violation of constitutional rights that are vindicated through § 1983. The first two of these are allegations of Mr. Harrell being retaliated against for exercising his first amendment rights, and for violations of Mr. Harrell’s supposed constitutional right to due process in the provision of reasonable accommodations. The third federal claim alleged is that plaintiff was not accommodated under the American with Disabilities Act.

1. State And State Entities Are Entitled To 11th Amendment Immunity For All § 1983 Civil Rights Claims

The 11th Amendment proscribes a suit against a state or one of its agencies in court, regardless of the relief sought. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). A state agency is not a “person” that Congress made amenable to suit in 42 U.S.C. § 1983. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). The appellant conceded that 11th amendment immunity applied in this matter in the course of argument over the CR 50 motion. RP 1384. Based upon this immunity, the State of Washington and DSHS were properly dismissed as parties to the § 1983 claim.

2. Individual Defendants Are Entitled To Qualified Immunity § 1983 Civil Rights Claims

The § 1983 failure to train claims against Dr. Richards and Mr. Gibson were dismissed because of their qualified immunity. RP 1395-1401. Although the court did not apply qualified immunity to the first amendment retaliation claim, this immunity applies equally to all of Mr. Harrell’s federal claims.

Qualified immunity exists for public officials sued in their individual capacity¹⁸ in § 1983 claims where a federal constitutional or statutory right is not clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396 (1982). Despite making multiple allegations of civil rights violations by Dr. Richards and Mr. Gibson, and the court having specifically dismissed claims due to qualified immunity, RP 1396-98, the plaintiff's briefing is silent on qualified immunity. Given that this subject was the basis of at least a portion of the CR 50 decision, and applies to all of the civil rights claims in this case, this omission is remarkable.

In *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), the U.S. Supreme Court set forth a two-step inquiry to be followed when qualified immunity has been raised. The threshold issue is whether the alleged facts show that the government official's conduct violated a constitutional right. *Id.* If not, further inquiry is unnecessary. If a violation would exist, if the allegations were established, then the second step is to consider whether the right was clearly established. *Id.* Mr. Harrell's § 1983 claims – including his first amendment retaliation claim – cannot survive these inquiries.

¹⁸ The 11th Amendment immunizes individuals from suit in their *official* capacities because such suits are, in essence, suits against the state. *Hafner v. Melo*, 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Based upon this immunity, Dr. Richards and Mr. Gibson cannot be sued under § 1983 in their official capacities.

A right is clearly established if it would be clear to a reasonable official that her conduct was unlawful in the situation she confronted. *Id.* at 202. If the law did not put the official on notice that her conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *Id.*; *Altshuler v. Seattle*, 63 Wn. App. 389, 394, 819 P.2d 393 (1991). The plaintiff bears the burden of proving that the rights claimed to be “clearly established,” actually were clearly established at the time of the alleged violation. *Moran v. State of Washington*, 147 F.3d 839, 844 (1998) citing *Davis v. Scherer*, 468 U.S. 183, 197, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).

To be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that his choices were violating that right. *Id.* citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). These rights are not examined in a general way, either, but rather must be clear in their application to a particular context. *Id.* citing *Todd v. United States*, 849 F.2d 365, 370 (9th Cir. 1988).

The only response to the qualified immunity defenses present in the record before the court was made in oral argument on the defendant’s CR 50 motion. RP 1384-85. Upon the direct questioning of the court, the plaintiff argued that there was no qualified immunity for Dr. Richards and

Mr. Gibson because there were no discretionary decisions involved in this matter based upon the existence of administrative policies instructing the officials as to what to do in reasonable accommodations. RP 1384-85.

Even if the plaintiff's argument was correct, the argument is not pertinent to the § 1983 issues currently before the Court. The defense of qualified immunity is not argued for the alleged WLAD claim of failure to reasonably accommodate, it is argued for the first amendment retaliation, due process and failure to train issues. The plaintiff's citation to administrative policies on accommodation is not germane to identifying a clearly established constitutional right that was violated, especially one that is clear in a particular context, as demanded by *Moran*.

3. Plaintiff's First Amendment Retaliation Claim Was Properly Dismissed

The trial court ruled that there was insufficient factual basis for a § 1983 first amendment retaliation claim. RP 1399. This decision was based upon the content of the speech, which clearly indicated that the appellant was voicing personal concerns over the insufficiency of the lighting that was focused on his own situation and his request for accommodation. *Id.* Based upon these findings, the court granted judgment as a matter of law to Dr. Richards and Mr. Gibson and dismissed the remainder of the § 1983 retaliation claim that had not been dismissed

based upon 11th amendment immunity. The appellant points to this decision as being error.

a. Prima Facie First Amendment Retaliation Cause Of Action Requires Speech Of A Public Concern

To qualify for First Amendment protection, an employee must show that the speech in question 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). To make this determination, Mr. Harrell must first prove that the speech he engaged in was on a matter of public concern and that he spoke out as a citizen not as a public employee performing his official job responsibilities. *Garcetti v. Ceballos*, 547 U.S. 410, 426, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). If that is established, then he must prove that such protected speech was a substantially or motivating factor resulting in an adverse employment action taken against the employee.¹⁹ *See generally 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); *Wilson v. State of Washington*, 84 Wn. App. 332, 340-41, 929 P.2d 448 (1996).

¹⁹ Even if the employee proves these elements, the burden then shifts to the employer to articulate non-retaliatory reasons for the adverse employment action and to show by preponderance that the employer would have reached the same decisions regardless of the protected speech. If the employer meets this burden, the employer has qualified immunity and judgment as a matter of law should be entered in favor of the employer under *Mt. Healthy*.

Whether speech relates to an issue of public concern was an issue for the trial court to determine as a matter of law. *Wilson* at 341. The content, form, and context of the speech, as revealed by the full record, bears upon the court's decision of whether speech touches on a public concern. *Wilson* at 341, *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 1690-91, 75 L. Ed. 2d 708 (1983) The speaker's intent also must be considered, and whether it was their intention to raise an issue of public concern or simply intended to further a personal interest. *Wilson* at 341. The employee carries the initial burden that the speech touched upon a matter of public concern. *Connick* at 147-48.

Applying *Connick's* content, form and context analysis to Mr. Harrell's case reveals that Mr. Harrell is attempting to reverse-engineer his complaints about workplace issues into constitutional issues. His communications, even those made through his attorney, made within weeks of his initial request, are devoid of any reference to perimeter lighting sufficiency or sick leave policy considerations. *See* CP 338-39. This court, in *Wilson*, accurately held that an "employee who acts as a concerned citizen interested in bringing problems to light more likely raises a matter of public concern than does one who attempts to rectify work place problems. *Wilson* at 342, *citing Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 385, 787 P.2d 1366 (1990). Private matters cannot

be cloaked in the mantle of public concern to raise First Amendment concerns. *Wilson* at 342, quoting *Connick* at 147-48.

b. Plaintiff's Speech Was As A Public Employee Under *Garcetti*

While the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize employee grievances. *Garcetti v. Ceballos*, 547 U.S. 410, 420, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). Case law does “not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of his or her job.” *Garcetti*, 126 S. Ct. at 1962. *Garcetti* clarified the limits of First Amendment protection for public employees.

Under *Garcetti*, if a public employee is performing regular workplace duties and thus acting as a representative of the state, the employee's speech should not receive First Amendment protection. See *Urofsky v. Gilmore*, 216, F.3d 401, 409 (4th Cir. 2000)(en banc). Mr. Harrell cannot invest his ordinary request for accommodation with Constitutional importance simply by invoking the First Amendment. He was performing actions of an ordinary employee in requesting his accommodation. His speech associated with that request is not protected.

c. Complaints Motivated By Personal Interests Are Not Matters Of Public Concern

Mr. Harrell raised his concerns over perimeter lighting and sick leave in the specific context of asking for a personal reasonable accommodation. Because these concerns were raised in the context of these very specific and personal concerns, his actual speech negates the public concern element. Mr. Harrell was clearly motivated by personal concerns, not by theoretical interests of the public in these issues.

Individual personnel disputes are not matters of public concern. *See Desrochers v. City of San Bernadino*, 572 F.3d 703, 710 (9th Cir. 2009). The undisputed evidence shows that the appellant was focused entirely on his own, personal issues and that he requested a purely personal solution: To be excused from swing or graveyard shift assignments. *Id.*; RP 1073-75; CP Attachment Ex. 13, 23, 90. Mr. Harrell was not taking a stand against DSHS lighting or sick leave policy, he was requesting a personal accommodation and complaining about his being removed from the schedule.

d. Plaintiff Has Offered No Evidence Of Causal Connection Between Complaints And Any Adverse Action

To establish a prima facie case, the protected speech must involve a matter of public concern made outside the scope of the employees

regular duties, but the speech also must be a substantial or motivating factor resulting in an adverse employment action taken against the employee. *Garcetti* at 426, *Mt. Healthy* at 287. There is no evidence connecting Mr. Harrell's speech with an adverse action.²⁰ His removal from the schedule was consistent with the request he made. Unless the removal was clearly contrary to specific, known constitutional rights, the decision is clearly entitled to qualified immunity. *See supra* discussion of Qualified Immunity; *Moran v. State of Washington*, 147 F.3d 839, 844 (1998); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Todd v. United States*, 849 F.2d 365, 370 (9th Cir. 1988).

Since the only adverse action tied to the protected speech is the removal from the schedule, the plaintiff cannot establish a prima facie claim of first amendment retaliation. The claim was properly dismissed upon the State's CR 50 motion.

²⁰ The plaintiff does not specifically state the retaliation alleged in their brief, but, based on the rulings below, the only actionable adverse action can be the removal from the schedule. The plaintiff is estopped from an argument on his separation from employment, since the jury already specifically rendered a verdict in favor of the defendants on whether Mr. Harrell was retaliated against in his termination, and rejected that claim. CP 860, 865-66. Again, the jury's verdict on plaintiff's 49.60 retaliation claim has not been appealed.

4. Plaintiff's Remaining 42 U.S.C. § 1983 Civil Rights Claims Barred

The plaintiff's remaining Civil Rights claims regarding a failure to train, due process inadequacies, and ADA violations are not properly before the Court for review. Each of these claims alleges injury arising from the process of failing to accommodate the plaintiff. Consequently, each claim relies on the plaintiff having not been reasonably accommodated. Since the jury actually found the opposite to be true, these claims are barred. The plaintiff cannot claim injury from the reasonable accommodation process if he was, in fact, reasonably accommodated.

These claims are each individually improper as well, and can be dismissed on their individual merits.

a. Notwithstanding Being Barred, Trial Court Properly Entered CR 50 Judgment As A Matter Of Law Dismissing Plaintiff's Failure To Train And Supervise And Due Process Claims

(1) Failure To Train And Supervise Properly Dismissed

The plaintiff alleges § 1983 liability for a failure to train employees on reasonable accommodation processes. CP 5. Liability for a state actor to fail to train under § 1983 requires (1) deliberate indifference by a state actor and (2) proof that the lack of training actually caused the

§ 1983 violation. *Connick v. Thompson*, 131 S. Ct. 1350, 1358, 179 L. Ed. 417 (2011). The plaintiff can establish neither element of a failure to train action under § 1983.

There is no evidence of deliberate indifference by Dr. Richards.²¹ Deliberate indifference requires proof of an actor's disregard for known or obvious consequences of his actions. *Bd. of Comm'rs of Bryan City v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, L. Ed. 2d 626 (1997). A pattern of similar violations is ordinarily necessary to demonstrate deliberate indifference in failure to train claims. *Id.* at 409. "Without notice that a course of training is deficient in a particular respect, decision makers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Connick v. Thompson* at 1360. No evidence of such a pattern has been offered by the plaintiff.²²

The court made specific findings that Dr. Richards was not deliberately indifferent and cited evidence of accommodation trainings

²¹ The plaintiff has never offered evidence suggesting that Mr. Gibson was responsible for providing training or supervision of reasonable accommodation processes, and Mr. Gibson testified that he was not personally responsible for reasonable accommodations. RP 555. Consequently, from the outset, Mr. Gibson should be dismissed from the plaintiff's § 1983 failure to train claim. Only Dr. Richards is capable of being liable for a failure to train based on the facts presented by the plaintiff.

²² "Single incident" liability, a hypothesized theory discussed in *Canton v. Harris*, 489 U.S. 390, n.10 (1989) is also inapplicable here, as it was in *Connick v. Thompson*. The provision of reasonable accommodations is no more reflective of the obvious consequences of a failure to train than the failure to train prosecutors to disclose exculpatory evidence. The Supreme Court's rejection of "single incident" liability where the plaintiff had served 18 years in prison as a consequence of the failure to train illustrates the rarity of a single incident being capable of supporting a deliberate indifference assertion.

and the existence of an entire human resources department to assist with providing accommodations. RP 1396-98. The plaintiff makes no showing that the court's decision was in error.

The plaintiff cannot meet the second element either. An alleged training deficiency must be the "moving force" for the violation. *Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 412 (1989). The lack of training must have actually caused Mr. Harrell to not be accommodated. *See Id.* at 391. Mr. Harrell has provided no evidence that but for some training, he would have been accommodated in the manner he assumes to be appropriate. In part, this is because Mr. Harrell does not have a right to a single, particular accommodation. Unlike the criminal defendant in *Connick v. Thompson*, who suffered a clear violation of a right, Mr. Harrell cannot establish that his right to a reasonable accommodation was clearly violated.

Thus, even if the Court were to assume an unquestioned violation existed, there is no evidence of causation here. There is nothing in the record that suggests that but for some hypothetical training, Mr. Harrell would have received the accommodation he desired.²³ Mr. Harrell's request was an unequivocal request for a day shift but due to contractual obligations, scheduled dayshifts could not be provided. In other words,

²³ In fact, it is impossible for the plaintiff to prove causation here, since Mr. Harrell's proposed accommodation was, itself, unlawful.

the consequence of greater training would end in the same result. The failure to train claim was properly dismissed as a matter of law.

(2) Failure To Provide Due Process Properly Dismissed

The plaintiff claims the defendants failed to provide due process in the reasonable accommodation process. Appellant's Br. at 33-35. Since a property right is required to be at stake for due process to be required in this context, the plaintiff's claim rests on the concept that he was deprived of a property right through a failure to follow reasonable accommodation processes. His basis for this is *Danielson v. City of Seattle*, 45 Wn. App. 235, 724 P.2d 1115 (1986), *decision affirmed*, 108 Wn.2d 788, 742 P.2d 717 (1987) a case interpreting the sufficiency of the termination process for a City of Seattle police officer in light of the then-recent U.S. Supreme Court decision of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

Mr. Harrell did not suffer a deprivation of a constitutional magnitude. As an on-call employee, Mr. Harrell was terminable at-will. RP 671-72; CP Ex. 118. As a result, he lacks any property interest in his job. Property interests are created by state law. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976). Mr. Harrell was an at-will public employee. CP Ex. 105, 118, 143.

At-will employees have no constitutional property interest in their job. *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir.1993). Public employment, taken alone, also does not confer a constitutional property interest in a job. *Danielson v. City of Seattle*, 108 Wn.2d 788, 796, 742 P.2d 717 (1987); *Giles v. Dep't of Soc. & Health Servs., Indian Ridge Treatment Ctr.*, 90 Wn.2d 457, 460-61, 583 P.2d 1213 (1976).

The plaintiff cites to Division One's *Danielson* 45 Wn. App. 235 decision, but fails to mention that the State Supreme Court reviewed *Danielson*. *Danielson v. City of Seattle*, 108 Wn.2d 788, 742 P.2d 717 (1987). While the Supreme Court affirmed the lower court's ruling, the State Supreme Court's analysis examined the reason for Danielson having a property interest at length. *Compare Danielson* 108 Wn.2d at 796-97 with *Danielson* 45 Wn. App. at 245. With the additional examination, it becomes clear that the decision reached in *Danielson* does not support Mr. Harrell's case. Mr. Danielson is found to have a property interest because he is dischargeable *only for cause*. *Danielson* 108 Wn.2d at 796-97. The court specifically contrasted Mr. Danielson's circumstances with those of a police officer who, like Mr. Harrell, was terminable at will. *Jordan v. Oakville*, 106 Wn.2d 122, 131, 720 P.2d 824 (1994)(finding no protected property interest where police officer was terminable at will).

Based upon the controlling law, Mr. Harrell possessed no property right in his job. As a consequence, he may not claim a deprivation of that right under § 1983. Moreover, since the jury found that Mr. Harrell was reasonably accommodated, even under this erroneous due process theory, Mr. Harrell was afforded due process.

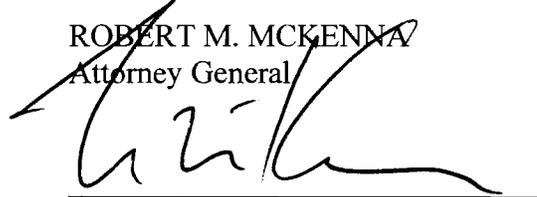
VI. CONCLUSION

The trial court correctly denied the plaintiff's motion for summary judgment and for a new trial in this matter. The work and sacrifice of the Pierce County jury that rendered a verdict on the legitimacy of the appellant's reasonable accommodation claim should not be overturned here. The trial court also properly dismissed the selection of federal claims made by the plaintiff. These matters were not dismissed at summary judgment or in a preliminary hearing, but after the conclusion of the plaintiff's multi-day case in chief. The court had the full benefit of

having heard the entirety of the plaintiff's evidence on these issues and still could not find grounds to permit the jury to hear these claims. The decisions of the trial court and the verdict of the jury should be upheld.

RESPECTFULLY SUBMITTED this 14th day of October, 2011.

~~ROBERT M. MCKENNA~~
~~Attorney General~~

A handwritten signature in black ink, appearing to read 'Matthew T. Kuehn', written over a horizontal line. The signature is stylized and cursive.

MATTHEW T. KUEHN, WSBA# 30419
Attorney for Respondents

COURT OF APPEALS
DIVISION II

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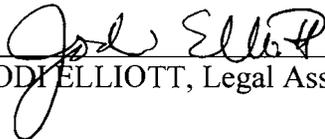
appellant's counsel of record on the date below via e-mail and US Mail

service with guaranteed delivery by Friday, October 14, 2011, as follows:

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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 14th day of October, 2011, at Olympia, WA.



JODI ELLIOTT, Legal Assistant