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No. 65404-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DEBORAH COLE,

Respondent,

v.

HARVEYLAND LLC, d/b/a The Harvey Apartments Group, a
Washington corporation; MARWOOD LLC, a Washington
corporation, and DONALD HARVEY, a single man, and MICHELLE
JEROME and JOHN DOE JEROME and their marital community,

Appellants.

REPLY OF APPELLANTS

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COURT OF APPEALS
DIVISION ONE
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I. INTRODUCTION

Deborah Cole had the burden of proving that an employer with at least eight employees discriminated against her. She did not do so, contrary to the arguments in the Respondent's Brief. Therefore the Washington Law Against Discrimination (WLAD), which applies only to employers with eight or more employees, did not apply, and the verdict cannot be sustained.

Having failed to present *any evidence* of her employers' payroll size at trial, Ms. Cole now seeks to uphold the verdict based on a dubious new theory. She argues that appellants Marwood LLC and Harveyland LLC should be treated as her "joint" employer for purposes of the discrimination statute's eight-employee threshold. This is entirely wrong.

Related companies are treated as a single employer, under the WLAD, only if they have common personnel management and employment policies. That was not the case here. The Marwood LLC was a separate corporation with its own personnel manager, Michelle Jerome, and with distinct employment policies not shared by any other apartment corporation.

Harveyland LLC was not an "employer" at all. It was merely an umbrella or parent company for smaller corporations, which

were the actual employers. Each apartment building was a separate corporation with a separate checking account for receiving rents and paying employees. There is not one shred of evidence that Harveyland LLC itself had a payroll.

Even if Harveyland LLC was the actual employer of the people who worked at the four apartment buildings managed by Don Harvey, the “joint employer” theory still fails. There is simply no proof that at least eight people worked for Harveyland LLC and Marwood LLC, if combined together, at the time of the alleged discrimination. In fact, only one person – Ms. Cole – was proven to be on the Marwood LLC payroll in May 2008. Also, Mr. Harvey testified that the number of employees at his buildings “varied,” and that only one job at each building was of a “permanent” nature. Thus, the evidence indicates that at the relevant time, only *five* people worked at the Marwood and the other buildings, *combined*.

Ms. Cole simply ignores the legal and functional distinctions between the Marwood LLC, which committed all of the acts alleged to be discriminatory, and the corporations managed by Mr. Harvey. She attempts to create confusion by describing conditions *before* Marwood LLC became a separately managed corporation, and by suggesting that she had only one job involving all five buildings,

when in fact her Marwood job had nothing to do with any other buildings. Cutting through the confusion, it boils down to this: a) Ms. Jerome took over Marwood management from her father at the end of April 2008; b) Ms. Jerome immediately set higher job expectations that were unique to the Marwood; and c) Ms. Jerome fired Ms. Cole for not meeting those expectations. Those actions, instead of establishing discrimination, simply illustrated that the Marwood was under new management.

Ms. Cole weakly attempts to fall back on the theory presented at trial - that Harveyland LLC is liable for the alleged discrimination based on a principal-agent relationship with Ms. Jerome and Mr. Harvey. But even if such a relationship existed, it is moot because the *WLAD does not apply*. It simply does not matter whether Ms. Jerome or Mr. Harvey acted as an agent of Harveyland LLC because there was no employer large enough to be subject to the *WLAD*, precluding liability of any kind.

In sum, there was no employment discrimination, but even if there was, Ms. Cole failed to prove that a non-exempt employer discriminated against her. That alone is reason to reverse the judgment. In addition, Ms. Jerome was unfairly prevented from testifying about her state of mind, even though discriminatory intent

was an element of the proof required for the wrongful firing claim. For that reason too, the judgment should be reversed.

II. CORRECTION OF MS. COLE'S FACTUAL MISSTATEMENTS

The purported fact section of the Respondent's Brief is replete with unsupported assertions. As a preliminary matter, some outright errors require correction.

A. Mr. Harvey *Denied* a Financial Interest in Marwood.

Ms. Cole states as a fact that "Mr. Harvey testified that when Ms. Jerome assumed operational control, she, her sister and Mr. Harvey all had a financial interest in the Marwood." Resp. Brief, p.

18. The record shows that contention is false:

Counsel: The Marwood Apartments...?

Harvey: I don't own that building.

Counsel: The Marwood? You have a financial interest in that building, don't you?

Harvey: My daughters do.

Counsel: You have a financial interest in that building, don't you?

Harvey: Again I'm not quite sure how to answer that.

RP (February 16, 2010) at 123. Thus, Mr. Harvey denied having a financial interest in the Marwood.¹

In fact, Mr. Harvey received no income from Marwood LLC himself. RP (February 17, 2010) at 80. His only connection was

¹ To support her assertion to the contrary, Ms. Cole cites, without quoting, two passages from *Ms. Jerome's* testimony. Resp. Brief, p. 18. But Ms. Jerome's testimony merely refers to an "indirect" interest without explaining its nature.

serving as trustee of the trust that held an undefined ownership interest in Marwood LLC, for the benefit of his daughters. A “trustee has bare legal title and the beneficiary has the equitable or beneficial ownership.” O’Steen v. Estate of Wineberg, 30 Wn.App. 923, 932 (1982). Thus, acting as trustee does *not* constitute a financial interest. It is irrelevant anyway because ownership and financial interests are not factors in determining whether related companies are treated as a single employer for WLAD purposes. WAC 162-16-220(6). In sum, Ms. Cole’s assertion is incorrect.

B. Mr. Harvey Did Not Ratify the Termination.

Ms. Cole claims Mr. Harvey ratified her firing from the Marwood by vowing to “stand by whatever Ms. Jerome decided.” Resp. Brief, p. 30. That is a distortion. Mr. Harvey testified that Ms. Jerome had “complete control” over Marwood personnel, and the firing was strictly her decision. RP (February 17, 2010) at 72, 86. Ms. Cole herself testified that Mr. Harvey told her “it was Michelle’s building, it was Michelle’s decision, and there was basically nothing he could do about it.” RP (February 16, 2010) at 51. Saying that he lacks any control over a decision is quite different from saying he ratifies it. Ms. Cole misstates the facts.

III. ARGUMENT

A. Ms. Cole Fails to Rebut Arguments That Subject Matter Jurisdiction Was Lacking.

Appellants previously argued at length as to why the trial court in this case lacked subject matter jurisdiction. Brief of Appellants, pp. 30-39. Ms. Cole did not even attempt to rebut most of those arguments. Resp. Brief, pp. 32-38. For example, Ms. Cole did not dispute that under Neilson ex rel. Crump v. Blanchette, 149 Wn.App. 111 (2009), when a statute defines violations as actions by a limited class of persons, a court lacks jurisdiction to decide suits against persons who are outside the statutorily defined class. Also, Ms. Cole did not address the actual language of the WLAD's jurisdictional provision, although appellants explained why it supports a finding that employee numerosity is jurisdictional.

1. Ms. Cole fails to recognize that the WLAD itself limits jurisdiction to employers with eight or more employees.

Ms. Cole acknowledges that, when jurisdiction "is explicitly limited by the Legislature," this Court may find that a trial court lacked subject matter jurisdiction. Resp. Brief, p. 33, citing Harting v. Barton, 101 Wn.App. 954, 960 (2000). But she ignores the fact that the Legislature *did* explicitly limit jurisdiction in WLAD cases through the language in RCW 49.60.030(2), which says:

Any person deeming himself or herself injured by any *act in violation of this chapter* shall have a civil action in a court of competent jurisdiction ...

(italics added). Because RCW 49.60.030(2) requires an alleged “violation” for jurisdiction, and because Ms. Cole did not allege or prove that her employers were large enough to be subject to the WLAD, there was no jurisdiction in this case. Griffin v. Eller, 130 Wn.2d 58, 61 (1996) (small employers are exempt).

2. Ms. Cole misses the point about the Arbaugh decision.

Ms. Cole devotes more than two pages of argument to the United States Supreme Court’s decision in Arbaugh v. Y&H Corp., 546 U.S. 500 (2006). The gist of her argument is that, because the federal discrimination law’s 15-employee threshold is not jurisdictional, then Washington’s similar eight-employee threshold cannot be jurisdictional either. Resp. Brief, pp. 35-38. Ms. Cole fails to rebut appellants’ extensive arguments about why Arbaugh actually requires the opposite conclusion about Washington’s law.²

Specifically, Ms. Cole fails to recognize that, unlike the WLAD, the federal law provides jurisdiction for any actions “brought under” that law. 42 USC 2000e-5(f)(3). Thus, all a plaintiff has to

² If footnote 10 is intended to refute appellants’ arguments, it fails to make any discernible point, and exhibits a failure to grasp the reasoning of Arbaugh. Id.

do, to establish subject matter jurisdiction under the federal law, is to bring an action invoking that law. The federal law's jurisdictional provision is not tied by any language to the 15-employee threshold. Arbaugh, 546 U.S. at 515.

Here, by contrast, there *is* a tie between the jurisdictional provision and the number of employees. RCW 49.60.030(2) authorizes state courts to handle actions alleging a "violation" of the WLAD, and under RCW 49.60.040(11), only an employer with eight or more employees can violate the employment discrimination law. By failing to rebut this argument, even while asserting that the reasoning of Arbaugh applies to this case (Resp. Brief, p. 37), Ms. Cole effectively concedes that Arbaugh compels a conclusion that Washington's eight-employee threshold is jurisdictional.

3. Ms. Cole misunderstands the issues related to the state Human Rights Commission's regulations.

Ms. Cole contends that, in arguing that employee numerosity is jurisdictional, appellants rely on the title of WAC 162-16-220, a Human Rights Commission regulation implementing the WLAD. Resp. Brief, p. 34. The regulation is entitled: "Jurisdiction – Counting the number of persons employed." Ms. Cole argues that

the title is “not controlling” because it is purportedly written by a code reviser rather than the Commission. Resp. Brief, p. 34.

But the Commission itself used the term “jurisdiction” when it rewrote WAC 162-16-220 in 1999, stating that the Anaya decision required a change in its “jurisdiction” rule. Wash. State Register 99-04-108. Thus, the Commission clearly views the employee numerosity requirement as jurisdictional.

The pertinent point – not disputed in the Respondent’s Brief – is that RCW 49.60.120, authorizing the Commission to hear WLAD complaints, is similar to RCW 49.60.030(2), authorizing courts to hear discrimination complaints.³ Because the Legislature used similar language in establishing WLAD jurisdiction for the Commission and courts, and because the Commission interprets the language as limiting jurisdiction to large employers, the courts should be guided by the Commission’s interpretation. Marquis v. City of Spokane, 130 Wn.2d 97, 111 (1996) (giving the Commission’s interpretation “great weight”).

4. The unfairness of trying cases without jurisdiction is to defendants, not to plaintiffs who fail to prove their cases.

³ The Commission may “pass upon complaints alleging unfair practices as defined in this chapter.” RCW 49.60.120(4). Courts may determine actions alleging “any act in violation of this chapter.” RCW 49.60.030(2).

Ms. Cole argues that it would be unfair to dismiss her case for lack of subject matter jurisdiction because “in the name of simplifying the court’s instructions,” she dismissed claims which did not require proving employee numerosity. Resp. Brief, p. 37. First, it is not true that Ms. Cole could have avoided the eight-employee threshold by pursuing her suit under the Seattle Municipal Code, as she claims. *Id.*, p. 38. RCW 49.60.330 gives superior courts “jurisdiction to hear all matters relating to violation” of city ordinances which are “*consistent with this chapter*” (italics added). Seattle’s one-employee threshold is *not* consistent with the eight-employee threshold in the WLAD. RCW 49.60.040(11); SMC 14.04.040. Therefore, the court would have lacked jurisdiction over Ms. Cole’s Seattle Municipal Code claim. *Id.*; RCW 49.60.330.⁴

Secondly, Ms. Cole says nothing about the unfairness of requiring appellants to pay \$523,554 in damages, fees and interest *under a law that did not apply* to them. It is not the appellants’ fault that Ms. Cole failed to raise the employee numerosity issue in her complaint or at trial. She had the burden of proving her employer

⁴ Ms. Cole also did not pursue a common-law claim based on public policy, which can be brought against any employer, because she wanted to “simplify” the case. Resp. Brief, p. 37. In other words, she wanted a shortcut. That is no reason to enforce a judgment based on an inapplicable law.

had eight or more employees. Having failed to meet that burden, it is only fair that she should live with the consequences.

Moreover, the Legislature has decided that it is not fair to subject small employers to WLAD suits for economic reasons. Griffin, 130 Wn.2d at 66-69. The Legislature recognized that having to defend such a suit can bankrupt a small business.⁵

Finally, Ms. Cole is correct that resources are wasted when a WLAD trial is mooted by a lack of jurisdiction. She should have thought of that before filing her deficient suit. Besides, the problem primarily affects courts and defendants, not plaintiffs like her. Under RCW 49.60.030(2), a prevailing plaintiff can recover attorney fees, which makes it possible to go through trial on a contingency fee arrangement without personally incurring significant costs. A defendant, on the other hand, does not have the benefit of fee-shifting and therefore cannot avoid paying for trial defense, regardless of the outcome. Thus, if a WLAD judgment is voided due to lack of jurisdiction, the defendant stands to lose much more in wasted resources than a contingent-fee plaintiff does. In sum, considerations of fairness favor the appellants.

⁵ Small businesses are unlikely to have in-house counsel to proactively advise them. Here, for example, Ms. Jerome relied on a state employee for advice.

B. Ms. Cole Did Not Prove Commonly Managed Employers.

Ms. Cole alleges for the first time on appeal that Marwood LLC and Harveyland LLC should be treated as a single, combined employer for purposes of counting employees. Resp. Brief, pp. 39-40. She cites WAC 162-16-220(6), which says companies are combined for employee-counting purposes if they “are managed in common in the area of employment policy and personnel management.” *Id.* But Ms. Cole did not prove that Harveyland LLC was an employer at all, let alone that it managed personnel in common with Marwood LLC.

Ms. Cole merely assumes – without proof – that Harveyland LLC, the entity she sued, employed the people who worked at the four buildings still managed by Mr. Harvey. The evidence at trial proves otherwise. Mr. Harvey testified that each building was owned by a “separate limited liability corporation.” RP (February 17, 2010) at 70. Also, “each of the buildings had a separate checking account.” *Id.* at 77-78. Just as Ms. Cole’s last paycheck was written from the Marwood’s account, the resident managers of other buildings were necessarily paid from those buildings’ accounts. Exhibit 22. Thus, each apartment building was a separate employer, and the appellant Harveyland LLC was not an

employer at all. Witnesses referred to “Harveyland” as shorthand for the buildings managed by Mr. Harvey, and were not referring to the LLC. There is no paycheck signed by Harveyland LLC.

Moreover, there was no jury instruction about common management and Ms. Cole did not ask any witnesses about it. To support her argument at this late date, she resorts to twisting the evidence. Each of her assertions collapses under scrutiny.

1. The Marwood did not use resident managers from other buildings to fill in for its resident manager.

Ms. Cole first argues that the Marwood and Harveyland were commonly managed because “Resident Managers would fill in for each other when they were sick or on vacation – it was a ‘team effort.’ ” Resp. Brief, p. 39. She fails to acknowledge that policy was implemented *only* at the buildings managed by Mr. Harvey. In fact, the whole basis for her reasonable accommodation claim is that the Marwood did *not* ask anyone to fill in for her while her knee healed. Thus, by her own admission, the Marwood did not have a policy that resident managers would fill in for each other. Because this was not a common employment policy, the argument fails.

2. Ms. Cole’s work at other buildings was managed separately from her work at the Marwood.

Ms. Cole next contends that Marwood and Harveyland are joint employers because “Plaintiff, acting in her capacity as Property Manager, trained and oversaw the performance of all the property managers, and reviewed their time sheets.” Resp. Brief, pp. 39-40. This is highly misleading. Ms. Cole’s work with other building managers was part of her *second* job, in which she was supervised by Mr. Harvey. RP (February 16, 2010) at 72. Her work for Marwood LLC was supervised by Ms. Jerome, and did not involve any other buildings. *Id.* Ms. Cole’s attempt to confuse her two jobs, in order to falsely suggest that her Marwood work was commonly managed with her other work, should be rejected.

3. Mr. Harvey signed the last Marwood paycheck as trustee, and it had nothing to do with personnel management.

Appellants previously explained that Mr. Harvey did not own the Marwood or receive any income from it, and that he wrote checks for the Marwood in his capacity as trustee. Brief of Appellants, p. 6. Ms. Cole ignores these undisputed facts, and argues that “Donald Harvey signed Plaintiff’s last pay check on behalf of himself and Marwood.” Resp. Brief, p. 40. He did *not* sign the check “on behalf of himself.” On the contrary, Mr. Harvey testified that he did not calculate Ms. Cole’s last check nor see her

last timesheet. RP (February 17, 2010) at 88-89. Ms. Jerome wrote the check based on Ms. Cole's timesheet and a new rate of compensation that Ms. Jerome set after taking over Marwood management. Id. at 139-140. Thus, all Mr. Harvey did was sign the check as trustee, which had nothing to do with managing personnel and does not prove that Harveyland and the Marwood had common personnel management. Who signs a paycheck is not one of the factors in WAC 162-16-220(6) for determining if employers are separate. The signature is irrelevant.⁶

4. Ms. Jerome did *not* fire Ms. Cole from Harveyland.

Ms. Cole also argues that Harveyland and the Marwood had common personnel management because "Ms. Jerome terminated Ms. Cole from Harveyland at the same time she terminated her from Marwood." Resp. Brief, p. 39. This is wrong. First, as already noted, there is no evidence that Harveyland LLC, as an entity, employed Ms. Cole. There is no paycheck signed by Harveyland.

Also, Ms. Cole distorts the evidence. When Ms. Jerome was asked if she fired Ms. Cole from "her employment for Donald Harvey" as well as from the Marwood, she said "***as it turns out,***

⁶ The "severance" check signed by Mr. Harvey was in recognition of Ms. Cole's many years of working for Mr. Harvey. Resp. Brief, p. 40. There is no evidence that the check had anything to do with Marwood LLC. It was left on Ms. Cole's chair without explanation. RP (Feb. 16, 2010) at 62.

yes.” RP (February 16, 2010) at 189 (emphasis added). “As it turns out” merely means that in retrospect, looking at how things turned out, it appeared that firing Ms. Cole from the Marwood resulted in her leaving Mr. Harvey’s buildings as well. It did *not* mean Ms. Jerome fired Ms. Cole from both jobs.

Ms. Cole herself testified that, when fired from the Marwood, she still had her other job, and “*was still working for Mr. Harvey.*” RP (February 16, 2010) at 50 (italics added). Thus, by Ms. Cole’s own admission, Ms. Jerome did *not* fire her from both jobs.

Also, Ms. Jerome testified that she had *no* management responsibilities at her father’s buildings. RP (February 17, 2010) at 129, 139. Thus, she lacked authority to fire Ms. Cole from her second job. Finally, Mr. Harvey testified that *nobody* fired Ms. Cole from her second job and that Ms. Cole voluntarily “quit.” *Id.* at 147, 157. In sum, Ms. Jerome fired Ms. Cole only from the Marwood.

C. There is No Evidence that Harveyland LLC and Marwood LLC Together Had Eight or More Employees.

Ms. Cole failed to provide any payroll records or elicit any testimony establishing how many people worked for the Marwood and Harveyland at the time of alleged discrimination in May 2008. Therefore, even if the two companies are treated as one, there is

no way for this Court to determine that together they had enough employees to be subject to the WLAD.

Washington courts use payroll to determine employer size for WLAD purposes. Anaya v. Graham, 89 Wn.App. 588, 590. There is simply no evidence that Harveyland LLC issued paychecks or had a payroll of any kind. Just because Harveyland LLC apparently had a parent relationship with other companies does not make Harveyland an “employer” of those companies’ employees.⁷

The only evidence of anyone’s wages in May 2008 was the final paycheck written to Ms. Cole for her Marwood work. Thus, as far as the evidence shows, the Marwood had only one employee.

Even if Harveyland, rather than the separate apartment corporations, did pay employees in May 2008, which was not proven, Mr. Harvey testified that the number of employees “varied” over the years. Just because there were sometimes 10 employees does not mean there were 10 employees in May 2008. In fact, Mr. Harvey testified that the only “permanent” employees of his apartment buildings were the resident managers. RP (February 17,

⁷ Minton v. Ralston Purina Co., 146 Wn.2d 385, 397-98 (2002) (parent company owes no independent duty to employees of a subsidiary, unless the corporate veil is pierced); Bestfoods, 524 U.S. 51, 61, 118 S.Ct. 1876 (1998) (“it is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation...is not liable for the acts of its subsidiaries”).

2010) at 61. So, the Marwood plus the other four buildings, even if counted together, had only five permanent employees.

Also, some temporary employees may not be countable. As Ms. Cole acknowledges, Mr. Harvey allowed resident managers to hire their spouses and children for Harveyland work. Resp. Brief, p. 40; RP (February 17, 2010) at 61. People who work for a parent, spouse or child do not count as employees. RCW 49.60.040(10). In sum, in the absence of any payroll records or testimony indicating who if anyone worked for Harveyland LLC in May 2008, it is not possible to conclude that the two companies together had at least eight employees at that time.

D. Judicial Estoppel Does Not Apply.

Ms. Cole argues that the appellants should be “judicially estopped” from arguing anything contrary to a statement that defense counsel Timothy McGarry made when trying to get the individual defendants dismissed from the case. Resp. Brief, p. 40. Ms. Cole’s argument is factually and legally wrong.

Judicial estoppel precludes a party from gaining advantage by asserting one position in a court proceeding and later seeking a second advantage by taking a clearly inconsistent position. Housing Authority Of City of Everett v. Kirby, 154 Wn.App. 842,

857-58 (2010). The doctrine applies “only if a litigant’s prior inconsistent position benefited the litigant or was accepted by the court.” *Id.* Here, Mr. McGarry’s request to dismiss Ms. Jerome and Mr. Harvey as defendants was not granted, so there was no benefit gained, and judicial estoppel cannot apply.⁸

Ms. Cole also suggests that estoppel arises from Jury Instruction No. 3, which stated that if either Ms. Jerome or Mr. Harvey is liable, then Harveyland is liable under a principal-agent theory. Resp. Brief, p. 40. But Ms. Cole’s instruction certainly did not benefit appellants, so judicial estoppel cannot apply.

Moreover, the instruction is *not* inconsistent with appellants’ argument that the judgment must be reversed because Ms. Cole failed to prove discrimination by an employer with eight or more employees. The WLAD simply doesn’t apply to small employers, so they cannot be liable through agents. Also, it is the corporation itself, not the owner, that is the “employer” for WLAD purposes. Patten v. Ackerman, 68 Wn.App. 831, 835 (1993). Since neither Ms. Jerome nor Mr. Harvey constituted an “employer” under the

⁸ Even if Mr. McGarry had said that Harveyland was responsible for the wrongful acts of Ms. Jerome and Mr. Harvey, which he did not, it would not matter. Resp. Brief, p. 40. “[C]ounsel’s argument is not evidence.” State v. Frost, 160 Wn.2d 765, 782 (2007).

WLAD, and the corporation defendants were exempt too, the instruction about agency is irrelevant.

E. Ms. Cole Did *Not* Prove Employee Numerosity.

In asserting that she proved employee numerosity at trial, Ms. Cole relies on Mr. Harvey's testimony that his apartment buildings employed about 10 employees. Resp. Brief, p. 40. She utterly fails to address appellants' extensive arguments as to why that testimony is insufficient. Brief of Appellants, pp. 14-16, 24-30. She also misrepresents the testimony.

It bears repeating what Mr. Harvey actually said:

Counsel: Mr. Harvey, during the period of time when Ms. Cole worked for you, it's true that you had approximately 10 employees?

Harvey: It varied, but about that.

Counsel: ...I believe you testified she started in 1994. Could she have started in 1991?

Harvey: Possibly.

RP (February 17, 2010) at 49, 100. Thus, Mr. Harvey described a payroll that "varied" during Ms. Cole's 17 years of employment from 1991 to 2008. He was *not* asked how many people were employed at the time the alleged discrimination occurred. He was *not* asked if anyone worked for Harveyland LLC, as opposed to the separate corporations he had created for each building, as of May 2008.

Thus, the estimated number of employees over 17 years is meaningless, because it does not define the payroll at the relevant time, *after* Ms. Jerome took over Marwood management and *after* each building became a separate employer.

The Respondent's Brief does not refute that Ms. Cole needed to prove payroll *at the time of discrimination*. Anaya, 89 Wn.App. at 589-90. Ms. Cole also concedes that the Marwood had fewer than eight employees at that time. In doing so, Ms. Cole claims the Marwood's size "is not the issue" because she did not seek damages from the Marwood. Resp. Brief, p. 41.

That she did not seek damages from the Marwood, however, is a reason to overturn the verdict. Marwood LLC – and not Ms. Jerome or Mr. Harvey - was her employer for WLAD purposes. Patten, 68 Wn.App. at 835. It appears Ms. Cole was unaware that corporate entities, not their owners or managers, are "employers" under the WLAD. Id. If she had realized this, she would not have instructed the jury that if Ms. Jerome or Mr. Harvey was liable, then Harveyland was liable. That instruction did her no good because, as already explained, a principal-agent relationship is irrelevant if neither the principal nor the agent was an employer subject to the WLAD. No employer met the eight-employee threshold - period.

In sum, Ms. Cole failed to offer any evidence of payroll in May 2008, although such proof was necessary to invoke the WLAD. Therefore, the judgment must be reversed for lack of sufficient evidence that her employer was subject to the WLAD.

F. Ms. Cole Misunderstands Arguments About the Excluded Testimony.

Contrary to Ms. Cole's arguments, appellants did not contend that discriminatory intent is an element of a reasonable accommodation claim. Resp. Brief, p. 42. However, intent *is* an element of Ms. Cole's other claim, wrongful firing. That is why Ms. Jerome's state of mind was relevant. The federal cases cited by Ms. Cole are off point and do not refute that intent is an element of a RCW 49.60.180 wrongful firing claim. Resp. Brief, pp. 42-44.

Nor have appellants ever suggested that ignorance of the law is a defense in this case. Resp. Brief, p. 44. On the contrary, appellants pointed out that the excluded testimony would have revealed that Ms. Jerome was *properly* advised about the law – and that she followed that advice. In fact, the WLAD prohibition against firing based on disability “does *not* apply if the disability prevents the employee from properly performing his job.” Havlina v. Wash. State Department of Transportation, 142 Wn.App. 510, 517 (2008)

(italics added). The duty to accommodate an employee's disability "does *not* include elimination of an essential job function." Davis v. Microsoft Corp., 109 Wn.App. 884, 890 (2002) (italics added). The state employee *correctly* told Ms. Jerome she is not obligated to employ someone who cannot perform the job.⁹ Thus, the excluded testimony was not to show "ignorance" of the law.

Rather, the important purpose of the excluded testimony was to show Ms. Jerome's concern for Ms. Cole's rights as a disabled employee. Because the testimony was excluded, jurors knew only that Ms. Cole's knee injury was a factor in Ms. Jerome's firing decision. They did not know *how* it was a factor. They did not know that the way in which Ms. Jerome considered the disability, before firing was Ms. Cole, was to ask a regulator about Ms. Cole's rights as an injured worker who was unable to perform her job. As it was, jurors could only speculate as to how disability was a factor.

The trial court's decision to exclude an explanation was unfairly prejudicial, especially when coupled with the attorney's false closing statement that Ms. Jerome did not investigate what accommodations would be reasonable. Contrary to Ms. Cole's

⁹ The Respondent's Brief (p. 46) asserts that appellants "cite no authority" for the proposition that the advice was correct. This is bizarre considering that four cases, including Havlina and Davis, were cited. Brief of Appellant, pp. 44-45.

arguments, the closing statement directly contradicted the excluded testimony. In asking the state regulator if she could fire an injured worker, Ms. Jerome was investigating what accommodations would be reasonable – she was investigating whether accommodations are necessary at all when a worker cannot perform the job. By allowing Ms. Cole’s attorney to tell the jury that Ms. Jerome did not investigate accommodations, while preventing Ms. Jerome from explaining that she *did* investigate what was reasonable under the circumstances, the trial court abused its discretion.

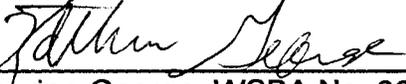
IV. CONCLUSION

For the foregoing reasons, the Court should declare the judgment void for lack of jurisdiction. If the judgment is not declared void, the Court should reverse the judgment and order dismissal based on insufficient evidence. If dismissal is not ordered, the Court should order a new trial based on abuse of discretion in excluding testimony. This Court should deny attorney fees to Ms. Cole.

Dated this 25th day of October, 2010.

RESPECTFULLY SUBMITTED,

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By: 
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Attorney for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date below, I caused delivery of a copy of the Reply of Appellants by United States mail, to:

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119 First Avenue South
Seattle, WA 98104
Attorney for Respondent

Dated this 25th day of October, 2010, at Seattle, Washington.


KATHERINE GEORGE