

Supreme Court Case No. 89316-1
Court of Appeals Case No. 303551-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LISA BUHR,

Petitioner,

vs.

STEWART TITLE OF SPOKANE, LLC,

Respondent.

ANSWER TO PETITION FOR REVIEW

James M. Kalamon, WSBA #7922
Brook L. Cunningham, WSBA #39270
Paine Hamblen LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
(509) 455-6000

Laurence E. Stuart, Pro Hac Vice Admittee
Stuart PC
909 Fannin, Suite 3250
Houston, Texas 77010
(713) 337-3750

Attorneys for Respondent

FILED
BY RONALD R. OAKFORTH
10/11/11 7:41 AM
COURT OF APPEALS
SPOKANE, WASHINGTON

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	3
	A. Buhr Becomes A Customer Service Representative For Stewart Spokane	3
	B. Buhr Was Expected To Work Between 8:00 a.m. and 5:00 p.m.....	4
	C. Buhr Was A Valued Employee of Stewart Spokane.....	5
	D. Buhr's Absences at Stewart Spokane Were Liberally Granted and Did Not Impact Her Work Performance.....	5
	E. Buhr's Employment Was Terminated For Falsification of Her time Card.....	7
	F. The Lawsuit	8
III.	ARGUMENT	
	A. The Court of Appeals' Decision on Accommodation Is Consistent With Applicable Law	10
	B. The Court of Appeals Properly Affirmed the Trial Court's Limitations on Accommodation at Trial and Exclusion of Accommodation from the Jury Instruction.....	16
IV.	CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES

<i>Jane Doe v. Boeing Co.</i> , 121 Wn.2d 8, 846 P.2d 531 (1993).....	15
<i>Sharpe v. Am. Tel. & Tel. Co.</i> , 66 F.3d 1045, 1050 (9th Cir. 1995)	15
<i>US Airways, Inc. v. Barnett</i> , 535 U.S. 391 (2002).....	11,13
<i>Wilson v. Wenatchee Sch. Dist.</i> , 110 Wn. App. 265, 40 P.3d 686 (2002).....	16

STATUTES

RCW 49.46.010(5) Washington Minimum Wage Act	8
RCW 49.52.050 Washington Wage Rebate Act	8
RCW 49.60.010 <i>et. seq.</i> ; Washington Law against Discrimination.....	8
RCW 49.78.010 <i>et. seq.</i> ; Washington State Family Leave Act	8
WAC 162-22-065(2)(a)	13

OTHER AUTHORITIES

29 C.F.R. 1630.2(o)(2)(ii)	13
42 U.S.C. § 12111(9)(B).....	13

I. INTRODUCTION

In a strained effort to obtain discretionary review of the Court of Appeals' determination of her case, Petitioner Lisa Buhr ("Buhr" or "Petitioner") mischaracterizes the holdings of the Court of Appeals and ignores existing law which supports these holdings.

Before the trial court, Buhr asserted disability discrimination claims against her former employer, Stewart Title of Spokane, LLC ("Stewart Spokane" or "Respondent"), under two separate theories—failure to accommodate and disparate treatment. The trial court granted summary judgment in favor of Stewart Spokane on Buhr's failure to accommodate claim, and Petitioner proceeded to trial on her disparate treatment claim. The jury found in favor of Stewart Spokane.

Buhr appealed, arguing that the trial court erred by dismissing her failure to accommodate claim on summary judgment, by limiting evidence on reasonable accommodation at trial, and by not including a distinct jury instruction on reasonable accommodation. The Court of Appeals properly rejected Buhr's arguments and affirmed the actions of the trial court.

Buhr now seeks discretionary review, arguing that the Court of Appeals erred by holding that Respondent accommodated Buhr by treating her "the same as a non-disabled employee" and by "reducing" her "full-time position to less than full time." The Court of Appeals held no such

thing. Rather, the Court of Appeals properly upheld the dismissal of Buhr's failure to accommodate claim after concluding that Stewart Spokane made special allowances for Buhr—specifically, allowing her to work a reduced work week—which enabled Buhr to perform her job. In support of this holding, the Court of Appeals cited well-established law—which Buhr conveniently ignores—that an employer's duty to reasonably accommodate an employee's disability is limited to those steps necessary to enable the employee to perform her job.

Buhr also asserts that the Court of Appeals erred by holding that accommodation played no role in Buhr's claims of disparate treatment, and by consequently limiting evidence of reasonable accommodation at trial and excluding a jury instruction on reasonable accommodation. Again, Buhr's characterizations and contentions have no merit. The Court of Appeals properly upheld the limitation on evidence of reasonable accommodation and the given jury instruction because it had been established at summary judgment that Stewart Spokane satisfied its duty of accommodation.

Further review by this Court is unnecessary. The opinion of Division III of the Court of Appeals (the "Decision") does not involve a significant question of law under the Constitution of either the State of Washington or the United States, does not involve an issue of substantial

public interest, and is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. For these reasons, Stewart Spokane respectfully requests that Buhr's Petition for Review be denied.

II. STATEMENT OF THE CASE

Petitioner Lisa Buhr suffered from a rare form of eye cancer as a child, and in 2000 she had a prosthetic eye inserted. (CP 332-333.) Following this surgery, Buhr's prosthetic eye caused her to suffer migraine headaches, dryness, irritation, bleeding, problems with vision, and inability to focus, among other problems. (CP 333-335.) Buhr also has a lifelong history of suffering from depression, tension, anxiety, trouble sleeping and social isolation. (CP 336-337.)

A. Buhr Becomes A Customer Service Representative For Stewart Spokane.

In June 2006, Anthony Carollo ("Carollo") interviewed Buhr regarding a customer service representative position at Stewart Spokane. (CP 345-346.) During her interview, Buhr informed Carollo of her medical issues and need for repeated absences. (CP 347.) Buhr specifically told Carollo that if she was hired, she would incur sick days beyond the "normal allotted," and if that was a problem, not to hire her. (CP 347, RP 1345-1346.) On June 30, 2006, Buhr was hired for the position. (CP 345-346, 375.)

B. Buhr Was Expected To Work Between 8:00 a.m. and 5:00 p.m.

Buhr was scheduled to work 8:00 a.m. to 5:00 p.m., Monday through Friday at Stewart Spokane.¹ (CP 351, 411.) Although there was the potential for 40 paid hours per week, Buhr and Carollo both testified that there was no guarantee that Buhr would receive 40 paid hours per week.² (CP 348, 382-383; RP 1350.)

Buhr testified that any hours worked outside her normal business hours required prior approval from her supervisor. (CP 351.) This included any hours needed to complete work resulting from her absences.³ (CP 387-388.) Buhr further testified that she never raised the possibility of working outside of normal business hours with anyone at Stewart Spokane. (CP 351; RP 1372-1375, 1557-1558.) Likewise, Carollo testified that Buhr never raised the issue of working outside normal business hours with him; i.e., at night or on weekends. (CP 387-388.)

In September 2007, Carollo announced that no hourly employee was to work outside 8:00 a.m. to 5:00 p.m. without advance authorization. (RP 1610, 1987-1988.) He did so because the economy was slowing,

¹ This was a typical workweek for most Stewart Spokane employees. (CP 382, 411.)

² Notably, during her employment with Stewart Spokane, Buhr never raised this issue with Carollo. (CP 386, RP 1372-1375.)

³ Buhr's testimony is consistent with the Stewart Spokane policy that employees must obtain permission before working outside normal business hours or working overtime. (CP 380-381, 383-384, 388, 392, 420-421.)

there were enough employees there to complete all work without extra hours being worked, and he did not want to lay anyone off. (RP 1987-1988; see also RP 275.) After that announcement, Buhr made a request on behalf of herself and co-employees Carrie Dove (“Dove”) and Allyson Hurd (“Hurd”) to work beyond 5:00 p.m. to complete work that was required by new guidelines implemented by the Washington Insurance Commissioner. (CP 356.) Carollo denied that request. (CP 356.)

On September 4, 2007, Scott Montilla (“Montilla”) was hired as Stewart Spokane’s Title Manager. (CP 409-412.) At that time, Montilla became Buhr’s supervisor, replacing Dave Chromy. (CP 410-412.)

C. Buhr Was a Valued Employee of Stewart Spokane.

Buhr testified that Carollo trusted her to perform special tasks not available to other customer service representatives.⁴ (CP 359.) In fact, Buhr testified that Carollo gave her more responsibility and demonstrated more confidence in her than other employees. (CP 359.) Carollo testified that he viewed Buhr as a productive employee. (CP 377-379, 385.)

D. Buhr’s Absences at Stewart Spokane Were Liberally Granted and Did Not Impact Her Work Performance.

At the time Buhr was hired, she was aware that Stewart Spokane provided its employees with 12 days of paid sick leave per year, and that

⁴ These tasks included, but were not limited to, providing special training, meeting with sales representatives and technology personnel, and educating real estate agents on what Stewart Spokane could offer them. (CP 359.)

after those days were used, the employee would have to use vacation time to be paid for additional absences. If the employee used all available paid sick time and vacation time during the year, any remaining absences were unpaid. (CP 346-347, 349, 353.)

Buhr testified that her absences increased at Stewart Spokane and that she incurred absences surpassing her paid sick and vacation time, which required her to incur unpaid sick time.⁵ (CP 340, 347.)

Stewart Spokane *never* denied a request by Buhr for a day off because she was sick or having medical issues that made her uncomfortable or unable to come to work. (CP 347.) All requests by Buhr for days off were granted, even after those absences exceeded the paid sick time allotment at Stewart Spokane. (CP 347; RP 1392-1393.) Despite repeated absences amounting to 16% of workdays (CP 1871-1872), Buhr testified that Stewart Spokane never questioned her regarding those absences. (CP 347; RP 1350, 1795-1796.) On days when Buhr was absent, Stewart Spokane was informed by her in the morning and responded “that was fine.” (CP 347, 379; RP 1350.)

Carollo testified that he never monitored her absences nor raised them with Buhr. (CP 379.) Carollo further testified that he did not view

⁵ In practice, Buhr made up for unpaid sick hours by working extra hours on other days and in other weeks.

Buhr's absences as impacting her work. (CP 379, 385.) Similarly, Montilla testified that Carollo never discussed with him Buhr's medical condition or her reoccurring absences. (CP 413-415.) Montilla testified that he never talked to Buhr about her absences nor did he raise that issue with Carollo during the short time he worked with Buhr. (CP 413-415.)

E. Buhr's Employment Was Terminated For Falsification of Her Time Card.

Stewart Spokane expects its employees to accurately fill out their timecards. Carollo had heard from at least two employees that Buhr had been padding her timecard with extra hours. (CP 381, 392, 394.) When Buhr submitted a time card showing five hours worked on a Saturday, within weeks of Carollo's announcement that employees should not work outside Monday to Friday 8:00 a.m. to 5:00 p.m. without pre-approval, he became suspicious and ordered alarm records to see if Buhr had actually worked the hours reported. (CP 381, 392, 394, 561.) By comparing Buhr's timecard to building alarm records, Carollo discovered that Buhr had intentionally falsified her time card, recording more time than she had actually worked on Saturday, September 22, 2007. (CP 376, 394, 396.)

Consequently, on October 1, 2007, Buhr was terminated by Carollo and Montilla for submitting an intentionally false timecard; i.e., recording hours she did not work, which amounted to stealing from the

company, and for not getting prior permission before working extra time on that Saturday, as required. (CP 390-391, 393, 417-419.)

Buhr admitted that she submitted a false timecard claiming that she worked 5 hours on Saturday, September 22, 2007, when in actuality, she worked 3 hours. (CP 356; RP 1352.) Buhr further testified that she was not pre-authorized to work on that Saturday. (CP 356.)

F. The Lawsuit.

In October 2009, Buhr sued Stewart Spokane asserting a variety of wrongful termination and disability discrimination claims, including alleged violations of the Washington Law Against Discrimination, RCW 49.60.010 *et. seq.*; Washington State Family Leave Act, RCW 49.78.010 *et. seq.*; Washington Minimum Wage Act, RCW 49.46.010(5); Washington Wage Rebate Act, 49.52.050; and for alleged wrongful discharge. (CP 20-34.)

On June 2, 2011, Stewart Spokane moved for summary judgment on all of Buhr's claims. (CP 300-323.) With respect to Buhr's failure to accommodate claim, Stewart Spokane argued that Buhr did not require any accommodation other than the allowance of liberal absences, which it provided.⁶ (CP 306-309.) The trial court granted summary judgment on

⁶ There is no record evidence that Buhr ever specifically requested any other accommodation.

this claim.⁷ (CP 1961-1967.) The trial court denied summary judgment on Buhr's claim for disparate treatment disability discrimination based on her termination and/or the company's alleged failure to allow Buhr to work outside normal business hours.⁸ (CP 1961-1967.)

At trial, Stewart Spokane filed a motion in limine seeking to prevent Buhr from referencing any legal obligation to accommodate Buhr's disability, as it appeared Buhr's counsel intended to conflate the dismissed accommodation claim with her disparate treatment claim. (RP 46-48.) The judge agreed that references to "accommodation" as contemplated by the applicable law would be likely to confuse the jury under the facts of this case, but ultimately denied the motion and instead suggested that counsel use "an appropriate amount of circumspection so that there won't be any confusion with the dismissed claim." (RP 59.)

Following the close of evidence, the parties submitted their proposed jury instructions, at which time Buhr sought instructions which included references to "reasonable accommodation" and a definition of the same, even though Stewart Spokane had conceded that Buhr was a

⁷ The trial court also granted summary judgment on Petitioner's claim under the Washington State Family Leave Act, and Buhr's claim for wrongful discharge in violation of public policy. (CP 1961-1967.)

⁸ The trial court also denied summary judgment on Buhr's claim for violation of the Washington Minimum Wage Act, and Buhr's claim for violation of the Washington Wage Rebate Act. (CP 1961-1967.)

“qualified individual” and even though the accommodation claim had been dismissed. Stewart Spokane argued that Buhr’s proposed instructions would confuse the jury and misstate the law. The judge rejected Buhr’s proposed jury instruction.

At the conclusion of trial, the jury found in favor of Stewart Spokane on all issues and issued final judgment dismissing Buhr’s remaining claims. (CP 2298-2300, 2327-2328.) Buhr timely appealed. (CP 2324-2326.) Division III affirmed the trial court in an opinion issued August 1, 2013.⁹ As a result, Buhr has petitioned this Court for review.

III. ARGUMENT

A. The Court of Appeals’ Decision on Accommodation Is Consistent With Applicable Law.

Buhr contends that the holdings of the Court of Appeals conflict with holdings of other Divisions and the holdings of federal courts, including the United States Supreme Court. Although Buhr strenuously attempts to create the appearance of conflict by skewing the facts, the holdings of Division III in the instant case, and the holdings of other cases she cites, the Decision in the present case is consistent with settled law and does not conflict with any of the cases Buhr cites.

⁹ Although Buhr identifies Appeal No. 30164-8-III as the Decision for review, she has identified this appeal in error. Buhr actually seeks review of Appeal No. 30355-1-III.

1. Stewart Spokane Satisfied its Duty to Accommodate Buhr.

After well reasoned analysis, the Court of Appeals held that by liberally permitting Buhr's unpredictable absences, Stewart Spokane accommodated Buhr's disability in such a manner that she was able to perform satisfactorily and continue her employment at Stewart Spokane. (Decision, pp. 9-14.)

Buhr argues that the Court of Appeals erred in its definition of the duty to accommodate. Buhr claims that the Court of Appeals' decision "conflicts with the very definition of accommodation" because the Court did not explain or require that "an employer is under an affirmative obligation to make positive adjustments or modifications to the work environment of the disabled employee." (Petition for Review ("Petition"), at p. 9.) Buhr asserts that Stewart Spokane did not accommodate her by providing her leave pursuant to its "neutral" leave policy because the policy provided for equal, not preferential, treatment. (*Id.* at 11.) In support of these arguments, Buhr heavily relies on *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), which states that, "[b]y definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially." *Id.* at 397. Buhr's arguments in this regard fail for the following reasons.

First, the Court of Appeals' Decision does not conflict with the concept of reasonable accommodation as preferential treatment or "positive steps." The Court of Appeals determined therein that Buhr was treated preferentially, concluding that "[u]ndisputed facts demonstrated by Stewart Spokane support the conclusion that Stewart Spokane made special allowances for Ms. Buhr" (Decision, p. 14.) The Court noted that Stewart Spokane accommodated Buhr's need for an "unusual" and "extraordinary" number of "unpredictable" absences. (*Id.* at 3, 10-11.)

Second, Buhr's argument is logically flawed insofar as it assumes the application of Stewart's leave policy results in equal treatment. The fact that a leave policy provides medical leave for all employees requiring it does not mean that an employer treats every employee's request for leave the same regardless of the employee's circumstances. Buhr was liberally granted an extraordinary number of absences (far exceeding the normal amount of sick days) to accommodate her disability. For the period of August 16, 2006 through September 30, 2007 there were 272 work days, of which Buhr took 43 sick days off, without Stewart Title of Spokane raising an issue as to the same. (CP 638-685.) This means Buhr was absent approximately 16% of the work days during her employment without her absences ever being questioned. (CP 1871-1872.) There is no

evidence in the record that Stewart Spokane permitted non-disabled employees the flexible leave given to Buhr.

Third, Buhr's reliance on *Barnett*, 535 U.S. at 397, is misplaced. Buhr cites *Barnett* to support her contention that the application of a neutral policy can never result in accommodation of a disabled employee. *Barnett* does not stand for this proposition. Indeed, Buhr has not cited any case supporting this proposition. The *Barnett* court did not even consider whether the application of a neutral policy could constitute reasonable accommodation. *Barnett* addressed another question altogether—whether an accommodation that would provide a 'preference' in violation of a neutral work rule (specifically, a seniority system) would render a requested accommodation unreasonable. *Id.* at 397-98. In the present case, Stewart Spokane does not contend that Buhr's requests for an unusual number of absences were unreasonable, and Buhr did not request an accommodation that would have violated a neutral work rule. Accordingly, *Barnett* is inapposite.

Moreover, as the Court of Appeals noted, providing a reduced or adjusted work schedule is recognized as one type of reasonable accommodation. (Decision, p. 11, citing WAC 162-22-065(2)(a); 42 U.S.C. § 12111(9)(B); and 29 C.F.R. 1630.2(o)(2)(ii)). Buhr has failed to

establish that the Court of Appeals erred in affirming the trial court's decision, and the Petition for Review should be denied.

2. Reasonable Accommodation Did Not Require Allowing Buhr To Work Outside of Normal Business Hours.

Buhr also contends that the Court of Appeals erred by holding that allowing Buhr to reduce her work hours to take unpaid sick days (which by itself would have reduced her pay) constituted accommodation. Buhr contends this reduction of her hours should be viewed as an adverse action, rather than accommodation. (Petition, p. 12.) These arguments relate to Buhr's contention before the Court of Appeals that Stewart Spokane should have accommodated Buhr by allowing her to work outside of normal business hours in order to make up time which she missed because of absences due to her disability.

Contrary to Buhr's assertions, the WLAD does not guarantee a disabled worker a full time work week. As the Court of Appeals aptly noted, Buhr cited "no authority for the proposition that an employer's duty to accommodate an employee's disability includes figuring out a way that an employee who needs to miss work days can make the same earnings as an employee who does not."¹⁰ (Decision, p. 12.)

¹⁰ Assuming, arguendo, that Stewart Title of Spokane was required to permit Buhr to work outside normal business hours because of her disability, Buhr's flex-time actually did remain constant throughout her employment. (CP 1872, 1888-1889.) Stewart Title

The duty to reasonably accommodate a disability extends only to measures which will help an employee perform her job, avoid termination or avoid aggravating a disability. *Jane Doe v. Boeing Co.*, 121 Wn.2d 8, 14, 20, 846 P.2d 531 (1993); *see, also, Sharpe v. Am. Tel. & Tel. Co.*, 66 F.3d 1045, 1050 (9th Cir. 1995) (where the employer provides a reasonable accommodation, its legal obligation is satisfied and the “inquiry is over”).

While Buhr was employed at Stewart Spokane, Buhr never actually requested to work outside of normal business hours as a disability accommodation.¹¹ (CP 351, 386-388, RP 1372-1375, 1557-1558.) Carollo and Montilla did not believe Buhr’s work suffered from her absences. (CP 379, 385.) Carollo was not aware of Buhr’s belief that she needed to work outside of business hours to perform her job. (CP 351, 386-388, RP 266.) Although Carollo was aware of Buhr’s disability and attendant absences, he was not aware, and Buhr never informed him, that

of Spokane records reflected that for the period of August 16, 2006 through September 30, 2007, Buhr’s work hours (per pay period) outside normal business hours – 8:00 a.m. to 5:00 p.m. – remained relatively consistent throughout her employment, with Buhr working between 0 to 11 hours per pay period outside those normal business hours all the way up to her termination on October 1, 2007, when she admittedly submitted an intentionally false timecard. (CP 1872, 1888-1889.) Buhr’s implication that her pay was reduced failed on this basis.

¹¹ Buhr’s only specific request to work outside regular hours came in September 2007 when Buhr claimed that she, Hurd, and Dove needed to work more because of new regulatory requirements – not because of her disability.

she believed she needed to work outside of normal business hours in order to perform her job. (CP 379, 385.)

Even if Buhr had requested to work outside of normal business hours because of her disability (which she did not), Washington law does not require an employer to offer a disabled employee the precise accommodation the employee requests. *Wilson v. Wenatchee Sch. Dist.*, 110 Wn. App. 265, 270, 40 P.3d 686 (2002). Stewart Spokane was under no obligation to allow Buhr to work outside normal business hours, where such accommodation was not requested and was not necessary to enable Buhr to perform the essential functions of her job. Stewart Spokane was required under its accommodation obligation to do that which would allow Buhr to remain employed, and this was accomplished by the liberal granting of leave. Petitioner has therefore failed to establish that the Court of Appeals erred in affirming the trial court's decision.

B. The Court of Appeals Properly Affirmed the Trial Court's Limitations on Accommodation at Trial and Exclusion of Accommodation from the Jury Instruction.

Buhr also claims that Division III erred by holding that "accommodation plays no role in the assessment of disparate treatment." (Petition, p. 14.) In fact, Division III did not make such a broad holding.

Before the Court of Appeals, Buhr argued that she was entitled to introduce evidence on accommodation at trial and receive a jury

instruction on accommodation because one of the elements of a disparate treatment claim is that plaintiff was able to perform her job with or without accommodation. Division III recognized that in some cases—where both reasonable accommodation and disparate treatment claims were still in the case at the time of trial—accommodation may be considered as part of a disparate treatment case. (Decision, p. 17.)

In Buhr’s case, however, Buhr’s reasonable accommodation claim had been dismissed at summary judgment after it was established that Buhr was able to perform all essential functions of her job with the allowances for absences given. Since the issue was no longer in dispute, the Court of Appeals affirmed the trial court’s limitations on accommodation evidence at trial and exclusion of an accommodation reference in the jury instruction.¹² (*Id.* at 17-19.)

¹² Because the parties agreed that Buhr was able to perform her job, the inclusion of the second element from Pattern Jury Instruction 330.32, particularly the bracketed words “with reasonable accommodation,” and the definition of reasonable accommodation Buhr sought did not apply to Buhr’s case. (*Id.* at 17-18.) Instructions on reasonable accommodation were unnecessary, inappropriate and would have confused the jury. (*See Id.* at 19.) The Court of Appeals properly affirmed the trial court’s exclusion of these instructions.

Likewise, to the extent the Court restricted any evidence on accommodation, it properly did so in order avoid confusing the jury. Buhr’s accommodation claim had been dismissed. Allowing extensive questioning and testimony regarding accommodation in the legal sense would have confused and misled the jury. Any refusal by the trial court of evidence relating to reasonable accommodation was well within its discretion and was properly affirmed. (*Id.* at 20-21.)

Recognizing the flaws in arguments she made to the Court of Appeals—Buhr attempts to reframe her argument in her Petition. She no longer argues that she should have been permitted to prove she needed accommodation to do her job. Instead, for the first time, Buhr argues that accommodation is a precursor necessary to create similarly situated employees for a disparate treatment comparison. (Petition, p. 15.) Buhr claims that “[a]bsent the affirmative step of accommodation, a disabled employee is not similarly situated to a non-disabled employee, and cannot be similarly judged.” (*Id.* at 15.)

In support of her argument, Buhr sets forth an example in which an employee is disciplined for being late to work although the employee cannot physically get through the door. (*Id.* at 16.) Buhr asserts that she “was the employee who could not get in the door, but was disciplined for being late.” (*Id.* at 17.) This example is completely off the mark.

First, as the Court of Appeals properly held, Buhr was accommodated, and as a result she was able to perform the essential functions of her position. In terms consistent with Buhr’s analogy, Stewart Spokane installed a ramp and an electric door opener so that Buhr was able to get in the door.

Buhr was not disciplined for being “late.” Buhr was terminated for submitting an intentionally false timecard; i.e., recording hours she knew

she did not work, which amounted to stealing from the company, and for not getting prior permission before working extra time on that Saturday, as required. (CP 390-391, 417-419.)

Buhr complains that she was not allowed to discuss or argue that she should have been accommodated by allowing her to go into work after hours (even though she never requested that as an accommodation during her employment), but the Court of Appeals determined, as a matter of law, that Stewart's allowances for Buhr's extraordinary absences constituted reasonable accommodation. As such, Buhr was not entitled to discuss or argue the accommodation she desired in hindsight. Buhr was similarly situated to other non-disabled employees insofar as her accommodations allowed her to do her job.

Buhr suggests that the jury instructions given could have allowed the jury to conclude that if Buhr was treated the same as everyone else, no discrimination existed, and that this is error. Even if this were somehow true, it is not error in this case. Where a disabled person has been adequately accommodated, otherwise treating that person the same as everyone else is not discrimination. *Doe*, 121 Wn.2d at 20 ("identical treatment may be a source of discrimination only when the work environment fails to take into account the unique characteristics of the

handicapped person”). Thus, in Buhr’s case, otherwise identical treatment could not be a source of discrimination, as Buhr claims.

At trial, Buhr’s claim for failure to accommodate had already been dismissed; the Court did not err by preventing Buhr from improperly injecting that theory back into the case. The Petition of Review makes no attempt to refute the appellate court’s reasoning. Petitioner has failed to demonstrate any error warranting this Court’s review.

IV. CONCLUSION

For the foregoing reasons, Stewart Title of Spokane, LLC respectfully requests that Buhr’s Petition for Review be denied.

RESPECTFULLY SUBMITTED this 4th day of October, 2013.

PAINE HAMBLEN LLP

STUART PC

James M. Kalamon, WSBA #7922
Paine Hamblen LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
Telephone: (509) 455-6000
Fax: (509) 838-0007
E-mail: james.kalamon@painehamblen.com
Attorneys for Respondent

Laurence E. Stuart, *Pro Hac Vice*
Stuart PC
909 Fannin, Suite 3250
Houston, Texas 77010
Telephone: (713) 337-3750
Fax: (713) 481-6320
E-mail: lstuart@stuartpc.com
Attorneys for Respondent

handicapped person”). Thus, in Buhr’s case, otherwise identical treatment could not be a source of discrimination, as Buhr claims.

At trial, Buhr’s claim for failure to accommodate had already been dismissed; the Court did not err by preventing Buhr from improperly injecting that theory back into the case. The Petition of Review makes no attempt to refute the appellate court’s reasoning. Petitioner has failed to demonstrate any error warranting this Court’s review.

IV. CONCLUSION

For the foregoing reasons, Stewart Title of Spokane, LLC respectfully requests that Buhr’s Petition for Review be denied.

RESPECTFULLY SUBMITTED this 4th day of October, 2013.

PAINE HAMBLEN LLP

STUART PC


James M. Kalamon, WSBA #7922
Brook L. Cunningham, WSBA #39270
Paine Hamblen LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
Telephone: (509) 455-6000
Fax: (509) 838-0007
E-mail: james.kalamon@painehamblen.com
Attorneys for Respondent


Laurence E. Stuart, *Pro Hac Vice*
Stuart PC
909 Fannin, Suite 3250
Houston, Texas 77010
Telephone: (713) 337-3750
Fax: (713) 481-6320
E-mail: lstuart@stuartpc.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2013, I caused to be served a true and correct copy of the foregoing **ANSWER TO PETITION FOR REVIEW**, by U.S. Mail/facsimile and addressed to the following:

MARY SCHULTZ
Mary Schultz Law, P.S.
2111 E. Red Barn Lane
Spangle, WA 99031

Laurence E. Stuart
Stuart PC
909 Fannin, Suite 3250
Houston, Texas 77010

Dated this 4th day of October 2013, at Spokane, Washington.



Brook L. Cunningham

I:\SPODOCS\37463\00003\PLEAD\1204562