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NO. 69332-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ELIZABETH AND JASON BROOKS,

APPELLANTS,

v.

BPM SENIOR LIVING COMPANY,

DEFENDANT.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

REPLY BRIEF OF APPELLANT

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1. Whether this reviewing court can apply the standard of mixed issues of law and fact or whether the findings and conclusions of the trial court end the inquiry.

2. Whether the trial court applied the correct standard of review in applying substantial evidence to the threshold of mixed questions of law and fact.

3. Whether the trial court erred in considering all the evidence in light of the "totality of the circumstances" standard for determining harassment.

4. Whether discussing a severance package is tantamount to a voluntary resignation when employment will be severed with or without accepting a severance amount.

5. Whether sanctioning an attorney for contacting a witness on the basis that the witness is a speaking agent when the employee does not have the status of a speaking agent, and the contact is de minimus rises to the level of sanctionable conduct.

B. Reply to Defendant's Statement of Evidence

1. BPM Fired Elizabeth Brooks

At no time did Elizabeth Brooks voluntarily leave her job with BPM. The defendant severed the relationship. BPM cannot provide any

proof that Elizabeth Brooks resigned. She did not sign any documents related to a severance package. She did not sign any Release of Claims with BPM. She did not sign BPM's Personnel Action Notice. Whether she had signed these documents or not, Elizabeth Brooks did not have a job with BPM after March 18, 2010 because BPM severed the relationship.

Travel Schedule Was Pretexual and Retaliatory.

While occupancy is important in the senior living industry, occupancy rates had been in decline or had plateaued for every senior living company due to the housing crisis. This is because most seniors pay for assisted living by selling their homes. No new 'crisis' existed in February and March of 2010 that had not existed for the previous three years. BPM presented no evidence that its occupancy rates were below any of its competitors. BPM presented no evidence that forcing Elizabeth Brooks to travel 4 days a week, 3 weeks out of every month would increase its occupancy rates. Despite claiming that Brooks suddenly had to maintain the travel schedule it created, BPM had suspended travel for Brooks at the time it terminated her employment. The trial court found that the schedule created by BPM exceeded her previous travel responsibilities despite the company's repeated protestations that her

travel had not increased. BPM hired Kim Homer primarily to have her in place so that it could terminate Elizabeth Brooks.

BPM Interfered With Maternity Leave And Fired Elizabeth Brooks The First Day She Returned

BPM pressured Brooks to resign and threatened her continued employment throughout her maternity leave, beginning 4 days after the birth of her baby. The trial court found that Dennis Parfitt pressured Brooks to resign during a luncheon on December 10, 2009. Furthermore, BPM fired Elizabeth her first day back from maternity leave. BPM even outlined duties Brooks would have as a consultant after Walt Bowen, BPM's owner got her "off the payroll".

After ordering her back to work with no explanation, Brooks traveled on behalf of BPM. She visited facilities reachable by car travel. Brooks traveled to company headquarters on two different occasions in January and February of 2010. She took her mother along as a nanny. Elizabeth had plans to travel to Las Vegas and attend the company's annual meeting at the time BPM fired her.

In February 2010, BPM presented Elizabeth Brooks with a travel schedule that demanded she travel 4 days a week, 3 weeks out of every month. Brooks had always been in charge of her own travel. This travel

schedule significantly increased the travel expectations for Elizabeth Brooks.

Elizabeth Brooks Developed A Medical Condition Requiring Accommodation

Brooks repeatedly requested accommodations for travel. At no time did she accept the travel schedule. Elizabeth began having difficulty with a medical condition caused by stress that resulted in decreased milk production. Elizabeth Brooks was the sole source of nourishment for her infant. Her physician, Dr. Bonnie Gong, wrote a medical note circumscribing Brooks' travel until she stopped breast feeding. Gong never ordered Brooks to suspend all travel. Her intent was for BPM and Brooks to agree on a reasonable travel schedule. BPM never contacted Dr. Gong to discuss the parameters of acceptable travel In fact, BPM never discussed her doctor's note with Elizabeth. BPM terminated the employment of Elizabeth Brooks 6 days after Brooks provided the note to Dennis Parfitt. Elizabeth planned to begin weaning her infant daughter in late March and estimated she would be able to maintain the travel schedule by early May. Any accommodation would have been for a short period of time—another fact the trial court ignored.

The record is devoid of any attempt by BPM to engage in any process to determine a reasonable accommodation for Elizabeth Brooks.

Sanctions Imposed by the Trial Court Are Not Warranted

Soher Bishai is one of the 17 executive directors that BPM has at its facilities spread throughout 7 states. As far back as December 2011, a full seven months before trial, the plaintiffs named Soher Bishai on their initial Disclosure of Possible Primary Witnesses. Counsel for the defendant represented to the court that the defense had also named Bishai as a witness in December 2011. Ms. Schleuning: "I admit she was disclosed by both sides at the very beginning of the case."[RP (6/18/12) P 8] The plaintiffs again named Bishai on the Witness & Exhibit List filed on May 21, 2012 five weeks before trial began. The witness was also on defendant's final Witness & Exhibit List [RP 6/19/2012 P 9] At no time did the defendant assert that Bishai was a managing agent. BPM's counsel waited until the plaintiffs subpoenaed Bishai to trial and suddenly claimed that Bishai was a speaking agent.

BPM's counsel admitted that the defendant sustained no prejudice whatsoever as a result of the contact Bishai initiated with plaintiffs' counsel. "I don't believe we've suffered prejudice." [(6/18/12) P. 24] In fact, when asked, the defense declined to request sanctions.[1] Only when

[1] Judge Heller: And what are you asking for in terms of relief? If anything.
Ms. Lennon: ...Nothing at this point.
Judge Heller: All right. Then I'm not going to give you any relief. (6/18/12) P 26

Judge Heller requested for a second time if the defense wanted sanctions imposed on plaintiffs' counsel did the defense respond affirmatively.

Bishai had no authority to speak on behalf of the company and no authority to settle this controversy on behalf of the defendant. Bishai had no contact with BPM's attorneys until the morning she arrived for trial.

The trial judge 'suspended sanctions' upon entry of judgment in August 2012.

C. Legal Argument In Reply

1. The Standard of Review Is, Substantial Evidence and De Novo Application of the Law. BPM Misidentifies the Definition of Mixed Errors of Law and Fact.

In their moving brief, Elizabeth and Jason Brooks identify the appropriate standard of review. Following a bench trial it is the duty of this court to determine whether or not the findings by the trial court are supported by substantial evidence and whether or not those findings support the conclusions of law. *Holland v. Boeing Co.*, 90 Wash.2d 384, 390, 583 P.2d 621 (1978); *Morgan v. Prudential Ins. Co. of America*, 86 Wash.2d 432, 545 P.2d 1193 (1976). The bulk of BPM's responsive brief is that if a trial judge finds evidence of a fact then the ruling as to the ultimate question must be correct. Therefore, challenging any finding made by the trial court is specious because the trial judge is correct. This is not the law under our system of appellate review.

This court reviews whether substantial evidence supports the trial court's challenged findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. *Ridgeview Prop. v. Starbuck,* 96 Wash.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill,* 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

Findings of fact are reviewed under the substantial evidence standard. Substantial evidence exists where there is evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *State v. Halstien,* 122 Wash.2d 109, 129, 857 P.2d 270 (1993). Mixed questions of law and fact are reviewed in terms of the substantial evidence test for quantitative determinations and de novo as to the legal aspects of the issue. *Harris v. Urell,* 133 Wash.App. 130, 137, 135 P.3d 530 (2006). The respondent fails to grasp the clear meaning of 'mixed questions of law and fact.' Simply because the trial judge found substantial evidence does not bring the inquiry to an end. This court must apply the law to those facts de novo. The trial court misapplied the legal standard in part because it did not take into account the totality of the circumstances.

Unchallenged findings are treated as "verities on appeal". This is prevented when the party seeking review of an issue challenges the Findings of Fact as enunciated by the trial court. *Harris v. Urell,* at 137. RAP 10.3(g) (mandating that, in the brief's "assignment of error" section, an appellant pinpoint the findings of fact that the trial court allegedly entered erroneously); *Hill,* 123 Wash.2d at 644, 870 P.2d 313; *Henderson Homes v. City of Bothell,* 124 Wash.2d 240, 244, 877 P.2d 176 (1994).

The inquiry for review in the instant matter requires examining questions of mixed law and fact—taking facts introduced at trial and a de novo review of the law. This requires the reviewing court to establish relevant facts, determine the applicable law and apply that law to the facts. The defense appears to attempt to dissuade this court from such an analysis. However, that analysis is well settled in law.

2. The Issue Before This Court Is Whether The Trial Incorrectly Applied The Substantial Evidence Test Without Giving Weight To the Totality of the Circumstances.

The defense fails to address the totality of the circumstances as set forth in the opening brief filed by Elizabeth and Jason Brooks. In a discrimination case Washington law holds that the proper inquiry of whether or not discrimination has occurred is to analyze the employer's actions and the effect on the employee by viewing the "totality of the

circumstances". This is well established in the legal framework of discrimination cases. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn. 2d 401, 406-407, 693 P. 2d 708 (1985). BPM fails to address this issue which is central to Ms. Brooks' position. The trial court improperly viewed BPM's actions in any given circumstance as separate and distinct from other actions directed at Elizabeth Brooks.

A. The Trial Court's Examination of Each Of Defendant's Actions Standing Alone Was Improper.

For instance, a single attempt to kiss a subordinate is not grounds to reasonably claim that the work atmosphere has been so altered as to have become hostile. "Although offensive and inappropriate, this isolated indiscretion cannot support a hostile environment claim." *MacDonald v. Korum Ford* 80 Wash.App. 877, 885, 912 P.2d 1052 (1996). Here is precisely where the reviewing court must examine the intersection of the facts with a de novo review of the law. "The court determines this by looking to the totality of the circumstances, considering factors such as 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and *whether it unreasonably interferes with an employee's work performance*.'" *Harris v. Forklift Sys. Inc.,* 510 U.S. 17, 114 S.Ct. 367,

371, 126 L.Ed.2d 295 (1993); *Glasgow,* 103 Wash.2d at 406–07, 693 P.2d 708. [emphasis added]

MacDonald at 885.

The trial judge in this case failed to view the totality of the circumstances. These circumstances included pressuring Elizabeth Brooks throughout her maternity leave, telling her she needed to leave the company, telling her the owner 'wanted her off the payroll,' firing Elizabeth Brooks her first day back from maternity leave, and creating a new schedule that BPM was acutely aware she could not possibly adhere to with a nursing infant. Furthermore, Elizabeth Brooks provided her employer with a doctor's note medically limiting her ability to travel and BPM ignored that disability and failed to engage in any attempts at accommodation. In fact, the record is replete with Elizabeth Brooks requesting accommodation—and repeatedly being met with silence.

B. The Burden of Proving Discrimination or Hostile Work Environment Requires Proving a Pattern of Discrimination.

Discrimination is proved by a pattern. Single, isolated acts do not rise to the level of discriminatory conduct or pervasively alter the work environment. At the center of examining discriminatory conduct on the part of the employer is establishing a pattern of conduct. *Payne v. Children's Home Soc. of Washington*, Inc. 77 Wash.App. 507, 892 P.2d

1102 (1995). Were any fact pattern analyzed in the manner that the trial judge analyzed the actions of BPM with regard to Elizabeth Brooks there would virtually never be a finding of discrimination—analyzing each circumstance in and of itself prevents proving a pattern of conduct. And that is at the heart of the error committed by the trial judge in this case.

3. Elizabeth and Jason Brooks Have Challenged Specific Findings of the Trial Court.

Elizabeth and Jason Brooks have challenged particular Findings of Fact and Conclusions of Law in their opening brief. BPM's assertion that the plaintiffs failed to challenge findings on appeal and therefore the findings become "verities on appeal" is without merit where the plaintiffs set forth specific findings as mandated by RAP 10.3(g). In fact, the Brooks challenge Findings 28, 38, 43, 45, 49, 51, 52.

4. BPM Had Notice of a Medical Disability And Failed Its Legal Duty To Engage In An Interactive Process to Reach an Accommodation Or Seek An Alternative Job for Elizabeth Brooks Within The Company.

BPM cannot produce any evidence that it engaged in an interactive process with Elizabeth Brooks to find a reasonable accommodation. Such an interactive process is required by law. *Goodman v. The Boeing Co.*, 127 Wn.2d 401, 408, 800 P.2d 1265 (1995). Elizabeth Brooks provided her doctor's note to Parfitt. Neither he nor anyone else at BPM ever contacted Elizabeth with regard to the note. No one at BPM contacted Dr.

Gong to discuss the parameters of the note. The employer is required by law to engage in an interactive process with the employee to find a reasonable accommodation. *Holland v. The Boeing Co.,* 90 Wn. 2d 384, 583 P.2d 621 (1978). BPM never engaged in that process. BPM can provide no evidence that it actually made an alternative job offer to Elizabeth Brooks. Such discussions must be substantive and requires concrete offers and an exchange of information regarding accommodation. BPM failed in its legal duty under the law to explore reasonable accommodation.

5. The Trial Court Erred In Ruling That Elizabeth Brooks Could Not Perform an Essential Job Function. Brooks Traveled to Company Headquarters And Multiple Properties In Early 2010. At the Time of Her Termination Ms. Brooks Was Preparing to Fly To Las Vegas.

The trial court erroneously concluded that Elizabeth Brooks could not perform an essential job function, finding that Ms. Brooks could not travel. This is not supported by the facts. Ms. Brooks could travel, she simply needed some accommodations with regard to the schedule for a few more weeks. This is precisely why Washington has reasonable accommodation laws. RCW 49.60.180(2) and (3).

First, Ms. Brooks could travel to any BPM facilities reachable by car. Secondly, she had traveled to Portland at least twice between January 2010 and March 2010 when BPM fired her. BPM owns three properties in

the Portland area which Ms. Brooks had visited during that time. Third, Ms. Brooks' commitment to travel is apparent by her arrangement to take her mother-in-law with her as a nanny. Fourth, at the time BPM fired Ms. Brooks in March 2010 she was planning to fly to Las Vegas and spend a week participating in the company's annual meeting. Finally, at no time did Dr. Gong, Ms. Brooks' preclude Elizabeth from all travel. The trial court mischaracterized the meaning of 'essential job function'.

A. The Trial Court Failed To Apply The Totality of the Circumstances Standard When It Evaluated the Travel Schedule. Examined As A Whole The Evidence Demonstrates The Travel Schedule Was Pretextual.

In reviewing the facts with the totality of the circumstances standard, the schedule created by BPM was adopted to force Elizabeth Brooks from her job. Again, the trial court failed to apply the correct standard. Rather than apply the totality of circumstances in viewing all the evidence, the trial court simply concluded that BPM's sales were down and that justified its conduct toward Elizabeth Brooks. However, the defendant failed to provide any documentation of that supposed fact beyond the self-serving testimony of Walt Bowen.

The schedule that BPM created for Elizabeth Brooks must be viewed using the standard applied in *Glasgow* and its progeny. Whether or not the schedule constitutes harassment depends upon whether or not

the schedule was pretextual in nature. Whether or not the schedule was retaliatory depends upon whether or not the schedule was created to harass Elizabeth Brooks. The only way to reach either question requires the fact finder to examine the totality of the circumstances. The trial court failed to examine the schedule in the context of all the surrounding circumstances regarding the relationship between BPM and Elizabeth Brooks and the acrimony toward her for taking maternity leave.[2]

The trial court focused on the self-serving statements of BPM's owner and two of its employees. BPM never provided documentation of its claims that occupancy rates were lower than at other similarly situated assisted living facilities. The trial court failed to appropriately examine all of the circumstances surrounding the schedule, including the timing of that schedule. The travel schedule was only created after BPM had fired Elizabeth Brooks once. It is safe to say that when a company fires an employee, as BPM did on Elizabeth's first day back from maternity leave, that it is seeking to rid itself of that employee. After allowing Elizabeth Brooks to stay on after her termination date, BPM came up with what appeared to be a more subtle way to get rid of Ms. Brooks. It created a

[2] BPM's claim that many of its women employees take maternity leave is unpersuasive. These are caregivers and assistants at the various facilities. Elizabeth Brooks was the only member of the executive team.

schedule it knew Ms. Brooks could not possibly adhere to due to the fact that she still had to nurse her baby.

Even the trial court found that Parfitt had pressured Elizabeth Brooks to resign during their December 12, 2009 luncheon meeting. And the trial court found that BPM fired Elizabeth Brooks her first day back from maternity leave. The record is replete that the senior housing industry had been adversely affected by the housing crisis. By early 2010, this was not a new development. The circumstances that affected the occupancy rates of senior living facilities was the ongoing housing crisis. Ms. Brooks needed an accommodation for approximately another 6 weeks. BPM had hired Kim Homer and claims that Homer was going to be responsible for a portion of the Brooks' travel. The 'crisis' that the trial court bootstrapped into a bona fide reason for the schedule change does not address the timing of the schedule change, the short period of time Elizabeth Brooks needed before she could begin the travel schedule or any other factors. Furthermore, BPM was not even implementing the schedule at the time that it fired Elizabeth Brooks.

Therefore, had the trial court taken into account all of the circumstances surrounding the fact that BPM chose February of 2010 to order Elizabeth Brooks to begin traveling four days a week, three weeks each month, it would have found that the schedule was merely a pretext.

BPM, and Walt Bowen in particular, made no secret of the fact that it wanted Elizabeth Brooks "off the payroll". The schedule was a way to accomplish that and then claim "business reasons" as an excuse.

B. BPM's Claimed Reason That The Schedule Was Necessary Because the Company Was in 'Crisis' Is Pretextual. BPM Had Suspended All Travel By Ms. Brooks At the Time That It Fired Her.

BPM admits that Elizabeth Brooks' travel schedule was suspended at the time of her final termination. In fact, her travel had been suspended for nearly a month. BPM is attempting to have it both ways by claiming the company was in 'crisis' and it had a bona fide business reason that Ms. Brooks had to keep the travel schedule while simultaneously terminating her for not being able to travel.

BPM fails to address this point in its briefing. It stands to reason that if the company were in 'crisis' and that crisis would be solved by Elizabeth Brooks traveling, then her travel would not have been suspended. The trial court allowed BPM to have it both ways, claiming Ms. Brooks absolutely had to adhere to the schedule because the company was in "crisis" without her travel, while simultaneously suspending her travel.

C. There Is No Evidence That Kim Homer Was Going To Take Over Portions of Brooks' Travel Schedule.

During trial Elizabeth Brooks testified at length regarding her travel responsibilities. Much of her job was coaching over the telephone. Her travel was dictated by what facilities needed her attention, not a set schedule. BPM only devised a set schedule after Elizabeth Brooks returned from maternity leave.

BPM's assertion that Kim Homer was taking over some travel on behalf of Elizabeth Brooks is without merit. No changes are reflected in the schedule appended to Brooks' opening brief. BPM fails to demonstrate how Brooks' travel schedule was reduced in any fashion as a result of the hiring of Kim Homer. Homer was hired in late February. (Ex. 46) BPM had already created Brooks' schedule at that point. At no time did BPM amend the schedule in any manner.

6. Termination Is Typically Viewed As An Adverse Employment Action. BPM Fired Elizabeth Brooks Twice.

The trial court found that BPM fired Elizabeth Brooks her first day back from maternity leave on December 21, 2009. Ms. Brooks spent the Christmas holidays with the knowledge that she had a new baby and no job. She was heartbroken that the company she had worked so hard for simply turned her out in retaliation for taking maternity leave. Parfitt told her, "Walt wants you off the payroll."

Yet, the trial court found that BPM took no adverse employment action against Elizabeth Brooks. Apparently, this is because on December 30, 2009 BPM ordered Elizabeth Brooks to Portland in early January. The defendant never officially reinstated Elizabeth Brooks or gave her any explanation. She complied and resumed her job duties.

Adverse employment actions can take many different forms. Arguably, termination is the ultimate adverse employment action—it severs the employment relationship. Elizabeth Brooks was fired and spent 10 days knowing that she had no job after the first of the year. The trial judge was in error in finding that BPM took no adverse employment action against Elizabeth Brooks.

7. The Trial Court Misapplied the Legal Distinction Between Voluntary Quit and Termination.

BPM provides no authority for its position that discussing a severance package is tantamount to voluntarily leaving a job.[3] Elizabeth Brooks no longer had a job when she discussed a severance package with Dennis Parfitt in March 2010. The question was not whether Elizabeth had a job or not, the question was whether she would release BPM from claims in exchange for a sum of money. Ms. Brooks never signed a release and never took any money offered by BPM. The defendant cites

[3] The defense attempts to make an argument that the e-mails Elizabeth Brooks wrote just after being fired are to "cheery" to have been written by a terminated employee. However, the tone of nearly every e-mail written by Ms. Brooks is overtly cheerful.

no authority for how discussion of a severance package becomes a voluntary termination. The defense also ignores that the Personnel Action Notice has a line for the employee signature—and that line is blank. [Ex. 57]

By contrast, Elizabeth Brooks has provided this court with legal authority distinguishing termination from voluntary quit. BPM continues to assert that severance package discussions turn Ms. Brooks' actions into a voluntary quit, an argument that ignores the fact that after March 18, 2010 Elizabeth Brooks no longer had a job whether she agreed to a severance package or not. The defense argues that Ms. Brooks' refusal to sign off on a severance package and release her claims against BPM has no meaning. In the world that the defense would like to create, an employer can escape liability by simply having a conversation with an employee that incudes discussion of a severance amount.

8. The Defense Cites No Authority That Plaintiffs Must Request A New Trial For The Court To Remand This Case f

BPM asserts that the Brooks are not entitled to remand for a new trial because they did not make a motion for a new trial at the conclusion of the proceedings in front of Judge Heller. This argument is also without merit. BPM fails to cite any legal authority for this contention.

Additionally, BPM is erroneous in its assertion that Brooks is basing her legal challenge on the trial judge's bias. This is an incorrect assertion and demonstrates the failure of BPM to grasp the legal grounds of this appeal. Rather, the argument Brooks makes is that Judge Heller failed to view the evidence in light of the totality of the circumstances. This misapplication of the correct legal standard is reversible error.

9. The Trial Court Erred In Finding That Soher Bishai Is a Speaking Agent.

The test for whether or not an employee is a speaking agent for a company and therefore is subject to attorney client privilege was set forth in *Wright v. Group Health Hosp.*, 103 Wn. 2d 192, 691 P.2d 564 (1984). A speaking agent is one who has authority to bind the company in some manner and presumably has either had direct contact with the company's legal counsel or has access to information regarding discussions with counsel. In other words, the employee is privy to how the company intends to respond to certain legal issues. As a result of that knowledge, the employee enjoys the protections afforded by attorney client privilege.

Soher Bishai had no such authority. In fact, she was not a member of the executive management team. She had no contact with upper management about this case. Bishai is one of 17 executive directors

across the western United States and the facility she is associated with was not targeted in any fashion in this lawsuit.

During trial in the instant matter, with no legal basis, the trial court expanded the definition of a speaking agent to include: 'An employee who manages a particular facility within the company. Doing so makes her a managing agent for all of the company even those portions of the company over which she cannot exercise any authority'. [RP 6/19/2012) p 15-16] This definition is not supported by case law defining speaking agent.

A. The Trial Court Applied A Broad And Unwieldy Definition of "Speaking Agent"Not Supported By Case Law Defining The Term.

Under the definition applied by the trial court, if U-Haul trailer has 3,000 U-Haul trailer outlets, then the manager of each would be a managing agent for the company. *Wright v. Group Health Hosp. supra.,* has a narrow definition of a speaking agent.

> Those who are ultimately responsible for managing the entity's operations have the strongest interest in the outcome of any dispute involving the entity. These officials are the multi-person entity's alter ego. They can speak and act for the entity and can settle controversies on its behalf.

Wright at 202.

The erroneous definition applied by the trial court would allow an employer to shield any employee from contact with opposing counsel simply by affixing a "manager" label. The employer would not have to confer any actual authority on the employee.

Furthermore, the trial court analyzed the definition of a speaking agent pursuant to whether or not a particular individual has hiring and firing authority.[4] [RP (6/19/2012) p 29-30] This is confusing the definition of managing agent with the definition of whether or not a supervisor has adequate authority to impute his or her acts to the employer. *Robel v. Roundup Corp.* 148 Wn.2d 35, 48, 59 P.3d 611 (2002). Such an analysis has no bearing on whether or not an employee is a speaking agent.

The definition applied by the trial court is inaccurate. First, it is so broad that, arguably, any employee can be brought under the umbrella of 'speaking agent'. Secondly, it extends the attorney-client privilege to the point of preventing opposing counsel from contacting a wide range of current employees. Should this court adopt such a broad definition of 'speaking agent' it would be an entirely a new definition.

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[4] See [RP (6/19/12) P 22; 30]where references are repeatedly made to Bishai's authority within her facility—which is separate and distinct from the issue of her authority *within the company* and whether it rises to the level of 'speaking agent'.

The morning that Bishai appeared in court to testify is the first time that BPM asserted that she was a speaking agent. The plaintiffs had named Bishai as a witness 7 months earlier in their initial witness disclosure and named her again 5 weeks prior to trial in their Witness & Exhibit List. At no time did the defense assert that Bishai was a managing agent. The defense claimed plaintiffs' counsel had inappropriate contact with Bishai on the basis that she is a speaking agent and therefore subject to attorney client privilege.

In an attempt to mislead this court, BPM asserts in its responsive brief that plaintiffs' counsel contacted Soher Bishai. In fact, plaintiffs' counsel *subpoenaed* Ms. Bishai. "I talked to her in a very brief and very formal way. And I did not contact her. She contacted me. I subpoenaed her....I don't think any sanctions are appropriate". (6/19/12) P 25-26. Plaintiffs' counsel made it clear that she respected the fact that Bishai was an employee of the defendant but had no reason to assume the defense considered her a 'speaking agent' pursuant to the terms set forth in *Wright v. Group Health Hosp., supra.*

Even though Bishai does not meet the definition of a speaking agent, at no time did plaintiffs' counsel conduct an interview with her. Plaintiffs' counsel only responded to Bishai's questions regarding why she needed to appear in court and what she would be asked. [RP (6/18/2012)

P 9-10; 24-25] Bishai claimed that counsel asked specific questions. However, her recollection of the conversation was inaccurate including whether or not counsel was still making a decision whether or not to call her to trial. [(6/18/12) P 23] On the witness stand she admitted, "maybe I need a new memory." [RP (6/18/2012) P 15]

It is a dangerous precedent to allow a party to withhold notice of the witness's presumed status and then simply assert the definition of managing agent at trial to the detriment of the opposing party—just as the defense did in this case. It is these situations our courts have gone to great lengths to avoid by implementing rules to prevent "trial by ambush". KCLR 26(k).

B. "Suspending" Sanctions Is Inappropriate With No Conditions or Timeframe for those Conditions.

Suspension is a temporary hold that will be lifted upon the happening of some event, usually coupled with the event happening or not happening in a certain period of time, or other specific conditions. The suspension of sanctions cannot be understood to mean the sanctions are held in abeyance pending an unknown condition during an unknown time period. This puts counsel in the position of never knowing what might trigger the reinstatement of the sanctions.

The trial court has not, however, made the lifting of sanctions dependent upon any known conditions or during any time period. The absence of conditions or time frame are contrary to goal of providing final resolution of matters in accordance with due process.

Conclusion

Elizabeth Brooks suffered both gender and disability discrimination at the hands of her employer, BPM. The company interfered with her maternity leave and retaliated against her for taking that leave. BPM fired Elizabeth upon her return and then developed a retaliatory travel schedule

BPM's actions caused Elizabeth Brooks a medical condition and she experienced decreased milk production. Ms. Brooks provided a note from her doctor to her supervisor and BPM fired her 6 days later, never seeking clarification regarding the accommodation she needed. BPM fired Elizabeth Brooks for needing reduced travel, even though the company had suspended her travel. This case should be remanded for trial.

Respectfully submitted this 16th day of September, 2013.

Lori S. Haskell WSBA #1577
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2013, I caused a true and correct copy of the Appellants' Reply Brief to be served as indicated below.

Farron Lennon Schwabe Williamson & Wyatt 1420 Fifth Avenue #3400 Seattle, WA 98104	[ ] U.S. Mail [ ] Overnight Mail [X] Hand Delivery [ ] And Supplemental Fax
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I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 16th day of September 2013.

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