NO. 90220-8

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 69332-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JASON AND ELIZABETH BROOKS,

Petitioners/Appellants,

vs.

BPM SENIOR LIVING COMPANY,

Respondent.

ANSWER OPPOSING REVIEW BY RESPONDENT BPM SENIOR LIVING COMPANY

Averil Rothrock, WSBA #24248
Elizabeth A. Schleuning, WSBA #16077
Farron D. Curry, WSBA #40559
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I. IDENTITY OF RESPONDENT

The respondent is BPM Senior Living Company, owner and operator of seventeen senior living facilities in seven states across the western United States. Petitioner Elizabeth Brooks was the Vice President of Sales at BPM from 2007 until she voluntarily resigned in March 2010, a factual finding she does not challenge in this Petition.

II. UNPUBLISHED COURT OF APPEALS DECISION AFFIRMING TRIAL VERDICT

BPM defends the trial verdict reached by the Honorable Bruce Heller after seven days of trial and the Division I unpublished opinion affirming that trial verdict (the Opinion). The Opinion rejected sixteen assignments of error, affirming the fact-finder's determination that Brooks failed to carry her burden of proof to support any of seven claims.[1] Brooks asks this Court to review four issues, but fails to articulate the specific relief she requests or identify findings that would support what she essentially seeks: a directed verdict in her favor on four claims. Her misrepresentation of the findings weighs against review.

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[1] Brooks asserted (1) gender discrimination based upon disparate treatment and harassment, (2) disability discrimination based on disparate treatment and failure to accommodate, (3) retaliation, (4) interference with maternity leave, (5) wrongful discharge in violation of public policy, (6) negligent infliction of emotional distress, and (7) outrage. CP 70 at 14-18.

III. COUNTERSTATEMENT OF THE CASE

A. Uncontested Findings of Fact Resulting from Seven-Day Trial.

This case concerns not a summary judgment but review of a trial verdict after seven days of trial. Brooks raises no evidentiary challenges. Brooks contests no factual findings. Brooks had her day in court and lost. The Honorable Bruce E. Heller considered and weighed testimony from 17 witnesses and 101 exhibits covering issues such as Ms. Brooks's travel responsibilities as Vice President of Sales, her maternity leave from September to November 2009, her return to work, BPM's struggle to contend with low occupancy rates and decreased revenue in 2009 and 2010 and to reorganize its marketing and sales staff, and the events of February and March 2010 leading to Brooks's resignation. Judge Heller issued twenty-two pages of Findings of Fact and Conclusions of Law. CP 58-80 (Appendix). Judge Heller made credibility determinations to decide disputed factual issues. *See, e.g.*, CP 63, FF 29; CP 69, FF 52. Judge Heller entered judgment for BPM on all claims after concluding that Brooks failed to prove her case. CP 55-57 (Appendix).

1. BPM's multi-state operations, Brooks's responsibilities, and BPM's occupancy rate crisis.

The evidence showed that BPM operates seventeen senior living facilities in seven states across the country from Washington to Arizona. CP 58 at FF 1. BPM's corporate offices are in Portland, Oregon. *Id.* BPM is a business of approximately 1,800 employees owned by Walter

Bowen. VR 6/20/12 at 9 (Bowen).

Brooks resided in Kirkland, Washington; her position required regular travel to the head office in Portland and to the company's seventeen facilities. CP 59, FF 5, 9. Judge Heller expressly found that Brooks's job always had required in-person visits to the facilities (CP 59, FF 9 to CP 60, FF 10) and that the travel schedule proposed by BPM was legitimate and non-discriminatory. CP 72, FF 5-13. Brooks's claims concern a period when the company was experiencing a significant decline in occupancy rates and revenue from 2009 through 2010. CP 60, FF 13-14; CP 61, FF 17-18. During this period, BPM was struggling with its revenues, how to structure its sales and marketing personnel, and whether to hire a new director of sales and marketing for a long-vacant position. CP 60, FF 14; CP 61, FF 17-18; CP 59, FF 7; CP 62, FF 22, 24. Its occupancy rates were below its competitors' rates. CP 60, FF 14.

2. Brooks's pregnancy, maternity leave, and return to work, including BPM's first offer to Brooks to take a non-travelling position.

In the midst of this company crisis, Brooks had happy personal news: she announced her pregnancy in February 2009. CP 60 at FF 13. Brooks took twelve weeks of maternity leave from August to November 2009. CP 61 at FF 20, CP 63, FF 26. As BPM struggled with how to move forward, President Dennis Parfitt—who also was a friend of Brooks and her husband (Brooks testimony VR 6/14/12 at 94-95; Parfitt testimony VR 6/18/12 at 149-50)—spoke with her about BPM's potential

reorganization and possible restructuring of management. CP 62 at FF 22, 24.

After Brooks had returned part-time from her maternity leave, Parfitt travelled in early December 2009 from Portland to lunch with Brooks. CP 63, FF 27. The two discussed whether Brooks would be interested in other work arrangements so that she could stay home with her child. They discussed whether Brooks would be interested in providing from her home a service to BPM as a consultant. CP 63, FF 28. *See also* CP 60, FF 11-12. This distressed Brooks, who felt she was being pushed out. *Id.* Parfitt testified that he was "merely helping [Brooks] brainstorm ways that she could avoid having to travel so she could stay home with her child." CP 63, FF 28. Judge Heller found that the suggestion to leave the company came from BPM, not Brooks. *Id.* Parfitt also offered Brooks "a lower-paying, on-site position [near her home] at Overlake Terrace property in Redmond, Washington, which she refused." CP 63, FF 28.

On Brooks's return to full-time status on December 21, 2009, Parfitt informed Brooks that "December 31, 2009 would be her last day." CP 64, FF 30. But this never came to pass because on December 30, 2009, President Walt Bowen's assistant called Brooks to indicate she would still be employed after the end of the year. CP 64, FF 33. Brooks never lost a day of work, continuing as Vice President of Sales into the new year.

3. Conflicts over Brooks's travel obligations, which obligations Judge Heller found to be legitimate and non-discriminatory.

Beginning in January 2010, Brooks, Parfitt, and Chief Operating Officer Lamey had multiple discussions regarding Brooks's travel schedule to the properties outside Washington. CP 64-67, FF 35-47. Brooks would not commit to travel according to the schedule Lamey created. CP 64, FF 35 to CP 65, FF 36. BPM made some reductions, and Brooks acquiesced to the schedule. CP 65, FF 36; CP 66, FF 42; CP 66-67, FF 43. Owner Walt Bowen told Brooks: "We are very fortunate to have you as leader of our marketing and sales team." CP 67, FF 43.

Much of the trial focused on whether the travel obligations demonstrated discrimination or retaliation, or whether they were legitimate obligations of Brooks's position. After reflecting at length on the evidence, Judge Heller found them to be legitimate and non-discriminatory, explaining,

> It is undisputed that by early 2010, the occupancy rates at BPM's properties had declined significantly and were lower than those of its competitors. As VP of Sales, it had always been Ms. Brooks' responsibility to travel to the company's facilities. **Given the crisis in which the company found itself, BPM had legitimate, non-discriminatory reasons for insisting that Ms. Brooks retain, and even increase, her travel responsibilities. Ms. Brooks has not established that requiring her to travel . . . was a pretext for discriminating against her for having a child.**

CP 72 at 10-13. Judge Heller concluded that BPM had "successfully established" a legitimate, non-discriminatory explanation for the travelling

requirements. CP 72 at 5-7. Brooks challenged this finding before the Court of Appeals, which upheld it. *Opinion* 8-12. Before this Court, she abandons a challenge to that finding.

4. BPM never "refused" to reassign Brooks, twice offering her non-travelling positions that Brooks was unwilling to consider.

Brooks now argues to this Court that she suffered a "disability" related to breastfeeding and that BPM refused to accommodate her by finding her a non-travelling position. *See Petition* at 1 (Issue Statement 1), 2-7, 11-13, 18-19. These assertions conflict with the Findings.

The Findings show that during discussions in January and early February, **Brooks never raised any "disability" with BPM** when she resisted the travel schedule proposed by BPM. CP 65, FF 35. For example, on February 9, 2010, Brooks "for the first time" requested a "less frequent" travel schedule "for my need to nurse my baby after returning from maternity leave." CP 65, FF 38. Brooks stated she assumed that BPM would limit the travel necessitated by her position for her convenience to remain closer to home to nurse. *Id.* Still, she did not raise that she or her baby daughter were having any medical difficulties or problems with breastfeeding.

Meanwhile, by late February 2010, in consultation with Brooks and using job descriptions and input crafted by Brooks, BPM created two new positions to report to and assist Brooks. Brooks Testimony VR 6/14/12 at 86, 143-44. One of these new positions went to Kim Homer,

who was promoted to Regional Sales Director; Homer would take over from Brooks the majority of travel to the southern properties in place of Brooks. CP 67, FF 45. This had the effect of substantially reducing Brooks's travel obligations. CP 67, FF 45.

Also in late February 2010, BPM put Brooks's travel responsibilities on hold pending her completion of Plans of Action for the properties, directing that she not visit any properties until these Plans were drafted. CP 67, FF 46. This also supports Judge Heller's conclusion that the travel obligations were work-driven and not retaliatory or discriminatory. *See Opinion* at 12 (same).

Brooks's "failure to accommodate" claim necessarily concerns only a six-day period from March 10, 2010, to her resignation on March 16, 2010. On March 10, 2010, Brooks **for the first time** presented to BPM a doctor's note that "prohibited travel while Brooks was breastfeeding." CP 67, FF 44, 47. Brooks stated that the proposed travel schedule "seriously impacted my ability to produce milk and to feed my daughter. . . . In her medical opinion I should not travel during the time that I am breastfeeding and I am providing you her note stating that medical fact." CP 67, FF 47. This was the first time Brooks raised a "disability," though she had held in confidence her doctor's note for two weeks. CP 67, FF 44.

On March 16, 2010, Brooks wrote to Parfitt complaining that her travel "had been ramped up" and stating that she could maintain a lighter travel schedule. CP 68, FF 48. Parfitt responded that Brooks was free to

travel with her baby. CP 68, FF 49. He reiterated his prior offer, rejected in December 2009, to look for other jobs in the organization that "do not require travel," stating,

> Your job has always required significant travel and will continue to do so . . . . That said, if you wish to bring your child along on your business trips, as I understand you have been doing, I am more than happy to permit that if that is something you are interested in. . . . **I am also willing to take a look to see if there are any positions within the organization that do not require travel. But if you take one of those, it most likely will require you to work at Overlake Terrace [near Brooks's home in Kirkland, WA] and the only positions I can think of offhand, pay a lot less than what you currently make, so I do not know whether that is an option you wish to discuss. Regardless, let me know if you are interested in that, as I would like to see you to [sic] remain with the organization. . . . Elizabeth, let me know if you have any suggestions that I have not considered.** If you can't fulfill the requirements of the position, then we need to come to a quick resolution of this situation.

CP 68, FF 49 (emphasis added). This communication, and the prior offer of a non-travelling position in December, establishes that, contrary to Brooks's assertions in the Petition, BPM invited Brooks to consider non-travelling positions within BPM. The Finding demonstrates that Parfitt went further, expressing that he would like Brooks to remain with the company and inviting Brooks to make "any suggestions" she could offer in case he missed anything. *Id.*

Based on these unchallenged Findings, the Court must reject Brooks's characterization of the record that BPM only communicated its willingness to look for other jobs in "a single phrase in an e-mail," that

this email is "an off-hand comment," and that BPM essentially refused to accommodate Brooks. *Petition* 1 at Issue Statements #1, #2, and #4; *Petition* 7, 12. The Petition falsely portrays the Findings.

After Brooks and Parfitt exchanged the March 16th emails, Parfitt and Brooks spoke on the telephone. CP 68, FF 50-2. Based on a credibility determination of competing testimony from Brooks and Parfitt, which determination relied on contemporaneous notes and emails written by Brooks, Judge Heller found that the parties agreed to a mutual separation based on a severance amount suggested by Brooks. *Id.*

B. Judge Heller Examined Each Claim in Detail and Concluded That Brooks's Proof Failed.

After setting forth thirteen pages of Findings, Judge Heller considered Brooks's claims. CP 70-79. Analysis of each claim contains reference to the determinative facts, his credibility determinations when necessary, his reasoning, and the law, including case citations. *Id.*

Judge Heller concluded that Brooks did not suffer an adverse employment action. CP 71:18-19. To reach this conclusion, Judge Heller applied *Crownover v. Dept. of Transportation*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011) and *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004), discussing the requirement of an adverse employment action. Because Brooks voluntarily resigned in March 2010, and because prior to that in December 2009, BPM had threatened but not followed

through on terminating Brooks after December 31, 2009, Judge Heller concluded that the facts did not establish an adverse employment action.

Judge Heller also concluded that because BPM had met its burden to show that the travel obligations of Brooks's position were "legitimate" and "non-discriminatory," the travel obligations did not establish her claims. See CP 72:1-15.

Judge Heller found that Brooks failed to establish a "sufficiently pervasive" work environment in her attempt to prove a hostile work environment. CP 72:17 to CP 73:14. Judge Heller correctly noted that emails from President Walt Bowen to Dennis Parfitt—from which Brooks quotes at length in her Petition—never were disclosed to Brooks. CP 73:12-14.

As to claims related to her alleged "disability," Judge Heller did not reach whether Brooks in fact had a disability. He ruled that, in any event, the essential functions of her job required the travel—at least some degree of travel—that she and her doctor said she could not perform. CP 74, 22 to 75:2. "Therefore, Ms. Brooks was not able to perform the essential functions of her job with or without reasonable accommodation." CP 75:1-2. Judge Heller also concluded that BPM had made sufficient offers of accommodation. CP 75:3-8. He noted, "There is no evidence that Ms. Brooks was interested in pursuing other lower paying jobs,

preferring instead the six-month severance package offered by BPM." CP 75:7-8.

Finally, as to alleged interference with maternity leave, Judge Heller stated, "There is no evidence . . . that Ms. Brooks was coerced into coming back early. Rather, her email communications with BPM's human resources director show that she herself wanted to return early." CP 76:25 to 77:3. Judge Heller ultimately concluded that "BPM did not interfere with Ms. Brooks' rights under RCW 49.78.300(1)(a)." Judge Heller recognized that "interference" could include actions "discouraging an employee's right to leave," CP 76:16-19, but found that this did not occur. CP 76:24-CP 77:7.

C. The Court of Appeals Affirmed Judge Heller's Trial Verdict in a Detailed, but Unpublished, Decision.

In twenty-seven pages, Judges Cox, Dwyer, and Grosse of Division I addressed Brooks's sixteen-assignment appeal. The Opinion's "unpublished" status shows that the panel did not view the decision as precedential. *See* RAP 12.3(d) (publication criteria). The panel relied on existing law to affirm the verdict. *Opinion* 5-27. The Opinion demonstrates proper deference to the trial court's findings, credibility determinations, and weighing of the evidence. *See, e.g., Opinion* 14.

D. Brooks's Petition Fails to Assert Plausible Grounds for Relief from This Court.

Brooks states at the conclusion of her Petition without citation, authority, or explanation that the Court should reverse the Court of Appeals "and remand for resolution of Appellant's claims for disability discrimination, interference with maternity leave, sex discrimination and retaliation." Petition 20. Presumably, Brooks seeks a direction from this Court that Brooks established four of her claims as a matter of law. She did not. She fails to identify the Findings that support judgment in her favor. Instead, she tells a story that has no support in the Findings and excludes pertinent Findings. The Petition seeks no plausible relief.

IV. ARGUMENT: THIS COURT SHOULD DENY REVIEW BECAUSE BROOKS MERELY SEEKS A DIFFERENT OUTCOME FOR HER TRIAL AND FAILS TO DEMONSTRATE ANY BASIS FOR REVIEW

Review is unwarranted under the grounds asserted, RAP 13.4(b)(2) and RAP 13.4(b)(4). There is no "conflict" of decisions. The Court of Appeals' unpublished decision creates no conflicts in need of reconciliation, least of which because it is not binding authority but also because the Opinion applies existing law. The Opinion—and the trial verdict—are consistent with precedent. The facts painstakingly found by Judge Heller—as opposed to those asserted without citation and falsely stated by Brooks—do not show that Brooks necessarily established any

claim. The trial result was fair and one of the possible results based on the conflicting evidence. This case does not present a worthy opportunity to refine any relevant jurisprudence.

This Court should reject the Petition because Brooks misrepresents the record and falsely premises her issue statements. These missteps should be fatal to review.

A. The Unpublished Decision Does Not Create a Conflict with Existing Precedent Concerning "Reasonable Accommodation."

This Court promptly should reject Brooks's assertion that the Opinion creates a conflict of decisions concerning "reasonable accommodation" of a disability that warrants review under RAP 13.4(b)(2). The Opinion does not.

Brooks fails to cite or quote from the Opinion to demonstrate that it creates a conflict. *Petition* at V.A. (pp. 10-13). Brooks leaves it to the Court and BPM to guess what formulation of law or portion of the Opinion is in conflict with other decisions.

The thrust of Brooks's objection, it becomes clear, is with the **result** in her case. This Court is not in the business of correcting results.

The Opinion does not conflict with Division I's decision *Frisino v. Seattle School Dist. No. 1*, 160 Wn. App. 765, 249 P.3d 1044 (2011). *See Petition* 12-13. A simple review of the explanations of law in the two

cases shows no conflict. *Cf.*, *Frisino*, 160 Wn. App. at 778-84 with *Opinion* at 21-23. Both rely on this Court's decision *Goodman v. Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995), the very case that Brooks asserts should control. *Petition* 11. *See Frisino*, 160 Wn. App. at 779-80 (*citing Goodman*); *Opinion* at 21 n. 58 (citing case quoting *Goodman.*) Judge Grosse apparently judged the Division I decisions compatible, as he notably signed both.

This case also is procedurally distinguishable from *Frisino*. The *Frisino* court reviewed a summary judgment ruling, 160 Wn. App. at 776-77, not a trial verdict as in this case. Taking all inferences in favor of the employee, the *Frisino* court remanded for trial the issue whether the various efforts at accommodation attempted by the Seattle School District for an employee with an alleged respiratory sensitivity were reasonable. The ultimate determination in *Frisino*—like in Brooks's case—is for the trier of fact. The Opinion and *Frisino* are compatible.

This Court need not accept review to establish that, in disability cases, to reach a "reasonable accommodation" requires "a flexible, interactive process" between the employer and the employee. This already is the law. *See* RCW 49.60.040(7)(d); *Goodman*, *supra*, 127 Wn.2d at 408-09; *Frisino*, 160 Wn. App. at 779-80. The Opinion is consistent with these duties. Brooks does not like Judge Heller's

conclusion that BPM satisfied the duty assuming it applied.[2] The Petition asks this Court to take the ultimate determination of "reasonable accommodation" away from the finder of fact. Brooks's position is contrary to law and not worthy of consideration.

The Opinion does not create a conflict concerning "reasonable accommodation" that this Court should resolve.

B. Brooks Fails to Demonstrate That the Law Requires Refinement Concerning the Proposed Issues or That Her Case Is a Suitable Vehicle to Examine Such Issues.

Brooks's case will not resolve the four issues presented. Because the unchallenged Findings are not as Brooks asserts, and because other issues resolved her claims, review of her case will not lead to resolution of the four proposed issue statements. Her Petition, thus, presents abstract questions unsuitable for review. The law is sufficiently developed to conclude on this record—as Judge Heller did—that Brooks did not prove her claims. The Court, therefore, should not take review under RAP 13.4(b)(4).

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[2] The Findings demonstrate that Brooks rejected repeat offers by BPM of non-travel positions, and that—both before and after Brooks presented her doctor's note—BPM expressly invited her input and suggestions. *Supra* at III.A.2 and 4. Judge Heller also found, "There is no evidence that Ms. Brooks was interested in pursuing other lower paying jobs, preferring instead the six-month severance package offered by BPM." CP 75:7-8. This finding is consistent with the law and explains the result.

BPM addresses the four proposed issue statements. As already noted regarding reasonable accommodation, Brooks's **Issue Statement #1** is premised on a false depiction of the Findings. *See supra*, III.A.[3] The actual Findings more than adequately support Judge Heller's conclusion that she did not prove failure to accommodate assuming, without deciding, that she had a disability. CP 74-75. The Court of Appeals confirmed that the record supported the findings and conclusion. *Opinion*, 21-23. Based on these Findings, it would be difficult to characterize the conclusion even as "a close call." For further discussion, *see supra*, IV.A.

Brooks's **Issue Statement #2** asks this Court to "provide guidance" on what constitutes "interference" with maternity leave prohibited by RCW 49.78.390. Brooks unjustly characterizes the Opinion's approach to "interference" as "narrow." *Petition* 7-8. Brooks states that the Court "should broaden the term ['interference with maternity leave'] to include harassment of the employee so that *the acts*

[3] Due to limited space, BPM cannot point out all the inaccuracies. As additional examples, Brooks states with citation to CP 157: "On March 10, 2010, Elizabeth reluctantly provided her doctor's note to Parfitt fearing there would be repercussions." *Petition* 6. The citation is misleading because Judge Heller made **no** finding that Brooks "reluctantly" provided the note or that she "feared" "repercussions." Brooks also re-argues her case. For example, she states that Parfitt's "interpretation of the note [that Brooks could not travel while breastfeeding] was inconsistent with the testimony of Elizabeth's physician." *Petition* 6. In fact, Judge Heller found that "Brooks obtained a doctor's note prohibiting travel as long as she was breastfeeding." This unchallenged Finding is binding.

such as those of the Respondent are precluded." *Petition* 15 (emphasis added). Brooks fails to identify specific acts or the rule that she proposes.[4] Brooks fails to show that lack of a statutory definition of "interfere" as used in RCW 49.78.300 is a problem, or one that her case could fix. Both the Court of Appeals and the trial court applied a flexible definition of "interference" not limited to "preventing" leave but including any conduct "discouraging" an employee from using leave. *Opinion* 25-26; CP 76-77. The Court need not accept review to "correct" a narrow reading.

Regarding **Issue Statement #3**, Brooks suggests this Court should accept review to rule that as a matter of law, she established a sexual harassment claim based on BPM's "refus[al] to reassign an employee so that she can breast feed" and "hostility" for taking maternity leave. But Brooks established neither. She cites no Finding that would support a directed verdict of sexual harassment. Brooks perceived the travel requirements as hostile, but Judge Heller did not. Because Judge Heller determined that BPM required Brooks's travel due to legitimate business needs, not because of her sex or her prior maternity leave, CP 72:25 to 73:1, she cannot claim that the travel requirements demonstrated

[4] Brooks asserts that this Court should pronounce that "forcing a woman to choose between her job and feeding her baby is gender discrimination." *Petition* V.C. (p. 15). BPM did not do this. This rhetoric is not helpful.

harassment. This Court should not accept review to take these ultimate conclusions away from the trier of fact.

If Issue Statement #3 refers to Brooks's effort to establish a "hostile work environment," her evidence also failed. CP 72-73; *Opinion* 15-18. Brooks communicated on these issues with Parfitt, whom Judge Heller found was never abusive. CP 73:10. Indeed, the Court of Appeals observed that the emails and communications from Parfitt had "a respectful and often friendly and concerned tone." *Opinion* 17. Emails written by Walt Bowen, which Judge Heller judged "harsh," CP 73:12-14, never were sent to Brooks. *Id.* Because she was not aware of these emails, they cannot establish a hostile workplace. Judge Heller also found that Bowen had no animus connected to Brooks's taking maternity leave. CP 77:11-12. Judge Heller concluded that Brooks's work environment was not "sufficiently pervasive as to alter the conditions of employment." CP 73:4-5. Brooks does not show that the Court could improve sexual harassment law by reviewing her case.

Finally, **Issue Statement #4** appears to be an amalgamation of Brooks's dissatisfaction with the outcome of multiple claims. Judge Heller judged the evidence and found that Brooks did not meet her burden of proof. The Petition reflects refusal to accept that the evidence was susceptible to judgment in BPM's favor. It was. Review is unjustified for

this Court to direct liability when the fact-finder determined on all the evidence that BPM did not violate the law.

Brooks offers no reasonable basis to conclude that review of her case would refine or improve the law, nor does she articulate a new rule that warrants this Court's consideration.

C. Brooks Undermines Review by Falsely Premising Her Proposed Issues.

This Court should decline review because the proposed issue statements are falsely premised. As already explained (*see supra*, III.A., IV.A at note 2, IV.B. at note 3), Brooks misrepresents the Findings in Issue Statements #1, #3, and #4, and throughout the Petition. A petitioner who misrepresents the record squanders opportunity for review. Review would be a waste because the issue statements will not be borne out by this record.

V. CONCLUSION

Brooks had her day in court. She failed to convince the fact-finder of her view of events. She did not meet her burden of proof as plaintiff. Judge Heller's findings support his legal conclusions that Brooks did not prove a claim against BPM. Brooks essentially asks this Court to rule that she had a right to judgment on four claims. She fails to demonstrate that she had any such right. This case—with all the disputed evidence that Judge Heller weighed and reconciled—is not a suitable vehicle to review

any of the issues proposed by Brooks. The law is adequately defined, the verdict is consistent with that law, and Brooks's issue statements are built on false premises.

This Court should deny review.

Respectfully submitted this 6th day of June, 2014.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: Averil Rothrock

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Attorneys for Respondent,
BPM Senior Living Company

APPENDIX

Judgment and Findings of Fact and Conclusions of Law (CP 55-80)

The Honorable Bruce E. Heller

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

ELIZABETH BROOKS and JASON BROOKS, husband and wife,

Plaintiffs,

vs.

BPM SENIOR LIVING COMPANY a/k/a STERLING PARKS, LLC,

Defendants.

No. 10-2-41987-0 SEA

[Clerk's Action Required]

JUDGMENT

This matter was tried by the Court from June 13, 2012 to June 25, 2013, the Honorable Bruce E. Heller presiding. Plaintiffs Elizabeth Brooks and Jason Brooks appeared personally and through their attorney of record, Lori S. Haskell. Defendant BPM Senior Living Company appeared through its President, Dennis Parfitt and through its attorneys of record, Elizabeth Schleuning and Farron D. Lennon of Schwabe Williamson & Wyatt, P.C.

The Court received the evidence and testimony offered by the parties, considered the pleadings and papers filed in this action, and heard the oral argument of the parties' counsel. The Court made findings of fact and conclusions of law, which were entered on August 3, 2012. A copy of the findings and conclusions is attached as **Exhibit 1.**

Consistent with its findings and conclusions, the Court enters final judgment in this matter as follows:

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1. All claims made by Plaintiffs Elizabeth Brooks and Jason Brooks in this action are dismissed with prejudice.

2. Defendant BPM Senior Living Company's counterclaim for breach of contract in this action is dismissed with prejudice.

3. Defendant BPM Senior Living Company shall file a cost bill and/or motion for attorneys' fees and expenses within 10 days after the entry of this Judgment, pursuant to CR 54(d).

Entry of this Judgment does not effect or extinguish Defendant BPM Senior Living Company's right to move for sanctions and/ or fees and expenses related to Plaintiffs' violations of the discovery rules, or its right to present a separate judgment against Plaintiffs' counsel, Lori Haskell, for the sanctions Judge Heller issued against her on June 19, 2012. Defendant BPM Senior Living Company explicitly reserves its right to move for sanctions and/ or fees and expenses related to Plaintiffs' violations of the discovery rules and to seek entry of a judgment against Plaintiffs' counsel subsequent to the entry of this Judgment.

* BEH

DONE ~~IN OPEN COURT~~ this 23 day of Aug., 2012.

The Hon. Bruce E. Heller

Presented by: * THE COURT SUSPENDS THE $250.00 SANCTION imposed on 6/19/12.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:
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EXHIBIT 1

Hon. Bruce E. Heller

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

ELIZABETH BROOKS and JASON BROOKS, husband and wife, Plaintiffs, vs. BPM SENIOR LIVING COMPANY a/k/a STERLING PARKS, LLC, Defendants.	No. 10-2-41987-0 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following a bench trial that began on June 13 and concluded on June 25, 2012, the Court makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

A. Parties

1. Defendant BPM Senior Living Company ("BPM" or "the company") operates seventeen senior-living facilities in seven states across the country, from Washington to Arizona. Its corporate offices are located in Portland, Oregon. BPM is owned by Walter Bowen, its President is Dennis Parfitt, and its Chief Operating Officer is Dan Lamey.

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue
Seattle, WA 98104
(206) 296-9085

2. Sterling Parks, LLC, is a separate and distinct corporate entity from BPM. Sterling Parks, LLC, at no time employed Plaintiff Elizabeth Brooks nor had any other relationship with her relevant to this case. Sterling Parks, LLC, has no employees.

3. At all times relevant to this suit, Ms. Brooks was an employee of BPM.

4. Plaintiff Jason Brooks is the spouse of Elizabeth Brooks.

B. **Elizabeth Brooks' Employment with BPM**

5. Ms. Brooks began working at BPM in 2005. On May 16, 2007, she was promoted to Vice President (VP) of Sales. Her duties as VP of Sales included "coaching, training, recruiting and encouraging the team to increase the occupancy" at all seventeen BPM properties.

6. Ms. Brooks was based in Kirkland, Washington and performed a wide array of her duties from her home office via telephone.

7. In April 2007, BPM's Senior Vice President (SVP) of Marketing and Sales, Fara Gold, left the company. Ms. Gold had been Ms. Brooks' immediate supervisor.

8. BPM did not immediately hire a replacement for Ms. Gold, but instead asked Ms. Brooks to assume some of Ms. Gold's most critical marketing responsibilities, as well as continue her existing duties as VP of Sales.

9. As VP of Sales, Ms. Brooks was required to travel regularly to the head office in Portland and the company's seventeen facilities. She was in charge of her own travel calendar. The extent of such travel varied between 2007 and 2009.

10. As her work calendars in 2007, 2008, and 2009 demonstrate, Ms. Brooks typically traveled between 1.86 and 2.67 weeks out of every month. In 2008, the year for

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which she had the heaviest travel calendar, Ms. Brooks' schedule included 69 nights of overnight travel. Exhibit 74, 164 and 165.

11. Beginning in 2007, BPM began to implement a new sales and marketing system developed by consultant Traci Bild. This system, the "Traci Bild System," relied more heavily on phone contact than on in-person marketing efforts. Ms. Bild herself was retained as a consultant from 2007 to the end of 2009.

12. Implementation of the Traci Bild System decreased the need for Ms. Brooks to travel in early 2009 compared to 2008. She travelled 5.75 days per month over 2.67 weeks on average each month in 2008, and 4.85 days per month over 2.00 weeks on average each month from January to July 2009.

C. Ms. Brooks' Pregnancy and Childbirth

13. In late February 2009, Ms. Brooks announced that she was pregnant. Prior to becoming pregnant, Ms. Brooks had an excellent employment record at BPM. She had never been written up, had never been counseled on improvement, and had never received negative criticism for her work performance.

14. During 2009, the occupancy rates at BPM's properties declined significantly and were lower than those of its competitors. The company's revenue for 2009 was accordingly lower than annual budget estimates by more than $1.4 million. The decreasing occupancy and revenue prompted a reconsideration of sales and marketing strategy and personnel. Exhibit 4, 5.

15. In a March 6, 2009 email, Mr. Bowen criticized Ms. Brooks' performance based on sagging occupancy rates. Exhibit 2.

16. The next day, Mr. Bowen wrote: "Elizabeth has been promoted and she is not

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efficient in her position. I would suggest that given her situation as it now stands and the care that will be needed with her child that we approach her with the idea of being 'the marketing and sales manager' at Overlake. This would of course result in a decrease in her salary but this is better than the alternative. You and Dennis have been covering for her too long." Exhibit 3.

17. During the spring of 2009, BPM interviewed candidates for the position of SVP of Marketing and Sales, Ms. Gold's former position, but the company ultimately did not hire anyone to fill the opening.

18. On August 16, 2009, Mr. Bowen sent an email to Mr. Parfitt outlining a reorganization plan for the sales and marketing teams that included the hiring of a new director. Exhibit 4. Among other responsibilities, the director was to travel four days a week "to continually evaluate the market." In the email, Mr. Bowen also wrote: "I have had it with Elizabeth, she must move back to where she started and where her comfort level has been in the past. We have taken a sales lady and promoted her to the level of incompetence. . . . [W]e just need to move on immediately with a search for a replacement. We should search out the best recruitment agency to handle the assignment and take the necessary steps to move Elizabeth out. I just do not see a role for her in the company." *Id.* Subsequently, BPM again attempted to recruit a director of marketing and sales via an outside recruiting agency.

19. Beginning in August 2009 and continuing through the last two months of her pregnancy, Ms. Brooks did not travel to any of BPM's properties or its corporate headquarters.

20. On September 15, 2009, Ms. Brooks informed BPM that she wanted to take maternity leave for six weeks, after which she intended to work on a part-time or light-duty basis for an additional six weeks.

21. Ms. Brooks worked through September 18, 2009, and gave birth to her first

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child, Grace Brooks, on September 20, 2009. Sometime after the birth, Ms. Brooks decided to take twelve weeks of maternity leave.

D. Ms. Brooks' Maternity Leave and Return to Work on a Limited-Hours Basis

22. On September 24, 2009, Mr. Parfitt advised Ms. Brooks via email that the company was searching for a new executive: "I'm sure this comes as no surprise. But what has become a bit of a concern, is that Walt, on several occasions, has referred to the open position as the director of both marketing & sales. We both know that Walt can be rather unpredictable when it comes to his business strategies and personal relationships as demonstrated time and again. . . . I certainly don't mean in any way to alarm you, but I think it's only prudent for all of us to be aware of our options and employment opportunities if change were to happen. . . . and that includes me." Exhibit 7.

23. Following the September 24, 2009 email, Ms. Brooks became concerned that her job was in jeopardy. She testified that she contacted Mr. Parfitt by phone on September 25 to discuss the email, and he explained that he would do what he could to save her job.

24. On or prior to October 2, 2009, Ms. Brooks became aware that the recruiting agency hired by BPM had posted a job listing for what she believed might be her job. She contacted Mr. Parfitt via email and requested that they speak about the listing. Exhibit 8. Mr. Parfitt assured Ms. Brooks that the position for which the company was recruiting was not Ms. Brooks' position, but rather the position vacated by Ms. Gold in April 2007.

25. On October 28, 2009, Ms. Brooks requested that she be able to return to work on a part-time basis. "I am excited to come back and would like to actually come back 'part time' prior to my 12 weeks. . . . is this possible? I would love to perhaps start off one day a week. starting next week?!?!?!, for two weeks and then come back 2 days a week for the month until I return full time. . . .?!?!" Exhibit 117. Mr. Lamey announced her return on

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November 5, 2009: "I am pleased to announce that Elizabeth Brooks will be returning to active duty at BPM on Monday, November 16th. . . . I am thrilled to have her back. . . ." Exhibit 10.

26. On November 16, 2009, Ms. Brooks returned to work on a part-time basis from home. While she was working on a part-time basis, she did not travel to any of BPM's properties or its corporate headquarters.

27. On December 8, 2009, Mr. Parfitt invited Ms. Brooks to meet him for lunch on December 10. Ms. Brooks accepted the invitation but asked whether they were "going to coffee"—a euphemism referring to Mr. Parfitt's practice of taking an employee to Starbucks to tell the employee of his or her termination—to which Mr. Parfitt responded "No Starbucks. . . . you pick the place to meet for lunch." Exhibit 11.

28. Mr. Parfitt met Ms. Brooks for lunch on December 10, 2009. During the lunch meeting, he offered her a lower-paying, on-site position at the Overlake Terrace property in Redmond, Washington, which she refused. He also encouraged her to begin her own consulting business and offered her a six-month contract with BPM that would run from January 2010 to June 2010. He offered her severance pay amounting to three months' salary, which she declined. According to Ms. Brooks, she was being pressured to resign. Mr. Parfitt, on the other hand, testified that he was merely helping her brainstorm ways that she could avoid having to travel so she could stay home with her child.

29. The court credits the testimony of Ms. Brooks on this issue. The impetus to leave came from the company, not from Ms. Brooks. Other witnesses, including Lynly Calloway, Jason Brooks, Margaret Broggel, and Soher Bishai, all testified credibly that Ms. Brooks was emotionally distraught before and after the lunch meeting—suggesting that she felt she was being pushed out rather than voluntarily negotiating an exit that would allow her to spend more time with her daughter. Furthermore, the day after the lunch, Mr. Parfitt wrote

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to Mr. Bowen, expressing that "[t]he conversation that I had with Elizabeth did not go as well as I had hoped." Exhibit 11. The court concludes that Mr. Parfitt was acting at the behest of Mr. Bowen, who wanted Ms. Brooks out of the company. Exhibit 4.

E. Return to Work

30. On December 21, 2009, Brooks returned to work full time at BPM. On that same day Mr. Parfitt informed her that December 31, 2009 would be her last day because "Walt wants you off the payroll."

31. Consistent with this communication, Mr. Parfitt authored a memorandum to Mr. Lamey setting out the responsibilities Ms. Brooks would take on as a consultant for the company from January 2010 to June 2010. Exhibit 13.

32. On December 23, 2009, Ms. Brooks accused Mr. Parfitt of threatening to fire her in retaliation for taking maternity leave and failing to accommodate her needs for reduced travel after childbirth. Exhibit 16. Mr. Parfitt denied the allegations and reiterated that the company was recruiting an SVP of Marketing and Sales to replace Ms. Gold. "If that replacement was capable of implementing efficiencies with the Marketing Department, then your position may be effected [sic]." Exhibit 17.

33. On December 30, 2009, Mr. Parfitt informed Mr. Lamey "Walt wants to get EB back involved." Exhibit 18. Mr. Bowen's assistant called Ms. Brooks and asked her to attend a meeting in Portland the following week, indicating that Ms. Brooks would still be employed by the company after the end of the year.

34. On January 27, 2010, the company suspended its efforts to recruit a new SVP of Marketing and Sales. Exhibit 28.

F. Issues Related to Ms. Brooks' Travel Obligations

35. In mid-January 2010, Mr. Lamey created a travel calendar for Ms. Brooks that required her to travel almost every week from February 2, 2010 through the end of April

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2010. Exhibit 32. The schedule required her to travel 8.6 days over 3.6 weeks on average each month, for a total of 86 days of overnight travel between March and December alone. This travel frequency was nearly double that of 2009, significantly more than in 2008, and almost four times that of 2007. Ms. Brooks did not make any requests for accommodation after receiving the schedule, instead telling Mr. Lamey she "would have to double-check the dates on my home calendar." Exhibit 33.

36. On February 3, 2010, Ms. Brooks told Mr. Parfitt that "[a]s it turns out, there are some scheduling conflicts as I do have some appointments and commitments that I cannot change. . . . however there are many things that I was able to finagle and change so that I could be on the road as often as possible." Mr. Parfitt responded, "I would prefer that we do not adjust this schedule unless we have [a] significant rationale that supports that a change is necessary. Please let me know what the conflicts and appointments are that cannot be changed. I would appreciate what you are proposing as an alternative schedule." Exhibit 33.

37. On January 18, 2010, Mr. Bowen wrote to Mr. Parfitt, "I don't see how we can work it out with E but who knows. We will need E in Portland most of the time when she is not on the road, I will not put up with her residing in Kirkland." Exhibit 23. On January 29 Mr. Bowen wrote, "I need to know what she is doing, what are her goals next week. . . . We are going to demand accountability from E." Exhibit 31.

38. On February 9, 2010, Ms. Brooks for the first time made a request for accommodation: "As you know, I am still nursing my daughter. Travelling requires that I, essentially, bring a nanny to watch Gracie as I am still her food source. . . . I assumed that my travel would be comparable if not less frequent than my previous schedule prior to my maternity leave. After all, it's only fair that you make a reasonable accommodation for my need to nurse my baby after returning from maternity leave." Exhibit 37.

39. Mr. Bowen told Mr. Parfitt in an email that "she needs to do what I think is in

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the best interests of the company. . . . Are we to expect that because Elizabeth has a baby that the needs of the company become secondary to the needs of Elizabeth. Having a baby is not a disability and millions of women are working after child birth. Maybe if she thought it was going to change her career options she should have taken a different approach to her career." Exhibit 37. Neither Mr. Bowen nor Mr. Parfitt conveyed this sentiment to Ms. Brooks.

40. After receiving the above email from Mr. Bowen, Mr. Parfitt wrote Ms. Books on February 10, 2010: "I am not understanding why you are making the assumption that your travel will be comparable if not less frequent than your previous schedule. . . . [Y]ou have the duty and responsibility to respond to fluctuations in market conditions and changes that directly impact revenues and occupancy at all of our communities." Exhibit 32.

41. In response, Ms. Brooks suggested discussing a lighter travel schedule that would involve maintaining the Traci Bild program from her home office and one or sometimes two scheduled trips to Portland. Exhibit 32. During subsequent discussions, Ms. Brooks advised Mr. Parfitt that she would be weaning her baby by June, which would free her up to travel more. In the meantime, she would travel as much as possible, taking her baby along, as well as her mother-in-law to care for the baby.

42. On February 18, 2010, Mr. Parfitt presented Ms. Brooks with another travel schedule that "accomplishes what Walt has requested." The schedule required two visits to the home office in Portland per month and a quarterly visit to each of the company's seventeen facilities. Mr. Parfitt stated he was "open to any tweaks and/or suggestions." Exhibit 142.

43. Ms. Brooks requested that the travel requirements for March through May be reduced, after which point her baby would be weaned. Mr. Parfitt told her that Mr. Bowen would not agree. The court finds that Ms. Brooks acquiesced to the schedule because on February 23, 2010, Mr. Bowen told her he was "pleased that you and Dennis have reached

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agreement on your travel schedule. . . ." He also said, "[w]e are very fortunate to have you as the leader of our marketing and sales team." Exhibit 40. Ms. Brooks did not respond or dispute Mr. Bowen's assertions that an agreement had been reached.

44. Unbeknownst to the company, on February 23, 2010, Ms. Brooks obtained a doctor's note from Dr. Bonnie Gong prohibiting travel as long as she was breastfeeding. Exhibit 61.

45. On February 25, 2010, Mr. Parfitt announced the promotion of Kim Homer to Regional Director of Sales and Marketing, with primary responsibility for the senior living communities in California, Arizona, and Nevada. Exhibit 46. Ms. Homer was to take over the majority of the travel to the southern properties listed on Ms. Brooks' travel calendar. This had the effect of substantially reducing Ms. Brooks' travel obligations.

46. On February 25, 2010, Mr. Bowen instructed Mr. Parfitt to inform Ms. Brooks that all of her travel obligations would be on hold pending her completion of Plans of Action. "If these plans are not completed by the new deadline, she is to be suspended or demoted to a regional director of sales covering the NW region. . . . I realize this is a last step and one we are reluctant to take but I must look at the threat we face if we do not have the right person in a leadership position. . . ." Exhibit 45.

47. On March 10, 2010, Ms. Brooks informed Mr. Parfitt by email that the proposed travel schedule "seriously impacted my ability to produce milk and to feed my daughter. In my doctor's opinion this is negatively affecting Gracie's health as well as my own health. In her medical opinion I should not travel during the time that I am breastfeeding and I am providing you her note stating that medical fact." She provided Mr. Parfitt the note that Dr. Gong had given to her on February 23. Exhibit 49.

G. **Brooks' Resignation**

48. On March 16, 2010, Ms. Brooks wrote Mr. Parfitt about the travel expectations

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of her job: "I am certain [Kim Homer] could assist in travelling and we could together cover all of our communities [sic] needs and more. . . . I just do not understand why the expectations for my travel have been ramped up so significantly since my return from maternity leave. . . . I can maintain the travel schedule I had prior to maternity leave with the help of my mother-in-law who can accompany me to care for Gracie." Exhibit 50.

49. Mr. Parfitt responded immediately, taking issue with Ms. Brooks' assertion that her travel responsibilities had increased dramatically. "Your job has always required significant travel and will continue to do so. . . . That said, if you wish to bring your child along on your business trips, as I understand you have been doing, I am more than happy to permit that if that is something you are interested in. . . . I am also willing to take a look to see if there are any positions within the organization that do not require travel. But if you take one of those, it most likely would require you to work at Overlake Terrace, and the only positions I can think of offhand, pay a lot less than what you currently make, so I do not know whether that is an option you wish to discuss. Regardless, let me know if you are interested in that, as I would like to see you to remain with our organization. . . . Elizabeth, let me know if you have any suggestions that I have not considered. If you can't fulfill the requirements of this position, then we need to come to a quick resolution of this situation." Exhibit 51.

50. That same afternoon, Mr. Parfitt and Ms. Brooks talked by telephone. According to Ms. Brooks, Mr. Parfitt said, "There's no more going back and forth, it's done, we have to separate ways, you're being let go." After terminating her, Mr. Parfitt offered her $55,000 in return for her signing a separation agreement and release.

51. Mr. Parfitt, on the other hand, testified that Ms. Brooks told him she could still travel to Portland and Las Vegas. Mr. Parfitt responded that he could not allow any travel based on the doctor's note and that they did not have many options. Ms. Brooks said she wanted to work something out. She suggested severance pay and told Mr. Parfitt that six

months would be agreeable to her. Mr. Parfitt said he would try to get approval for the six months. After the conversation ended, he obtained approval from Mr. Bowen for a $55,000 severance package and communicated this to Ms. Brooks. According to Mr. Parfitt, Ms. Brooks "seemed very happy and satisfied with this number." Mr. Parfitt told her she would have to sign a severance agreement and release.

52. The court credits the testimony of Mr. Parfitt on the issue of whether Ms. Brooks was involuntarily terminated, for the following reasons:

First, Ms. Brooks' contemporaneous notes of the March 16 telephone conversation do not establish by a preponderance of the evidence that she was terminated. The notes include the term "separate ways," but not "you're being let go." In addition, Ms. Brooks' notes of a telephone conversation the next morning are more consistent with Mr. Parfitt's testimony that Ms. Brooks requested six months' severance and that Mr. Parfitt would try to get authority for that: "Wait not in yet. Steve felt '6 months work for him!' Understands why I want 6 mo. Fight for 6 months." Exhibit 166. An employee who has agreed to leave but wants certain terms in return is more likely to negotiate aggressively over severance pay than an employee who has been fired.

Second, Mr. Parfitt's version is more consistent with the email he sent her shortly before the phone call, including "Let me know if you are interested in that [Overlake Terrace], as I would like to see you to [sic] remain with our organization." Exhibit 51.

Third, the cheerful tone of Ms. Brooks' subsequent correspondence with Mr. Parfitt is more consistent with a mutually agreed separation than an involuntary termination. As previous correspondence reflects, Ms. Brooks was quite capable of being assertive with Mr. Parfitt. See Exhibits 15, 49. Yet, in response to Mr. Parfitt's March 17, 2010 email in which he stated that he would have a final check for her that afternoon, Ms. Brooks wrote, "I will have my email [announcing her departure] for your review this morning!" Exhibit 53. Later

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that day, after submitting the draft announcement, Ms. Brooks wrote to Mr. Parfitt: "[L]et me know what you think of the rough draft email (and , yes, you can tease me about 'too' versus 'two'!). . . . Have a drink for me!"

Fourth, the company's March 18, 2010 Personnel Action Notice reflects a mutual parting of the ways rather than a firing. Under the "dismissal" box, the document refers the following statement at the bottom of the document: "Negotiated separation by mutual agreement and subject to separate severance agreement." After the question "would you rehire?" the "yes" box is checked. Exhibit 57.

53. On March 18, 2010, the company sent Ms. Brooks a Separation Agreement and Release. Ms. Brooks never signed it and therefore did not receive the negotiated severance pay.

II. CONCLUSIONS OF LAW

A. Claims Asserted by the Parties

Ms. Brooks has asserted the following claims: (1) Gender discrimination based on disparate treatment and harassment; (2) disability discrimination based on disparate treatment and failure to accommodate; (3) retaliation; (4) interference with maternity leave; (5) wrongful discharge in violation of public policy; (6) negligent infliction of emotional distress; and (7) outrage.

Mr. Jason Brooks has asserted a loss of consortium claim.

BPM has filed a counterclaim alleging that the filing of this lawsuit breached an agreement between the parties that in return for six months' severance pay Ms. Brooks would release the company from liability.

B. Gender Discrimination

(1) No Adverse Employment Action

The Washington Law Against Discrimination (WLAD), RCW 49.60, prohibits

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discrimination in employment based on sex or gender. Claims of discrimination based on pregnancy-related conditions, including conditions related to childbirth, are evaluated as claims for discrimination based on sex or gender. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 12 P.3d 688 (2007). To establish a claim of gender discrimination, the employee bears the initial burden of making a prima facie showing of discrimination. *Hill v. BCTI*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001). To establish a prima facie case, Ms. Brooks must show that (1) she belongs to a protected class, (2) she suffered an adverse employment action, and (3) the adverse employment action was due to her pregnancy or condition related to childbirth. *Hegwine*, 162 Wn.2d at 355. An adverse employment action means a "tangible change in employment status, such as hiring, firing, failing to promote, reassignment with different responsibilities, or a decision causing a significant change in benefits." *Crownover v. Dept. of Transportation*, 165 Wn.App. 131, 148, 265 P,3d 971 (2011) (internal quotation marks and citation omitted). A hostile work environment may also constitute an adverse employment action. *Kirby v. City of Tacoma*, 124 Wn.App. 454, 98 P.3d 827 (2004). However, threats to terminate are not an adverse employment action. *Id.*, 124 454, 464 ("yelling at an employee or threatening to fire an employee is not an adverse employment action").

The court concludes that Ms. Brooks did not suffer an adverse employment action. Had the company followed through with its threats to terminate Ms. Brooks by December 31, 2009, this would have constituted an adverse employment action. However, the company decided at the last minute not to pursue this course of action. Likewise, had the company terminated Ms. Brooks' employment in March 2010, this would also have been an adverse employment action. But, as already determined, Ms. Brooks was not terminated and instead agreed to leave in return for six months of severance. The fact that she ultimately decided not to sign the Separation Agreement and Release does not convert her resignation into a termination.

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Assuming, without deciding, that increasing Ms. Brooks' travel responsibilities constituted an adverse employment action by virtue of being "a reassignment with different responsibilities," *Crownover*, 165 Wn.App. at 148, Ms. Brooks established a prima facie case of discrimination based on the hostile emails by Mr. Bowen, which coincided with her pregnancy. However, applying the *McDonnell Douglas* burden-shifting protocol described in *Hill v. BCTI*, the company successfully established a legitimate, non-discriminatory explanation for the travelling requirements. It is undisputed that by early 2010, the occupancy rates at BPM's properties had declined significantly and were lower than those of its competitors. As VP of Sales, it had always been Ms. Brooks' responsibility to travel to the company's facilities. Given the crisis in which the company found itself, BPM had legitimate, non-discriminatory reasons for insisting that Ms. Brooks retain, and even increase, her travel responsibilities. Ms. Brooks has not established that requiring her to travel an average of 3.6 weeks per month was a pretext for discriminating against her for having a child. Ms. Homer, the Regional Director of Sales for the southern region, who did not take pregnancy leave, testified that she travels three weeks per month.

(2) No Harassment

To establish a hostile work environment claim based on gender, an employee must prove the existence of the following elements: the harassment was (1) unwelcome; (2) because of the employee's sex; (3) sufficiently pervasive to affect the terms and conditions of employment and create an abusive work environment; and (4) is imputed to the employer. *Glasgow v. Georgia-Pacific*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985).

The alleged harassment claimed by Ms. Brooks falls into two time periods—pressuring her to leave her job between September and December 2009 and pressuring her to increase her travel between January and March 2010. The harassment claim fails with respect to the second period because it was not based on Ms. Brooks' sex. The requirement that she travel was

based on the occupancy rate crisis, not on Ms. Brooks' pregnancy. On the other hand, BPM's efforts to get Ms. Brooks to leave the company in late 2009 were related to her pregnancy. Therefore, the second *Glasgow* element is satisfied with respect to that incident.

However, Ms. Brooks has not established that the harassment was "sufficiently pervasive as to alter the conditions of employment and create an abusive work environment." *Glasgow*, 103 Wn.2d at 406. The court credits Ms. Brooks' testimony that while on maternity leave she had a number of phone conversations with Mr. Parfitt from which she reasonably concluded that her job was in jeopardy. Likewise, at the December 10 lunch, Mr. Parfitt pressured her to resign and become a consultant. However, there is no evidence that Mr. Parfitt ever engaged in abusive behavior towards her. While his communications were certainly upsetting to Ms. Brooks, this had to do with the possible loss of her job, not the way in which Mr. Parfitt communicated the message. Further, none of Mr. Bowen's harsh emails were disclosed to Ms. Brooks until discovery in this lawsuit. Thus, they cannot be a basis for a hostile work environment claim.

C. **Disability Discrimination**

The court's finding that Ms. Brooks chose to leave BPM pursuant to a negotiated severance package is dispositive of her claim of disability discrimination based on an involuntary termination.

Ms. Brooks also argues that the company engaged in disability discrimination by failing to accommodate her. This claim involves two different alleged disabilities: (1) her need to breastfeed; and (2) her diminished milk production as a result of job stress. With respect to the first, Ms. Brooks alleges that BPM failed to accommodate her need to breastfeed by requiring her to travel extensively. With respect to the second, she alleges that once she provided a doctor's note documenting her diminished milk production, the company was required to engage in an interactive process to determine whether another position within the

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company was available to her. *Goodman v. Boeing*, 127 Wn.2d 401, 899 P.2d 1265 (1995).

Breastfeeding, like pregnancy, is not a disability. Rather, it is a condition related to childbirth within the purview of the sex discrimination statutes. *Hegwine*, 162 Wn.2d at 348–52; WAC 162-30-020(2) ("Pregnancy is an expectable incident in the life of a woman. Discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.") *See also Allen v. Totes/Isotoner Corp.*, 915 N.E.2d. 622, 632, 123 Ohio St.3d 216 (Ohio 2009)("[t]o hold that a woman is 'disabled' because she is pregnant or lactating evokes the paternalistic judicial attitudes towards working women that were apparent in the early twentieth century cases.").

Whether an inability to breastfeed may constitute a disability is a closer question. The Court of Appeals in *Hegwine* suggested that while pregnancy itself is not a disability, a disability due to pregnancy might be. 132 Wn.App. 546, 565 (2006). Dr. Gong testified that Ms. Brooks' milk production was negatively impacted by work stressors. Assuming, without deciding, that such a temporary condition meets the definition of a disability under RCW 49.60.180, i.e., that it "substantially limits one or more major life activities," *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006), Ms. Brooks has failed to establish a failure to accommodate.

The duty of an employer reasonably to accommodate a disability does not arise until the employer is aware of the employee's disability. *Goodma*, 127 Wn.2d at 408. BPM did not become aware of Ms. Brooks' difficulties with breastfeeding until March 10, 2010, when Ms. Brooks provided Dr. Gong's note prohibiting her from travelling.

Further, an employer's duty to accommodate does not include eliminating essential functions of the job, "as that would be tantamount to altering the very nature or substance of the job." *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 534, 70 P.3d 126 (2003). The court concludes that travelling to at least some of BPM's properties and to its corporate headquarters

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in Portland was an essential function of Ms. Brooks' job. Therefore, Ms. Brooks was not able to perform the essential functions of her job with or without a reasonable accommodation.

In any event, BPM offered to accommodate Ms. Brooks by offering her a non-travelling position at Overlake Terrace in Kirkland that paid less. Exhibit 51. The duty to accommodate does not require an employer to maintain the employee's current rate of pay if there are no vacant lateral positions available. *Wilkerson v. Shinseki*, 606 F.3rd 1256, 1265 (10th Cir. 2010). There is no evidence that Ms. Brooks was interested in pursuing other lower paying jobs, preferring instead the six-month severance package offered by BPM.

Ms. Brooks has therefore failed to satisfy her burden of proving that BPM discriminated against her in violation of the WLAD by failing to reasonably accommodate a disability.

D. Retaliation

RCW 49.60.210(1) of the WLAD prohibits employers from discharging or discriminating against any person because the person opposes practices forbidden by the WLAD. To establish a claim for retaliation, Brooks must show that (1) she engaged in statutorily protected activity; (2) employer took an adverse employment action; and (3) there is a causal link between her activity and her employer's adverse action. *Francom v. COSTCO Wholesale Corp.*, 98 Wn.App. 845, 861-62, 991 P.2d 845 (2000).

Ms. Brooks cannot satisfy the second and third elements because she voluntarily resigned from BPM.

E. Wrongful Termination in Violation of Public Policy

To establish a claim for wrongful termination in violation of public policy, Ms. Brooks was required to prove each of the following elements: (1) that a clear public policy exists (clarity element); (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy (jeopardy element); (3) that the public policy-linked conduct

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caused her dismissal (causation element); and (4) that BPM cannot offer an overriding justification for her termination (absence of justification element). To establish the second element—the "jeopardy element"—Ms. Brooks was required to establish that other means of promoting the public policy she alleges to be at issue are inadequate. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 529, 259 P.3d 244 (2011).

Ms. Brooks has alleged a public policy of preventing employers from terminating working breastfeeding mothers. However, the tort of wrongful discharge in violation of public policy adds nothing to the statutory remedies embodied in the WLAD. Therefore, the court dismissed this claim during trial.

F. Interference with Maternity Leave

Under RCW 49.78.300(1)(a), it is unlawful for an employer to "[i]nterfere with, restrain, or deny the exercise of, or the attempt to exercise" the right to maternity leave. There are no Washington cases interpreting this statute. Since § 105 of the Family Medical Leave Act, 29 U.S.C. § 2615, contains identical language, the court looks to federal authority for guidance.

Like the Washington leave statute, the FMLA does not define "interference." However, Department of Labor regulations provide that interference with an employee's right includes not only refusing to authorize FMLA leave but discouraging an employee from using such leave. *Howard v. Millard Refrigerated Services, Inc.*, 505 F.Supp.2d 867, 881 (D. Kan. 2007); 29 C.F.R. § 825.220(b). *Mardis v. Cent. Nat. Bank & Trust of Enid*, 173 F.3rd 864 (10th Cir. 1999) (informing an employee that she would be irrevocably deprived of all accrued sick leave and annual leave as a condition of taking FMLA leave discouraged employee from taking leave).

Ms. Brooks testified that she began working part time six weeks into her twelve week maternity leave because Mr. Parfitt encouraged her to show "she was back on track." There is

no evidence, however, that Ms. Brooks was coerced into coming back early. Rather, her email communications with BPM's human resources director show that she herself wanted to return early. "I am excited to come back. . . . I would love to perhaps start off one day per week. . . ." Exhibit 117. The court concludes that BPM did not interfere with Ms. Brooks' rights under RCW 49.78.300(1)(a).

Ms. Brooks also alleges that BPM attempted to force her out of her job in retaliation for her taking maternity leave. Like other types of retaliation claims, retaliation for taking maternity leave requires an adverse employment action. *Edgar v. JAC Products, Inc.*, 443 F.3rd 501, 508 (10th Cir. 2006). As already determined, a threatened termination does not constitute an adverse employment action.

In any event, the court concludes that BPM did not threaten Ms. Brooks with termination because she took maternity leave. Instead, the threat was based on Mr. Bowen's assumption that as a new mother, Ms. Brooks would not be able to perform the functions of her job. See Exhibit 3. Had the company terminated Ms. Brooks in December, this may well have constituted gender discrimination as opposed to a violation of RCW 49.78.300(1)(a).

G. **Negligent Infliction of Emotional Distress ("NIED")**

To establish a claim for NIED, Ms. Brooks has the burden of proving: (1) a duty; (2) a breach of that duty; (3) proximate cause; and (4) damage or injury. *Haubry v. Snow*, 106 Wn.App. 666, 678, 31 P.3d 1186 (2001). An employee may recover damages for emotional distress in an employment context only if the factual basis for the claim is distinct from the factual basis for a discrimination claim. *Id.* Unlike the circumstances in *Chea v. Men's Warehouse, Inc.*, 85 Wn.App. 405, 413-14, 932 P.2d 1261 (1997), Ms. Brooks' NIED claim is based on the same facts that underlie her gender discrimination and retaliation claims—threatened and actual job loss based on her maternity leave and need to breastfeed. The court dismissed the NIED claim at trial because it is duplicative of her discrimination claim.

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H. Outrage

To establish a claim for outrage, Ms. Brooks must prove (1) extreme and outrageous conduct by BPM; (2) intentional or reckless infliction of emotional distress; and (3) actual resulting severe emotional distress. *Haubrey*, 106 Wn.App. at 680. To be "extreme and outrageous," the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly deplorable in a civilized community." *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

Ms. Brooks has not established any of these elements. While BPM's plan to terminate Ms. Brooks' employment in December 2010 would have been unlawful had it not been aborted at the last minute, the company's actions were not "outrageous." As the court found with respect to the harassment claim, Mr. Parfitt was never abusive in his emails or at the December 10 lunch. Secondly, there is no evidence that Mr. Parfitt intentionally or recklessly inflicted emotional distress on Ms. Brooks. Third, Ms. Brooks has not established that she suffered from severe emotional distress as defined in *Kloepfel v. Bokor*, 149 Wn.2d 192, 203, 66 P.3d 630 (2003) ("not transient or trivial, but distress such that no reasonable [person] could be expected to endure it."). She did not see a health care professional for stress, discomfort, or other signs or symptoms of emotional distress and has not offered any medical evidence to support her emotional distress claim.

In addition, the court finds that this claim is duplicative of her discrimination and retaliations claims. *Anaya v. Graham*, 89 Wn.App. 588, 596, 950 P.2d 16 (1998).

I. Loss of Consortium Claim of Jason Brooks

"Loss of consortium involves the loss of love, affection, care, services, companionship, society, and consortium suffered by a deprived spouse as a result of a tort committed against the impaired spouse." *Conradi v. Four Star Promotions*, 45 Wn.App. 847, 852–53, 728 P.2d

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617 (1986). No claim arises if no tort is committed against the affected spouse. *Id.* Because BPM committed no tort against Ms. Brooks, Jason Brooks may not maintain a claim for loss of consortium.

J. **BPM's Counterclaim for Breach of Contract**

BPM contends that a binding contract existed between BPM and Ms. Brooks, whereby BPM agreed to pay her six months' severance in return for Ms. Brooks' agreement not to sue the company. According to BPM, Ms. Brooks has breached this contract by filing this lawsuit. BPM claims it is entitled to its damages for Ms. Brooks' breach of this contract, including the costs and attorney fees incurred in defending this action.

The facts do not support this argument. Mr. Parfitt testified that after offering Ms. Brooks the $55,000 severance package, he told her she would have to sign a separation agreement and release. He did not advise her of the terms of the severance agreement, and, equally importantly, Ms. Brooks never committed to signing the document. Once Ms. Brooks saw the agreement, she declined to sign it.

For an agreement to be binding, the parties must agree on its essential terms. *McEachren v. Sherwood & Roberts, Inc*, 36 Wn.App. 276, 579, 675 P.2d 1266 (1984). Here, there was a meeting of the minds that in return for the six months of severance pay, Ms. Brooks would leave the company. However, there was no meeting of the minds regarding the terms of the yet-to-be-drafted severance agreement and release.

III. CONCLUSION

Based on the preceding Findings of Fact and Conclusions of Law, Ms. Brooks' claims against BPM and BPM's counterclaim against Ms. Brooks are dismissed with prejudice.

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue
Seattle, WA 98104
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Dated this 2 day of August, 2012.

JUDGE BRUCE E. HELLER

Judge Bruce E. Heller
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 6th day of June, 2014, I arranged for notice of filing *via E-mail and U.S. mail* of the foregoing ANSWER OPPOSING REVIEW BY RESPONDENT BPM SENIOR LIVING COMPANY to the Petitioner's attorney as follows:

Lori S. Haskell
936 N. 34th Street, #300
Seattle, WA 98103
lori@haskellforjustice.com
Telephone: (206) 816.6603

Averil Rothrock

OFFICE RECEPTIONIST, CLERK

To: Williams, Mary A.
Cc: lori@haskellforjustice.com; Rothrock, Averil; Schleuning, Elizabeth; Curry, Farron
Subject: RE: Filing by Attachment to Email: Case No. 90220-8/Brooks v. BPM Senior Living Company

Received 6-6-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Sent: Friday, June 06, 2014 2:15 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: lori@haskellforjustice.com; Rothrock, Averil; Schleuning, Elizabeth; Curry, Farron
Subject: Filing by Attachment to Email: Case No. 90220-8/Brooks v. BPM Senior Living Company

Dear Clerk:

Attached for filing is Respondent BPM Senior Living Company's Answer Opposing Review.

Thank you,

Mary

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