NO. 45097-6-II

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION II

ANTHONY BROWN

Petitioner.

GOLDEN STATE FOODS CORP. and QUALITY CUSTOM DISTRIBUTION SERVICES, INC.

Respondents.

APPELLANT'S BRIEF

Richard F. DeJean
Attorney for Petitioner
P.O. Box 867
Sumner, WA 98390
(253) 863-6047
WSBA #2548

TABLE OF AUTHORITIES

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR:

I. The Trial Court erred in finding in its Order Granting Defendant's Motion for Summary Judgment, entered June 21, 2013, that there were no issues as to any material facts, and that the Defendant was entitled to Summary Judgment as a matter of law.

II. The Trial Court erred in denying Plaintiff's Motion for Summary Judgment entered June 21, 2013.

III. The Trial Court erred in denying Plaintiff's Motion to Compel by Order entered May 17, 2013, and in denying Plaintiff's Motion to Strike.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1(a). In entering its Order Granting Defendant's Motion for Summary Judgment, the Court dismissed Plaintiff's First Cause of Action alleging a disability-based hostile work environment. The issue here is whether the Defendant, being fully aware of the Plaintiff's prior back injury, necessitating the insertion of rods into his back should have provided the Plaintiff with a mechanical lift as it did for the other drivers after being advised by the Plaintiff that offloading heavy cases of milk, lifting overhead, weighing in excess of 70 pounds without the assistance of a mechanical lift and, after further being advised by the Plaintiff that having to jump from the truck, a distance of some 5 1/2 – 5 3/4 feet, and landing on concrete surfaces was causing further injury to his back. (CP 35-39, at

35 & 36) & (CP 287-320, at 288) The Defendant created a disability-based hostile work environment for the Plaintiff when the evidence demonstrates that the Defendant supplied most of the other truck drivers with mechanical lifts which would have prevented the Plaintiff from causing further injury to his back. And, when the Plaintiff would raise the subject in conversation, all he would ever hear was "hurry up". (CP 35-39, at 37)

1(b). Does an employer discriminate against an employee by failing to accommodate a previous back injury which was aggravated as a result of the Plaintiff being required to offload heavy cases of milk, lifting overhead, weighing in excess of 70 pounds and being required to jump from the delivery truck, a distance of some 5 1/2 – 5 3/4 feet, thereby causing additional injury to his back when a reasonable accommodation could have been provided which would have removed these two injury-producing activities, by providing Plaintiff with a mechanical lift for the dairy section of his load as was provided to the other drivers.

1(c). Did the Defendant employer fail to accommodate the Plaintiff, with a previous back injury, after the Plaintiff notified the Defendant that having to offload 70+ pound cases of milk and being required to jump 5 1/2 – 5 3/4 feet from the delivery truck to the concrete surface was causing additional injury to his back, did the Defendant, <u>in failing to initiate any</u>

discussion about attempting to accommodate the Plaintiff's injuries, discriminate against the Plaintiff.

1(d). Did the employer fail to accommodate the disability of the Plaintiff by refusing to consider him for a warehouse job where the Plaintiff notified the Defendant that jumping from his truck and off-loading heavy loads without the assistance of a lift, brought about by the constant demands of the Defendant to speed things up, where it was shown that the Defendant was hiring persons to staff the warehouse and where Plaintiff could have accomplished the work without causing further injury to his back.

1(e). Did the Defendant terminate Plaintiff's employment after learning that Plaintiff intended to file a Labor & Industries claim for an on-the-job injury received in the early morning hours of August 10, 2009.

2(a). Did the Court err in not granting Plaintiff's Motion for Summary Judgment on the issue of failing to accommodate Plaintiff's disability where the Defendant offered no evidence that it even attempted to comply with the "interactive process" and thereby engage the Plaintiff in a discussion of what might be done to prevent further injury to his back when it did not provide him with a mechanical lift as it did other drivers, which required him to jump some 5 1/2 – 5 3/4 feet from the truck and to offload heavy loads.

And, secondly, did the Court err in failing to grant Plaintiff's Motion for Summary Judgment for failure to accommodate Plaintiff's request for a job in the warehouse where Defendant offered no evidence, again, that it ever engaged Plaintiff in this "interactive process" by discussing Plaintiff's request for a warehouse job with him.

3. The Trial Court admitted into evidence in deciding the Defendant's Motion for Summary Judgment self-serving statements; namely, emails between the Defendant's employees and yet denied Plaintiff the right, under the discovery process, to challenge and question the authenticity of these emails.

3(a). Did the Trial Court err by denying Plaintiff's Motion to Strike the emails of the Defendant, an issue which went to the heart of the case, which were simply self-serving statements; and did it earlier compound the error by denying Plaintiff the ability to question and challenge the authenticity of these emails?

III. STATEMENT OF THE CASE:

Plaintiff Anthony Brown began his employment with the Defendant (both Defendants at one time or the other were identified as his employer) in May of 2009. In his pre-employment meetings with the Defendant, Plaintiff advised the Defendant of surgery had on his back and that the surgery had left him with rods in his back to stabilize it. This

information was also placed in Plaintiff's medical records. (CP 287-320, at 288)

Plaintiff drove a tractor/trailer combination for the Defendant, bringing supplies to Starbucks stores. Most of the other truck drivers drove vehicles with "mechanical lifts" on them. The lift removed the stress associated with moving the heavy loads from the trailers. Most of the heavy loads came from the freezer unit, especially boxes containing gallons of milk, weighing in excess of 70 pounds. Without a lift, Plaintiff had to reach above his shoulder level to move these heavier items and then remove them to ground level. Additionally, the absence of a lift and the time demands placed upon him required him to jump from the truck to the ground. All of this created considerable stress on his already compromised back. (CP 287-320, at 287, 288)

Plaintiff made the Defendant aware of the difficulties he was experiencing because of the absence of a lift or any other mechanical means of transferring the heavy items from the trailer to the ground. The Defendant not only refused to accommodate the Plaintiff in this regard, but even refused to discuss the matter with him and, when the Plaintiff re-injured his back in the early morning hours of August 10, 2009, the Defendant fired him.

The Defendant alleges that it placed importance on speed. And, whereas the Defendant wants the Court to believe that Anthony Brown was considerably slower in his job duties than the other drivers, the evidence does not bear that out. This was simply another part of the Defendant's pretext.

Additionally, Anthony Brown could have been even faster in accomplishing these deliveries and would not have caused additional injury to his back had the Defendant done one thing for him that it did for the other drivers, and that is to have provided him with a mechanical lift for the dairy section. A mechanical lift would also have prevented Anthony Brown from having to do two maneuvers in offloading these dairy products that, as he describes in his Declaration, probably lead to his second back injury, and that is having to jump from a height of 5 1/2 – 5 3/4 feet from the trailer to the concrete surface below (CP 287-320, at 288, 292, 293), and off-loading, over his head, heavy boxes of milk. Again, the use of a mechanical lift was not anything exceptional as most of the other drivers had these.

On what was to be his last delivery route, the Des Moines route, he injured his back while attempting to offload crates of milk in the early morning hours of August 10, 2009. The truck drivers' routes would begin at either 5:30 p.m. or 6:30 p.m. each day. (CP 287-320, at 289) These

routes were designed so that deliveries could be made when the customers' stores were closed for business. So when we talk of, say, an August 9 route, this would be a route which begins in the evening of August 9 but which concludes in the early morning hours of August 10. And, likewise, an August 10 route would be a route which begins in the evening of August 10 and concludes in the early morning hours of August 11. When the injury occurred, he called his night supervisor, Chuck Brewer, and informed him of this. Mr. Brewer came to the scene and helped Anthony Brown complete his route. The Defendant was clearly aware of Plaintiff's injury, before he was terminated, through the knowledge of Chuck Brewer. (CP 35-39, at 36; CP 453-454, at 454)

While he was helping Plaintiff, Mr. Brewer told him to stop by the dispatch office when he completed his route to pick up his L&I papers to file his claim. (CP 35-39, at 36) However, when Anthony Brown completed his route and went to the dispatch office, Chuck Brewer had already left and there were no L&I papers awaiting him. Because of the pain in his back, he went home and went to bed and because the pain and discomfort had worsened, he did not return to the dispatch office to obtain the L&I papers until August 11.

When he came to pick up the L&I papers, Damon Spear had him immediately come into the office and terminated him. The Defendant

wants the Court to believe that through this maneuver of Damon Spear, that Anthony Brown was terminated before the Defendant knew of his injury. However, Chuck Brewer had known of the injury from the early morning of August 10. The Defendant has produced no testimony from Chuck Brewer contradicting anything that Plaintiff has related about that course of events.

Further, the Plaintiff, in his Declaration, advises the Court that as he was leaving the dispatch office, Steve McCraney, another supervisor, who had not been in the same office with he and Damon Spear, made the comment to him "that he did not need the L&I papers in order to see a doctor". Steve McCraney, another supervisor, could only have made that statement if he had knowledge of Plaintiff's injury from Chuck Brewer. (CP 35-39, at 35, 36; CP 287-320, at 288)

After Damon Spear terminated Plaintiff and before he left Spear's office, the Plaintiff again asked to be placed in a warehouse position with the Defendant. The warehouse position would not have required the strain on his back and speed was not a factor as it was for the delivery drivers. He was refused this request out-of-hand. (CP 35-39, at 36, 37) In addition to violating the Defendant's obligation to accommodate Anthony Brown's injury, the outright rejection of his request for a warehouse job clearly demonstrates that it was not Plaintiff's job performance that

brought about his termination, but, rather, his job injury. Why would an employer automatically reject a request by an employee who gave 100 percent effort every day for another position with the Defendant? Again, the answer is obvious, and that is, the Defendant knew of Plaintiff's injury and that was the reason for his termination and that was the reason they did not want to offer him another position.

In order to make the Court believe that it had come to the decision to terminate Anthony Brown before he was injured, the Defendant put together a rather elaborate scenario. The Defendant "produced" some emails from all of Plaintiff's supervisors stating they wanted to terminate Plaintiff on August 1. Anthony Brown was scheduled to drive the week of August 2 through August 8. To try and have the Court believe that he was not terminated on August 1 pursuant to the statements in the emails, the Defendant comes up with a scheme that because it was short-handed with drivers, it advised the Trial Court that it decided to keep Anthony Brown on through that week. However, the deposition testimony of Damon Spear shows the flaw in this pretext. Mr. Spear testified that the Defendant had at least six other drivers that it could have assigned to Anthony Brown's route if, indeed, the Defendant had intended to discharge Mr. Brown as of August 1. (CP 264-286, at 268)

And then, to try and explain why he was still driving the following week, beginning August 9th, the Defendant concocts a story that one Mark McAlister called in sick on August 9th and Anthony Brown was assigned to drive his route, scheduled for August 9. (CP 87-110, at 91) As the Defendant explains this in his Motion for Summary Judgment:

> "The decision to terminate Brown's employment was made on August 1, 2009. Damon Spear, one of QCDS's supervisors planned to notify Brown of his termination when he first reported to work on August 9, 2009. However, earlier on the afternoon of August 9, a driver named Mark McAlister called in sick. Spear decided to place Brown on the schedule to work McAlister's Des Moines route because QCDS was 'short-handed' on that day.
>
> Brown worked the Des Moines route on August 9, 2010 which begins at 6:15 p.m. and went into the early morning hours of August 10, 2009." (CP 87-110, at 91, 92)

However, in attempting to devise this sham, the Defendant overlooked one important item of evidence, and that is, that Anthony Brown had already been scheduled to drive his regular route. He had a copy of the written schedule that comes out weekly, which was filed with the Trial Court. (CP 287-320, at 291) Mark McAlister is alleged to have called in sick at 11:36 a.m. of August 9. The evidence shows that a written schedule could not have been prepared that quickly. (CP 321-323, 322) The written schedule in Anthony Brown's possession was that schedule printed and distributed on a weekly basis. There was no last-

minute use of Anthony Brown to drive for Mark McAlister. Anthony Brown was driving his own regular route on August 9. The Defendant had not intended to discharge Anthony Brown until it learned of his injury in the early morning of August 10!

In attempting to create this pretext, the Defendant submitted the Affidavit of Eric Lard, the transportation supervisor. Mr. Lard's deposition declared:

> "Attached hereto as Exhibit A is a true and correct copies of each of the daily route assignments for the month of August 2009 for the Kent, Washington facility. These are the copies of the actual route and driver assignments at that time. As these documents show, Mr. Brown was taken off of the schedule after August 9, although he was placed back on the schedule for one day, August 10, because the regular driver, Mr. McAlister had called in sick." (CP 188-221, at 189)

As the Court will notice, the Defendant had advised the Trial Court that Mark McAlister called in sick on August 9. However, Eric Lard testifies that he had called in sick on August 10.

IV. ARGUMENT:

2. Lunch Time and "Break" Time:

Plaintiff has alleged that the Defendant provided neither time for lunch nor "break" time. This Cause of Action is supported by both the testimony of Anthony Walton and Anthony Brown. Mr. Walton, a former driver himself for the Defendant, advises the Court:

"As far as lunch and rest breaks, I have never seen these written into our routes schedules. For the most part, drivers had to work through these – although occasionally a driver might get a sandwich to eat between deliveries – not the best safety practice." (CP 321-323, at 323)

And, the Plaintiff also advised the Court in his Declaration as follows:

"I had no time allowed for my lunch nor my two 10 minute breaks. Nor was I paid for them." (CP 35-39, at 37)

And, at his deposition, Plaintiff testified:

"I never took one. I was working through my breaks, lunch and breaks... We were told to just keep working and get the shift done. That's what I was told. Some guys, they eat their sandwich while they're going down the road to their next stop to try and get the routes done.

...."

Additionally, Eric Lard, at his deposition, testified on this subject as follows:

"Q. But there is no specific break written into that schedule, is there?

A. No, we don't. No, there isn't.

Q. And there isn't a specific lunch break written into that schedule?

THE WITNESS: No." (CP 264-286, at 270, 271)

This is not what the law intends when it requires an employer to allow an employee a lunch break and two 10 minute breaks during the day.

WAC 296-126-092 prescribes:

> "(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty, on the premises or at a prescribed work site in the interest of the employer.
> (2) No employee shall be required to work more than five consecutive hours without a meal period.
>
> ....
>
> (4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.
> (5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required."

As the Court will see, meal periods are "on the employer's time" and rest periods "shall be scheduled". Telling a driver that they can eat a sandwich while they are driving from one delivery point to the next is not in keeping with what the law envisions. Telling the employee is he/she can find time during the day to both take a meal break and a rest period is

obviously not providing for these on the employer's time and is not scheduling them as required by law.

2(a).

Plaintiff submits to this Court that there are two issues on which the Defendant has not presented any evidence, and these are:

(1) When the Plaintiff advised the Defendant's supervisors that operating his truck without a mechanical lift and thereby having to jump from the truck some 5 1/2 – 5 3/4 feet and then offload heavy loads was causing additional aggravation and injury to his prior back injury and requested a mechanical lift, that the Defendant had an obligation, at the very least, to engage Plaintiff in an "interactive process", that is, to discuss the matter with him. This the Defendant never did.

As Anthony Brown advised the Trial Court:

> "About two weeks before I was terminated, Damon Spear, Chuck Brewer and Steve McCraney began 'riding' me. They were saying that I was not fast enough. I told them that most of the other drivers had lifts for their dairy products and that this would both help speed me up and would prevent my back from acting up as a result of having to jump from the truck and climb back into the truck to offload products as well as requiring overhead lifting to remove heavy cartons of milk. They simply ignored my discussions about my back and how the lift gate would assist me in completing my job assignments... In addition to telling Eric Lard about my back injury, I also mentioned this to Steve McCraney and Chuck Brewer, two other supervisors." (CP 35-39, at 36, 37)

(2) And, Anthony Brown further testified to the Trial Court:

> "Prior to my termination, I had spoken to Damon Spear and other supervisors about work in the warehouse. I had done this because once it was obvious that they were not going to give me a lift and that I was going to have to keep jumping out of these trucks, I knew the warehouse position would be less strenuous on my back. I had spoken to both Steve McCraney and Chuck Brewer, two of my supervisors, about the warehouse position two or three times previously and I had mentioned it to Damon Spear once before.
>
> And then, on August 11, when he terminated me, I again asked him about the warehouse position and his response was simply they would not use me in the warehouse, that 'we're done'.
>
> The work in the warehouse was less physical and one was not always running up against time deadlines. These time deadlines, in conjunction with the fact that I did not have a mechanical lift, was the reason why I was continually having to jump from these high trailers which was producing a lot of stress of my back. I was familiar with the work that was being done in the warehouse and I know that I could have handled that position and would have done a very good job at it." (CP 287-320, at 292, 293)

In *Frisino v. Seattle School District, 160 Wn. App. 765, 249 P.3d 1044 (May 2011)*, the Court, in discussing the issue of accommodation stated:

> "WLAD requires an employer to reasonably accommodate a disabled employee unless the accommodation would pose an undue hardship. RCW 49.60.180(2) A reasonable accommodation must allow the employee to work in the environment and perform the essential functions of her job without substantially limiting symptoms. To accommodate, the employer must affirmatively take steps

> to help the disabled employee continue working at the existing position or attempt to find a position compatible with the limitations. (Author's note: This latter phrase would apply to the warehouse position.)
>
> ....
>
> Generally, the best way for the employer and employee to determine a reasonable accommodation is through a flexible, interactive process. A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee's capabilities and available positions. The employer has a duty to determine the nature and extent of the disability, but only after the employee has initiated the process by notice."

Anthony Brown gave notice to the Defendant of his need for accommodation but the Defendant simply ignored him. Summary Judgment should have been entered on Plaintiff's behalf on these two issues.

3. Denial of Plaintiff's Motion to Compel and Plaintiff's Motion to Strike:

The Defendant submitted emails from the Plaintiff's supervisors wherein they, allegedly, decided to terminate Plaintiff on August 1. These were simply self-serving statements. Plaintiff motioned the Court to strike these emails from consideration. Even though the Court admitted that these emails were self-serving (see Appendix to Appellant's Brief, p. 4, 5). The Court overruled Plaintiff's Motion. This was error. In *W. W. Conner Company v. McCollister and Campbell, 9 Wn. 2d 407, 115 P.2d 370*, the

Plaintiff, in attempting to recover a commission, submitted a letter allegedly establishing the agreement to pay him a commission. In holding that this was simply a self-serving that this was simply a self-serving statement and inadmissible, the Court said:

> "So if Plaintiff is to recover, it must be on the theory that there was an express agreement on the part of McCollister and Campbell to pay a commission. The only evidence that there was any such agreement is contained in Appellant's letter of May 3 in which it laid claim to a commission. This letter, of course, was a self-serving declaration and was inadmissible."

Recognizing that the Court might place importance on the self-serving emails and firmly believing that these were falsified because of the manner in which events unfolded, Plaintiff attempted to engage in discovery which would have permitted access to the Defendant's computer system, which generated these emails. Further, recognizing that the Defendant was going to attempt to show that Plaintiff could not fulfill his job duties, even though the evidence would show otherwise, the Plaintiff attempted to locate other employees or utilize their personnel records to demonstrate that Plaintiff was doing as good a job as any other employee and that the allegations against him were part of a scheme put together by the Defendant once it learned of Plaintiff's on-the-job injury. The text of these discovery requests will appear as Appendix A to Appellant's Brief.

Further, the fact that Defendant "lost" so many of the records which would have reflected Plaintiff's job performance and the fact that he sustained his on-the-job injury created an additional incentive for Plaintiff's discovery requests.

An important issue is whether the Defendant knew of the Plaintiff's injury on August 10th before it fired him on August 11th. The Plaintiff has advised the Court that one of his supervisors, Charles Brewer, came to the scene of his injury on August 10 and assisted him in completing his delivery and advised Plaintiff to obtain the paperwork needed for an L&I claim when he returned to the office after completing his deliveries. (CP 287-320, at 291, 292)

Of all the delivery trips that Plaintiff made from May through August, the Defendant has provided Plaintiff with copies of only 23. They contend that the others were "lost". And, they have even "lost" the Trip Record for the August 9/10 route; namely, the route on which Plaintiff was injured. They certainly have better record keeping than this. Plaintiff submits that these records are not "lost"! And, without the additional information sought in these Interrogatories, Defendants will succeed in keeping this information from the Court.

In *Guillen v. Pierce County, 96 Wn. App. 862, 982 P.2d 123*, the Plaintiff, a victim of MVA injuries suffered at a certain intersection sought

information on employees with knowledge of other MVAs occurring at this same intersection and traffic controls in place, etc. In granting these requests, the Court said:

> "The Trial Court properly granted Guillen's request to disclose (a) the identity of all Sheriff's deputies who patrolled the intersection; (b) accident photos; (c) witness statements; and (d) accident reports sent to the county from citizens involved in accidents at the intersection...
>
> The Trial Court properly granted Guillen's request to disclose the identity of all county employees with knowledge of accidents at the intersection..."

And, as to discovery of electronic evidence to question the validity of the "August 1 emails", the Court in *Mechling v. City of Monroe, 115 Wn. App. 830, 222 P.3d 308*, held:

> "Mechling contends that the court erred in ruling that the City had no obligation under the PDA to provide the unredacted e-mail messages in an electronic format... The City relies on Dismukes v. Dept. of Interior, 603 F.Supp. 760 to argue that the PDA does not impose an obligation to provide records in an electronic format. However, the Dismukes decision was superseded by the 1996 amendments to Freedom of Information Act, 5 USC § 552. In 1996, Congress amended the FOIA to require disclosure of electronic information in an electronic form.
>
> ....
>
> However, while not binding, the model rules adopted by the Attorney General in chapter 44-14 of the Washington Administrative Code offer useful guidance.
>
> (2) ... The Public Records Act does not distinguish between paper and electronic records... Providing

> electronic records can be cheaper and easier for an agency than paper records. In general, an agency should provide electronic records in an electronic format if requested in that format."

And, in *O'Neill v. City of Shoreline, 170 Wn 2d 138, 240 P.3d 1149*, the Court addressed the issue of metadata from the email's "entire chain". In ruling that the metadata should be made available, the Court said:

> "This is an issue of first impression that has been examined previously by only one court. The Arizona Supreme Court ruled that 'metadata in an electronic document is part of the underlying document [and] does not stand on its own.' Lake, 222 Ariz. at 550. It therefore held that 'when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under Arizona's public records law.' Metadata may contain information that... could conceivably include information about whether a document was altered, what time a document was created, or who sent a document to whom... We agree with the Supreme Court of Arizona that an electronic version of a record, including its embedded metadata, is a public record subject to disclosure. There is no doubt here that the relevant e-mail itself is a public record, so its embedded metadata is also a public record and must be disclosed."

Disability-Based Hostile Work Environment:

Anthony Brown testified by Declaration in opposition to the Motion for Summary Judgment that when Eric Lard, his overall supervisor, was conducting his road test, he advised Mr. Lard that he had a back injury in 1980 and had two rods inserted into his back for support.

He also advised the Court that he informed Steve McCraney and Chuck Brewer, two other supervisors, about his injury. He also told them that whereas the other drivers had mechanical lifts for the dairy products, the heavier products, that if he had one it would prevent his back from acting up as a result of having to jump from the truck and climb back into the truck to off-load products as well as requiring overhead lifting to remove heavy cartons of milk. (CP 35-39, at 35, 36)

Rather than attempting to assist him in some fashion, Mr. Brown testified that Damon Spear, Chuck Brewer and Steve McCraney began "riding" him. He further testified that all they could say was "keep going faster". When he told them that a mechanical lift would both help prevent further injury to his back and would permit him to speed up his unloading process (although it appears that he really was not any slower than other drivers), "they simply ignored my discussions about my back and how the lift gate would assist me in completing my job assignments". Even on the day he was injured, August 10, when Chuck Brewer came to assist him with unloading the customer at the location where he injured his back, Mr. Brewer told him that he had "to keep working in spite of my back injury because they could not have a 'late'". (CP 35-39, at 36, 37)

Anthony Walton, a former driver for the Defendant, and completely neutral in this matter, advised the Trial Court that:

> "About two weeks after his training ended, the company put him on a route by himself. When he started out, he had 11 deliveries on the route; however, shortly after this they added 4 more deliveries." (CP 321-323, at 322)

The Court held that harassment of a much less severe nature constituted a disability-based hostile work environment in *Robel v. Roundup Corp., 48 Wn. 2d 35, 59 P.3d 611*, where all of the harassment was verbal in nature. This is not to condone what happened in Robel, but in instant case Plaintiff was assigned four additional deliveries on his route, was denied the use of a mechanical lift and this subject was not even discussed with him, even though he advised his supervisors that it was aggravating his back and was always told to "hurry up". In Robel, the Plaintiff, following a workplace back injury, was placed on light duty; however, her coworkers ridiculed her, implying that she was faking her injury and calling her uncomplimentary names. Even though one of her harassers was fired and the employees were admonished not to harass her, after it continued, she did not return to work. She sued, claiming an unlawful hostile work environment based on her disability, retaliation for filing a worker's comp claim, negligent and intentional infliction of emotional distress and defamation. The Trial Court found in her in favor on all five claims; however, the Court of Appeals reversed on all claims. The Supreme Court reinstated the discrimination, retaliation and

intentional infliction of emotional distress claims. The Supreme Court said that:

> "... A Plaintiff in a disability-based hostile work environment case must prove (1) that he or she was disabled within the meaning of the anti-discrimination statute, (2) that the harassment was unwelcome, (3) that it was because of the disability, (4) that it affected the terms or conditions of employment and (5) that it was imputable to the employer."

It is clear that Plaintiff had a disability within the meaning of the statute and that the harassment was unwelcomed. With the 2007 Amendment, a disability is now defined:

> "Disability means the presence of a sensory, mental, or physical impairment that:
> (i) Is medically cognizable or diagnosable; or
> (ii) Exists as a record or history; or
> (iii) Is perceived to exist whether or not it exists in fact...
>
> (d)(i) The impairment must have a substantially limiting affect upon the individual's ability to perform his or her job..." (RCW 49.60.040(7)(a))

The Plaintiff testified that he spoke with his supervisors and even the Transportation Department head, Eric Lard, on several occasions about how requiring him to jump out of the truck some 5 1/2 – 5 3/4 feet and unload heavy dairy products was causing further injury to his back and yet all that they could say was "hurry up". And, it clearly affected the terms or conditions of employment as the Defendant allegedly based the decision to terminate Plaintiff on this issue, although Plaintiff has clearly

shown that this was pretext. It goes without saying that it was imputable to the employer because the harassment was coming from his supervisors.

Failure to Accommodate Back Injury:

Initially, Plaintiff asserts that the Defendant failed to accommodate both the back injury that, while it occurred prior to his employment at Quality Custom Distribution, became exacerbated because of the Defendant's failure to provide him with a lift for the dairy products; and, at the time he injured his back on his last route for the Defendant, the Defendant rather than attempting to accommodate his injury, fired him.

His Pre-Existing Back Injury:

As Anthony Brown states in his Declaration supporting his Motion for Summary Judgment:

> "About two weeks before I was terminated, Damon Spear, Chuck Brewer and Steve McCraney began 'riding' me. They were saying that I was not fast enough. I told them that most of the other drivers had lifts for their dairy products and that this would both help speed me up and would prevent my back from acting up as a result of having to jump from the truck and climb back into the truck to offload products, as well as requiring overhead lifting to remove heavy cartons of milk. They simply ignored my discussions about my back and how the lift gate would assist me in completing my job assignments. On my last route, August 9-10, 2009, I injured my back during the early morning hours of August 10. I called my night supervisor, Chuck Brewer, and informed him of this and he came out and helped me complete the route." (CP 35-39, at 36 & 37)

While the main thrust of Plaintiff's claim for failure to accommodate is directed at his prior back injury, there was, also, a brief period of time after which he severely injured his back when Chuck Brewer, his supervisor, was notified, and Brewer came out to help him complete his route. Plaintiff told Brewer about his injury and rather than let him retire for the evening, he made him continue to work so that they did not have a "late".

Plaintiff fulfilled the first step required of him in the accommodation process, and that is to provide notice to the employer. After this is done, the employer has an obligation to engage the employee in a discussion about how an accommodation should be accomplished, the so-named "interactive process". As the Court said in *Holland v. America West Airlines, 416 Fed. Supp. 2d 1028 (206 US Dist. Lexis 26438)*:

> "In contrast, in Martini and Goodman, decided before Pulcino, the Washington Supreme Court held that an employer's duty to accommodate applied when the employee's job exacerbated his condition. Pulcino and subsequent cases have not disagreed with Martini or Goodman. In fact, recent cases have cited them with approval. Furthermore, Washington Courts have noted that the Washington Law Against Discrimination (WLAD) Wash. Rev. Code § 49.60.010 is to be interpreted liberally to reflect 'the Legislature's high priority of eliminating workplace discrimination by providing an incentive for employers to accommodate disabled employees in safe positions'. Requiring an employee to exacerbate his medical condition to the point that he was unable to

> perform his job before he is entitled to any accommodation is inconsistent with prior Washington cases and the purpose of the WLAD.
>
> The notice obligation under the Washington Law Against Discrimination is not onerous; it requires that an employee give 'simple notice' of his disability. Employees are not required to request an accommodation to trigger the employer's duty to accommodate.
>
> ....
>
> America West argues that Plaintiff did not give it notice of his abnormality and resulting limitations. He did not list any limitations in his employment application, he never informed America West that he had depression or an anxiety disorder, never informed them that any medical condition impacted his performance and never contacted Human Resources to request an accommodation as directed by the employee handbook. America West argues that Plaintiff did nothing more than grouse about the overnight shift, as any employee would. However, the notice obligation under the WLAD is not onerous; it requires that an employee give 'simple notice' of his disability. Downey v. Crowley Marine, 236 Fed. 3d 1019 (noting that employees are not required to request an accommodation to trigger the employer's duty to accommodate)."

Clearly, Plaintiff gave Defendant much more than "simple notice" and, just as clearly, the Defendant's insistence that Plaintiff continue to work from a truck without a lift gate, of a kind supplied to other employees, and requiring Plaintiff to lift heavy loads from the trailer and to jump from the trailer and climb back into the trailer would, exacerbate his back condition.

A1. Accommodation of Brown's on-the-job Injury:

The Defendant argues that Plaintiff has been medically restricted from performing work since August 11, 2009, and that there is, therefore, no evidence of whether an accommodation could enable Plaintiff to perform the essential functions of his job. What the Defendant overlooks, however, is that after the Plaintiff notified the Defendant (through Chuck Brewer) of his injury, the Defendant had an obligation to engage Plaintiff in a discussion of how an accommodation might enable him to continue working. Because Defendant terminated him, rather than attempting to engage in this discourse, we will never know. The Defendant, however, violated Washington law initially by failing to engage Plaintiff in a discussion on the issue of accommodation.

A2. Accommodation of Plaintiff's 1980 Back Injury:

Here the Defendant is simply wrong in its interpretation of Washington law. First, it argues that Plaintiff failed to establish that he was disabled. As *Holland*, and *Martini* and *Goodman* establish, only "simple notice" is required. And, "employees are not required to request an accommodation to trigger the employer's duty to accommodate".

And, in his deposition, Plaintiff testified:

> "I constantly said, 'I need the lift'. I told them about my back problem. I felt maybe they could have adjusted that.

....

Q: Would a liftgate also lessen the strain that you have to put on your back –

A: Yes, sir. It does.

Q: - if there is some heavy lifting?" (CP 264-286, at 265)

Plaintiff also testified to many additional instances when he brought the difficulties he was having with his back in offloading these trailers to the attention of the Defendant. The Defendant's position appears to be grounded on the fact that Mr. Brown's back problem was not, as Defendant alleges, "a substantial limitation". Does a substantial limitation not exist when Plaintiff is continually aggravating his prior back injury and where, ultimately, he re-injures this prior back injury? Again, *Holland* establishes that a Plaintiff is not required to exacerbate a limiting condition before he is entitled to accommodation. As the *Holland* Court said:

> "Furthermore, Washington Courts have noted that the WLADis to be interpreted liberally to reflect 'the Legislature's high priority of eliminating workplace discrimination by providing an incentive for employers to accommodate disabled employees in safe positions'. Requiring an employee to exacerbate his medical condition to the point that he was unable to perform his job before he is entitled to any accommodation is inconsistent with prior Washington cases and the purpose of the WLAD. Therefore, Plaintiff has raised a genuine issue of material fact on this issue."

The Defendant then argues that there is no "record" of Plaintiff's impairment. The Court in *Holland* disposed of a similar argument by America West. The Court said:

> "In this case on several occasions beginning on October 3, Plaintiff informed his supervisor that the overnight shift was causing him severe anxiety, was affecting his health... Although Plaintiff never gave America West any medical documentation during his employment, Collier never requested it, despite Plaintiff's repeated health related complaints. Instead, under Plaintiff's version of the facts, Collier ignored his statements. Accordingly, Plaintiff has raised a genuine issue of fact regarding whether he gave America West notice of his condition and its limitations... America West argues that employers in Washington are only required to provide medically necessary accommodations and are not required to provide accommodations based solely on an employee's own perception of need. America West argues that Dr. Moen did not recommend any restriction or schedule changes when he saw Plaintiff on October 9, 2003. America West has not cited any authority for the proposition that medical necessity can only be established through contemporaneous evidence."

When Does Duty to Accommodate End?:

In addition to the failure to accommodate Plaintiff before his termination, the Plaintiff also presented an issue to the Trial Court that the Defendant owed Plaintiff a duty to accommodate him after he requested a warehouse position. The Trial Judge felt and held otherwise as a matter of law.

In *Wheeler v. Catholic Archdiocese, 65 Wn. App. 552, 829 P.2d 196*, the Court addressed, head-on, the question of whether an employer's duty to a handicapped employee extends after the termination of the employee. In answering this in the affirmative, the Court said:

> "The three job vacancies that Wheeler alleged she was qualified to fill arose subsequent to the termination of her employment with the Archdiocese. The question whether an employer's duty of reasonable accommodation extends beyond the termination of the employer/employee relationship had how long it extends has not been directly addressed in Washington case law. However, three Washington Supreme Court decisions provide us with guidance on this question.
>
> In Dean v. Municipality of Metropolitan Seattle, supra, a bus driver who suffered vision loss in one eye unsuccessfully applied for several non-driving positions with his employer before resigning in order to collect retirement benefits. He applied for three more such positions as his resignation. Other vacancies arose for which he might have qualified but he was not notified of them. The Supreme Court affirmed judgment in Dean's favor stating that Dean produced proof he had applied for five vacant positions with his former employer and was qualified for others about which he was not informed. Dean, 104 Wn.2d at 638-39, 708 P.2d 393. It is significant for our purposes that the Court did not differentiate between the employer's duty regarding the vacancies which arose before Dean's resignation and those which arose after it. Furthermore, the Court stated that the case did not involve a failure to hire but rather a failure to reasonably accommodate a handicap which developed while the Plaintiff was in the employ of the employer. Thus, the employer's duty towards the handicapped former employee was not merely a duty of non-discrimination in hiring should the former employee choose to apply, but an

affirmative duty to inform him of job openings for which he might be qualified.

The employer's duty of accommodation was likewise seen as continuing beyond the end of the employment relationship in Clarke v. Shoreline School District, 106 Wn. 2d 102, 720 P.2d 793 (1986). In Clarke, a teacher's employment was terminated due to teaching deficiencies and a handicap which prevented proper performance of his job. The Supreme Court affirmed the lawfulness of Clarke's discharge against his challenge based on handicap discrimination, holding that the school district had proved Clarke was not qualified for a teaching position. However, the Court stated in Dictum that the school district had an ongoing duty to accommodate Clarke even after his discharge by attempting to place him in a non-teaching position.

....

Finally in Phillips v. Seattle (111 Wn. 2d 903, 766 P.2d 1099), the City terminated Plaintiff's employment for excessive absenteeism caused by alcoholism... Phillips requested his job be kept open until he completed an in-patient treatment program. The City refused. Whether keeping his job open was an undue burden or a reasonable accommodation was a question for the jury and will not be imposed as a matter of law.

....

We conclude from these three cases, especially from Phillips, that the period of time the duty of accommodation continues after termination should not be imposed as a matter of law. Certainly there is no statutory or regulatory authority indicating that the duty terminates upon termination of the employment relationship or at any particular time thereafter. Rather, it is for the trier of fact to decide at what point continued attempts to accommodate become an undue burden as opposed to a reasonable requirement."

It should be noted here that in instant case Plaintiff had requested transfer to the warehouse even before his termination. Mr. Brown testified:

> "Prior to my termination, I had spoken to Damon Spear and other supervisors about work in the warehouse. I had done this because once it was obvious that they were not going to give me a lift (Editor's Note: a mechanical lift on the truck) and that I was going to have to keep jumping out of these trucks, I knew the warehouse position would be less strenuous on my back."

Plaintiff's Driving of Routes on August 2–August 9 Clearly Shows Pretext:

For the Defendant to obtain any traction with its allegation that it had decided to terminate Plaintiff on August 1, 2009, it has to give the Court an explanation of why, then, was Plaintiff still driving for the week of August 2 through August 8 and also for the next week, beginning August 9. (CP 264-286, at 268) The Defendant attempts to do this by stating that it was "short on drivers". However, the deposition testimony of Damon Spear indicates that there were at least six other drivers who could have been assigned Anthony Brown's route for the week August 2 – August 8. (CP 264-286, at 267, 268)

However, even more convincing than this, that all of this was simply pretext, is the fact that Plaintiff again drove a route on August 9. And, in Defendant's attempt to explain this inconsistency, Defendant

states in "Defendant's Reply in Support of Their Motion for Summary Judgment", p. 5:

> "Brown claims that 'the written schedule in Anthony Brown's possession' shows that 'was no last minute use of Anthony Brown to drive for Mark McAlister' and that 'Brown was driving his own regular route on August 9'. This argument is actually contradicted by undisputed evidence. See Lard Decl., § 3, Exhibit 1 at 215 (attaching work schedules showing that Brown was assigned a different route on August 9 – McAlister's route – because he had been taken off of his normal University Village route because of the earlier termination decision)."

However, this is not what the Lard Declaration testifies. In his Declaration Eric Lard advises the Court:

> "Attached hereto as Exhibit A is a true and correct copies of each of the Daily Route Assignments for the month of August 2009 for the Kent, Washington facility. These are the copies of the actual route and driver assignments at that time. As these documents show, Mr. Brown was taken off of the schedule after August 9, although he was placed back on the schedule for one day, August 10, because the regular driver, Mr. McAlister, had called in sick." (CP 188-221, at 189)

The Court will clearly see the divergence in the Defendant's offer of proof in its Reply as opposed to what Eric Lard actually testified. The Defendant alleges that Anthony Brown was assigned "a different route on August 9". However, Eric Lard testifies that Anthony Brown was taken off of the schedule "after August 9". And, even more importantly, the Defendant alleges that Anthony Brown was assigned to drive on August 9

because an employee (McAlister) had called in sick on August 9. "QCDS scheduled Brown to work the route of a sick employee on August 9." (CP 324-336, at 331) (Defendant's Opposition to Plaintiff's Motion for Summary Judgment, p.8, l. 11) However, that is not what the Declaration of Eric Lard tells the Court. Mr. Lard states: "... he was placed back on the schedule for one day, August 10, because the regular driver, Mr. McAlister, had called in sick." The Defendant's attempt to explain-away the driving of Anthony Brown on August 9 completely fails. There can be no doubt that Anthony Brown was driving his own, regular route. There had been no decision to terminate him and that decision was not made until the Defendant learned of his injury on August 10, 2009.

Anthony Walton, a former driver of Defendant, advised the Court that route schedules are posted once a week and "if a driver calls in sick for a day, say at 11:30 a.m. of that same day, I have never seen a printed schedule put together placing another driver on that day's schedule. There simply would not be enough time. This would all be done by telephone." (CP 321-323, at 322)

Thus, we have the Defendant advising the Court that Anthony Brown was still driving on August 9, even though they allege they had made the decision to terminate him on August 1, because another driver, Mark McAlister, had called in sick on that day. However, the evidence on

this issue from the Declaration of Eric Lard shows that Mark McAlister actually called in sick on August 10. The Defendant's contentions on this issue of why Plaintiff continued to drive through August 9, even though the decision had been made to terminate him on August 1, is complete, unadulterated pretext.

However, the deposition of Damon Spear, one of the Transportation Department's supervisors and one of Plaintiff's supervisors, demonstrated the lack of truth in this scheme. In his deposition, Damon Spear testified that there were multiple other drivers who could have driven Plaintiff's route if Plaintiff had been discharged. He testified as follows:

> "Q. So you don't actually remember Mark McAlister calling in sick, do you?
>
> A. No.
>
> Q. Who would have gotten that phone call?
>
> A. Most likely I would have, but it could have gone to anyone else in the warehouse too.
>
> Q. Did you have other drivers that could have been called to take over Mark McAlister's route?
>
> A. Sure.
>
> Q. A fair number, wouldn't there have been?
>
> A. I don't know what you call a fair number. I don't remember how many there were.

Q. Four? Five? Six?

A. Perhaps." (CP 264-286, at 267, 268)

This scheme was devised to show why Plaintiff was driving a route on August 9. However, as so often happens when the truth is deviated from, "cracks" appear.

Failure to Accommodate – A Warehouse Job was Available:

The Plaintiff advised the Trial Court that, upon realizing that the Defendant was not going to provide him with a mechanical lift or otherwise accommodate his pre-existing back injury and that jumping from the truck and off-loading heavy loads was exacerbating his back injury, that he spoke to Defendant about a position in the warehouse since warehouse employees work in conjunction with drivers in providing the necessary goods that the drivers would deliver. (CP 287-320, at 292)

Additionally, Anthony Walton, a former driver with the Defendant and only a casual acquaintance of the Plaintiff, advised the Trial Court that Anthony Brown had requested a warehouse job on several occasions. He said:

> "I was with Anthony Brown on one occasion, and possibly two, when he told Steve McCraney and Damon Spear that he would like a job in the warehouse because it was less physically demanding than working as a route driver. On one of these occasions when he was speaking to Steve McCraney, Mr. McCraney asked him why he wanted to

> work in the warehouse and Anthony Brown told him it was because of his prior back injury and he also mentioned that he had had rods inserted in his back from that surgery." (CP 321-323, at 322)

Further, the Plaintiff testified that on August 11, 2009, the day that he was terminated and immediately after Damon Spear told him he was terminated, he again asked about the warehouse position and Damon Spear said that they would not use him in the warehouse, that "we're done". (CP 287-320, at 292, 293)

Accommodation and the "Interactive Process":

Plaintiff alleges that the failure of the Defendant to consider the Plaintiff for a position in the warehouse, to engage in the "interactive process" as part of the accommodation process clearly violates Washington law. As the Court said in *Holland v. America West Airlines, 416 Fed. Supp. 2d 1028; 2006 US Dist. Lexis 26438*, a case decided under Washington law:

> In this case on several occasions beginning on October 3, Plaintiff informed his supervisor that the overnight shift was causing him severe anxiety, was affecting his health, was causing him to have panic attacks, and that the effects were so serious that he would be forced to resign absent a shift change. Although Plaintiff never gave America West any medical documentation during his employment, Collier never requested it, despite Plaintiff's repeated health related complaints. Instead, under Plaintiff's version of the facts, Collier ignored his statements. Accordingly, Plaintiff has raised a genuine issue of fact regarding whether he gave America West notice of his condition and its limitations.

> See e.g. Martini, 88 Wn. App. at 457 (finding that the employer had a duty to investigate further into the nature and impact of an employee's disability after it learned that he had symptoms of major depression and was about to begin treatment)."

And, in *Dean v. Municipality of Metropolitan, 104 Wn. 2d 627, 708 P. 2d 393*, the Court said on this issue:

> "Metro failed to make reasonable accommodation to Dean's handicap when he informed it of his illness in that Metro treated him as any other job applicant, did not determine the extent of his disability, did not call him into the office or assist him in applying for other positions but left the initiative to him. He received no special attention from the personnel office when he tried to find another position within Metro."

And, in *Curtis v. Security Bank, 69 Wn. App. 12, 847 P.2d 507*, the Court held:

> "The handicapped worker requires treatment different from other non-handicapped employees if the purposes of RCW 49.60 are to be achieved. The employer must take 'positive steps' to accommodate the physical limitations of handicapped employees...
>
> ...."

And, here the Defendant violated the most basic of requirements placed upon it in fulfilling its duty to a handicapped employee in that it failed to even discuss the Plaintiff's limitations and what accommodations might enable the Plaintiff to continue at his job, or another job with the

Defendant. As the Court said in *Frisino v. Seattle School District, 160 Wn. App. 765, 249 P.3d 1044 (2011)*:

> "Generally the best way for the employer and employee to determine a reasonable accommodation is through a flexible, interactive process. RCW 49.60.040(7)(d); *MacSuga v. Spokane County, 97 Wn. App. 435, 983 P.2d 1167(1999)*. A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee's capabilities and available positions. See *Goodman v. Boeing Company, 127 Wn. 2d 401, 408-09, 899 P.2d 1265*; RCW 49.60.040(7)(d) ('An impairment must be known or shown through an interactive process to exist in fact.') The employer has a duty to determine the nature and extent of the disability but only after the employee has initiated the process by notice... A good faith exchange of information between parties is required whether the employer chooses to transfer the employee to a new position or accommodate the employee in the current position."

The Defendant argued against this by advising the Court that "Brown provides no evidence that his preferred accommodation method – a warehouse job – was feasible, available or appropriate". That allegation is completely contrary to the evidence. The testimony of Eric Lard, Defendant's transportation manager, clearly shows that in June of 2009, Quality Custom Distribution began staffing the warehouse (CP 432-433) and the deposition of Corey Alfano, a transportation supervisor, demonstrated that the staffing of the warehouse by Quality Custom

Distribution continued through the remainder of 2012. (CP 264-286, at 275)

And, more importantly, the Defendant has gone from step one of the accommodation process, being the notice requirement of the Plaintiff, to step three, as it has done throughout the discussion on these issues, and has simply bypassed step two, the "interactive process".

V. RETALIATORY DISCHARGE AND EVIDENTIARY ISSUES:

Anthony Brown was doing as Good a Job as any Other Driver:

The Defendant answered Plaintiff's Interrogatory No. 13 that there were no complaints received about Plaintiff's job performance. (CP 264-286, at 278) Further, at his deposition, defense counsel asked Mr. Brown the following:

> "Q. by Mr. Symes: And did anybody ever come to you and say, 'Mr. Brown, I don't think you're giving 100 percent' or words like that?
>
> A: No, sir. Nobody ever told me that.
>
> Q: Because you were, right?
>
> A: Yes, I felt like I was." (CP 264-286, at 278)

And, during the deposition of Eric Lard, Mr. Lard testified:

> "Q. He could have been, but as we sit here today, you don't know even one occasion when he was counselled, do you?

A. Not written, no, but I believe he was counselled.

Q. But you can't tell me when that was, can you?

A. I can't, no.

....

Q. How many letters would it take before a person would be terminated?

THE WITNESS: According to the progressive discipline, an associate can be terminated after the third letter." (CP 264-286, at 274)

Many, if not Most Other Drivers, Had Same Issues as Plaintiff:

During the deposition of Eric Lard, Mr. Lard was presented with a "Daily Route Assignment" for Friday, June 5. Of the 23 drivers listed on this route assignment, 13 of them had a notation opposite their name "off 0530". The significance of this is that these drivers had used up their 70 hour driving limit for that week, indicating that they had been late in driving other routes that week. In his deposition, Mr. Lard stated:

"Q. Mr. Lard, I'm handing you what's been marked as Exhibit 4. This is a Daily Route Assignment. As you look at that, it appears that -- for June 5th it appears that most of those drivers had used up their 70-hour driving limit, correct?

A. I'm not sure of that. No, I can't say that.

Q. Look at the notation, 'Off by 5:30,' 'Off by 5:30' -- actually, all of them.

MR. SYMES: It's actually 6:30. And what relevance does this have, Counsel?

BY MR. DeJEAN:
Q. Does that indicate that they've used up their 70-hour driving limit?

A. I couldn't tell you that, no.

Q. That could be an indication, correct?

A. It could be 70 hours. It could be what they had for the day, yes...

Q. Mr. Lard, you ordinarily would not have a driver assigned a route that would place him at driving over the 70-hour limit, correct?

A. Yes.

Q. So if that's happened, that means they've been late in driving other routes, right?

A. Not necessarily, no.

Q. But it could mean that, right?

A. Yes." (CP 264-286, at 277)

Additionally, Anthony Walton advised the Trial Court:

"I am a former employee of Quality Custom Distribution Services, Inc., employed as a truck driver and was so employed during the entire time that Anthony Brown worked there. During Anthony Brown's employment and when he was new at QCDS, he was assigned as a "helper" on several of my routes. I worked with Anthony Brown for about two weeks at the beginning of his employment and I know that Anthony Brown gave 100 percent of his work ability to the company. He did a very good job. While I was friendly with Anthony Brown while he was employed

> at QCDS, we were not social friends and I have had very little contact with him, other than an occasional phone call since he left QCDS.
>
> ....
>
> As far as drivers not finishing their routes on time, every driver has this problem at one time or the other and many drivers, who drive the harder routes, have it on a continuing basis. Because many drivers would nightly be late in completing their routes, these drivers would need help from other drivers to complete their routes. This happened on an almost nightly basis." (CP 321-323, at 322, 323)

And, Anthony Brown addressed this issue in his Declaration where he said:

> "I also recall Mr. Lard being presented with a Daily Route Assignment for June 5, 2009, with a list of drivers, driving that day, 13 of which had written opposite their names 'off by 0530'. This indicates that these drivers had used up their 70 hour driving limit. This would not have occurred unless they had been late on other deliveries." (CP 264-286, at 290)

The Defendant, in its Motion for Summary Judgment, alleged that "... Brown was terminated because he was unable to make his deliveries on time or without a helper". (CP 87-110, at 88) Plaintiff has demonstrated several reasons why this allegation will not hold water. Additionally, in his Declaration filed with the Court, Plaintiff advised:

> "To again demonstrate that the Defendant is attempting to sell the Court 'a bill of goods', I am attaching hereto, as Exhibit 4, two 'Trip Records' where I was the driver, both on the '13 Kirkland' route. The first for July 15, 2009/July 16, 2009 reflects that I completed this route four hours

> earlier than driver Byers did. And, the next 'Trip Record' for '13 Kirkland' driven July 16, 2009/July 17, 2009 also reflects that I drove this route some four hours quicker than driver Byers did. At the time I was discharged, Mr. Byers was still employed by the Defendant." (CP 287-320, at 289)

To further illustrate that Plaintiff's job performance was no different that the other drivers employed by QCDS, Inc., Mr. Brown further advised the Trial Court:

> "The Defendant wants the Court to believe that I was constantly in need of help from other drivers to complete my route. This is something that all of the drivers experience at one time or the other. Things such as mechanical problems with the lift gates, mechanical problems with the trucks we were driving, improperly loaded trailers would cause all drivers to run late at one time or the other. As a matter of fact, I went on at least four, and possibly five, occasions out to help other drivers after I had completed my route.
>
> ....
>
> I sat in on the deposition of Eric Lard and I recall Mr. Lard testifying that of all the QCDS drivers all had at least one counseling letter in their file, similar to the one that I received for being two cases short of 2 percent milk. He said every driver would have at least one of those in their file also." (CP 287-320, at 290)

Lastly, to show that the termination of the Plaintiff was not made on August 1 and was not made before his injury, Plaintiff presents the testimony of Corey Alfano, another of his supervisors.

Corey Alfano, in his deposition, testified that at the time an employee is discharged there would be paperwork reflecting this termination given to the employee to be signed by the employee and then placed in the employee's personnel file. There was no such paperwork given to Anthony Brown nor was there any paperwork signed by him at the time of his termination. Corey Alfano testified as to what occurs at termination as follows:

> "Q. From what I've seen of Mr. Brown's discharge, there's -- I don't think there was ever a written note made that he was discharged for performance issues. Would that be something that would appear in some type of written record, or do you just say, 'This employee is discharged, terminated'?
>
> A. Normally, when they're in a discipline state, there's normally some type of paper. I wasn't involved with Mr. Brown's termination, so I can't speak to as to what he was given at the time of termination.
>
> Q. But ordinarily there would be written paperwork given to the employee?
>
> A. Not given to them, but given and signed.
>
> Q. And then kept by Quality Custom Distribution?
>
> A. Kept in his file, yes." (CP 264-286, at 272)

And, remembering that there were no written records of counseling sessions in Plaintiff's personnel file, Corey Alfano testifying to the significance of that absence said:

"Q: Do you remember having a counseling session and not making a record of it?

A: Several times.

Q. What would generally dictate whether you made a record of it?

A. The severity.

Q. So if a performance issue was not severe, than there would be no record made?

A. If it wasn't a severe issue that affected our customer then, yes, there would be no record made." (CP 264-286, at 272)

Why would a company which is allegedly short on drivers terminate a driver who is giving 100 percent effort and doing a good job as a delivery driver with no complaints about his performance (except to support Defendant's spurious position in this litigation)? The answer, of course, is it would not. Anthony Brown was terminated because he had injured his back on the job and was preparing to file an L&I claim. And, RCW 49.17.160 prohibits retaliation against an employee that has filed a claim for worker's compensation benefits. And, the deposition testimony of Damon Spear, the supervisor who terminated Plaintiff, pretty much states this is what happened. Damon Spear testified:

"Q. Well, you terminated him, didn't you?

A. Yes.

Q. You terminated him in person?

A. Yes.

Q. And you were told by either Chuck Brewer -- you were told by Chuck Brewer, as a matter of fact, that he had hurt his back on that late route?

A. No, I wasn't.

Q. Are you positive of that?

A. Pretty sure.

Q. But you're not positive, are you?

A. I guess not." (CP 40-86, at 42)

VI. CONCLUSION:

In conclusion, Anthony Brown was doing a good job, receiving no write-ups (except one for being short on 2% milk – which has nothing to do with loading or unloading) until the Defendant started adding deliveries to his route and denying him the use of a mechanical lift, which was afforded to the other drivers, to facilitate the off-loading of the heavy dairy products and to obviate the necessity of jumping from the trailer to the ground surface. As the difficult off-loading process began to take a toll on his previous back injury, he requested a mechanical lift and also a job in the warehouse. The Defendant provided neither and did not even discuss either of these requests with him. This refusal to provide any type of accommodation to Mr. Brown lead to the inevitable, another injury to his

back in the early morning of August 10. The Defendant clearly knew of this when his supervisor, Charles Brewer, came to the scene and through the comments of Steve McCraney that Plaintiff did not need L&I paperwork to see a doctor. Plaintiff submits it is very clear that this was a termination seeking to keep Plaintiff from filing an L&I claim. Or, at the very least, there are many substantial factual questions around this issue. The refusal to pay him for his breaks and lunch time is simply a violation of Washington law.

Plaintiff requests the Court to reverse the Trial Court's Order Granting Defendant's Motion for Summary Judgment, to grant Plaintiff's Motion for Summary Judgment and to hold that admission of the self-serving statements was in error. Further, considering that Defendant has "lost" so much relevant evidence (especially the Trip Records of August 9/August 10, 2009 and most of the Trip Records driven by Plaintiff) that the Court grant Plaintiff's Motion to Compel Discovery.

Respectfully Submitted this 1st day of November, 2013.

Richard F. DeJean WSBA #2548
Attorney for Plaintiff

APPENDIX A:

In Plaintiff's Motion to Compel Discovery, Plaintiff requested Defendant to respond to Interrogatory No. 17 of Plaintiff's First Set of Interrogatories. This read:

> "**INTERROGATORY NO. 17:** Please identify each cellular telephone or other mobile communications device and account that you have used at any time between August 10, 2009 and the present day by telephone number or address, together with each email address and/or account that you have used between August 10, 2009 and the present day as well as each land line telephone number or account that you have used in this same time frame.
>
> **ANSWER:** Defendant objects to this Interrogatory as seeking information that is not relevant to this action and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects on the grounds that this Interrogatory is over broad and unduly burdensome."
>
> **Plaintiff's response for purposes of this Motion:** The Defendant has emails of Plaintiff's supervisors in the time frame immediately prior to Plaintiff's firing. None of these emails make reference to the fact that Plaintiff had notified at least one of his supervisors that he had been injured on the night of his last delivery route. It is believed that this information exists in an email and that the Defendant is simply not providing this information to the Plaintiff. Obviously this is highly relevant and in order to make certain that the Defendant is not simply 'hiding' this information, Plaintiff needs this information requested which will then be utilized by an electronics expert to search these communication devices. Plaintiff will stipulate that any such information obtained will be subject to a Protective Order not to be used for any purpose other than purposes of this litigation and to be returned to the Defendant at the conclusion of the litigation.

Plaintiff filed a Motion to Compel a response to Request for Production No. 8, which read:

> "**REQUEST FOR PRODUCTION NO. 8:** Please produce for inspection by Plaintiff's attorney all emails,

text messages or other electronic communications made by or to you on any cellular telephone, land line telephone or other mobile communications device between August 10, 2009 and the present day that relate to the Plaintiff's Complaint or your Answer or any related issue in this litigation.

RESPONSE: Defendant objects to this Interrogatory as seeking information that is not evidence. Defendant further objects on the grounds that this Interrogatory is over broad and unduly burdensome. Without waiving its objections, Defendant has produced 8 emails contemporaneously with and relating to Mr. Brown's termination."

Plaintiff's response for purposes of this Motion: This information can obviously become evidence and can certainly lead to the production of evidence. Further, the objection of "over broad and unduly burdensome" is not one recognized by the Courts of the State of Washington, except in extreme circumstances.

And, from Plaintiff's Interrogatories/Requests to Produce, dated February 25, 2013:

"**REQUEST FOR PRODUCTION NO. 1:** Please produce for inspection by Plaintiff's attorney a copy of the Trip Records for Jim Hystad, Anthony Jackson, Anthony Walton, Mr. Byers and Mr. Njie for the months of May through August 2009.

RESPONSE: Defendants object to this Request on the grounds that it seeks information that is not relevant to this dispute and is not reasonably calculated to lead to the discovery of admissible evidence."

Plaintiff's response for purposes of this Motion: Again, the Defendant is attempting to defend by stating that Plaintiff was not able to complete his route in a timely fashion. The employees whose records are requested were employees who drove on the same route as the Plaintiff during the same time periods. Obviously a comparison between the times that these employees completed the same routes in comparison to that of Plaintiff's time would be highly relevant.

"**REQUEST FOR PRODUCTION NO. 2:** Please produce for inspection by Plaintiff's attorney a copy of the Trip Records for Anthony Brown from June 15, 2009 through July 2, 2009, as well as the Trip Records for the months of May and August 2009.

RESPONSE: Response to a prior request, Defendants have searched for and produced the requested Trip Records to the extent they could be located after a reasonable search. Without waiving this response, Defendants object to this request on the grounds that it seeks information that is not relevant to this dispute and is not reasonably calculated to the lead to the discovery of admissible evidence."

Plaintiff's response for purposes of this Motion: These Trip Records go to the heart of the Defendant's defense. If the Defendant is going to contend that the Plaintiff was not able to complete his route in a timely fashion, how can they possibly say that the Trip Records for the Plaintiff are not relevant? If the Defendant is unwilling to conduct a further search, then the Plaintiff requests the Court for an Order allowing the Plaintiff to search the Defendant's records. Such a search would be conducted under an appropriate Protective Order.

From Plaintiff's Interrogatories/Requests to Produce, dated February 27, 2013:

"**REQUEST FOR PRODUCTION NO. 1:** Please produce for inspection by Plaintiff's attorney a copy of the personnel files of Jeff Nelson, David Reed and Josh , all of whom were 'helpers' for the drivers. Information such as their Social Security Numbers can be redacted.

RESPONSE: Defendants object to this request on the grounds that the information requested is not relevant to this dispute and is not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this request on the grounds that the information requested does not relate to similarly situated employees. Specifically, Plaintiff was a driver but the personnel files requested are for individuals who are employed as 'helpers'."

Plaintiff's response for purposes of this Motion: The employees mentioned herein were "helpers" who rode with drivers who drove the same routes as did the Plaintiff and thus would know what a reasonable amount of time would be to complete the routes. And, some of these individuals were "helpers" for the Plaintiff. The information they possess is directly relevant to one of the central issues in this litigation.

"**REQUEST FOR PRODUCTION NO. 2:** Please produce for inspection by Plaintiff's attorney a copy of the personnel files of Steve McClanny, Charles "Chuck" Brewer and Damon Spear.

RESPONSE: Defendants object to this request on the grounds that the information requested is not relevant to this dispute and is not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this request on the grounds that the information requested does not relate to similarly situated employees. Specifically the requested personnel files are for employees who held management positions at the time of Plaintiff's employment."

Plaintiff's response for purposes of this Motion: The individuals named were supervisors of the Plaintiff. They are directly related with the information conveyed by Plaintiff on the night he was injured. Further, they supervise numerous drivers who drove the same routes as the Plaintiff. Plaintiff has been unable to make contact with these individuals and these files may provide information such as family members, etc., who could assist Plaintiff in locating these individuals. Further, there may be information in their files that reflect on evidence helpful to the Plaintiff's case. (CP 1-7, at 4, 5, 6, 7)

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

ANTHONY BROWN **Plaintiff,** **vs.** **GOLDEN STATE FOODS CORP. and QUALITY CUSTOM DISTRIBUTION SERVICES, INC.** **Defendants.**	**NO. 45097-6-II** **CERTIFICATE OF SERVICE**

I, Brenda M. High, certify under penalty of perjury under the laws of the State of Washington that on November 1, 2013 I served the documents; namely, Appellant's Brief, to which this is attached to the party listed below in the manner shown:

James A. Barrett, Esq. The Koin Center 222 SW Columbia Street, Suite 1500 Portland, OR 97201	[X] By United States Mail [ ] By Legal Messenger [X] By Facsimile [ ] By Overnight Fed Ex Delivery

Brenda High
Legal Secretary for Richard F. DeJean

LAW OFFICES OF
RICHARD F. DEJEAN
P.O. BOX 867
SUMNER, WASHINGTON 98390
(253) 863-6047