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 REPLY BRIEF

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COMES NOW the Appellant and submits the following Reply Brief.

MOTIONS TO STRIKE:

The Respondents submit two Motions to Strike. The first being a broadly worded Motion without reference to any specific testimony and which, therefore, cannot be rebutted. The Respondent alleges that Appellant has made allegations that are unsupported and, in some cases, contradictory of earlier deposition testimony. That is not the case. All of Appellant's references to Anthony Brown's testimony are based on either his Declarations, which were before the Trial Court, or on his deposition testimony, which also was before the Trial Court.

The Respondent then moves to strike assertions of fact on page 7, paragraph 11 of Appellant's Brief "to the extent those assertions are based on Brown's July 1, 2013 Declaration located at CP 453-454".

None of these assertions are based upon the July 1, 2013 Declaration, although that Declaration is completely in harmony with the assertions in paragraph 11. Obviously, the Respondents want these factual references removed because they completely contradict the Respondents' position that they knew nothing of Anthony Brown's injury in the early morning hours of August 10, before they terminated him. These Declarations by Anthony Brown demonstrate that after he injured himself,

he called one of his supervisors, Chuck Brewer, and asked if he could come out and help him complete the route. Mr. Brewer did this and, of course, was then fully aware of Anthony Brown's injury and even told Anthony Brown that "he would leave L&I paperwork for me in the office". All of this is contained in the Declarations of Anthony Brown, including his May 22, 2013 Declaration at CP 35-39, 36.

The July 1, 2013 Declaration of Anthony Brown is in response to an inquiry by the Trial Judge during the Summary Judgment presentation. During argument, the Court inquired:

> "The Court: A couple of questions for Mr. Symes. Does supervisor Brewer acknowledge that he knew of Plaintiff's injury on August 9 when Plaintiff asked for help completing deliveries prior to the actual termination on the 11th?
>
> Mr. Symes: The short answer is Mr. Brewer won't call either of us back, he doesn't work for the company anymore. So we don't know the answer to that question at this point." (CP 14, 15)

Appellant's July 1, 2013 Declaration advises the Court:

> "I am the Plaintiff in the above entitled proceedings. On Saturday, June 29, 2013, I called (562) 826-6462 and spoke to Charles "Chuck" Brewer. This is the same Chuck Brewer who was one of my supervisors while I was at Golden State Foods/Quality Custom Distribution Services.
>
> It was my intent to ask Mr. Brewer to provide us some assistance in this litigation. However, he made it clear that he would not become involved in

> any way. I further asked him if he might know where we could locate Steve McCraney and he said that he did not...
>
> I then asked him if he remembered my getting hurt in the early morning hours of August 10, 2009, and he said he did. He told me that he recalled having to come out and help me because I had hurt my back." (CP 453-454)

This Declaration was specifically considered by the Court in ruling on Plaintiff's Motion for Reconsideration. (CP 465-466)

Additionally, the Court in *Hofsvang v. Estate of Brooke, 78 Wn. App. 315, 897 P.2d 370*, ruled on a similar Motion and in Footnote 3 held:

> "The Estate's status, offered in Sylvia Brooke's Declaration, was not raised until reconsideration was sought. The Hofsvang's move this Court to strike Sylvia Brooke's Declaration as it was not part of the evidence admitted below, citing RAP 9.12. RAP 9.12 provides that, on review of an Order of Summary Judgment, this Court will consider only evidence and issues 'called to the attention of the Trial Court'. Although this evidence was never admitted below, it was called to the attention of the Trial Court and thus may be considered on appeal. We deny the Motion to Strike."

The Declaration is clearly admissible and the material at the heart of the Motion to Strike is not based on it in any event, although it is consistent with it.

Plaintiff's Motion to Compel:

The Defendant argues that the Court was correct in denying Plaintiff access to the Defendant's computer system. The Defendant characterizes it as "invasive" discovery. What the Respondent does not tell the Court is that the Plaintiff placed in his discovery requests the following:

> "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." (Rog 17, CP 1-7, at 4, 5, 6, 7)

What we have with Respondents' discovery responses is the Respondents' use of self-serving emails against which a Motion to Strike was made, and denied by the Court even though the Court admitted that they were self-serving statements (CP 4), and the failure to provide Plaintiff with information on other employees working in similar positions as the Plaintiff and in the same time frame, which would have permitted Plaintiff to locate these other employees for purposes of determining what the Respondents knew of Plaintiff's August 10 injury, and when they knew of it, and the nature of Plaintiff's job performance.

These August 1, self-serving emails played a primary role in the Court's decision to grant Respondents' Motion for Summary Judgment.

Yet, the Plaintiff was given no opportunity to rebut them. Our legal system can do better than this.

And, for the Court to call the August 1 decision to terminate "undisputed" is difficult to comprehend. If the decision had been made to terminate on August 1, why was Plaintiff still driving a route on August 9? The Respondents respond by saying that they were short-handed with drivers. However, the deposition testimony of Damon Spear, a Transportation Supervisor, stated that there were at least six other drivers who were available. (CP 264-286, at 267, 268) Further, the Respondents have a material conflict in their own evidence where they argued to the Court that one Mark McAlister called in sick on August 9 and therefore they had to substitute Anthony Brown for Mr. McAlister's route on August 9 (again, there were many other drivers they could have used). (CP 324-336, at 331) However, the Declaration testimony of Eric Lard, the head of the transportation department, advised the Court that Plaintiff was placed back on the trip schedule for August 10. (CP 188-221, at 189)

With this inconsistency, this pretext, in Respondents' evidence, Plaintiff submits that, first, there was sufficient evidence, on a Summary Judgment Motion, to prevent the Court from deciding that the decision to terminate Plaintiff was made on August 1 and, secondly, that there was ample reason for the Court to allow Plaintiff discovery into the system that

produced these self-serving statements under an appropriate Protective Order.

Further, the Respondent advised the Trial Court that it was not aware of Plaintiff's injury before it terminated him. Plaintiff has countered this by testifying that Chuck Brewer, one of his Transportation Supervisors, actually came to help him after he injured his back in the early morning hours of August 10. Now, with the Respondent submitting the Declaration of Eric Lard that Plaintiff was placed back on the schedule for August 10, this would mean that a route beginning in the evening of August 10, at either 5:30 or 6:30 p.m. would not conclude until August 11. And, everyone agrees that August 11 was the date on which Plaintiff was terminated! If, as Respondent says, the Plaintiff was driving the evening of August 10, this would have concluded the morning of August 11, the day he was injured.

And, the decision to deny Plaintiff information which would have enabled Plaintiff to make contact with other employees in the transportation department assumed added significance after Plaintiff was denied any discovery into the computer system. Essentially, the Court denied the Plaintiff the opportunity to gather any information to counter these August 1 self-serving emails.

And this as against a company which "lost" two-thirds of Plaintiff's trip records and most importantly the trip record for his last trip of August 9, which would have reflected the injury he received. This was also "lost".

Court's Offer of Additional Time:

The Respondent asserts that after an exchange with the Trial Judge, the Appellant waived his right to the information sought in his discovery requests. However, the Respondent did not set forth the full discourse with the Court, which read as follows:

> "The Court: Anything else evidentiary-wise on that issue?
>
> Mr. DeJean: No, other than the Plaintiff wasn't given an opportunity to contest them, Judge. If we could have gotten into that email system, I am confident that these things were – I mean this is Golden State Foods, this is McDonalds. That HR Department is probably the Harvard and Yale of HR Departments.
>
> The Court: Are you requesting a 56(f) continuance?
>
> Mr. DeJean: No, no, no. I mean, you've already ruled on it.
>
> The Court: Alright.
>
> Mr. DeJean: I don't think that would do any good. I mean I've already brought that Motion -

> The Court: No – well, what you're suggesting, Mr. DeJean, is that there might be something else. If there's something else that you want to discover, you know, I'm always opposed to trying to make a decision if there's not enough information but if you think that there is enough in the record. I am not going to strike the Declaration, but I certainly would give you more time if you think you need more time to find more emails.
>
> Mr. DeJean: I won't be able to find them, Judge." (RP 5, 6)

In this exchange, the Court was offering the Appellant more time to conduct discovery. However, the Court had previously ruled on Plaintiff's Motion to Compel Discovery to allow access to the emails and the employee records. And that ruling denied Plaintiff discovery into these issues. Additional time would have accomplished nothing. The Appellant needed an Order from the Court permitting the requested, and needed, discovery. (CP 1-7; 25-26) The Court evidently thought there was "something else" that Appellant needed. However, there was not anything else, but rather, the same information that had been part of Appellant's earlier Motion to Compel, which was denied by the Court. Appellant was not going to take the time of the Court and of the defense where Plaintiff had been denied any access to Respondents' computer system and could not locate any of the Respondents' employees with the outdated information supplied, except Charles Brewer, at the very end of

the proceedings and that only through a telephone call (Mr. Brewer would not provide Appellant with any contact information). Appellant was simply denied any meaningful discovery.

Failure to Accommodate:

In addressing both of Appellant's claims for failure to accommodate, the Respondent, in support of its position, utilizes Washington law prior to the 2007 amendments, and further, utilizes decisions under the ADA. The Respondent cites *Calhoun v. Liberty Northwest, 789 Fed. Supp. 1540*, for the statement: "Ms. Calhoun has set forth no medical evidence that she suffered from a disability..." And, throughout its argument on this issue, it continually references the absence of medical evidence. This argument was disposed of by the decision in *Johnson v. Chevron, 159 Wn. App. 18, 244 P.3d 438*, where the Court said:

> "Under the new statute, the question is not whether the accommodation was 'medically necessary' in order for Johnson to do his job, such as hearing enhancements or a wheelchair might be. Instead, it is whether Johnson's impairment had a substantially limiting effect upon his ability to perform the job such that the accommodation was reasonably necessary or doing the job without accommodation was likely to aggravate the impairment such that it became substantially limiting." (Johnson at 30)

The Court in *Johnson v. Chevron* rejected the same argument that Respondents make here. The Court's discussion on this issue was as follows:

> "Chevron's view is that an accommodation is required only when the employee has a disability that substantially limits job performance and the accommodation is medically necessary to enable the employee to perform the job. Chevron emphasizes Dr. Blair's deposition testimony that in his professional opinion, as of that time, Johnson was 'not necessarily' substantially limited in his ability to perform the job; that the tool was not 'medically necessary' for Johnson to perform his duties; and that when he released Johnson to return to work without conditions, there was nothing that limited his ability to do his work...
>
> But this argument derives from definitions adopted in cases decided before the Legislature amended the statute in 2007. The common law definitions have been superseded. 'Medical necessity' is no longer the sole basis for a right to accommodation."

Thus we see that under the 2007 amendments, the showing of a medical necessity for an accommodation is no longer a requirement and if an accommodation will prevent or be likely to prevent an aggravation of an impairment that is all that is necessary. And, that is exactly what happened here. Mr. Brown testified that:

> "About two weeks before I was terminated, Damon Spear, Chuck Brewer and Steve McCraney began 'riding' me... 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." (CP 35-39, at 36, 37)

And, Anthony Brown further testified:

> "And, as I explained to my supervisors, my back, because of the previous injury and surgery, would not allow me to jump in and out of the trucks and off load heavy products, often times at shoulder level, without producing pain and discomfort. It is clear that my continued attempts to meet their time demands lead to the final injury of my back on August 10, 2009. Had I simply been given what the other drivers were given; namely, a mechanical lift, the injury would not have occurred and I could have met the speed demands of the supervisors." (CP 287-293, at 288)

And, the Respondent distorts the Plaintiff's allegations in an attempt to provide support for their arguments. It is not the Plaintiff's position that his high school injury needed accommodation, rather, it is the Plaintiff's position that the aggravating effects from requiring the Plaintiff to jump in and out of trailers 5 ½ - 5 ¾ inches off the ground to hard surfaces and then being required to offload heavy products over his shoulder aggravated the previous injury and that is what needed the accommodation.

The Court and Defense Counsel Applied the Wrong Standard:

It is clear the Respondents grounded their argument on Plaintiff's causes of action for failure to accommodate on the absence of medical documentation.

> "Brown ignores, however, that he failed to submit any 'medical documentation' that his injury would be aggravated without an accommodation."

And, the Trial Judge also applied this standard.

> "I believe that the undisputed evidence is that there was no notice of a disability as required by law, medically, prior to the termination." (RP 18)

Medical documentation can be submitted to prove a disability but it is no longer necessary.

As the Court said in *Johnson v. Chevron, supra.*:

> "Under the new statute, the question is not whether the accommodation was 'medically necessary' in order for Johnson to do his job... it is whether Johnson's impairment had a substantially limiting effect upon his ability to perform the job such that... doing the job without accommodation was likely to aggravate the impairment such that it became substantially limiting." (Johnson at 30)

The application of wrong standards permeated the Respondents' argument and the decision. The Trial Court actually applied ADA standards which are clearly more onerous than are Washington State standards, and should not be applied in WLAD cases.

> "The Court: I think this case boils down to two causes of action. Although I'm not sure it was

> couched this way, but I read it as a wrongful discharge and violation of public policy/retaliation for filing an L&I claim, and then an ADA failure to accommodate." (RP 10)

ADA standards are more specifically rejected by the Legislature. In a Legislative "Finding", the Legislature found:

> "The Legislature finds that the Supreme Court, in its opinion in *McClarty v. Totem Electric, 157 Wn. 2d 214, 137 P.3d 844 (2006)*, failed to recognize that the law against discrimination affords to state residents protections that are wholly independent of those afforded by the federal American's with Disabilities Act of 1990 and that the law against discrimination has provided such protections for many years prior to passage of the federal Act." (2007 c 317, § 1)

And, the Respondents further advise this Court that:

> "To establish that he had a 'disability' eligible for an accommodation, Brown was required to produce evidence of the existence of an impairment 'in fact' – i.e. an impairment that was either 'medical cognizable or diagnosable' or that existed 'as a record or history'. (RCW 49.60.040(7)(a))

However, the Respondents omit a third, a very important element of RCW 49.60.040(7)(a). This part of the statute reads, in full:

> "(7)(a) '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."

And, RCW 49.60.040 continues:

> "(7)(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter."

Anthony Brown clearly perceived the aggravation of his prior back injury to exist as he brought it to the attention of his supervisors on several occasions. And, those supervisors were clearly advised of the disability by Appellant and recognized its existence by continually "riding" him to speed things up.

Anthony Brown clearly submitted more than sufficient evidence to the Court for the Court to find that the failure to provide him with a mechanical lift, as was provided to the other drivers, created a "substantially limiting effect upon the individual's ability to perform his or her job". As Mr. Brown told the Court:

> "About two weeks before I was terminated, Damon Spear, Chuck Brewer and Steve McCraney began 'riding' me. They were saying 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...

While Chuck Brewer was with me on the route, he told me that I had to keep working in spite of my back injury because they could not have a 'late'. He further told me that once we had finished the route, he would leave the L&I paperwork for me in the office and I could pick it up in the morning and then go to the doctor's office." (CP 35-39, at 36)

Mr. Brown further advised the Court:

"And, as I explained to my supervisors, my back, because of the previous injury and surgery, would not allow me to jump in and out of the trucks and off load heavy products, often times at shoulder level, without producing pain and discomfort. It is clear that my continued attempts to meet their time demands lead to the final injury of my back on August 10, 2009. Had I simply been given what the other drivers were given; namely, a mechanical lift, the injury would not have occurred and I could have met the speed demands of the supervisors.

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.

And, during my pre-employment discussions with Eric Lard, at no time did Mr. Lard ever mention that I would be required to jump in and out of trucks as part of the offloading process. I always assumed that I would have a mechanical lift to assist me in doing this as most truck drivers do. If I had been told that I would be required to jump some 5 ½ - 5 ¾ feet from these trailers to a hard surface, I am certain I would have been concerned about my back and would have brought this to the attention of Eric Lard. At no time was I provided with this information." (CP 287-320, at 288, 293)

And, as the Court said in *Holland v. America West Airlines, 416 F. Supp. 2d 1028 (206 US Dist. Lexis 26438)*:

> "... 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."

Mr. Brown adequately performed his job until the Respondents increased the number of deliveries required of him (Walton Decl.: CP 321-323) and in order to meet their time demands, required him to jump out of the trailer and offload dairy products without the assistance of a mechanical lift, which aggravated his prior back condition. The necessity of jumping in and out of the trailer and offloading without a mechanical lift was not part of the job description when he interviewed with Eric Lard. (CP 287-320, at 288)

Brown's Second Failure to Accommodate/Warehouse Position Claim:

In seeking to justify the Trial Court's dismissal of Appellant's failure to accommodate claim by engaging him in discussion of a warehouse job, the Respondents against argue that "Brown relied solely

on his own Declaration and provided no medical evidence of a disability or of the likelihood of aggravation of a disability absence an accommodation." Where in the world do the Respondents find the authority to make a statement that a party cannot rely on his own Declaration? Certainly there is no legal authority for same, nor do the Respondents supply any. Then we are back to the Respondents' reliance on the absence of "medical evidence". As previously pointed out, this is outdated law. As the Court said in *Johnson v. Chevron*:

> "Under the new statute, the question is not whether the accommodation was 'medically necessary' in order for Johnson to do his job..."

And, the third reason advanced by Respondents; namely, that "Brown... provided no medical evidence... of the likelihood of aggravation of a disability absence an accommodation. *Simmerman, 57 Wn. App. at 687.*" This third contention suffers from the same infirmity as the second; namely, that the *Simmerman* case was again decided on pre-2007 law, which did, under certain circumstances, require medical documentation. As the *Simmerman* Court said, "Mr. Simmerman has not presented any medical evidence of his handicap." Again, this is no longer the law in the State of Washington.

And, any attempt to utilize the decision in *Josephinium Assoc. v. Kahli, 111 Wn. App. 617, 45 P.3d 627*, in any fashion is misplaced. This

case alleged discrimination under the Federal Fair Housing Amendments Act and has no relationship to WLAD. And, on the question of an accommodation always being "prospective", the *Josephinium* Court would not adopt that position in any event. The Court, in dealing with an alleged act of discrimination occurring after a Notice of Eviction had been served, said:

> "We do not address whether efforts to accommodate a disability may be required after an eviction notice in other circumstances; presumably a landlord may not escape an obligation to accommodate merely by serving a notice to vacate."

Additionally, there is no evidence that the failure to accommodate occurred only after August 1. Appellant requested transfer to the warehouse job before he had injured his back. As Appellant advised 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... 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 287-293, at 292, 293)

As to the Respondents' contention that Appellant's physician had not released him to work in any capacity since his August 9, 2009 injury, this statement is again off the mark as Appellant had requested the warehouse job prior to any injury occurring.

Anthony Brown knew that the continual jumping from the high trailers to hard surfaces and the off-lifting, overhead, of heavy load was aggravating his prior back injury. Prior to the injury actually occurring, he requested two accommodations; one, the use of a mechanical lift on his truck, and, secondly, transfer to a warehouse job. The Respondents not only did not grant either request, but failed to even discuss either request with Appellant, failed to engage him in the "interactive process" required. And, now, it wants this Court to believe that it did not discriminate against Mr. Brown because now that he has aggravated, and injured his back and the doctor would not release him to work, at that time, that it therefore had no obligation to accommodate him. Such an approach should be held to be direct discrimination.

On the issue of providing accommodation through a warehouse job, after his termination, the Trial Judge decided this issue as a matter of law and held that there was no obligation under Washington law to accommodate an employee after termination.

> "The Court: Alright. Thank you. My decision would not turn on whether or not this was during a probationary period or not, frankly. So a couple of observations and then a ruling. First, I don't believe that you do have a duty to accommodate a disability after termination. That's number one..." (RP 17)

This is inconsistent with Washington law. In *Wheeler v. Catholic Archdiocese, 65 Wn. App. 552, 829 P.2d 196*, the Court said:

> "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."

MEAL AND REST BREAK CLAIMS:

Among Respondents' efforts to support their failure to either provide or pay for meal and rest breaks, the Respondents attempt to discount the testimony of Anthony Walton, who advised 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)

And, through some strange reasoning, the Respondents object to a Declaration from Appellant's counsel, setting forth the witness's deposition testimony and alleges that it was inadmissible. Counsel is evidently not familiar with the local rules for the Pierce County Superior Court, which actually requires that deposition testimony be presented in this manner. PCLR 7(10)(b) provides:

> "Testimony. If testimony transcribed at any pretrial deposition is used in support of or in opposition to a motion for summary judgment, such testimony shall be presented by affidavit containing excerpts of the testimony relied upon by the party using such testimony, with reference to the line and the page of source."

Obviously, Respondents are concerned about this deposition testimony as well as the deposition testimony of Eric Lard. And, as in several other instances, Respondents are simply off the mark in their reference to Washington law.

The same is true in their treatment of Washington law on meal periods and rest periods. WAC 296-126-092 provides as follows:

> "Meal periods – Rest periods
> (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.
> (3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime 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 four hours worked, scheduled rest periods are not required."

And for the Respondents to say that *Pellino v. Brinks' Inc., 164 Wn. App. 668, 267 P.3d 383*, does not require the employer "to schedule breaks" is off the mark. *Pellino* holds that an employer does not have to schedule breaks although "the employer must provide breaks that comply with the requirements of 'relief from work or exertion'".

As the Court said in *Pellino*, which factual setting overlaps that of Respondents' drivers:

> "The plain language of WAC 296-126-092 imposes a mandatory obligation on the employer. WAC 296-126-092(1) states that employees 'shall be allowed a meal period of at least 30 minutes' and when the employer requires the employee to remain

> 'on duty' the 'meal periods shall be on the employer's time'. WAC 296-126-092(2) also states that 'no employee shall be required to work more than five consecutive hours without a meal period.' In addressing rest breaks, the plain language of WAC 296-126-092(4) states that '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,' and describes when rest periods 'shall be scheduled'."

In *Wingert v. Yellow Freight Systems, 146 Wn.2d 841, 50 P.3d 256*, the Washington Supreme Court addressed the meaning of the language used in WAC 296-126-092(4) for rest breaks.

> "The Court interpreted the language used in WAC 296-126-092(4) to 'clearly and unambiguously prohibit working employees for longer than three consecutive hours without a rest period.' *Wingert, 146 Wn.2d at 848.* The Court held that 'Yellow Freight did not comply with WAC 296-126-092(4) when it failed to provide paid rest periods to employees.' *Wingert, 146 Wn.2d at 848.* The Court further held that because Yellow Freight did not comply with the requirements for rest breaks, the employees' work day was extended by 10 minutes, the employer received an additional 10 minutes of labor and the employees were entitled to compensation for that time."

And, what Anthony Brown told the Trial Court in reference to these issues was:

> "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.
>
> ....
>
> He told me most of the drivers they just grab a sandwich and stuff and they would eat the sandwich while they're going to the next route in order to get their route done." (CP 271)

And, Eric Lard, the Transportation Manager, testified at his deposition:

> "Q. But there is no specific break written into that schedule, is there?
>
> A. No, we don't. No, there isn't." (CP 270)

Obviously, this is not in keeping with the mandates of WAC 296-126-092 or the holding in *Pellino*.

In *Weeks v. Chief of the Washington State Patrol, 96 Wn.2d 893, 639 P.2d 732*, the Court held that under Washington law, an employee must be completely relieved from duty for a meal period of at least 30 minutes. If the employee remains on duty or is subject to being called back to duty on a moment's notice, then the employee is not completely relieved from duty and the meal break must be compensated. Similarly, a purported meal break must be fully compensated if it in fact lasts less than 30 minutes or is interrupted by work. *Alvarez v. IBP, Inc., 339 F. 3d 894.*

In conclusion, there are many, many issues of material fact precluding the grant of Summary Judgment in favor of the Respondents and the absence of material facts on Appellant's Motion for Summary Judgment should dictate a grant of Summary Judgment in Appellant's favor on those issues. As the Court said in *City of Tacoma v. Smith, 50 Wn. App. 717, 750 P.2d 647*:

> "Although evidentiary facts may be undisputed, if reasonable minds could draw different conclusions, a Motion for Summary Judgment must be denied... Additionally, the Trial Court may not grant Summary Judgment, even on undisputed evidence, if that evidence does not supply all the facts necessary to determine the issues."

Respectfully Submitted this 23rd day of December, 2013.

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Attorney for Plaintiff

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 December 24, 2013 I served the documents; namely, Appellant's Reply 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] [ ] [X] [ ]	By United States Mail By Legal Messenger By Facsimile By Overnight Fed Ex Delivery

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