No. 93620-0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 73758-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STACIA HARTLEBEN,
an individual,

Petitioner,

v.

UNIVERSITY OF WASHINGTON,

Respondent

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

The Court of Appeals correctly held that respondent University of Washington had no obligation to waive petitioner Stacia Hartleben's tuition as an "accommodation" under the Washington Law Against Discrimination. The Court of Appeals decision comports with the plain language of RCW 49.60.215 and is consistent with this Court's decisions and those of the Court of Appeals. Hartleben fails to identify any basis for review under RAP 13.4(b).

B. Restatement of Issues Presented for Review.

1. RCW 49.60.215 allows places of public accommodation to charge the disabled "the uniform rates charged other persons." Did the University of Washington comply with the Washington Law Against Discrimination by offering a student with amnesia to re-enroll in any classes, to extend the time necessary to complete her program, and to take a reduced course load, in order to give her full access to the service provided by the University – enrollment in classes in exchange for tuition – or must it waive tuition for the student as an "accommodation?"

2. Does requiring the University of Washington to waive tuition as an accommodation to the disabled fundamentally alter the nature of the service the University provides the public?

3. Does the WLAD's requirement of "reasonable accommodation" require the University to "financially accommodate" a student by waiving tuition because her newly incurred disability undermines the value of classes previously provided by the University when that disability did not exist?

C. Restatement of the Case.

1. The University granted Hartleben additional time to complete her master's degree program and offered her additional accommodations to address her memory loss.

Petitioner Stacia Hartleben was enrolled in the University of Washington's Computational Linguistics master's program from 2008 through November 2011, completing five courses. (Opinion ¶ 2; CP 77, 105)[1] While enrolled, the University granted Hartleben hardship withdrawals because she suffered from depression and granted her tuition refunds when she withdrew from classes. (Op. ¶ 2; CP 57, 82-83, 105, 161) Hartleben was treated with electroshock therapy in December 2011. (Op. ¶ 3; CP 78)

[1] This Restatement of the Case is supported by citation to the Court of Appeals Opinion and the record before the trial court.

As a side effect of the therapy, Hartleben experienced retrograde amnesia. She lost memory of the five completed courses. (Op. ¶ 3; CP 77-78, 155) In February 2013, Hartleben emailed Dr. Emily Bender, a professor in her program, requesting to retake those classes without paying tuition. (Op. ¶ 4; CP 58, 62) Dr. Bender referred her to the University's office of Disability Resources for Students (DRS) and the student health clinic. (Op. ¶ 4; CP 58, 156) Hartleben asked DRS's representative Terri Dobrich if she could re-enroll in the classes she had previously taken for free. (Op. ¶ 5; CP 51, 88-89, 157)

Dobrich and Bree Callahan, the director of DRS, consulted with colleagues at the Registrar's Office and Student Fiscal Services and the Americans with Disabilities Act Coordinator at the University. They all agreed that "all students must pay tuition," that "there was no circumstance under which they would not pay tuition," and that waiving tuition was not a reasonable accommodation. (Op. ¶ 7; CP 50, 53, 261-63) On March 14, 2013, Dobrich explained to Hartleben that the University would extend the time to complete her program, allow Hartleben to take a reduced course load, and allow Hartleben to retake or audit any classes she had forgotten. (Op. ¶ 8; CP 46, 48, 52, 160, 406)

Hartleben rejected these accommodations, but did not suggest any others. (CP 52, 160)

Dobrich also suggested that Hartleben contact the University's financial aid office and referred Hartleben to the Washington Division of Vocational Rehabilitation, which concluded that she should work before she returned to classes. (Op. ¶ 9; CP 52, 529) Hartleben did not apply for financial assistance. (CP 98)

Dobrich formally denied Hartleben's request to waive tuition on May 2, 2013, explaining that "enrolling in a course requires payment of tuition" and that payment of tuition is required whenever a student repeats a course, even for health or emergency reasons. (CP 53, 55) Dobrich offered Hartleben the opportunity to re-enroll, stating that if she did so, DRS would "provide any disability accommodations that are relevant to the current impact of your disability." (CP 55, 90)

In May 2013, Hartleben filed a complaint with the University Complaint Investigation & Resolution Office (UCIRO) alleging disability discrimination. (Op. ¶ 10; CP 32, 36-40) UCIRO Investigator Kate Leonard found that Dobrich had offered multiple accommodations that would allow Hartleben to return on the same terms as the non-disabled. (Op. ¶ 10; CP 33, 42-49, 193-94, 202-11)

When Leonard met with Hartleben to explain her findings, as an additional accommodation she offered Hartleben audio recordings of the five classes, including recordings of the actual classes Hartleben had taken. (Op. ¶ 11; CP 33-34, 513-14) Hartleben rejected the offer, stating she could not learn from recordings. (Op. ¶ 11; CP 513-14)

2. The Court of Appeals affirmed dismissal of Hartleben's WLAD claim on summary judgment because the University offered Hartleben service comparable to the non-disabled and because waiving tuition would fundamentally alter the University's services.

Hartleben filed this action in King County Superior Court under the Washington Law Against Discrimination, RCW ch. 49.60, alleging the University violated the WLAD by "refusing and failing to provide her with reasonable accommodations that would allow her to re-take certain classes." (CP 2) The Court of Appeals affirmed the trial court's summary judgment dismissing that action. (CP 480-81)

The Court of Appeals held that "Hartleben did not present any evidence that the University failed to offer her a comparable service." (Op. ¶ 19) Rather, the University offered Hartleben comparable service when it allowed her to re-enroll in any classes, offered to extend the timeframe necessary to complete her program

and allowed her to take a reduced course load. (Op. ¶ 20) The accommodations offered by the University gave Hartleben the same opportunity as the non-disabled to enjoy the University's service – "classes offered in exchange for tuition" – because "[a]ll students must pay tuition." (Op. ¶ 20) Hartleben's request to take classes without paying tuition was not reasonable, but was instead a fundamental alteration of the University's services. (Op. ¶¶ 20, 27)

D. Argument Why Review Should Be Denied.

1. The Court of Appeals correctly held the University treated Hartleben comparably to students without a disability and that her request to enroll in classes without paying tuition was not a reasonable accommodation.

The Court of Appeals correctly held that the WLAD did not require the University to grant Hartleben a waiver of the "uniform rates" charged to both the disabled and non-disabled alike. Its holding that a tuition waiver is not a reasonable accommodation does not conflict with any decision of this Court, the Court of Appeals, or for that matter, any decision of any court in any other jurisdiction.

The WLAD protects "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement."

RCW 49.60.030(1)(b). The WLAD requires places of public accommodation to provide the disabled the same services or, if that is not possible, "comparable services" through "reasonable accommodations." *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 627-28, 635-36, 911 P.2d 1319 (1996); *see also* WAC 162-26-060(1) ("The purposes of the law against discrimination are best achieved when disabled persons are treated the same as if they were not disabled."); WAC 162-26-080. To establish discrimination the plaintiff must prove that the defendant did not treat the plaintiff comparably to non-disabled individuals. *Fell*, 128 Wn.2d at 637.

The WLAD protects "the right to *purchase* any service," RCW 49.60.040(14) (emphasis added), and expressly allows places of public accommodation to charge the disabled the "*uniform rates charged other persons.*" RCW 49.60.215(1) (emphasis added). Thus, by its plain terms, the WLAD recognizes that a place of public accommodation treats the disabled and non-disabled comparably by charging both "uniform rates" for its services.

The Court of Appeals correctly held that the University offered Hartleben multiple accommodations that afforded her treatment comparable to students without her disability based on substantial and undisputed evidence. (Op. ¶¶ 18-26)

The University repeatedly granted Hartleben's requests for hardship withdrawals (refunding her tuition) and welcomed her back afterwards. (CP 52, 57, 82-83, 105, 161) The University offered to accommodate any lingering symptoms of Hartleben's memory loss should she re-enroll,[2] granted her extra time to complete her degree program, reduced the normal course load, and allowed her to retake or audit classes as she deemed necessary. (CP 46, 48, 52, 55, 160, 406) *See also* 34 C.F.R. § 104.44(a) (suggesting as reasonable accommodation "changes in the length of time permitted for the completion of degree requirements"). It also offered her, free of charge, recordings of the classes she had forgotten. (CP 33-34, 513-14) While the evidence must be construed in Hartleben's favor on summary judgment, this Court cannot – as Hartleben does – simply ignore undisputed facts. RAP 9.12; *see Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("An appellate court would not be properly accomplishing its

[2] Undisputed documentary evidence refutes Hartleben's allegation that the University "did not discuss with [her] the impact of her memory loss on her ability to participate in classes going forward." (Pet. 5) In fact, the University told Hartleben it would "work with you to provide any disability accommodations that are relevant to the current impact of your disability." (CP 55) The parties never crossed that bridge because Hartleben refused all accommodations short of a tuition waiver.

charge if the appellate court did not examine *all* the evidence presented to the trial court . . . .") (emphasis in original).

Hartleben dismisses the steps the University took to address her amnesia by asserting that they "were either not accommodations or were unrelated to her disability." (Pet. 9) Hartleben likewise brushes off the recordings offered by the University as a mere "afterthought," (Pet. 7) and ignores the undisputed fact that the University did not "follow up" on this accommodation (Pet. 8) only because Hartleben rejected it immediately. (CP 33-34, 514)

The WLAD expressly allows the University to charge Hartleben the same fee for its services that it charges the non-disabled. RCW 49.60.215(1). The University did not attempt to make Hartleben "pay twice" to enroll in a single class, as she asserts (Pet. 3), but simply sought to charge her each time she enrolled, as it does for everyone, even where the need to re-take a class is prompted by medical or emergency reasons. (CP 53, 55)

Hartleben now contends she was "willing to consider" other accommodations (Pet. 5), but she undisputedly rejected every accommodation offered by the University while at the same time failing to suggest any others. (CP 514 ("none of the options that the

university suggested were appropriate")) Thus, Hartleben – not the University – "cut off" discussion and failed to engage in an "interactive process." (Pet. 7-12) The University had no obligation to continue attempting to accommodate Hartleben after she made clear she would reject all accommodations other than one not required by the plain terms of the WLAD. *See Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993) ("The Act does not require an employer to offer the employee the precise accommodation he or she requests."); *Allen v. Pacific Bell*, 348 F.3d 1113, 1115-16 (9th Cir. 2003) (affirming dismissal of failure to accommodate claim because plaintiff refused to engage in interactive process).[3]

The Court of Appeals decision does not conflict with *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 249 P.3d 1044, *rev. denied*, 172 Wn.2d 1013 (2011) (Pet. 9-12), where the Court of Appeals reversed a summary judgment for an employer because there was an issue of fact whether an employee with a respiratory sensitivity to mold and other toxins had returned to her worksite after the employer's remediation efforts and whether she continued

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[3] Washington looks to federal decisions for guidance in applying the WLAD because it has "the same purpose as [its] federal counterparts." *MacSuga v. Cty. of Spokane*, 97 Wn. App. 435, 442, 983 P.2d 1167 (1999), *rev. denied*, 140 Wn.2d 1008 (2000).

to suffer symptoms. 160 Wn. App. at 784, ¶ 30. The *Frisino* Court held resolution of this disputed issue was necessary because, unlike other accommodation cases, there was no "objective standard . . . to measure whether an accommodation [of the mold disability] is effective," and thus the issue could only be resolved by "trial and error." 160 Wn. App. at 781-82, ¶¶ 21-23.

Here, in contrast to *Frisino*, the issue is not whether an attempted accommodation was in fact effective. Rather, it is whether the University complied with its statutory obligation by offering Hartleben a suite of accommodations while also refusing to waive the uniform rates it charges students for an education. The Court of Appeals' holding that the University was not required to waive tuition does not merit this Court's review. RAP 13.4(b)(2).

2. The Court of Appeals correctly held that a tuition waiver fundamentally altered the University's operation.

The WLAD did not require the University to abandon the essential *quid pro quo* of receiving tuition from students in exchange for an education. The Court of Appeals correctly affirmed dismissal of Hartleben's claim because Hartleben's request

fundamentally altered the nature of the University's services and thus was not required by the WLAD.[4]

An accommodation is unreasonable as a matter of law, and thus not required, if it would fundamentally alter the defendant's business. *Fey v. State*, 174 Wn. App. 435, 452, ¶ 33, 300 P.3d 435 (2013) (WLAD does not require employer to alter the fundamental nature of a job), *rev. denied*, 179 Wn.2d 1029 (2014). "[A]n educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones." *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1046 (9th Cir. 1999). *See* 28 C.F.R. § 35.130(b)(7) (accommodations not required if they "fundamentally alter the nature of the service, program, or activity"); 28 C.F.R. § 36.302(a) (same).

The Court of Appeals correctly held that "the University provides classes in exchange for payment of tuition" and thus Hartleben's request that it "[p]rovid[e] classes without collecting tuition fundamentally alters its business model." (Op. ¶ 27) The University's recovery of the cost of a student's enrollment in classes

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[4] Hartleben's assertion that the Court of Appeals decision was inconsistent in addressing this issue is without merit. (Pet. 19) The Court of Appeals noted the University was under no obligation to address the fundamental alteration issue because Hartleben failed to make out a prima facie discrimination case, as discussed in § D.1. (Op. ¶ 27)

is essential to its mission of offering students a quality education. (CP 53, 55) If tuition is not directly paid by the student, it is paid from some other source, either scholarships, grants, or financial aid. (CP 53) While the WLAD prohibits surcharging the disabled for providing accommodations, WAC 162-26-070(2), the law, by its terms, allows the University to charge the disabled the same consideration for its services that it charges the non-disabled. RCW 49.60.215(1).[5]

The Court of Appeals decision is consistent with this Court's decision in *Fell* (Pet. 16-17), which held the WLAD does not require places of public accommodation "to offer *greater* service to disabled people than is available to nondisabled people." 128 Wn.2d at 640 (emphasis in original). *See* RAP 13.4(b)(1). Though the University must (and did) offer Hartleben reasonable accommodations, neither *Fell* nor the WLAD requires it to offer its services free of charge. 128 Wn.2d at 631 ("The statute was *not* intended to entitle certain protected classes to some unspecified type and unlimited level of services.") (emphasis in original). By allowing an institution

[5] Hartleben erroneously argues that because she did not seek credit or a grade for the courses, she did not request a change in the University's operation. (Pet. 18) But her demand would have required the University to allow her "to participate in the classes, the discussions, and get feedback by doing homework and taking tests" – all without payment of tuition. (CP 157)

to charge the disabled and non-disabled uniform rates, the Court of Appeals decision does not authorize places of public accommodation to avoid the WLAD by "simply claim[ing] the accommodation . . . is not provided to people without disabilities," as Hartleben asserts. (Pet. 16)[6]

Hartleben mistakenly relies on federal housing discrimination cases, but none involve the waiver of the basic consideration for a service. (Pet. 13-15) Instead, these cases hold the waiver of incidental fees or policies do not fundamentally alter services because they do not "try[] to avoid payment of the usual rent." *Giebeler v. M & B Associates*, 343 F.3d 1143, 1159 (9th Cir. 2003) (request to waive no co-signor policy was reasonable accommodation); *Fair Housing of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc.*, 778 F. Supp. 2d 1028, 1039 (D.N.D. 2011) (fact issue whether waiver of pet deposit was reasonable); *Bentley v. Peace & Quiet Realty 2 LLC*, 367 F. Supp. 2d 341, 343 (E.D.N.Y. 2005) (fact issue whether swapping apartments in building while maintaining current rent was reasonable); *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689, 121 S. Ct. 1879, 1896, 149 L. Ed. 2d

[6] As *Fell* makes clear, whether the University would face "hardship" in implementing Hartleben's request is irrelevant (Pet. 5) because "[f]inancial ability to provide a service is not enough" to establish discrimination. 128 Wn.2d at 631-32.

904 (2001) (where a rule is "peripheral" to the nature of defendants' activities, it may "be waived in individual cases without working a fundamental alteration"). The Ninth Circuit in *Giebeler* recognized that what Hartleben seeks here – alteration of the University's usual fee for its services – is an unreasonable accommodation not required by any anti-discrimination statute. 343 F.3d at 1154, 1159 (9th Cir. 2003) ("mandating lower rents for disabled individuals would fail the . . . reasonableness inquiry").

The Court of Appeals correctly reasoned this case is unlike *Giebeler* for another reason – "Hartleben has not shown a connection between her status as a person with a disability and her status as a person with financial hardship." (Op. ¶ 24) In *Giebeler* the plaintiff's disability precluded *all* work. 343 F.3d at 1147. In contrast, Hartleben was able to, and did, work after her memory loss and could have obtained aid to alleviate any financial hardship. (CP 226, 552)[7]

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[7] The Court of Appeals correctly rejected Hartleben's reliance on *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002), which held that absent "special circumstances" a request to bypass an established seniority system would be unreasonable. (Pet. 17; Reply Br. 11) No "special circumstances" warranted departing from the University's uniform policy of requiring payment of tuition from some source in exchange for enrolling in classes, particularly given Hartleben's failure to seek available financial assistance.

The Court of Appeals correctly concluded that the "University's waiver of tuition would only address barriers Ms. Hartleben faces due to financial hardship and not those due to her disability." (*See* Pet. 13, quoting Op. ¶ 26; alterations omitted) Hartleben's case is, as the Court of Appeals explained, analogous to *Lipton v. New York Univ. Coll. of Dentistry*, 865 F. Supp. 2d 403, 410 (S.D.N.Y. 2012), *aff'd sub nom. Lipton v. New York Univ. Coll. of Dentistry*, 507 F. App'x 10 (2d Cir. 2013) (Op. ¶ 25), where the federal court rejected a dental student's requested accommodation of waiving re-matriculation fees, because it had "no bearing on the [reading] disability alleged." Here, as in *Lipton*, a waiver of tuition has no bearing on Hartleben's academic success, unlike the other accommodations offered by the University.

The Court of Appeals correctly held that requiring the waiver of the essential *quid pro quo* for the University's service was a fundamental alteration of the University's operation and thus not required by the WLAD. Its decision conflicts with no decisions from this Court or the Court of Appeals and raises no issue of substantial public concern. RAP 13.4(b)(1), (2), (4).

3. The WLAD requires *prospective* accommodation of disabilities. It is not disability insurance meant to shift financial loss caused by disabilities.

The purpose of the WLAD is to fight discrimination, not to insure against disabilities. The Court of Appeals correctly rejected Hartleben's unprecedented expansion of the WLAD to shift financial responsibility for her memory loss to the University under the guise of an "accommodation."

The WLAD requires covered entities to provide reasonable accommodations that *prospectively* prevent discrimination, not to retroactively address the consequences of a new disability. WAC 162-26-060(2) ("The law protects against discrimination because of the *'presence'* of a disability.") (emphasis added); *see also Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107 (Fed. Cir. 1996) (duty to accommodate under ADA is "prospective from the time [the covered entity] gained knowledge of the disability"). Prospective accommodation achieves the WLAD's core purpose of "remov[ing] barriers to *equal opportunity* in our society." *Fell*, 128 Wn.2d at 631 (emphasis in original); *see also Negron v. Snoqualmie Valley Hosp.*, 86 Wn. App. 579, 586, 936 P.2d 55 (1997) ("A reasonable accommodation ... is one that allows a comparable opportunity") (Pet. 17).

Examples of prospective accommodations include providing closed captioning for deaf customers, or interpreters for hospital patients. *Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 293 P.3d 413, *rev. denied,* 178 Wn.2d 1010 (2013); *Negron*, 86 Wn. App. at 586.

Hartleben received an equal opportunity to enjoy the University's services when she enrolled in and completed five classes, but due to circumstances entirely outside the University's control did not retain what she learned. Hartleben does not allege the University failed to accommodate a then existing disability at the time she actually took the five classes. Properly framed, Hartleben's request is not for prospective accommodation of a current disability – it is for the re-provision of services free of charge because a new disability undermined the value of services that had already been provided.

Many students have disabilities that prevent them from successfully completing a class, even with accommodations such as extra time for assignments and exams. It is no more discriminatory to charge Hartleben tuition than it is to refuse tuition waivers to any other individual claiming that his or her disability makes payment of tuition an onerous discriminatory barrier to enjoying the same

education as everyone else. (*See* Pet. 13 (claiming "[i]t is because of her disability that she will be forced to pay the additional tuition.")) Hartleben's remedy lies not in the WLAD, but in the resources available to students in need of financial assistance, such as scholarships, grants, and financial aid, resources Hartleben ignored.

Requiring the University to grant Hartleben's requested accommodation would expand the WLAD far beyond its intended purpose of fighting discrimination and render it the "entitlement statute" *Fell* disavowed by turning places of public accommodation into insurers of their services. 128 Wn.2d at 626. For example, under Hartleben's interpretation of the WLAD, any school charging tuition would be required to offer free classes to any students who claimed that they needed to "relearn" a higher level class because a disability prevented them from remembering a prerequisite. (Pet. 3) A hospital would be obligated to treat a patient free of charge if a subsequent disability impairs the "benefit" of previous treatment. Hartleben cites no case where a covered entity was required to waive the normal fee for its services as an "accommodation" because a new disability impaired the value of previous services.

The Court of Appeals decision correctly reflects that the WLAD does not turn places of public accommodation into insurers for losses caused by a disability that did not exist at the time they provided their services.

E. Conclusion.

This Court should deny review.

Dated this 21st day of September, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 21, 2016, I arranged for service of the foregoing Answer to Petition for Review, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 21st day of September, 2016.

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Attachments: Answer to Petition for Review.pdf

Attached for filing in Hartleben v. University of Washington, Court of Appeals, Division I Case No. 73758-9-I, is the Answer to Petition for Review. The attorney filing this document is Howard Goodfriend, WSBA 14355, e-mail address howard@washingtonappeals.com.

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