73758-9

73758-9

NO. 73758-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

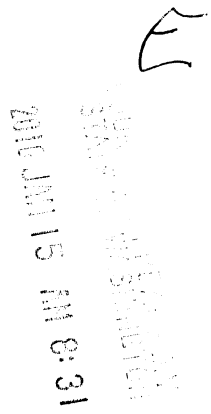
STACIA HARTLEBEN,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.



REPLY BRIEF OF APPELLANT STACIA HARTLEBEN

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A. ARGUMENT

1. The University's "Restatement of Facts" does not present the facts in the light most favorable to Ms. Hartleben and consists largely of disputed facts and argument.

It is fundamental that on summary judgment the disputed facts are considered in the light most favorable to the nonmoving party. See App. Br. 22. The University, however, has presented as undisputed facts in support of summary judgment statements that are disputed or are conclusions and argument. In its Br. 4, for example, the University states that Ms. Hartleben asked to "re-enroll" in classes without paying tuition. Actually, she asked for a disability accommodation that would allow her to relearn the contents of five classes for which she previously paid tuition. She proposed that she attend and participate in the classes without receiving a new grade or more credit. She explained the disadvantage she would "*have in the program and compared to other students*" if she did not in some way retake these classes. CP 157¶11 See App. Br. 10-12.

The University then states that at the meeting on March 4, 2013 Ms. Hartleben "refused to discuss other options" and that Dobrich promised to "investigate her request". R. Br. 4-5. According to Ms. Hartleben's testimony, though, during that meeting, even though she knew it is DRS, not the Graduate School, that determines reasonable accommodations,

Dobrich sent her away; she told Ms. Hartleben that she should take up her request with the Graduate School. CP 156 ¶7 Dobrich also said that she did not believe retrograde amnesia is a disability. CP 157 ¶11, 252:17-24, 253:3-10, 354 She was dismissive of Ms. Hartleben's request, saying she was looking for "free classes" or "compensation". CP 157 Dobrich made it clear she did not intend to treat Ms. Hartleben's request as a request for a disability accommodation. CP 158 ¶11

The University then claims the Associate Dean of the Graduate School said "payment of tuition…[is]…necessary to participate in the program". R. Br. 5. The Associate Dean, however, offered no such testimony; Dobrich claimed the Associate Dean said this to her. But it was the Associate Dean who, in response to Ms. Hartleben's request to attend and participate in certain classes she previously took, sent Callahan an email stating, "*If you decide that this is a reasonable accommodation, we are able to make this work. But, as you know the accommodation must be initiated from your office.*" CP 357 The Associate Dean's own statement contradicts Dobrich's claim that she was told tuition is "necessary". In fact, the Associate Dean said that as a reasonable accommodation, the Graduate School is "*able to make this work*". Id. Also, Callahan had a follow up phone call with the Associate Dean in which they agreed if DRS

decided Ms. Hartleben's request is a reasonable accommodation, "*then we would figure out what that meant*". CP 316:6-317:12

A jury could find the Associate Dean never said tuition is necessary as Dobrich claims. Even the Registrar's Office and Student Financial Services did not go so far. See pp. 3-4, infra.

Curiously, the University then claims Dobrich "continued to explore" Ms. Hartleben's request and there were "weeks of discussions with the Registrar, Student Financial Services and other departments". R. Br. 6. The University describes it conducted an "exhaustive investigation" or a "diligent investigation". Id. 21, 26 The hyperbole and argument notwithstanding, Dobrich and Callahan had one phone call with someone from the Registrar's Office, Colin McDonell, and then two emails, one from Robert Rhodes at the Registrar's Office and the other from an employee at Student Financial Services, Marisa Martin. CP 316-321 The purpose of these few communications, according to Callahan, was to determine if there was already a process in place for students to retake classes without paying tuition. CP 310, 317-319 McDonell did not know and referred them to Rhodes and Martin. CP 318 He said he had had no experience with students not paying tuition as a disability accommodation or otherwise. CP 262-263 Rhodes and Martin conveyed there was "*not a process in place or case where a student hasn't had to pay tuition*". CP

320-321. No one told Dobrich or Callahan that payment of tuition is always necessary or that DRS can not waive tuition in Ms. Hartleben's case as a disability accommodation, particularly in view of her request simply to attend and participate in the classes and not obtain a new grade or more credit. App. Br. 12. There is no dispute that it is up to DRS to determine reasonable accommodations. CP 240:10-19, 241:3-5, 7-14; 242:3-6, 292:22-23, 293:1-8, 294:15-20, 316:6-18.

The University also overstates its claims throughout its Brief that it offered "multiple accommodations" rejected by Ms. Hartleben. The facts establish the following: Dobrich brought up in the March 14, 2013 meeting auditing and retaking classes both of which require payment of full tuition. Any student can audit or retake a class upon payment of full tuition. CP 159-160, 266:3-15 And Ms. Hartleben did not want to retake the classes for a new grade or more credit. Auditing does not even provide the feedback that she needs to relearn the content of her classes. CP 157-160 Callahan acknowledged DRS never considered or proposed alternatives to Ms. Hartleben's proposal to relearn the content of these classes. CP 325:9-13, 16-25; 326:1-2, 4-6, 14-23

Similarly, though the University makes much of the fact that Ms. Hartleben could take a reduced course load and extend the time for completing her degree, this was available to all students in her

Department. Like most students in the Program, she had already been taking a reduced course load and thus planned to take longer to complete her degree. App. Br. 9. She did *not* reject this, and would likely continue to attend part time. But this is not an accommodation for her disability. Neither taking a reduced course load nor taking longer to complete her degree has anything to do with relearning the content of classes that was wiped from her memory by her disability. CP 160

Ms. Hartleben did not reject but instead went to DVR as suggested. She submitted to an extensive evaluative process and in the end, she was not offered any help. App. Br. 18 The evidence is that Ms. Hartleben was willing to consider other possible accommodations that would enable her to relearn the content of her classes, but Dobrich never suggested any, and Ms. Hartleben could not think of any other ways she could do so. CP 160

Ms. Hartleben also did not reject the recordings, as the University contends. She attempted to discuss the recordings with Leonard but was cut off. The University can insist Leonard did not present the recordings as "take it or leave it", but that is exactly what a jury could find happened. App. Br. 19-20 The University ignores that Leonard refused to listen to Ms. Hartleben's explanation of why recordings alone would not be sufficient for her to relearn the class material. Leonard told her there would be no more discussion. CP 161, 535:13-23

The University also offers as undisputed its claim that Ms. Hartleben "never discussed with Dobrich…that she is disabled by the inability to focus or concentrate unless she is participating in a group setting". R. Br. The evidence, however, from Ms. Hartleben is that she told Dobrich it is important for her to participate in the classes and obtain feedback and that she cannot catch up through self study. CP 159 Dobrich never bothered to follow up. See App. Br. 16-17.

The University omits that Ms. Hartleben told Leonard she could not learn solely from recordings of the classes because of her focus and cognitive issues. CP161 ¶18, 535:13-23 When she tried to explain her focus and cognitive issues prevented her from learning simply by listening to recordings, Leonard told her this is all the University would offer; she said there would be "*no more discussion*". Id. Ms. Hartleben did not reject the idea of relearning the content of her classes from recordings, as the University argues over and over. Instead, a jury could find, as Ms. Hartleben characterized, the University cut her off with a "*take it or leave it*" offer rather than engage in an interactive process to determine how interaction and feedback might be included to make listening to recordings an effective accommodation. See App. Br. 19-21 Also, Ms. Hartleben contacted Dr. Bender about the recordings and her inability to learn without interaction and feedback. CP 161¶19, 184, 541:7-20, 542:1-5, 555

Dobrich knew of the recordings. CP 267:5-20 Neither followed up to determine how Ms. Hartleben might relearn the contents of these courses from recordings. App. Br. 20

The University attempts to denigrate Ms. Hartleben, claiming she left the Leonard meeting early. R. Br. 8-9. Again, on summary judgment the facts must be considered in the light most favorable to Ms. Hartleben. It is Ms. Hartleben's testimony she only left the meeting when Leonard told her, "*There will be no more discussion*". Leonard refused to listen to her explain the limitations created by her focus and cognitive issues. CP 161¶18 In fact, Ms. Hartleben took with her the papers Leonard *"tossed"* to her with information from Dr. Bender about the recordings. CP 555 She tried the recordings and could see "*it wasn't going to work*" for her in view of her focus and cognitive issues; she needs interaction and feedback to learn effectively. CP 517 She never heard anymore about the recordings from the University. App. Br. 20

In effect, on summary judgment the University has argued its version of disputed facts that should be left to a jury to determine.

2. There is sufficient evidence for a jury to find that Ms. Hartleben was not treated comparably to students who did not suffer from her disability and that the University failed to provide her with reasonable accommodations as required by WLAD.

The University claims Ms. Hartleben had the same opportunity as non-

disabled students "because the University offered to accommodate her disability". R. Br. 11. The University claims as a matter of law that it did enough. Id. 14 But retaking classes, which is available to any student, would mean paying full tuition again for a new grade and college credit. Ms. Hartleben did not request to retake classes for a different grade or college credit. She seeks only to relearn in the most effective way the information erased from her memory, i.e., by attending and participating in the classes again. Her disability prevented her from retaining the information she learned previously. It is her disability of retrograde amnesia that has caused her to need to attend the classes again. The additional tuition is a direct result of her particular disability. Unlike students without her particular disability, she will not have the information from those classes needed to move forward and complete her degree Program. Or under the University's analysis, she will be required to pay twice for the information from those classes because of her disability. A jury should be able to find Ms. Hartleben was not afforded a comparable opportunity to enjoy and complete her degree Program.

The other so-called options, i.e., auditing, taking a reduced course load and more time to complete her degree, and listening to recordings, either also required full tuition or did not accommodate her disabilities. See pp. 4-5, supra.

It is not enough for the University to point to options available to all

students and that do not actually accommodate the disability. Under WLAD reasonable accommodations must be effective. Compare *Frisino v. Seattle Sch. Dist. No. 1,* 160 Wn. App. 765, 777-778, 249 P.3d 1044, 1049. For example, "trial and error" may be required to provide an effective reasonable accommodation. *Frisino, supra*, 160 Wn. App. at 780-782; 249 P.3d at 1051-1052. A reasonable accommodation *must* provide Ms. Hartleben with an opportunity for success in taking advanced courses in the Program and completing her degree that is comparable to that provided to students without retrograde amnesia. *Fell v. Spokane Transit Authority,* 128 Wn. 2d 618, 637; 911 P. 2d 1319,1328; *Negron v. Snoqualmie Valley Hospital,* 86 Wn. App. 579, 586; 936 P. 2d 55, 59 (1997). The only options that directly accommodate her disabilities as such are (1) attending and participating in the classes without getting a new grade or more credit, or (2) listening to recordings of the classes with some means of having interaction in relearning the contents of the classes and obtaining feedback. The University has refused to consider either option. A jury should be able to decide that her requests for accommodation are reasonable and having to pay again to relearn the content of her classes lost because of her disability does not provide her with the comparable opportunity required by WLAD. See App. Br. 23-30.

The University has presented Ms. Hartleben's request as if she wants the full benefit of paying tuition, i.e., a grade and college credit. She has asked

for neither, and simply wants to attend and participate in certain classes to relearn the material. She already has a grade and college credit for these classes. She has already paid for them. This is not about a financial accommodation. It is a request to relearn the contents of classes she already paid for but that she cannot remember at all because of a disability; without the knowledge of these classes, she will be at a "severe disadvantage" in taking advanced courses compared to students without her disability, and it is unlikely she will be able to complete her degree Program. It is this accommodation that the University has refused to address, preferring to redefine it as a financial accommodation even though she will not receive a grade or college credit.

Regardless, a waiver of tuition absolutely has a bearing on Ms. Hartleben's disability. See R. Br. 15 Before the ECT therapy she worked part time in software development; her parents paid her tuition to attend the University's Program. CP 186-187, 495: 6-25, 499: 11-14, 501:4-6, 545:18-25, 546-550:5, 551:13-552:8 When she lost her memory, she lost programming and other work skills. CP 66 She was not able to work as a result. Id. She is struggling to support herself and the evidence is "paying for tuition would not be an option" for her. App. Br. 10-11, CP 66 If she cannot relearn the contents of these classes, it is unlikely she can take advanced classes successfully and complete her degree. CP 62, 64

Compare analogously, cases brought under the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. §3604(f)(1), (3)(B), in which courts have found that fees applicable to all residents must be waived as a reasonable accommodation for a disabled resident who, if required to pay the fees, would be denied an equal opportunity to enjoy the housing of their choice. See *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F. 3d 1413, 1416-1418 (9th Cir. 1994).

See also *Giebeler v. M&B Associates*, 343 F. 3d 1143, 1144-1145,1147, 1154 (9th Cir. 2003) relying on *U.S. Airways v. Barnett,* 535 U.S. 391 (2002). In *Giebeler t*he Court found the landlord's failure to waive minimal financial qualifications denied the tenant the equal opportunity to use and enjoy the housing. The landlord refused per its generally applicable policy to allow the prospective tenant's mother to co-sign the lease. The Court found the causal link between the tenant's disability and the requested financial accommodation was "obvious". The Court, quoting *Barnett*, observed: "Preferences will sometimes prove necessary to achieve the [Americans with Disabilities] Act's basic equal opportunity goal. ...By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the

accommodation beyond the Act's potential reach." *Giebler, supra*, 343 F. 3d at 1150. The Court recognized an "obligation to 'accommodate' a disability can include the obligation to alter policies that can be barriers to non-disabled persons as well". *Id.* 1151.

Compare further *Bentley v. Peace and Quiet Realty*, 367 F. Supp. 2d 341, 347 (E.D.N.Y. 2005)(Plaintiff was not required to pay the higher rent normally charged for a lower level apartment because the accommodation was related to her disability that left her unable to walk up and down stairs.) and *Fair Hous. Of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1039 (D.N.D. 2011)(Summary judgment was not appropriate where the landlord refused to waive fees as a reasonable accommodation for non-specially trained assistance animals; the court found the requested waiver was not simply a financial accommodation, but instead that the evidence created a fact question regarding whether the accommodation was necessary to afford the disabled tenant an equal opportunity to use and enjoy the property.) See further App. Br. 27-30.

The University's case, *Lipton v. New York Coll. Of Dentistry*, 865 F. Supp. 2d 403 (S.D.N.Y. 2012) is not to the contrary. In that case there was no evidence the fee required for the plaintiff to take the dental exam was related to his disability. Similarly, the University's case, *Doe v. The Boeing Company*, 121 Wn. 2d 8, 18-19; 846 P.2d 531, 537 (1993) is inapposite. In

that case the Court found the male employee's request to dress as a female was not job-related; also, the employee was allowed to wear unisex clothing. Further, the employee said he needed to dress as a woman to be eligible for sex reassignment surgery, but that was not true.

In this case Ms. Hartleben's request is directly related to ameliorating the impact of her disability on her ability to take advanced classes and complete her degree Program.

The University also decries that it will become an insurer, that Ms. Hartleben "apparently believes" it must "guarantee the acquisition and retention of all information" taught in its courses. R. Br. 16, 21. Of course, Ms. Hartleben has nowhere stated as much. And no one would seriously expect the University to guarantee all students learn and retain all the information taught in its classes. Again, the issue is whether a jury should be able to find that it is reasonable to accommodate Ms. Hartleben's disability, retrograde amnesia or memory loss, by allowing her to relearn the content of certain classes in order that she can complete her degree on a comparable basis with students in the Program who do not have her disability.

The University then claims students with learning disabilities are charged tuition to retake classes they could not successfully complete because of their disabilities. R. Br. 16. There is nothing in the record, however, no evidence offered at all, about any students with learning

disabilities, let alone the circumstances under which such students may retake classes. It is likely such students are not paying tuition again for the same service because they probably sought a better grade or failed to complete the class the first time and needed a grade and college credit. Also, it is unclear without more facts whether some of these alleged students disabilities were not and should have been given a tuition refund or waiver for any classes they took again. Just because the University has not offered a tuition waiver as a reasonable accommodation previously does not mean one is not appropriate, even necessary, in a particular situation.

The University points out students who take hardship withdrawals for any number of reasons pay tuition if they retake the class. R. Br. 17. Actually, tuition is refunded, at least, in part for hardship withdrawals. CP 161 Even if tuition is not refunded to some students, again, they are not paying twice for the same service as they did not complete those classes initially and get a grade and college credit. And those students with disabilities may have been entitled to accommodations including a tuition waiver. It should be noted Ms. Hartleben does not seek to attend and participate again in classes from which she took a hardship withdrawal. CP 161-162. She wants only to participate in classes she previously completed for a grade and college credit but cannot now recall at all because of her disability.

The University's argument seems to be that because it has never waived

tuition, doing so now in the case of Ms. Hartleben as a disability accommodation, would be providing her with "greater services". R. Br. 17-18. No student, however, has ever made the same request as a disability accommodation. App. Br. 29 Just because no one has requested a particular disability accommodation does not mean it is unreasonable. CP 303:10-16 The evidence establishes that in view of Ms. Hartleben's particular disability, it is the most feasible. There is substantial evidence from the University's employees that her request is reasonable. App. Br. 30 The University has said there is no hardship that would result should it provide this accommodation. CP 301:24-302:1-3, 6-8, 12

Ms. Hartleben would not receive the full benefit of tuition. She wants only to relearn the content of certain classes and can do so only with interaction and feedback; she would not receive a grade or college credit. A jury should be able to find that relearning these classes with interaction and feedback is not a "greater service" but an accommodation necessary to allow Ms. Hartleben to enjoy an opportunity to succeed in her advanced classes and degree Program that is comparable to students without her particular disability.

The University also claims Ms. Hartleben wants tuition waived for all disabled students who cannot afford it. R. Br. 16-17. Of course, she nowhere says that. The issue is whether there is evidence from which a jury could find

the University failed to provide her with a reasonable accommodation. Such a determination is made on a case by case basis bearing in mind her particular disability "and the accommodations that might allow her to [enjoy meaningful access to the program.]" *Vinson v. Thomas*, 288 F. 3d 1145, 1154 (9th Cir. 2002).

The University then complains it is not responsible for Ms. Hartleben's memory loss, that it was "entirely outside the University's control". R. Br. 17. No one is blaming the University for Ms. Hartleben's disability. Instead, she seeks under WLAD a reasonable accommodation for her disability to allow her to enjoy meaningful access to her degree Program on a basis comparable to students who have not suffered retrograde amnesia.

3. Under WLAD the issue is the reasonableness of Ms. Hartleben's request for accommodation, not whether it is prospective or retroactive.

For the first time, the University claims on appeal that WLAD requires "prospective accommodation". R. Br. at 18. The University does not explain what it means by "prospective accommodation" other than to couple this claim with statements that it is not required to insure against disabilities or relieve the financial stress of the disabled. First, it should be noted that DRS was explicit that they did not fail to consider or deny Ms. Hartleben's accommodations request as "retroactive". CP 254:23-25, 255:1, 313:14-19

Also, nothing in WLAD limits its protections to "prospective

accommodations". The issue under WLAD is whether a disability accommodation is reasonable. It is the nature of Ms. Hartleben's disability, retrograde amnesia, that has forced her to request to relearn the content of certain classes. Her retrograde amnesia or memory loss is very much a present disability affecting her now and in the future. To get the full benefit of her Program and complete her degree, Ms. Hartleben must know the content of certain classes wiped from her memory by her disability. Otherwise, she will be at a severe disadvantage compared to students in the Program who do not have her disability and will likely not be able to finish her degree. She does not seek a new grade or additional credit. Nor does she seek to retake all of the classes in which she was enrolled prior to suffering retrograde amnesia. But there is no way for her to move forward except by relearning the content of five of her classes. A jury should be able to find in view of the evidence that her request is reasonable. See App. Br. 27-30.

The University then wildly predicts should a jury be allowed to decide whether Ms. Hartleben's disability accommodation request is reasonable, hospitals will be required to treat patients free of charge "if a subsequent disability impairs the 'benefit' of previous treatment". R. Br. 20-21. In this case, though, Ms. Hartleben was enrolled in a degree Program where the classes at issue were either required before taking advanced classes or built on a required course. CP 272:18-25 Ms. Hartleben did not enroll in particular

classes but instead in the Program. She paid tuition for and took those classes in order to be able to succeed in advanced classes and obtain her degree. She seeks the accommodation of relearning the contents of those classes in order to be able to enjoy meaningful access, a comparable opportunity, to her Program as students without her disability. Medical treatment, on the other hand, does not require participation in a larger program; it is typically fee per service. Any disability accommodation can only be determined anyway on a case by case basis. A hospital may well claim having to provide free services is a hardship. The University in this case has said there is no hardship. CP 301:24-302:1-3, 6-8, 12 And there is evidence from which a jury could find the disability accommodation requested by Ms. Hartleben is reasonable.

4. The University has presented no evidence of "fundamental alteration of its operations"; it is for the jury to determine whether the University failed to provide Ms. Hartleben with reasonable accommodations.

The University continues to claim with no evidence whatsoever that any waiver of tuition would fundamentally alter its programs. R. Br. 21. The claim was first offered as bare speculation in its summary judgment motion. There is no statement or other evidence offered anywhere in the record by the University to support that "tuition …[is]… an essential condition" or "essential quid pro quo". R. Br. 24. Moreover, the University nowhere offers any evidence that even if tuition is a *quid pro quo* for classes including a grade and

credit, how a participating in a few classes again, this time without a grade or credit, will fundamentally alter its programs. Its protests notwithstanding in its Br. 23, the University has the burden to produce evidence Ms. Hartleben's request will fundamentally alter its programs. Its own cases state as much. See *Zukle v. Regents of Univ. of Cal.*, 166 F. 3d 1041, 1047 (9th Cir. 1999) and, similarly, *Fey v. State*, 174 Wn. App. 435, 454; 300 P.3d 435, 445 (2013). It has in no sense met that burden.

In *Zukle*, the student simply could not meet the academic requirements to pass the medical school classes. The medical school required students to complete a number of clerkships. An exam was given at the end of each clerkship. The student requested as a disability accommodation that the school allow her to stop in the middle of a clerkship, begin another, then start a third clerkship before the second was finished and then return at some point to finish the interrupted clerkships. The student *admitted* it would mean the school would be required to make "substantial curriculum alteration[s]". *Zukle, supra,* 166 F. 3d at 1049. The student also wanted less clinic hours and to decelerate her schedule which would lower the school's academic standards.

In contrast, Ms. Hartleben does not want any alterations in the curriculum or for the University to lower its academic standards. She simply wants to relearn the information erased from her memory in order that she can have an opportunity to complete her degree comparable to students in the Program who

do not have her disability. Her request is actually very consistent with the University's operations. See App. Br. 31.

In the University's case, *Fey v. State*, *supra*, the evidence was undisputed that it was an essential function of the employee's job to drive commercial weight equipment that required a commercial driver's license. The employee could not qualify for a license to perform the job. There was no way to accommodate him without changing the licensing requirements for the job.

In this case Ms. Hartleben does not ask the University to alter the Program requirements. She only wants to relearn the contents of a few classes in order that she can have a comparable opportunity as students without her disability to succeed in advanced classes and finish her degree. See further App. Br. 31-32.

5. A jury should be able to decide whether the University engaged in good faith in an interactive process or investigation to determine reasonable accommodations for Ms. Hartleben.

Ms. Hartleben's claim is not that the University "did not engage" with her as it claims in its Br. 24, but that it failed to engage in good faith in the interactive process as required by WLAD. See *Frisino, supra*, 160 Wn. App. at 777, 779-780. See App. Br. 32-36. The University harshly accuses its student, Ms. Hartleben, of "patently misrepresenting" its employees actions. But it is the University that has not presented the facts in the light most favorable to Ms. Hartleben. It is nonsense for the University to describe its actions in response to Ms. Hartleben's request as "an exhaustive investigation" or "diligent".

The University did not "repeatedly" meet with Ms. Hartleben to offer her accommodations. DRS met with her twice. In the first meeting Dobrich dismissed her request as one for "free classes" or "compensation". Ms. Hartleben was not offered any accommodations. A jury could find Dobrich told Ms. Hartleben to take her request to the Graduate School simply to avoid dealing with her. During the second meeting Dobrich again dismissed Ms. Hartleben's request as one for "free classes", instead suggesting she audit the classes or take more time to complete her degree, neither of which addressed her disability. The purpose of the third meeting held with Leonard months after DRS denied her request was to tell her DRS did nothing wrong in denying her request for a disability accommodation. Only at the end of the meeting did Leonard remember that Dr. Bender had suggested the recordings. But when Ms. Hartleben explained that she could not learn from recordings alone, Leonard cut her off, saying there would be no more discussion. This is hardly the interactive, give and take, trial and error process, contemplated by WLAD. See further App. Br. 33-36.

A jury could find DRS decided virtually from the outset not to grant Ms. Hartleben's accommodation request. See App. Br. 11-18, 32-36.

Notably, DRS did not discuss with Ms. Hartleben the impact of her retrograde amnesia on her ability to participate in classes going forward and complete her degree. DRS did not discuss whether the loss of memory of the

contents of certain classes would put her at a disadvantage compared to students without this disability. DRS did not hear or consider that she did not want a new grade or college credit and instead saw her request as one for financial accommodation. DRS did not discuss with her how her memory loss impacted her ability to work and support herself, its impact on her ability to pay tuition. DRS never contacted anyone in her Department or the Program about the classes involved, how they were taught, and how she might relearn the content of the classes. No one from DRS ever considered how to incorporate interaction and feedback into listening to the recordings. Instead, DRS continued to see her as a freeloader, someone who wanted the University to "pay for college" and give her "free classes". See App. Br. 11-17, 32-33.

A jury could find that it was the University that failed to engage in good faith in an interactive process required by WLAD. It was the University that ended the interactive process, such as it was. See further App Br. 32-36.

6. It is "strictly" for the jury to determine causation.

The *Fell* Court made clear that the "test for discrimination requires only that the ...discrimination result from something the defendant has done....[r]egardless of the subjective intent of the defendant". *Id.* 128 Wn. 2d at 642 n. 30; 911 P.2d at 1331 n. 30. Whether the disability was a substantial factor in causing the discrimination is "strictly" a question of fact. *Id.* 128 Wn. 2d at 637, 639-643; 911 P. 2d at 1328-1331.

The discrimination is the University's failure to make reasonable accommodations for Ms. Hartleben's disability. Such failure means she must pay more than students without memory loss for the same classes or attend at such a severe disadvantage in the program and compared to other students, she may not be able to obtain her degree. The "discrimination result[ed] from something the defendant has done" or in this case, has failed to do. *Id.* 128 Wn. 2d at 642 n. 30; 911 P.2d at 1331 n. 30. Regardless, the *Fell* court made clear this issue is "strictly" for the jury. *Id.* 128 Wn. 2d at 637, 639-643; 911 P. 2d at 1328-1331.

It should be noted that Ms. Hartleben is not required to prove discriminatory intent as the University seems to contend. See *Fell, supra,* 128 Wn. 2d at 642 n. 30; 911 P.2d at 1331 n. 30. Regardless, the University's treatment of this student shows a lack of good faith in the so-called interactive process.

It is undisputed Dobrich expressed to Leonard that she often sees "*I need it now*" mindset in people with depression and anxiety. Leonard confirmed she took down the statement as Dobrich said it "*the best as I could get down while we were talking".* CP 334 Simply substitute "women" or a particular race or national origin for "people with depression and anxiety" and the prejudice is familiar. Dobrich does not deny she made the statement but attempts now in retrospect to ascribe a different meaning to it. It is for the

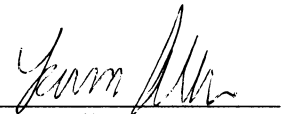
jury, however, to determine Dobrich's good faith. See *Scrivener v. Clark College*, 181 Wn. 2d 439, 450 n.3; 334 P.3d 541, 548 (2014)(finding all such remarks may be "relevant, circumstantial evidence of discrimination.") Dobrich's comment is consistent with the prejudice she showed Ms. Hartleben in her March 11 email that was also untruthful. App. Br. 14-15.

B. CONCLUSION

In view of the disputed issues of material fact, summary judgment is not appropriate in this case. Ms. Hartleben respectfully requests the Court reverse the summary judgment of the trial court and enter an order allowing her a jury trial on the issues in this case.

RESPECTFULLY SUBMITTED this _15th__day of January, 2016.

ALLEN & MEAD PLLC



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PROOF OF SERVICE

I certify under oath and penalty of perjury that I arranged for service of Reply Brief of Appellant on the date below as follows: Hand delivery of

original plus one copy to: Court Of Appeals Of Washington, Division I, 600 University Street, One Union Square, Seattle, WA 98101-1176, by electronic mail to: Skylar Sherwood Ssherwood@Riddellwilliams.Com and Kristina Markosova, kmarkosova@riddellwilliams.com Riddell Williams P.S., and by electronic mail and U.S. Postage, priority, postage prepaid, to: Howard Mark Goodfriend, howard@washingtonappeals.com Smith Goodfriend, P.S., 1619 8th Ave. N., Seattle, WA 98109-3007.

DATED this ___15th___ day of January, 2016 at Seattle, Washington.

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