

NO. 73758-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STACIA HARTLEBEN,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT STACIA HARTLEBEN

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 STATE OF WASHINGTON
 COURT OF APPEALS
 DIVISION I
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TABLE OF CONTENTS

Table of Authorities.....iv

A. INTRODUCTION.....1

B. ASSIGNMENTS OF ERROR.....6

 1. Assignments of Error.....6

 2. Issues Relating to Assignments of Error.....7

C. STATEMENT OF THE CASE.....9

D. SUMMARY OF ARGUMENT.....21

E. ARGUMENT.....22

 1. Standard of Review.....22

 2. There are disputed issues of material fact regarding whether the University violated Ms. Hartleben’s rights to the full enjoyment of meaningful access to her Master’s Program.....23

 a. Controlling law.....23

 b. There is sufficient evidence for a jury to find that the Ms. Hartleben was not treated comparably to students who did not suffer from her disability and that her request for a disability accommodation is reasonable.....27

 c. The University has presented no evidence of “fundamental alteration of its operations”; it is for the

jury to determine the reasonableness of Ms.
Hartleben’s disability accommodations request.....31

d. 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.....32

F. CONCLUSION.....36

PROOF OF SERVICE.....37

TABLE OF AUTHORITIES

	Page(s)
<u>Washington Cases</u>	
<i>Carle v. McChord Credit Union</i> , 65 Wn. App. 93, 827 P.2d 1070 (1992).....	22
<i>Fell v. Spokane Transit Authority</i> , 128 Wn. 2d 618, 911 P. 2d 1319 (1996).....	22, 24
<i>Frisino v. Seattle Sch. Dist. No. 1</i> , 160 Wn. App. 765, 249 P.3d 1044 (2011) <i>rev. denied</i> 172 Wn.2d 1013, 259 P.3d 1109 (2011).....	23, 25, 26, 27, 32, 34, 35
<i>Negron v. Snoqualmie Valley Hospital</i> , 86 Wn. App. 579, 936 P. 2d 55 (1997).....	26, 30
<i>Rice v. Offshore Sys., Inc.</i> , 167 Wn. App. 77, 272 P. 3d 865 (2012).....	22
<i>Washington State Communication Access Project v. Regal Cinemas, Inc.</i> , 173 Wn. App. 174, 293 P. 3d 413 (2013).....	24
<i>Wilson v. Steinbach</i> , 98 Wn. 2d 434, 656 P.2d 1010 (1982).....	23
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn. 2d 216, 770 P.2d 182 (1989).....	22
<u>Federal Cases</u>	
<i>Button v. Bd. of Regents of Univ.</i> , 289 F. 2d 964 (9 th Cir. 2008).....	26
<i>Duvall v. County of Kitsap</i> , 260 F.3d 1124 (9 th Cir. 2001).....	24, 25, 35
<i>Mark H. v. Hamamoto</i> , 620 F.3d 1090 (9 th Cir. 2010).....	25
<i>Vinson v. Thomas</i> , 288 F. 3d 1145 (9 th Cir. 2002).....	24, 25, 28, 29, 35, 36

Statutes

RCW 49.60.....7
RCW 49.60.030(1)(b).....23
RCW 49.60.040(2).....23
RCW 49.60.040(7).....23
RCW §49.60.215.....24, 27
RCW 49.60.215(1).....23

Rules and Regulations

WAC 162-26-040(2).....25
WAC 162-26-080.....23
WAC 162-26-080(2).....25
WAC 162-26-120.....23
CR 56(c).....22

A. INTRODUCTION

Stacia Hartleben was a student at the University of Washington (“University”) in its Masters program in Computational Linguistics (“the Program”) when she requested certain accommodations for her disabilities. Ms. Hartleben has long struggled with depression and anxiety, and she became so ill during her work on her Master’s program, her physician recommended electroconvulsive therapy (“ECT”). In November, 2011 took a leave of absence from the Program and underwent ECT therapy to treat her depression. At that point she had successfully completed five courses in the Program.

Retrograde amnesia or memory loss is a side effect of ECT therapy. And, following the ECT therapy Ms. Hartleben came to realize she had no memory for a period of years preceding the therapy. Even now she has only fleeting memories triggered, for example, by seeing someone she once knew or if she is in a place where she worked or studied during that time. Unfortunately, she has no memory of the content of the five classes she completed in the Program. She very much wants to complete the Program, however. Ms. Hartleben has been interested in Computational Linguistics since she was a teen. Despite her depression and anxiety she graduated with a Bachelor of Arts in linguistics from

Macalester College. She also worked in software development for a number of companies while pursuing her Master's degree in the Program. Her career goal was and continues to be software developer with a focus in natural language processing.

In the spring, 2013 Ms. Hartleben felt ready to return to the Program. Before she can continue, however, she needs to relearn the content of the five courses she completed. Four of the courses are required to complete the degree; the other course builds on one of the required courses. Because of her disability, retrograde amnesia or memory loss, she will be at a disadvantage compared to other students in the Program if she cannot relearn the content of these courses. It is doubtful Ms. Hartleben can complete the Program without the knowledge from those courses that she has lost because of retrograde amnesia.

Ms. Hartleben requested as a disability accommodation that the University allow her to attend the five courses without paying additional tuition. Her parents paid for the tuition for these courses when she took them initially. She did not receive any financial assistance from the University. She does not want additional college credit or a different grade. But because of her depression and anxiety, she has issues with focus and retention; she can only really learn when there is interaction with others and feedback. She thus proposes to relearn the content of the

classes by attending lectures and study groups, completing homework, and taking the tests.

The authority to determine and approve reasonable accommodations rests exclusively with the University's Office of Disability Resources Services (DRS). The DRS dismissed Ms. Hartleben's request virtually out of hand. Instead, she was treated as if she wanted "free classes" and told to make her request to the Graduate School. The Associate Dean of the Graduate School, Rebecca Aaenerud, indicated the Graduate School could implement this request but said DRS must approve it and sent Ms. Hartleben back to DRS.

In refusing to approve the request, DRS deferred to the Registrar's Office and Student Fiscal Services that indicated there was no circumstance in which students did not pay tuition. DRS did not engage in any meaningful investigation or interaction about the impact of Ms. Hartleben's retrograde amnesia or memory loss on her ability to complete her degree and the disadvantage she would have without relearning the content of those classes. DRS also did not engage in an interaction or investigation to determine if there was an effective means to relearn the content of the five courses without having to pay additional tuition. In fact, the DRS coordinator assigned to handle Ms. Hartleben's request

encouraged her to believe memory loss or retrograde amnesia is not a disability.

DRS told Ms. Hartleben that she could retake the classes or audit them upon payment of tuition. Any student, however, can retake classes or audit them upon payment of tuition. DRS also said the University would consider allowing her to attend part time and take longer to complete her degree. But like most students in the Program, she had previously attended classes on a part time basis. DRS did not consider, let alone offer, any accommodations for her retrograde amnesia or memory loss. The DRS coordinator was dismissive towards Ms. Hartleben, showing a prejudice against those who struggle with depression and anxiety.

Ms. Hartleben then filed a complaint with the University's Complaint Investigation and Resolution Office ("UCIRO") in the hope the University would reconsider the denial of her disability accommodations request. Months later, as Ms. Hartleben was leaving a meeting in which she was told the denial would be upheld, the UCIRO investigator said she could listen to recordings of the classes she no longer remembers. The offer was "take it or leave it"; the investigator said there would be no more discussion. The investigator would not listen when Ms. Hartleben tried to tell her she could not learn effectively without interaction and feedback. The University refused even to discuss how Ms. Hartleben might be

provided interaction and feedback in relying primarily on the recordings to relearn the content of the courses. Ms. Hartleben went to the link to the recordings and confirmed she will not be able to relearn the content of these classes in this way.

The University has claimed no hardship or undue burden in denying Ms. Hartleben's request for a disability accommodation. The University has said only that Ms. Hartleben has access to the classes upon payment of tuition again. For the first time in its *Motion for Summary Judgment*, the University claimed it is not required to waive tuition as a reasonable accommodation. The University offers no basis for such a limitation. In fact, the refusal even to consider the disability accommodation requested by Ms. Hartleben means she will be forced to pay twice for these classes, something not required of students who do not suffer from retrograde amnesia. Her disability prevents her from knowing the content of the classes for which she has already paid tuition. Without knowing that content, she will be at a severe disadvantage in trying to complete her degree. The University will not even consider accommodations to assist Ms. Hartleben in relying on the recordings of classes to relearn their content.

The University also asserted for the first time in its *Motion* that waiving tuition in this case would constitute a "fundamental alteration of

its operations”. But the University has offered no proof of this claim. In fact, no one from the University even said in a statement or declaration that the waiver of tuition requested in this case would fundamentally alter its operations, let alone why or how. The claim without more was simply asserted in the *Motion*.

Ms. Hartleben does not seek additional college credit or a new grade that are the primary benefits of paying tuition. Instead, because of her disability, she seeks only to relearn the content of those classes through classroom participation, in order that she can complete her Master’s degree. Her request presents no hardship to the University. A jury should be able to determine the reasonableness of this requested accommodation.

There is sufficient evidence as well to allow a jury to decide whether the University failed to engage as required in the interactive process to determine reasonable accommodations. A jury should also be able to decide whether the University failed to provide reasonable accommodations otherwise to Ms. Hartleben.

B. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in entering summary judgment against Ms. Hartleben and in favor of the University on Ms. Hartleben's claim for failure to accommodate her disabilities.

2. The trial court erred in entering summary judgment against Ms. Hartleben and in favor of the University on Ms. Hartleben's claim that the University failed to engage in the interactive process to determine reasonable accommodations.

B. Issues Relating to Assignments of Error

1. If there is evidence that a university student cannot fully enjoy meaningful access to her Master's Program because of her disability and requests a disability accommodation that is denied, and there is no hardship or undue burden in providing the accommodation, should a jury be able to decide the reasonableness of the requested accommodation?

2. If there is evidence that because of her disability of retrograde amnesia, a university student will be required to pay twice to learn the content of classes required to complete her degree, should a jury be able to decide if there has been a violation of the Washington Law Against Discrimination, RCW 49.60, et seq. ("WLAD")?

3. Should a jury be able to determine the reasonableness of a request for disability accommodation by a university student to attend classes she already completed simply to relearn the content of the classes erased from

her memory but with no additional college credit or different grade, when there has been no claim of hardship or undue burden and there is evidence from the dean of her graduate school and director of her classes that the request could be implemented?

4. Should a jury be able to determine that a university failed to engage in good faith in the interactive process to determine reasonable disability accommodations for a student requesting to relearn the content of classes she already took and paid for, but because of the disability, she can not recall, when there is evidence the university (1) was dismissive of the disability accommodations request as one for “free classes” and DRS sent her to another department, the Graduate School, for the accommodation when it is clearly DRS’ responsibility to approve reasonable accommodations, (2) made discriminatory comments about persons with the student’s disabilities of depression and anxiety, (3) refused to consider the disability accommodations request or alternatives that would address the student’s disabilities, and (4) offered months after the request was denied, a “take it or leave it” offer to let her listen to recordings of the classes but said there would be no more discussion and refused to discuss any options that would make the recordings a feasible alternative to accommodate her disabilities?

C. STATEMENT OF THE CASE

From the fall, 2008 until November, 2011, Ms. Hartleben attended classes in the Computational Linguistics Master's Program on a part time basis. CP 155, 166, 490:20-25, 491:1-7, 499:5-25, 500:1-9 Dr. Emily Bender, director of the Program, explained any student in the program may attend part time and so take longer to complete the degree. CP 270:5-12, 271:5-25, 272:1-16, 278:15-21 In fact, most students in the program attend on a part time basis. CP 274:20-23, 275:1-3

In addition to attending classes in the Program, Ms. Hartleben also worked in software development for a number of companies. CP 495:6-25, 499:11-14; 545:18-25, 546-550:5, 551:13-552:8 She was interested in computational linguistics even as a teen and planned to make it her career. CP 154-155 ¶2, 164, 275:25-277:14; 543:23-25, 544:1-4. She had previously obtained a Bachelor of Arts degree in linguistics from Macalester College. CP 490:20-25, 491:1-7, 500:4-9 Ms. Hartleben's career goal was and continues to be software developer with a focus in natural language processing. CP 543:23-25, 544:1-4; CP 275:25-276:18

Ms. Hartleben's parents paid the tuition for her classes in the master's program. CP 186-187. She did not receive any financial assistance from the University. CP 501:4-6

Ms. Hartleben worked towards her career goal, completing five courses in the Program, despite her struggle with depression and anxiety. CP 155 ¶5, 166, 501:11-22, 553:7-11 Her depression was at times severe enough, that she

was forced to take hardship withdrawals or withdraw from some of her classes for hospitalizations and other treatment. CP 166, 503:13-505:1-6

Since undergoing ECT therapy in December, 2011 to treat her depression, Ms. Hartleben has suffered from a side effect, retrograde amnesia or memory loss. CP 155 ¶3, 351-352, 491:15-25, 492:1-14, 506:24-25, 507:1-5 She has virtually no memory for a period of years preceding the ECT therapy. CP 491:15-25, 492:1-14, 493:16-25, 494:1-4, 508:14-25, 509:1-17, 537:1-9 Any memories she does have come as “*little flashes*”, “*a picturewith no context*”. CP 494:11-496:23, 497:2-24 Ms. Hartleben does not remember the content of the classes she completed before the ECT therapy. CP 155 ¶3, 498:2-15

She described the impact of her memory loss or retrograde amnesia in emails to Dr. Bender: “*This situation is “very” sensitive for me. I lost all my job skills, most of the past 4 years ...are a complete blank. I didn’t remember my former coworkers, and I barely remembered the person I lived with. I haven’t been able to work due to this and I’m just trying to figure out my options going forward in life.*” CP 66

Four of the courses Ms. Hartleben had completed previously are required; the other course builds on one of the required courses. CP 272:18-25, 273:1-21 Without the knowledge from those courses that is now erased from her memory, she has no choice but to participate again in, or in some way relearn the content of, those classes. CP 155 ¶¶3-5 Otherwise, as she expressed to Dr. Bender, she doubts that she can complete her degree, to wit: “*I also have lost my work skills and have been struggling to support myself in the mean time, so paying for tuition would not be an option for me...and if I were somehow ...able*

to take the other classes without any background, it would be dishonest to get a degree in something that I had no qualifications for half of. It's been very hard for me to step back into programming..... I don't know what I was like as a student at UW, but I know that in undergraduate school I was extremely motivated. I have an entrance letter to Macalester stating my intent to go into computational linguistics (at 17 years old).... I don't know anything about the scholarship process, nor can I provide much Background for my qualifications at the moment. But do you think there is someone who would be willing to listen to my story, and possibly let me restart the program again, and if not with a full scholarship, somehow be able to retake my previous courses without re-paying the fee? I feel like someone at the University would have to listen to this story.”
CP 62, 64

Dr. Bender responded that Ms. Hartleben was “*indeed a very motivated student in the ...classes*”. Id. She suggested Ms. Hartleben contact the DRS for reasonable accommodations and also the student health clinic. CP 156 ¶6, 510:10-19 Joyce Parvi, a Program employee, suggested she could “petition” the Graduate School. CP 156 ¶6

Ms. Hartleben was hesitant to seek a disability accommodation because she was worried,

“if this starts ballooning out of control with too many departments not knowing what to do and referring me in a circle, I'll probably just have to quit the program. It's painful enough as is, and I don't want this to get to the point where I feel as if I'm on trial.” CP 68

Ms. Hartleben did meet on March 4, 2013 with Terri Dobrich, a DRS

counseling services coordinator. CP 156-157 ¶¶7, 11; 238:5-12, 239:2-8 Ms. Hartleben sought an accommodation that would allow her to attend the five classes she had already completed and paid for previously without having to pay twice; she did not want college credit or a different grade, but she did want to be able to participate fully in the classes and obtain feedback by doing homework assignments and taking tests. As Ms. Hartleben describes, “*I explained the severe disadvantage I would have in the program and compared to other students if I did not retake the classes.*” CP 157 ¶¶11, 511:6-11, 20-512:13; 516:6-13

At the time of this March 4, 2013 meeting Ms. Hartleben was under the misapprehension that memory loss is not a disability under the law. She certainly always considered her memory loss as a disability, however. CP 157 ¶¶11, 518:16-519:5, 520:8-15 She questioned Dobrich about whether retrograde amnesia or memory loss is a disability under the law because she believed it was not. CP 157 ¶¶11 Dobrich told her that memory loss is not a disability. CP 157-158 ¶¶11, 13, 518:5-15 Dobrich’s own notes indicate that she wanted Ms. Hartleben to think memory loss is not a disability. Dobrich writes, “I explained that it is correct to say that memory [loss] is not a disability”. CP 252:17-24, 253:3-10, 354 Also, Dobrich later told Kate Leonard, the UCIRO investigator, “[m]emory loss is not a disability.” CP 337:10-25, 338:1-2

Despite her emphatic denials to Ms. Hartleben and UCIRO that memory loss is a disability, Dobrich could not state in her deposition whether memory loss is a disability under state law. CP 244:12-14, 17-19, 23-25; 245:1-3, 5-6, 13-15, 17-18; 246: 7-13, 15-20, 23-24 Bree Callahan, DRS Director,

acknowledged that regardless, the function of DRS is accommodating the impacts that symptoms of a disability have on a student. CP 289:4: 5-12, 25; 290:1-2, 291:20-22, 296:18-23, 297:10-25, 298:1-17 In Ms. Hartleben's case, Dobrich and Callahan agreed that memory loss is a symptom or impact of the disability of depression. CP 244:2-4, 7-8; 296:18-23, 297:10-298:17 Dobrich never explained to Ms. Hartleben that DRS is supposed to provide reasonable accommodations for impacts of her memory loss but instead simply encouraged her to think memory loss is not a disability. CP 160 ¶14

Also, during the March 4, 2013 meeting Dobrich characterized Ms. Hartleben as seeking "*free classes*". She said "*if the university gave you free classes, they would have to do it for everyone*". Dobrich also told Ms. Hartleben that the Graduate School would make the decision about whether she could have "*free classes*"; Dobrich told her to "*petition*" the Graduate School. CP 156-158 ¶¶7,11, 521:16-22, 522:3-12

In fact, Callahan and Dobrich knew that it is DRS, not the Graduate School, that has the exclusive authority to make the determination about whether the University will offer a disability accommodation. DRS is not even required to obtain approval for costs expended in providing reasonable accommodations. CP 240:10-19, 241:3-5, 7-14, 242:3-6; CP 292:22-23, 293:1-8, 294:15-20, 316:6-18

Despite the negative tone of her meeting with Dobrich, Ms. Hartleben was encouraged. She believed it had been established that the Graduate School is the proper department for her request. She described to Dr. Bender, she had "*made some progress*" that day. CP 173

That same day Ms. Hartleben wrote Dean Rebecca Aanerud at the Graduate School about her request for an accommodation for memory loss. The dean, however, sent her back to DRS, saying, “*whatever they determine to be reasonable accommodation is what the department will do.*” CP 156¶8, 168-170

Dean Aanerud wrote Callahan on March 4, 2013, “*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

Ms. Hartleben felt she had “*hit a... wall*”. Each department was pointing her to the other in her quest for a reasonable accommodation. CP 156-157¶9, 173

Callahan responded to Dean Aanerud the next day, “*I am not sure what/if anything can be done retroactively in terms of accommodations as that is not how the process works.*” CP 356

Sometime after the March 4 meeting and before March 12, Dobrich talked to Callahan about Ms. Hartleben’s disability accommodation request. They discussed how they did not believe Ms. Hartleben’s request not to pay tuition twice for classes is a reasonable accommodation. CP 157-160¶¶11, 13-15; 260:19-23; 261:3-13

After several days Ms. Hartleben had heard nothing more from DRS. She then called and emailed DRS primarily to be sure Dobrich had received the medical documentation of her disability. CP 158 ¶12, 177-178

Dobrich fired back an email commenting on Ms. Hartleben’s “*distress over the time it takes to clarify things...[T]hat cannot happen instantly. Please remember that you asked me to connect directly with those people who might be*

able to add clarification to the picture as you did not want to make any more of these contacts yourself...The documentation did come in...on Friday but I do not work on Friday so obviously, I did not see it.” CP 176-177 Dobrich later expressed her animus directly to the UCIRO representative, Leonard, in stating to the effect it is “[n]ot uncommon to see ‘I need it now’ mind frame on someone w[ith] diagnosis of depression and anxiety”. CP 332:9-17,19-25; 333:22-25, 334:1-20; 522:23-25, 523:1-9

But Ms. Hartleben had not asked for anything to happen “*instantly*”. She was trying to find out if Dobrich had received the medical documentation and asked to be updated directly rather than through Dr. Bender. CP 158-159 ¶12, 177-178 Also, Dobrich did not “*connect*” with anyone during this time at Ms. Hartleben’s request. CP 158-159 ¶12

Other than chatting with a colleague about retrograde amnesia and getting an email about it from a psychologist, Dobrich did not consider Ms. Hartleben’s request further until March 12, 2013. CP 259:5-19 She and Callahan then contacted the Registrar’s Office and later Student Fiscal Services. They were told there was no situation in which a student did not pay tuition. CP 261:19-262:6, 9-25; 263:1-20; 310:4-17, 19; 317:16-25, 318:3-11, 16-25; 319:1-3, 20-23; 320:19-321:7 On March 12, 2013 Dobrich and Callahan discussed again that they did not believe that a tuition waiver is a reasonable accommodation. CP 264: 5-16

DRS had never received a request for disability accommodations from a student with retrograde amnesia or memory loss. CP 243:19-21 No student had ever asked as a disability accommodation to retake classes without paying

tuition. CP 251:19-24, 301:10-11, 13-16, 18-23 Callahan acknowledged that an accommodation does not have to have been implemented previously to be reasonable. CP 303:10-16

But Callahan echoed Dobrich's characterization of the request as "free classes" when she told Leonard, "Having someone pay for college is not an accommodation" and the "univ[ersity] doesn't pay for college". CP 339:6-25, 340:13-17, 341:1-8, 10-13; 342:5-16, 343:3-6

Other than one email exchange with Dr. Bender, DRS had no contact with anyone in the Computational Linguistics program. CP 258:3-20, 307:21-24, 308:14-25, 309:1-11, 14-19 In her email to Dr. Bender Dobrich only confirmed the credits required to obtain the master's degree and that students can attend full time or part time; she inquired when classes are offered during the year. CP 325:2-8, 361

On March 14, 2013 Dobrich met with Ms. Hartleben in what she called DRS' standard "access planning" meeting that is held with students requesting reasonable accommodations. During the meeting Dobrich again characterized Ms. Hartleben's request as one for "*free classes*". CP 159-160 Dobrich told Ms. Hartleben again memory loss is not a disability. Because Dobrich continued to insist memory loss is not a disability, Ms. Hartleben asked her if the request for accommodation could be based on her depression as a disability. Dobrich refused. CP 524:25-525:2, 11-25; 70:1-12

Dobrich admitted that Ms. Hartleben told her she would be limited in pursuing her degree if she did not attend these classes again. She tried to tell Dobrich she would need interaction and feedback to relearn the content of these

classes. But Dobrich never asked Ms. Hartleben about the nature or scope of her memory loss or its impact on taking advanced classes towards her degree. CP 159-160, 322:23-25, 323:1-10, 16-25; 324:1-7, 10-11; 525: 4-7 Dobrich never asked for any additional medical records. CP 257:13-17 Dobrich never asked to talk with Ms. Hartleben's physicians. CP 257:21-23, 265:7-10

Ms. Hartleben recalls, "[Ms. Dobrich] was so fixated on what she saw as a request for "free classes" that she never looked at the impact of my disability and how I needed a reasonable accommodation to be able to perform at the same level and under the same requirements as students without memory loss; because she only saw my request as one for "free classes", Ms. Dobrich never suggested other disability accommodations. ... I was trying to get access to the program under the same terms and so I could perform at the same level as students without memory loss or disability. I was more than willing to consider and discuss in that meeting or any time, even now, other possible accommodations, but she never suggested any, and as I said in my deposition, I could not think of any other accommodations." CP 159-160 ¶13

DRS actually never considered or proposed at any time alternatives to Ms. Hartleben's proposal. CP 325:9-13, 16-25; 326:1-2, 4-6, 14-23 Dobrich discussed auditing classes with Ms. Hartleben even though she knew the cost was the same as for retaking the class. CP 159-160¶ 13, 266: 3-15 Auditing is available on the same basis to anyone, and it does not provide the feedback that Ms. Hartleben needs to relearn the content of her classes. CP 159-160 ¶13

Dobrich referred Ms. Hartleben to DVR. CP 159-160

Several weeks later, on May 2, 2013 Dobrich sent Ms. Hartleben an

email, formally rejecting her request for a disability accommodation. CP 160

¶14

Callahan has acknowledged Ms. Hartleben's request to participate again in these classes presents no hardship to the University. CP 301:19-302:1-3, 6-8, 12

Ms. Hartleben did go to DVR where she underwent an extensive evaluation, and the extent of her disability was discussed, including its effect on her employment and school. The third party vendor, IKRON that assisted with the evaluation recommended she return to school. DVR disagreed and said Ms. Hartleben should work and would not authorize payment for school. CP 527:8-529:2, 11-19, 22-25; 530-533:5

Ms. Hartleben filed a complaint with UCIRO, an office within the University's Office of Risk Management. She saw her complaint as another effort to request the accommodation for her disability. CP 160-161¶16, 180-182 535:24-536:8 Her UCIRO complaint is explicit that she is seeking a reasonable accommodation for her disability, retrograde amnesia or memory loss. CP 180-182

Leonard, who was assigned to handle the complaint, never interviewed Ms. Hartleben. CP 161 ¶17

Leonard offered her opinion to the trial court that Dobrich's decision to deny Ms. Hartleben's request was not a failure to accommodate. CP 33 ¶6 But in her deposition Leonard refused to say whether in her view the request to participate in classes without paying tuition again could be a reasonable accommodation. She said, "*That's not my role.*" When pressed, Leonard said,

“I cannot answer that question any better than I have. As an attorney defending those types of cases, anytime I would have tried to answer a question like that, I would have done extensive discovery, extensive research, extensive work on a question. That is not what I did [in this case], and I can’t answer”. CP 330:5-13, 331:11-25, 347:24-348:3, 7-9, 11, 13, 18; 349:7-16, 18-24 In her deposition Leonard also said she could not recall the reasons why DRS denied Ms. Hartleben’s request. CP 335:1-13 Leonard’s own statements in her deposition establish she has no basis for her opinion. And Leonard nowhere identifies the “facts” upon which she claims to rely. CP 33 ¶6

Similarly, Leonard’s statement to the trial court that Dobrich did not discriminate is without foundation, irrelevant, and the province of the jury. *Id* She does not identify in her investigation the “many avenues” she claims Dobrich “explored”. *Id* In her deposition Leonard said the “many avenues” referred to the calls to the registrar’s office and financial aid. CP 344:16-18, 23-25

Leonard did meet with Ms. Hartleben in order to tell her that she did not think the University had done anything wrong. CP 534:17-25, 535:1-12 Ms. Hartleben then got up to leave, and Leonard said, *“Oh, wait, wait, wait. I have these classes here I guess you could review the recordings of.”* CP 535:13-18 She related this was Dr. Bender’s idea. CP 541:7-20, 542:1-5 Ms. Hartleben explained to her that she could not learn from recordings because of her focus and cognitive issues. CP 161 ¶18, 535:13-18 Ms. Hartleben said, *“[I]t wasn’t offered as an option. It was offered as a ‘take it or leave it’.”* CP 513:17-19, 24-25; 514:1-12, 535:13-23 Leonard *“tossed”* some papers at her with information

from Dr. Bender about the recordings. CP 555 Leonard told her this is all the university would offer and there would be no more discussion. CP 535:13-23 Ms. Hartleben later went to the link provided for a recording but saw “*it wasn’t going to work*” for her as she has difficulty learning unless she is participating in a group setting. CP 161¶18, 366-368, 517:1-17

Ms. Hartleben wrote Dr. Bender to thank her for suggesting the recordings and explained why in order to learn, she, in particular, needed interaction. CP 161¶ 19, 184, 541:7-20, 542:1-5, 555 No one followed up to determine if or how interaction and also feedback might be included to make listening to recordings an effective accommodation for Ms. Hartleben. CP 267:5-20, 287:6-15, 326:14-23

Dr. Bender explained that any of her students could listen to recordings but as part of a class with access to bulletin boards and study groups, and they are responsible for homework assignments; the students must still participate in the class. She said there is more to a class than just watching lectures and students need the other elements of the class. CP 279:5-25, 280:2-13 Ms. Hartleben’s physician, Dr. Sonja Olson, proposed to testify about her “*serious neurocognitive disabilities that affect...her ability to learn new information*”. CP 366 Dr. Olson explained that Ms. Hartleben has “*impaired memory and impaired ability to learn or retain information unless she is in a group setting*”. CP 366 Dr. Marcia Dixson, a communications expert, who has studied and written about the challenges in engaging students in learning from online or distance courses, will testify that Ms. Hartleben, in particular, cannot learn effectively simply from listening to recordings. CP 367-368 The University took

no steps to engage with Ms. Hartleben or investigate whether providing recordings accommodated her disability or what might be offered to add interaction and feedback to her experience in trying to learn from recordings. CP 161

D. SUMMARY OF ARGUMENT

To prevail on summary judgment, the University was required to demonstrate a lack of disputed issues of material fact. The University is a place of accommodation that is required to provide Ms. Hartleben with every effective reasonable accommodation for her disability that is not an undue hardship. She is entitled to full enjoyment of meaningful access to her Master's Program. The University must provide services to her that are comparable to those provided to students without her disability.

The University acknowledges Ms. Hartleben's disability accommodations request did not present a hardship. Despite evidence the request could be easily implemented, the University declared that Ms. Hartleben's proposed accommodation is not reasonable. This despite that because of her disability, Ms. Hartleben is left to pay twice the tuition for certain classes and will be left at a severe disadvantage compared to other students in her Program who do not suffer from her disability. There is also substantial evidence the request is quite reasonable. It should have been left to a jury to decide the reasonableness of the requested

accommodation and whether the University could have otherwise made reasonable accommodations for Ms. Hartleben's disability.

The University is also required to engage with Ms. Hartleben in an interaction to determine effective reasonable accommodations. The evidence of the parties' interactions is at best disputed and a jury could find that the University failed to engage in "give and take" interactions or "trial and error" to determine effective reasonable accommodations.

E. ARGUMENT

1. Standard of Review

When reviewing the grant or denial of a motion for summary judgment, the standard of review is *de novo*. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 226; 770 P.2d 182, (1989). In reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court. *Id.* Under CR 56(c) summary judgment is improper if there is any genuine issue of material fact. As required, in considering a motion for summary judgment, the courts consider the evidence and the reasonable inferences in the light most favorable to the non-moving party. *Fell v. Spokane Transit Authority*, 128 Wn. 2d 618, 625; 911 P. 2d 1319, 1322 (1996); *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 88; 272 P. 3d 865, 871 (2012). Where competing inferences may be drawn from the evidence, the issue cannot be resolved on summary judgment. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 104; 827 P.2d 1070, 1078 (1992). Summary judgment "should be granted only if, from all the evidence, reasonable

persons could reach but one conclusion.” *Wilson v. Steinbach*, 98 Wn. 2d 434, 437; 656 P.2d 1010 (1982).

2. There are disputed issues of material fact regarding whether the University violated Ms. Hartleben’s rights to the full enjoyment of meaningful access to her Master’s Program.

a. Controlling law

The WLAD is explicit that “[t]he right to be free from [disability] discrimination . . . shall include . . . [t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges” of “any . . . educational institution” such as the University in this case. RCW 49.60.030(1)(b); .040(2). WLAD broadly describes unfair practices in places of public accommodation which include any act that imposes “any distinction, restriction, or discrimination”, “require[s] any person to pay a larger sum” than others or “refus[es] or withhold[s] . . . admission, [or] presence” on account of disability. RCW 49.60.215(1). A “disability” is broadly defined at RCW 49.60.040(7). The WLAD “mandates liberal construction.” *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 777; 249 P.3d 1044, 1049 (2011) *rev. denied* 172 Wn.2d 1013; 259 P.3d 1109 (2011).

A place of public accommodation including a university must make “reasonable accommodation [for] . . . a person with a disability . . . , when same service would prevent the person from fully enjoying the place of public accommodation.” WAC 162-26-080. See also WAC 162-26-120. A public entity

must make reasonable modifications to its policies and practices to avoid discrimination on the basis of disability. *Vinson v. Thomas*, 288 F. 3d 1145, 1154 (9th Cir. 2002).

The WLAD permits a plaintiff with a disability to pursue a claim that she suffered discrimination. RCW §49.60.215. WLAD also permits a plaintiff to pursue a more specific claim that the defendant discriminated by failing to make reasonable accommodations for her disability. *Washington State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 188-195; 293 P. 3d 413, 421-425, 437 (2013). Such a claim is established upon a showing that (1) the plaintiff has a disability under the statute, (2) the defendant's business or establishment is a place of public accommodation, (3) the plaintiff was “discriminated against by receiving treatment that was not comparable to the level of designated services provided to individuals without disabilities,” and (4) the plaintiff's disability was a substantial factor causing the discrimination. *Fell*, *supra*, 128 Wn.2d at 637; 911 P. 2d at 1328. See *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

In analyzing cases of failure to accommodate disabilities in places of public accommodations, the Washington Courts have long borrowed from cases of disability discrimination in employment. *Fell v. Spokane Transit Authority*, *supra*, 128 Wn. 2d at 632-633; 911 P. 2d at 1326.

A public entity does not "act" by proffering just any accommodation: it

must consider the particular individual's need when conducting its investigation into what accommodations are reasonable. *Duvall v. County of Kitsap, supra*, 260 F.3d at 1139. The *Duvall* Court approved giving “primary consideration to the requests of the individual with disabilities”. *Id.*

Whether an accommodation is reasonable "depends on the individual circumstances of each case, and requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow her to [enjoy meaningful access to the program.]" *Vinson v. Thomas, supra*, 288 F. 3d at 1154-1155; *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010). See WAC 162-26-040(2), 080(2). "[M]ere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement." *Duvall, supra*, 260 F. 3d at 1136; *Hamamoto, supra*, 620 F. 3d at 1098. “Generally, the best way ... to determine a reasonable accommodation is through a flexible, interactive process. ... A reasonable accommodation envisions an exchange ... where each party seeks and shares information to achieve the best match A good faith exchange of information between parties is required”. *Frisino v. Seattle Sch. Dist. No. 1, supra*, 160 Wn. App. at, 777, 779-780; 249 P.3d at 1049, 1050.

A reasonable accommodation must be effective. *Frisino, supra*, 160 Wn. App. at 780-782; 249 P.3d at 1051-1052. In fact, “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.

“Ordinarily, the question of reasonableness presents an issue of fact.”

Negron v. Snoqualmie Valley Hospital, 86 Wn. App. 579, 586; 936 P. 2d 55, 59 (1997). See *Button v. Bd. of Regents of Univ.*, 289 F. 2d 964, 966 (9th Cir. 2008).

In *Negron*, for example, the Court found that treatment in a hospital “generally includes not only medical intervention, but also the opportunity to explain symptoms, ask questions, and understand the treatment being performed including options, if any. A reasonable accommodation to a deaf patient is one that allows a comparable opportunity, reasonable under the circumstances.”

Negron v. Snoqualmie Valley Hospital, supra, 86 Wn. App. at 586; 936 P. 2d at 59. In that case the hospital saved the plaintiff’s life, but she was deaf and required the services of an interpreter to communicate with the hospital staff. The hospital did call an interpreter service twice initially but failed to call the service’s emergency number; the patient did not have consistent assistance from an interpreter. Also, the hospital did not coordinate the interpreter’s visits with those of her attending physicians. The hospital asked the court to find as a matter of law that the patient had been provided with reasonable accommodations for her disability. The trial court granted summary judgment to the hospital, but the Court of Appeals found the reasonableness of the accommodation was a question of material fact. The Court concluded a trier of fact could find the hospital did not treat the patient comparably to nondisabled

persons and thus issues of material fact precluded summary judgment. Compare also *Frisino v. Seattle Sch. Dist.*, *supra*, 160 Wn. App. at 777-784; 249 P.3d at 1049-1053.

b. There is sufficient evidence for a jury to find that the Ms. Hartleben was not treated comparably to students who did not suffer from her disability and that her request for a disability accommodation is reasonable.

Ms. Hartleben's disability, retrograde amnesia or memory loss, has prevented her from retaining the information she learned in the five classes she completed prior to the ECT therapy. CP 155 ¶¶3, 5; 166 It is her disability of retrograde amnesia or memory loss that has caused Ms. Hartleben to need to relearn the content of those classes. Because of her particular disability, she must now pay tuition twice to learn the information taught in these classes. Because of her disability, Ms. Hartleben did not get all of the benefit of her tuition payments. Unlike students with no memory loss, she will be forced to pay tuition twice because of her disability. See RCW 49.60.215 prohibiting the University from charging a "*larger sum*" for the same services to persons with disabilities. Her retrograde amnesia or memory loss creates a discriminatory barrier to completion of her Master's degree that is not experienced by persons without this disability.

Four of these courses are required for completion of her Master's Program. CP 272:18-25, 273:1-21 The other course builds on one of the

required courses. *Id.* Without the knowledge from these courses, the evidence is that Ms. Hartleben will be at a severe disadvantage compared to other students completing the Program. CP 157 ¶¶4, 11, 13 She will in no sense “enjoy meaningful access” to her degree Program. *Vinson v. Thomas, supra*, 288 at 1154. A jury should be able to determine that a reasonable accommodation is required in this case.

Indeed, on the one hand, the University does not dispute that an accommodation is required. The University characterizes as “reasonable accommodations” auditing or retaking the classes upon payment of tuition or taking classes on a part time basis, all of which are available to Ms. Hartleben regardless. The University, however, will not simply allow her to sit in on these classes again and participate and obtain feedback without paying additional tuition. This despite that she does not seek additional college credit or a different grade. CP 157 ¶11 The University has refused to consider any accommodation that will allow Ms. Hartleben to relearn the content of these classes without paying tuition again. Without explanation, the University has said as a matter of law, that while Ms. Hartleben’s request presents no hardship, it is not reasonable. CP 285:1-16, 19-25; 286:1-7301:19-302:1-3, 6-8, 12

DRS was very much concerned that the Registrar’s Office said, in essence, that all students pay tuition. CP 261:19-262:6, 9-25; 263:1-20; 310:4-17, 19; 317:16-25, 318:3-11, 16-25; 319:1-3, 20-23; 320:19-321:7 This is also

the first time the University has been presented with a request for a disability accommodation from a student suffering from retrograde amnesia or memory loss. CP 243:19-21 No student has previously asked the University to waive tuition as a disability accommodation. CP 251:19-24, 301:10-11, 13-16, 18-23 DRS was clearly unprepared to respond to Ms. Hartleben and simply deferred to the Registrar's Office or Student Fiscal Services. But WLAD requires the University to provide reasonable accommodations to allow students with disabilities to "enjoy meaningful access" to their classes and this may mean making exceptions to policies or practices that otherwise apply to all students. *Vinson v. Thomas, supra*, 288 at 1154. It may also mean considering accommodations that no one has previously requested. It is the exclusive job of DRS to make sure that the policies and practices of the University do not result in the denial of a disabled student's enjoyment of meaningful access. For DRS to defer to the Registrar's Office, as in this case, or some other office in the University, in determining whether a reasonable accommodation is required, undermines the purpose of WLAD. Of course the Registrar's Office will want payment of tuition by all students. But the inquiry cannot end there. WLAD requires DRS to go further and determine if exceptions should be made to policies and practices of the University in order to give disabled students comparable access to its classes and other services. A jury in this case should be allowed to determine if Ms. Hartleben's proposed accommodation was

reasonably required for her to enjoy meaningful access to her Program.

The issue comes down to whether the proposed accommodation is reasonable. There is substantial evidence that Ms. Hartleben's request to attend classes with interaction and feedback can easily be accomplished. Ms. Hartleben has made clear she does not seek additional college credit or a different grade, which are typically expected in return for payment of tuition. CP 157 Callahan acknowledged that an accommodation could be reasonable even if it has not been implemented previously. CP 303:10-16 Dr. Bender said she would approve Ms. Hartleben's reinstatement to complete her degree. CP 281:1, 4-9, 282:3-284:17

Dean Aanerud did not object to the request; she said the Graduate School could implement it if DRS approved it. CP 357 Callahan said in her deposition DRS is not concerned about whether others would also request to retake classes at no additional cost. CP 304:20-25, 305:1-9, 11 She also said they had no concern that Ms. Hartleben's request would be unfair to other students. CP 305:19-306:2, 7-8

The proposal to participate again in the classes but without obtaining college credit or a different grade, is likely the only effective and most reasonable accommodation for Ms. Hartleben's disability, retrograde amnesia or memory loss. At least a jury should be able to decide as much. See *Negron v. Snoqualmie Valley Hospital, supra*, 86 Wn. App. at 585-587; 936 P. 2d at 58-59.

c. The University has presented no evidence of “fundamental alteration of its operations”; it is for the jury to determine the reasonableness of Ms. Hartleben’s request.

In its *Motion for Summary Judgment* the University announced for the first time that allowing Ms. Hartleben to attend five classes again without paying for them twice would “fundamentally alter” its operations. CP 26 The University has offered no evidence for this claim. No one from the University even states this in a declaration or otherwise, let alone explains how this request alters its operations, fundamentally or at all. It is simply speculation offered in its *Motion*. The University does not even claim there would be a hardship in implementing this request. CP 301:19-302:1-3, 6-8, 12

Having a student attend classes, participate in them fully, do homework and take tests, with or without financial assistance, is actually very consistent with the University’s operations. Ms. Hartleben is not asking for any alterations in the curriculum or lower academic standards. She does not seek college credit or a different grade. She simply wants to relearn the information erased from her memory in order that she can complete her degree and not be at such a severe disadvantage compared to students in the Program who do not have her disability.

Dean Aanerud saw no fundamental alteration in the operation of the university. She told Callahan if DRS approved the request, “*we are able to make this work*”. CP 357 Dr. Bender said she would reinstate Ms. Hartleben if her

request was approved and described nothing out of the ordinary in allowing her to attend classes to relearn their content. CP 281:1, 4-9, 282:3-284:17, 285:1-16, 19-25; 286:1-7

The University's argument is simply another way of stating that Ms. Hartleben's disability request was not reasonable. This should be at best for the University a jury issue.

d. 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.

The evidence establishes there was no real interactive or investigative process through which reasonable accommodations are typically determined. See *Frisino v. Seattle Sch. Dist. No. 1, supra*, 160 Wn. App. at 777, 779-780; 249 P.3d at 1050 Dobrich clearly has a prejudice against those who suffer from depression and anxiety; she is irritated by them. CP 176-177, 332:9-17,19-25; 333:22-25, 334:1-20, 364 She treated Ms. Hartleben with impatience and immediately dismissed her request as one for "*free classes*". CP 156-158 ¶¶7,11; 160 ¶13, 521:16-22, 522:3-12 She and Callahan tried to defer Ms. Hartleben's request to the Graduate School. CP 156-158 ¶¶7,11 Associate Dean Aanerud of the Graduate School immediately sent Ms. Hartleben back to DRS with firm statements to her and Callahan that it was up to DRS to determine whether the disability accommodation request was reasonable. CP 156¶8, 168-170, 357 Dobrich and Callahan already knew DRS has the exclusive authority to make

this determination. CP 240:10-19, 241:3-5, 7-14, 242:3-6; 292:22-23, 293:1-8, 294:15-20, 316:6-18

Also, within one day of Ms. Hartleben's meeting with Dobrich on March 4, 2013, Callahan made clear to Aanerud she had already decided that she did not see "*what/if anything*" could be done. CP 356 Both Dobrich and Callahan saw Ms. Hartleben as a freeloader, looking for "*free classes*". Callahan was dismissive, telling Leonard, "*Having someone pay for college is not an accommodation*" and the "*univ[ersity] doesn't pay for college*". CP 339:6-25, 340:13-17, 341:1-8, 10-13; 342:5-16, 343:3-6

Dobrich was so fixated on what she saw as a request for "*free classes*" that she never actually considered or proposed at any time alternative accommodations to Ms. Hartleben's proposal. CP 157-158, 159-160 ¶¶11,13, 323:16-25, 324:1-7, 10-16; 325:9-13, 16-25; 326:1-2, 4-12 It was incumbent on DRS to engage with Ms. Hartleben and consider ways to help her relearn the content of the classes without paying tuition again. As Ms. Hartleben testified, she was not insistent participating in the classes again was the only option for her; she simply could not think of anything else.

Dobrich never talked with Dr. Bender or communicated with her at all about Ms. Hartleben's proposal or other ways to accommodate her disability. CP 258:3-20, 307:21-24, 308:14-25, 309:1-11, 14-19; 325:2-8, 361

Leonard also never engaged Ms. Hartleben in an interactive process or

contacted DRS to investigate the use of recordings to accommodate her disabilities. Instead, she said it was “*take it or leave it*” and there would be no more discussion. CP 161¶18, 366-368, 513:17-19, 24-25; 514:1-12, 517:1-17, 535:13-23, 555 Had the University discussed this more fully with Ms. Hartleben and Dr. Bender, they would have realized the importance of some interactive component and feedback in learning. CP 279:5-25, 280:2-13, 366-368 Even “trial and error” may have been appropriate to find reasonable accommodations that would enable Ms. Hartleben to use recordings to learn the content of these classes. The recordings alone are not an “effective” accommodation. See *Frisino v. Seattle Sch. Dist. No. 1, supra*, 160 Wn. App. at 778-784; 249 P.3d at 1049-1053 in which the school district as a reasonable accommodation removed mold from a classroom of a teacher who had sensitivities to a number of irritants. The district pronounced the air in the classroom at least as clean as outdoor air, and the trial court granted summary judgment on the teacher’s claim against the district for failure to provide a reasonable disability accommodation. The Court reversed the grant of summary judgment, noting, “During th[e interactive] ... process, the duty to accommodate is continuing. The employer may wish to test one mode of accommodation and then test another, if the first mode fails. Or, if the attempt to accommodate is not effective, one or more additional attempts may be undertaken.... An employer may choose to make only one attempt at accommodation, but it risks statutory liability if that attempt is not effective and

it cannot show that additional efforts are an undue burden.”

In this case the University was required to conduct an “individualized analysis of the disabled individual's circumstances and the accommodations that might allow her to [enjoy meaningful access to the program.]” *Duvall v. County of Kitsap*, *supra*, 260 F.3rd at 1139. The University in no sense conducted such an analysis or engaged in a good faith interactive exchange with Ms. Hartleben. See *Frisino v. Seattle Sch. Dist. No. 1*, *supra*, 160 Wn. App. at 777, 779-780; 249 P.3d at 1050. The University rejected her request virtually out of hand, condemning her as a freeloader. It should be the role of DRS to knock down barriers and make exceptions to policies to accommodate disabilities, however uncommon they may be, in order to allow the disabled student “to enjoy meaningful access” to services provided to students without that disability. Instead, DRS abandoned its role as the exclusive authority to determine reasonable accommodations and deferred to the policy stated by the Registrar’s Office that all students pay tuition. *Vinson v. Thomas*, *supra*, 288 F. 3d at 1154-1155. And instead of working through “trial and error” or otherwise to try to offer an effective accommodation, the University then pointed Ms. Hartleben to recordings on a “take it or leave it” basis.

This is exactly what the law on reasonable accommodations was enacted to prevent – a place of public accommodations dismissing someone with a disability that makes people uncomfortable or with which they are not familiar

and failing to engage in an interactive or investigative process to determine reasonable accommodations to assure “full enjoyment of meaningful access” to its services. *Id.*

F. CONCLUSION

In view of the foregoing, 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 19th day of October, 2015.

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PROOF OF SERVICE

I certify under oath and penalty of perjury that I served a copy of this document on the Court, all parties or their counsel of record on the date below as follows:

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DATED this 19th day of October, 2015 at Seattle, Washington.

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