FILED
Court of Appeals
Division I
State of Washington
7/14/2021 9:40 AM

FILED
SUPREME COURT
STATE OF WASHINGTON
7/15/2021
BY ERIN L. LENNON
CLERK

Supreme Court Cause No. 99983-0

Court of Appeals Cause No. 80976-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ELLIOTT GIBSON,

Petitioner,

vs.

COSTCO WHOLESALE, INC.,

Respondent.

PETITION FOR REVIEW

Darryl Parker, WSBA # 30770
CIVIL RIGHTS JUSTICE CENTER, PLLC
2150 N 107th Street, Suite 520
Seattle, WA 98133
206-557-7719
dparker@civilrightsjusticecenter.com
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. IDENTITY OF PETITIONER

Petitioner Elliott Gibson asks this court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

On May 10, 2021, the Court of Appeals Division One issued an opinion affirming summary judgment in favor of Respondent/Defendant Costco Wholesale Corporation ("Costco") on all claims brought against it by Petitioner/Plaintiff Gibson. A copy of the decision is attached as Appendix A ("Opinion").

On June 14, 2021, Division One denied Gibson's motion for reconsideration of its decision, and granted Costco's motion to publish. Copies of these orders are collectively attached as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Division One panel improperly intruded upon the domain of the factfinder in determining that Gibson's requested accommodation in June and July 2019 was unreasonable as a matter of law.

2. Whether the Division One panel's decision is in conflict with Washington Supreme Court and Court of Appeals precedent establishing that employers have an affirmative duty to ascertain the

nature and extent of an employee's disability prior to deciding that the employee cannot be accommodated at work.

3. Whether this case presents an issue of substantial public interest as to the circumstances in which an employer may place an employee on an involuntary unpaid leave of absence as a form of reasonable accommodation for the employee's disability.

IV. STATEMENT OF THE CASE

It is undisputed that Gibson has a disability which Costco knows prevents him from performing his job absent accommodation. Opinion at 14. Beginning in April 2018, Costco allowed Gibson to take additional breaks during his temporary part-time work schedule (TTD) in relation to this disability. *Id*. at 6-7. The chart note Gibson submitted for this request instructed him to "take breaks as needed 5-20 minutes to manage symptoms." *Id*. at 7.

In late June 2018, Gibson submitted a note from his doctor indicating that he could "return to work immediately." *Id*. at 8. When asked, Gibson indicated that he still needed to take additional breaks, and Costco placed him on leave. *Id*. On July 21, 2018, Gibson submitted a work restriction form indicating he should take breaks of 5-15 minutes hourly as needed. *Id*. at 9. On July 25, Costco sent Gibson notice that it

could not accommodate his restrictions and that his leave was extended to October 31, 2018. *Id*.

This lawsuit was initiated in early October 2018. *Id*. at 10. Later that month, Gibson e-mailed Costco about returning to work. *Id*. Costco organized and held a job assessment meeting (JAM) with Gibson on November 9, 2018. *Id*. On December 12, 2018, Gibson submitted an updated restriction form which requested that he be "allowed to take a 5-15 minute break every hour." *Id*. It also explained that "[h]e may not need breaks this often, but knowing this is an option will decrease his overall stress level helping him be more successful at work." *Id*. at 10-11. Costco held another JAM on December 28, 2018, where it determined that Gibson could return full time with the requested breaks on a trial basis. *Id*. at 11.

It is a disputed matter whether Costco asked Gibson for additional information or documentation on his breaks restriction before he provided the release to work in June. Admin Manager Wendi Mathison and General Manager Sue Larson submitted declarations stating that Gibson's April chart note was "vague" and "raised many questions", and that Costco asked Gibson for clarification which he was unable to provide. CP 479; 567. However, Gibson denied anyone raising any issues with him during his TTD (CP 1117) and provided testimony from his supervisor, Malia Zablan, and a letter from Larson confirming this. CP 705-06; 661-62. He

also submitted an e-mail chain from June 19, wherein he asked Mathison what Costco needed for him to return to full-time work, and was specifically told to submit a doctor's note stating he could start working full time. CP 1018. He stated that Mathison told him only that he needed a "full release" on June 20 (CP 1117-18), and that when he brought the note in on June 22, she told him that "Costco doesn't accommodate restrictions beyond the 12 weeks [of TTD]." CP 180.[1]

It is also disputed whether Gibson promptly responded to Costco's attempts to communicate with him. Larson stated in affidavits that she attempted to contact him on June 22, 23, 29, and 5, but that Gibson did not respond. CP 568. These e-mails are not included in the record; what is in the record are Gibson's e-mails to Larson on July 4, 5, and 14. CP 804-06. The first of these e-mails specifically requested that Costco communicate with him via mail or e-mail instead of by phone. CP 806.

Larson also stated that she attempted to reach Gibson by phone twice on July 25[2] with "no success". CP 568. However, Gibson did respond to at least one of these calls that very day at 12:27 p.m. CP 240-

[1] Gibson also sent two e-mails to Larson on July 4 and 14 asking for clarification and stating that he had been told that he had to provide a release without restrictions in order to return. CP 804-06. Larson responded on July 16 that Costco was waiting for "clarification on the need for accommodation, and the expected duration." CP 871.

[2] According to a letter she later sent, the purpose of these calls was to obtain additional information and clarification about what Gibson's restrictions meant and to determine whether he could perform his job with them. CP 664.

41. In response to this e-mail, Larson merely informed him that his accommodation had already been denied and that his leave had been extended. *Id*.

After receiving this notice, Gibson continued to e-mail back and forth with Larson through July 27, requesting multiple times that she explain what Costco's understanding of his restrictions was and why it could not accommodate him at work. *Id*.; CP 810-11. Through this exchange, Larson continued attempting to call Gibson despite his repeated requests that she contact him via e-mail instead. *Id*. On July 27, she indicated that she hoped to have answers to his questions by the next week. CP 810. After that point, all communication from Costco ceased for approximately three months, until Gibson reached out again in October. CP 680.

A final point of dispute between the parties surrounds whether Gibson was able to perform his job with the restrictions he had in June and July. At summary judgment, Costco submitted two affidavits from Larson indicating that "reliable attendance" is an essential function of all positions (CP 562; 1594), and policy documents listing "taking an extended break" as a cause for disciplinary action. CP 1605. It also presented an unofficial "log" maintained by Zablan from April 26 through June 20, 2018 of each instance wherein she or someone else observed that Gibson was absent

from his workstation. CP 539-40. Zablan and one of Gibson's coworkers submitted affidavits stating that these absences were frequent, causing frustration and prompting Zablan to go look for him. CP 538-39; 557-58.

Gibson denied the accusations of poor work and workstation attendance in his own affidavits. CP 1113; 1116-17. He presented testimony from Zablan that she did not discipline him for his extra breaks because she did not think it was "significant" or "necessary". CP 705-06. He also presented performance reviews that she completed for him from 2017-2019 indicating that he was doing satisfactory work. CP 1008-11. Larson also testified that, while she had concerns about how the breaks might affect the "quantity" of his work, the only actual issue she could recall coming up during his TTD was Gibson failing to consistently check in and out with his supervisors. CP 721-22. Finally, he cited to the JAM notes from December and January, which reflected that Costco eventually trialed and determined that it could accommodate discretionary breaks of 5-15 minutes hourly as needed. CP 237; 1651.

V. ARGUMENT

The standard of review for summary judgment is well-established in Washington law. It is the moving party which must demonstrate by uncontroverted facts and evidence that there is no genuine issue of material fact for trial. *See LaRose v. King County*, 8 Wn. App. 2d 90, 103-

04, 437 P.3d 701 (2019). It is only after this proof is made that the nonmoving party must present evidence to preclude judgment as a matter of law. *Id*. All facts and reasonable inferences must be drawn in favor of the nonmoving party. *Id*.; CR 56(e). Appellate courts are bound by these same rules when reviewing summary judgment appeals. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231, 393 P.2d 776 (2017).

Although the Division One panel correctly identified many of the applicable precedents and legal principles guiding its review, it did not follow them. Both parties presented hundreds of pages of documentary evidence, testimony, and affidavits to support their positions. Despite Gibson's extensive evidentiary showing, which matched or exceeded Costco's at several key points material to his prima facie case, the panel still elected to rule that his claim must fail as a matter of law. This determination was made without due deference to the evidence presented by Gibson, it misapplies WLAD case law precedent and accepted evidentiary standards, and it more generally runs counter to the particular legal rights, duties, and obligations that both the statute and the case law interpreting it have worked to establish and uphold.

A. This Court should grant review under RAP 13.4(b)(1), (2), and (4) to correct the Division One panel's intrusion on the domain of the jury as the factfinder in affirming that Gibson's requested accommodation in June and July 2018 was unreasonable as a matter of law.

It is notoriously difficult to obtain or present clear, unambiguous evidence of discrimination by an employer. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 777, 249 P.3d 1044 (2011). It is for this reason that Washington courts require the WLAD to be "liberally construed" and usually must reject summary judgment unless a plaintiff clearly fails to establish a prima facie element. *Id.*; *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 790, 358 P.3d 464 (2015). The question of whether a requested accommodation was unreasonable or unduly burdensome is almost always one of fact which must be left to a jury. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 644, 9 P.3d 787 (2000), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006).

However, there are some cases in which the presented facts demonstrate that the request was unreasonable as a matter of law. *Id*. The Division One panel cited to two such cases: *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 45 P.3d 589 (2002), and *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003).

In *Griffith*, Division Three was presented with evidence from Griffith's provider and a separate physical capacity evaluation that she was able to perform some but not all of the essential functions of her position. *Griffith*, 111 Wn. App. at 440-41. She requested accommodation

in the form of assistance from another employee, which her employer had previously given her on a temporary basis. *Id*. Division Three concluded that this request was unreasonable as a matter of law because it amounted to a request to remove some of her essential functions. *Id*. at 444.

In *Davis*, this court reviewed specific testimonial evidence that Davis' position regularly involved working flexible, over-60-hour work weeks. *Davis*, 149 Wn.2d at 526-27. The court was also presented with evidence that, when Davis was medically restricted to a structured 40-hour work week, he was by his own admission unable to keep up with his usual workload and had to reduce it by over 50 percent to complete it satisfactorily. *Id*. at 528. Davis nonetheless requested to remain in this position with these restrictions in place, arguing that he was able to satisfactorily complete the reduced workload he had been placed on. *Id*. at 536. This request was deemed unreasonable as a matter of law by this court on the specific basis that the undisputed evidence clearly demonstrated that working a flexible schedule of more than 40 hours per week was an essential function of Davis' position that Davis was unable to meet with his restrictions. *Id*. at 535-36.

In deciding that Gibson's requested breaks accommodation in June 2018 was unreasonable as a matter of law, the Division One panel relied primarily on *Davis*, stating that "[t]he ability to work a particular schedule

can be an essential function" (Opinion at 18) and the WLAD "does not require" an employer to convert a full-time position to a part-time position.[3] Opinion at 20. In doing so, the panel appears to be trying to use *Davis* to establish a "bright-line rule" that any accommodation which impacts (or, as would be more accurate to this case, could impact) the total number of hours worked by an employee must be unreasonable as a matter of law, regardless of the actual demands of the position. But, as recent case law interpreting the WLAD has noted, reasonable accommodation and undue hardship are "fact-dependent concepts that are rarely amenable to bright-line rules." *Washington v. Matheson Flight Extenders, Inc.*, 440 F. Supp. 3d 1201, 1210 (W.D. Wash. 2020).

The *Davis* ruling itself highlights this point. The court did not determine that Davis' request to a lesser work schedule was universally unreasonable, merely that it was specifically inconsistent with the "type of job presence and service that is indispensable to being a Microsoft systems engineer." *Davis*, 149 Wn.2d at 535. This was a fact-specific determination which was made only after Microsoft presented clear

---

[3] This discussion occurred in the context of Zablan's unofficial break logs, which reflected some days in which Gibson was alleged to be on break for a total of one hour out of his then-five-hour shift. The panel noted that this would be "equivalent to converting a full-time position to a part-time position" if viewed as an accommodation request. Opinion at 19-20.

evidence that such presence and service were in fact indispensable. As with *Griffith*, the determination in *Davis* ultimately came down to the employer proving via uncontroverted evidence that the requested accommodation was incompatible with the essential functions of the employee's particular job.

By contrast, Costco presented no evidence at summary judgment that working a certain number of hours was necessary to complete all job tasks for Gibson's position. The Job Analysis it used for his position does not state that a full-time schedule is required, (CP 1620-24) nor does the phrase "reliable attendance" appear anywhere within it. *Id.* And even taking this function as essential per Larson's affidavits, Costco still needed to demonstrate uncontroverted evidence that Gibson's requested accommodation did not allow him to meet this requirement.

However, while Zablan and Gibson's coworker claimed poor workstation attendance and performance, Gibson denied the majority of these accusations and presented documentary evidence that he was able to satisfactorily perform his job both in 2018 and in 2019 even with additional breaks. Aside from Gibson needing to consistently check in and out with his supervisors, Larson's affidavits, testimony, and letter all consisted of merely speculative ways in which Gibson's breaks *could* impact his work or the department. It is well-established that "[a] party

may not rely on speculation or having its own affidavits accepted at face value." *Slack v. Luke*, 192 Wn. App. 909, 916, 370 P.3d 49 (2016). Larson's theoretical concerns about Gibson's performance are not sufficient to award summary judgment for Costco without supporting evidence that the concerns had actual merit.

However, the majority of Gibson's evidence went unacknowledged by the Division One panel in its analysis. Instead, it misapplied *Davis* to determine that Gibson's accommodation request in June was unreasonable. It then adopted Costco's disputed viewpoint that Gibson's restrictions had changed enough between July and November that his request had by then become reasonable. This determination was made without citation to any legal authority, or even to the record. The baseline accommodation, for 5-15 minute breaks up to hourly, did not change. Whether there was a meaningful and material difference between Gibson's restrictions sufficient to impact the reasonableness of his accommodation request between July and November is not settled in the record and requires the input of a fact-finding jury.

The panel's opinion does not demonstrate that it construed the facts and inferences in Gibson's favor as required, nor that it properly applied the available case precedent to this set of facts. If the cost of an accommodation is not clearly disproportionate, then it is reasonable. *Kries*

v. WA-SPOK Primary Care, LLC, 190 Wn. App. 98, 143, 362 P.3d 974 (2015). Costco did not demonstrate that Gibson's requested accommodation was disproportionately costly, and Gibson in turn made a strong evidentiary showing to support that he was qualified for his position with the accommodation requested.

B. The Court should grant review under RAP 13.4(b)(1), (2), and (4) to correct the Division One panel's faulty conclusion that Respondent met its interactive burden as a matter of law.

In *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995), this court held that once made aware of an employee's disability, an employer has an affirmative duty under the WLAD to "determine the nature and extent of the disability." The employee, while he must "cooperate with the employer's efforts by explaining [his] disability and qualifications", is not required to "[inform] the employer of the full nature and extent of the disability." *Id*.

Goodman has served as significant legal precedent for numerous failure to accommodate cases over the last 25 years. Division One in particular has historically emphasized the importance of the *Goodman* interactive process when determining whether an employer met its reasonable accommodation duties. *See Frisino*, 160 Wn. App. at 779-80. Within the last year alone, Division One affirmed reversal of summary judgment in a failure to accommodate case in significant part on the basis

that the employer failed to demonstrate as a matter of law that it met its interactive burden under *Goodman*. *See City of Seattle v. Am. Healthcare Servs.*, 13 Wn. App. 2d 838, 468 P.3d 637 (2020).

In affirming as a matter of law here that Costco's actions (or lack thereof, as the case may be) did not amount to a failure to interact with Gibson, the panel's decision comes dangerously close to relieving employers of the affirmative burden established in *Goodman*. The record demonstrates clear questions of fact as to the actual content of Costco's communications with Gibson, as well as whether the methods used were reasonable under the circumstances. To ignore these unresolved issues also requires ignoring the clear purpose of the interactive process—to work together and exchange information in good faith. *See Am. Healthcare Servs.*, 13 Wn. App. 2d at 857; *see also Goodman*, 127 Wn.2d at 408-09.

First, the panel determined as a matter of law that "Costco was engaging in the interactive process on June 20, 2018 when it met with Gibson, and on June 22 when Gibson worked an additional shift" and that Gibson "had not responded in that process with the necessary medical information and, as a result, had not achieved agreed upon accommodations." Opinion at 17. However, merely engaging in meetings

or communications alone does not automatically mean that Costco was meeting its interactive burden in those meetings.[4]

Courts do not demand clairvoyance of an employer when engaging in an interactive accommodation process. *Gamble v. City of Seattle*, 431 P.3d 1091, 1097 (Wash. App. 2018). Although not directly established in any case precedent, this principle must also apply in reverse. An employee cannot reasonably be expected to know what questions or concerns an employer has about his restrictions or accommodation requests without first being asked. It must therefore be part of the employer's interactive duty to clearly communicate its informational needs and concerns so that the employee has the chance to address and answer them.

In this instance, there is no clear, uncontroverted evidence within the record that Costco had specifically requested any additional information or documentation from Gibson about his breaks between May 1 and June 19, 2018. Nor, when taking the disputed testimonial evidence in the light most favorable to Gibson, was he asked for any updated documentation on his breaks restriction between June 19 and June 21.

---

[4] See, for example, *Frisino*, 160 Wn. App. at 770-77, 783-85. Division One carefully considered the exact content of the communications held between Frisino and her employer in order to determine whether any questions of fact remained as to each party's interactive engagement.

If Costco did not understand Gibson's restrictions between May 1 and June 22, it had an affirmative duty to seek specific clarification. Without it doing so, Gibson could not have been expected to know that it needed more information and could not reasonably have been required to provide anything more than he already had. Similarly, if Costco required updated documentation on his breaks restriction in June, then it needed to clearly communicate that need to Gibson. Gibson could not reasonably be expected to know otherwise that the April note was insufficient. The note he brought in on June 22 facially met the requirements communicated to him in the June 19 e-mail.

The panel also determined as a matter of law that, following the meetings with Mathison in June, "Costco reached out to [Gibson] repeatedly during June and July and continued reaching out until December", and that "Gibson did not respond to all of Costco's attempts to reach him." Opinion at 17. These findings are similarly problematic—not only do they ignore the glaring deficiencies both in Costco's attempts and responses, they also ignore Gibson's numerous responses and attempts to interact in a clear and productive way.

First, Larson's claims that she attempted to call and e-mail Gibson in late June and early July with no success are entirely unsupported. Gibson meanwhile presented a lengthy record demonstrating his own

attempts to communicate with Costco via e-mail throughout the month of July. Some of his e-mails even directly counter Larson's claim that he was unresponsive to her calls, as they clearly reference her voicemails. Second, Costco's documented communications with Gibson in June and July did not contain any clear questions, concerns, or specifics as to the clarifications it was seeking from him. Gibson, by comparison, posed very specific questions and requests for clarification in his e-mails to Costco. And while Larson indicated that answers to his questions would be forthcoming, it was Costco, not Gibson, who ceased all communication for a nearly three-month period without providing any such answers. Larson's letter to Gibson in December, as well as the JAM notes from November, also indicate that Costco did not have an adequate understanding of Gibson's restrictions during this period of radio silence.

Regardless of whether Costco resumed interaction after prodding from Gibson in October, the record does not reflect that its interactive attempts in June and July were productive, successful, or sufficient to meet its burden as a matter of law. That it ceased contact entirely between July 27 and October 25 despite both it and Gibson appearing to have lingering questions and misunderstandings only serves to further highlight this glaring issue. Whether or not Gibson's evidentiary showing is

sufficient to fully demonstrate failure to interact as a matter of law, it must at the very least be sufficient to place the question before a jury.

C. This Court should grant review under RAP 13.4(b)(1) and (4) to address an issue of substantial public interest regarding the circumstances in which an involuntary unpaid leave of absence can qualify as a reasonable accommodation under the WLAD.

In *Pulcino*, this Court declined to rule as a matter of law both that the plaintiff's disability was reasonably accommodated by involuntary unpaid leaves of absence, and that her requested accommodation was unreasonable. *Pulcino*, 141 Wn.2d at 645. The reasoning behind this decision stated there were "disputed issues of material fact regarding whether Pulcino was qualified to fill vacant positions when she was placed on involuntary leaves of absence" and that "FedEx's general policy of not providing light duty positions to part-time employees, shows that FedEx failed to take affirmative steps to determine whether Pulcino was in fact qualified for any vacant positions." *Id.* at 644-45.

These determinations appear to support two general principles regarding reasonable accommodation under the WLAD: (1) that if an employee is qualified to fill either their current position or another position with or without reasonable accommodation, then placement on an involuntary unpaid leave instead does not qualify as a reasonable accommodation under the WLAD; and (2) that the WLAD requires an

employer to take affirmative steps to determine whether the employee is in fact qualified for their current or any other positions with or without reasonable accommodation. The second of these two proposed principles and its place in Washington case precent is discussed in Section B above.

Division One has previously determined that involuntary medical leave can be appropriate as a reasonable accommodation when it is used "as an accommodation of last resort." *Tharp v. Univ. of Wash.*, 143 Wn. App. 1051 (2008). And it would obviously be improper for the courts to blanket-bar employers from placing employees on a temporary leave if the employer is still determining whether the employee is qualified for any positions. However, it would also be against the spirit of the WLAD and the case law surrounding were an employer allowed to place an employee on such a leave and then halt all affirmative measures or interaction until the leave is concluded. The duty to accommodate—and, by extension, to interact—is continuing. *Frisino*, 160 Wn. App. at 781. Employers cannot be given a loophole to put employees on involuntary unpaid leave as a means to temporarily suspend their interactive burdens or duty to accommodate.

This case presents evidence and facts indicating that Costco placed Gibson on a three-month involuntary leave without having first determined the nature and extent of his disability and restrictions, during

which time it did not answer any of his inquiries or affirmatively seek additional information from him. It therefore raises the question of whether this leave, under these conditions, can qualify as a reasonable accommodation as a matter of law. Although it may implicitly authorize the leave as lawful, the Division One panel's official opinion does not directly address this question. However, because an employer is not required to demonstrate undue hardship if multiple forms of reasonable accommodation exist, it is vitally important that this court address when involuntary leave can and cannot be accepted as reasonable. *See Frisino*, 160 Wn. App. at 779.

VI. CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant review, enter a ruling that the trial and appellate courts erred in granting summary judgment in respondent's favor, and remand this matter for trial.

Dated: July 14, 2021.

Respectfully submitted,

CIVIL RIGHTS JUSTICE CENTER PLLC

/s/ Darryl Parker
Darryl Parker, WSBA #30770
Attorney for Appellant

CERTIFICATE OF SERVICE

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

That on the date indicated below, I electronically filed the foregoing document with the Clerk of the Court, and caused a true and correct copy to be served on the following via e-mail and the Washington State Courts e-filing portal:

Office of the Clerk
Court of Appeals – Division I
One Union Square
600 University Street
Seattle, WA 98101

Steven H. Winterbauer
Nicholas Gillard-Byers
Winterbauer & Diamond PLLC
1200 Fifth Avenue, Suite 1700
Seattle, WA 98101-3147
steven@winterbauerdiamond.com
nicholas@winterbauerdiamond.com

Dated: July 14, 2021.

/s/ Jordon Henderson
Jordon Henderson, Legal Assistant

APPENDIX A

FILED
5/10/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ELLIOT GIBSON,

Appellant,

v.

COSTCO WHOLESALE, INC.,

Respondent,

DOES I through V, inclusive,

Defendants.

No. 80976-8-I

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — Gibson challenges the trial court's award of summary judgment to Costco on his disability discrimination claim. He argues Costco failed to engage in an interactive process to determine a reasonable accommodation for his disability before placing him on an unpaid leave. We affirm.

FACTS

Elliot Gibson has worked at the Costco Optical Lab (Lab) in Auburn since 2008. The Lab is one of two that collectively produce all prescription eyewear for Costco's North American warehouses. It is a large, airplane hangar-like facility that operates around the clock. The production floor contains large machinery, conveyer belts, workers, forklifts, hazardous chemicals, and a dedicated environmental compliance team. The Lab is divided into several departments including Stockroom, Surface, Anti-Reflective Coating, and Finish. For the most

part, these departments are not separated by physical barriers; they exist side-by-side on the production floor.

Gibson began work on the production floor in the Stockroom in 2008. In 2012, he transferred to Finishing. In that position, he worked on the production floor grinding eyeglass lenses into shape to fit the frame.

In December 2013, Gibson presented Costco with documentation from his doctor indicating that he was unable to work around loud noises. His doctor recommended that he be permitted to wear noise cancelling headphones. Costco had some safety concerns with headphones on the production floor. Nevertheless, Costco accommodated Gibson's request. Shortly thereafter, Costco further accommodated Gibson by facilitating a transfer back to the Stockroom, which is generally quieter than Finishing.

On November 3, 2014, Gibson presented Costco with documentation from his doctor that he was "[un]able to be around people [or] loud noises." His doctor indicated he would need to be intermittently absent from work for up to two days per month for the next year. Costco agreed to this request, pursuant to its policy allowing employees to take two "accommodation days" per month even if they are unable to cover those days with sick or Family Medical Leave Act (FMLA) time. 29 U.S.C. §§ 2601-2654.

On November 12, 2014, Gibson's supervisor and another manager had a meeting with him to clarify his restrictions. In that meeting, Gibson acknowledged that there were no jobs where he would not be around people, and that he told that to his doctor. Because of this, Costco placed Gibson on a nine week leave of

absence with instructions to get further clarification on his restrictions. The manager documented the meeting on a transitional duty checklist.

On November 20, 2014, a manager sent Gibson a letter seeking further clarification from his doctor on his inability to work around people. She informed him that, should he have any difficulty obtaining the records, Costco was willing to provide a physician to communicate with his doctor at Costco's expense. She invited him to contact her directly if he had any questions.

On January 8, 2015, Gibson's manager sent him another letter informing him that he had exhausted his FMLA and state law leave and provided dates when he was anticipated to be eligible for further FMLA or state law leave. Despite his exhaustion of leave, his manager indicated that he would still be allowed two excused absences per month due to his documented health condition. He was instructed to indicate absences taken for this purpose were due to his documented medical condition when calling out of work. His manager offered to discuss any further assistance that would help Gibson not miss work, and encouraged him to reach out to her with any questions. Gibson signed this letter indicating that he accepted the offered accommodation.

Thereafter, Gibson submitted further documentation from this doctor dated January 2, 2015. That documentation indicated that Gibson would need intermittent leave for up to seven days per month. Gibson's manager sent another letter on January 8, 2015 indicating that Costco would not be able to excuse more than two days per month. She indicated that Gibson was able to access personal

medical leave (PML): a one year job protected leave provided by Costco in addition to FMLA and Gibson refused to sign that letter.

In November 2015, Gibson submitted further documentation from his doctor indicating that he was able to work only three days per week, four hours per day. It also indicated that he could not push or pull any more than 20 pounds, and could only stand, walk, bend or stoop for up to 3 hours per day. In response, Costco offered a temporary, part-time assignment in the Stockroom that allowed him to work within his restrictions. Gibson declined that accommodation. He later provided additional documentation with further restrictions, including that he was unable to stand or sit continuously for more than 30 minutes.

On November 17, 2015, Costco offered Gibson a temporary assignment at the Auburn Humane Society Thrift Shop under Costco's Interim Community Employment Program (ICEP). Under the program, Gibson would be able to work at the thrift store while receiving his full Costco pay and benefits. While working at the store, his manager checked in with him regarding his physical restrictions and ability to perform job functions. Gibson worked at the store until February 10, 2016. At the conclusion of his ICEP assignment, Costco placed Gibson on leave.

On March 17, 2016, Costco conducted a job assessment meeting (JAM) with Gibson. Costco utilizes JAMs where an employee has medical restrictions on their ability to perform their job functions. They are designed to clarify restrictions, determine whether they can be reasonably accommodated, and assess whether there are open positions that the employee can be reassigned to within their

restrictions. The meetings generally include the employee, manager, and a neutral note taker.

At the JAM, Gibson and Costco determined that he was still unable to meet the essential requirements of his Stockroom job. The Lab had no other open positions. Gibson was placed on leave until his restrictions changed or until another position which fit his restrictions became available. These findings were memorialized in contemporaneous notes, which Gibson signed to indicate his agreement.

On June 1, 2016, Costco offered Gibson a position as a member services assistant, and installed a stand/sit desk for him. This position is the only position in the Lab that does not require significant physical strain. The position is nevertheless demanding. It involves working to resolve problems with incomplete or erroneous eyeglass orders. Costco has high standards for the prompt resolution of these issues. Its goal is to have all eyeglass orders processed within 48 hours. The position also involves managing phone traffic to and from the Lab, monitoring building access, and greeting visitors. Costco expects all phone calls to be answered within three rings. To accomplish this, all Member Services employees are expected to answer calls. When someone is unable to answer a call, it will increase the workload for the other employees. Costco believes that "reliable attendance and cognitive focus and engagement" are essential functions of the job.

On December 28, 2017, Gibson requested another leave to address "auditory hallucinations." At that time, Gibson had accrued 205 hours of FMLA leave. After those hours were exhausted, Costco allowed him to continue leave under its PML policy. He remained on PML leave for 12 weeks.

On March 26, 2018, Gibson was cleared to return to work, but at a reduced schedule of five hours per day, four days per week. Costco held another JAM with Gibson the next day. At that meeting, Costco offered Gibson a Temporary Transitional Duty (TTD) position in Member Services that allowed his reduced schedule. Costco offers TTD when an employee has restrictions that prevent them from performing essential functions of their job. It is essentially a temporary, light-duty assignment that removes one or more essential function of the employee's job. Costco generally limits TTD to 12 weeks. Gibson's TTD in this instance was for a total of 12 weeks. Gibson accepted the offer.

During this TTD, Costco noticed that, in addition to his reduced hours, Gibson was taking a number of additional breaks. Often, he would simply leave his workstation without informing anyone, sometimes for long periods of time, prompting complaints from other employees.

When asked about the breaks, Gibson indicated that he required breaks as an additional medical accommodation. Costco management met with him to discuss the accommodation the following day, April 26, 2018. Costco indicated that Gibson would need to provide medical documentation of his need for this accommodation. Still, Costco allowed the breaks pending Gibson providing the necessary documentation.

Gibson provided medical documentation May 1, 2018. The documentation Gibson provided indicated only that he should "take breaks as needed 5-20 minutes to manage symptoms." Costco wanted more information, including what the anticipated frequency of the breaks would be, whether they could be scheduled, how long the accommodation would be necessary, and whether a different accommodation would suffice. Costco asked Gibson for further clarification on the note, but he was unable to provide any.

On May 5, 2018, Costco management conducted another meeting with Gibson to determine if it could continue to accommodate Gibson's restrictions. At that meeting, it was determined that Gibson would be allowed to continue on transitional duty until May 31, working his reduced schedule and taking breaks as needed to manage his symptoms. Gibson signed a letter indicating his acceptance of the offer. On May 17, the TTD was extended to July 5, 2018.

During this TTD, Costco informally tracked Gibson's breaks. It found the breaks to be unpredictable in frequency and duration. During his 5 hour shift, he would take 2 to 3 breaks, often approaching or exceeding 20 minutes, sometimes 30 minutes. On multiple occasions, the breaks during his shift totaled more than an hour. Gibson often did not tell others that he was leaving his station, despite policy and practice to do so.

On June 20, 2018, Costco management met with Gibson to discuss the upcoming end to his TTD. Management informed him that, when his TTD ended he would need to resume a full-time schedule and provide medical documentation of his ability to do so. Gibson claims that management termed this as a "full

release," which Gibson interpreted to mean able to work a full-time schedule. An internal management e-mail termed it a "full duty release." The sender of that e-mail indicated that the "full duty release" e-mail was a standard message sent to management whenever an employee was nearing the end of a TTD period. Nobody from Costco management told Gibson that he would need an unconditional release in order to return to work.

Costco provided testimony from its designated corporate officer that it has no policy of requiring a full release at the end of TTD. Instead, the practice is to require an employee coming off of TTD to be able to perform all essential job functions.

On June 22, 2018, Gibson presented Costco with a note from his doctor indicating he could "return to work immediately." The note did not indicate any restrictions on Gibson's ability to work. That day, Gibson worked a full eight hour shift but still took periodic unscheduled breaks. When asked if he still required unplanned breaks on a possibly hourly basis, Gibson indicated that he did. Gibson claims that management informed him that if he still required these breaks, he would be unable to return to work, and instead would be offered an unpaid leave of absence. Gibson was then placed on leave.

On June 22 and 23, 2018, Costco management e-mailed Gibson, but received no response. Management also called and left a message, but he did not respond. On July 4, 2018, Gibson sent an e-mail to Costco reminding it that he had questions and asking for further details on why he had been placed on leave. Management responded the next day. Management provided more detailed

written responses to his questions on December 18, 2018. On June 29 and July 5, Costco sent Gibson leave paperwork to share with his doctor, but he did not respond.

On July 11, 2018, a representative of Costco's third party accommodations assistance provider, Briotix Health Limited Partnership, called Gibson and offered assistance obtaining medical documentation to move the process along. Gibson declined assistance. Briotix called again on July 17 and left a message. Gibson did not respond.

On July 21, 2018, Gibson provided a work restriction form—dated July 12—which set forth several work restrictions. The form indicated that Gibson still required breaks of 5-15 minutes hourly as needed. The form indicated that this would be required at a minimum until October 31, or until "treatment success." The form also indicated that he was limited in his ability to perform under stress, maintain composure, work with others, and respond to feedback and criticism. Costco determined it could not accommodate this restriction for this amount of time, and placed Gibson on leave until October 31, or until his restrictions changed, whichever came first.

On July 25, 2018, after unsuccessfully trying to reach Gibson multiple times by phone, Costco sent Gibson a letter to notify him of the status of his employment. The letter indicated that Costco was unable to accommodate his restrictions at that time, that his leave was extended to October 31, 2018, and asked him to notify Costco if his restrictions changed.

On July 26, 2018, Gibson filed a complaint against Costco with the Equal Employment Opportunity Commission (EEOC). On October 8, 2018, Gibson commenced this suit in King County Superior Court, alleging that Costco had violated the Washington Law Against Discrimination[1] (WLAD).

On October 25, 2018, Gibson e-mailed Costco in anticipation of the end of his leave of absence. He indicated that he was ready to work full-time with the same break restrictions. Costco replied that if he was ready to return to work, Costco needed a medical release, "with or without restrictions." Gibson replied that Costco should be able to use the same paperwork he had submitted at the start of his leave.

On November 9, 2018, Costco held another JAM meeting with Gibson to discuss further job accommodations. At the meeting, the parties discussed Gibson's continued need for breaks during the workday. Costco indicated that the breaks posed difficulty because there were not enough employees to answer the phones when he was not at his workstation. Costco asked Gibson to go back to his medical providers for further clarification on his needed accommodations.

On December 12, 2018, Gibson submitted an updated medical form on his restrictions. It said,

> Elliott has difficulty handeling [sic] stressful social interactions and evaluations . . . He has been practicing exercises taught to him by psychologist [sic]. He is ready to return to work but will need time to practice using his new mental health tools when stressors arise. He would benefit from being allowed to take a 5-15 minute break every hour. He may not need breaks this often, but knowing this is an

[1] Chapter 49.60 RCW.

> option will decrease his overall stress level helping him be more successful at work.

The parties held another JAM on December 28, 2018. At the meeting, it was determined that Gibson would be allowed to come back to work on a trial basis. During this trial period, Gibson was instructed to notify managers when he took breaks so they could be logged. Management confirmed to Gibson that their willingness to allow him back to work arose from their sense from his new documentation that his condition was improving. Costco indicated their sense that the frequency and duration of Gibson's required breaks had lessened and would continue to do so over time.

On January 2, 2019, Gibson returned to work in the Member Services Department. He still took breaks, but they were of less frequency and duration than they had been prior to his leave.

In April 2019, Gibson submitted medical documentation indicating he may need to return to a part-time schedule and needed to take longer breaks. Costco agreed to a reduced schedule and allowed him to take breaks as needed. Gibson began having attendance issues as well, compiling unexcused absences sufficient to trigger discipline. Costco did not formally discipline Gibson, opting instead to discuss the issue with him informally.

Gibson requested another leave of absence on October 10, 2019. Costco granted this request. Costco claims Gibson is still employed at

Costco, and Gibson does not dispute this. It is unclear from the record whether he is on leave or working regularly at this time.

All the while, this lawsuit has continued. On November 15, 2019, the parties each requested summary judgment. The trial court denied Gibson's motion and granted summary judgment for Costco.

Gibson appeals.

DISCUSSION

Gibson argues that Costco failed to adequately engage in an interactive process to accommodate his disability. Specifically, he takes issue with Costco's decision to place him on leave in June 2018. He claims this decision was based on Costco's unlawful policy requiring employees to provide a "full release" at the end of a transitional duty assignment. So, he argues, the trial court erred in granting summary judgment for Costco.[2]

I. Washington Law Against Discrimination

The WLAD makes it unlawful for an employer to discriminate against an employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(3). It requires an employer to reasonably accommodate an

[2] Gibson's original complaint alleged violations of WLAD and the Washington Family Leave Act (WFLA), former chapter 49.78 RCW, repealed by LAWS OF 2006, ch. 59, § 23, LAWS OF 2017, ch. 5, § 98. Costco moved for summary judgment on both claims. The trial court granted the motion. Gibson assigns error to the trial court's grant of summary judgment but provides no argument regarding his WFLA claim. Appellants are required to provide argument in support of the issues presented for review, including citations to the record. RAP 10.3(a)(6). Failure to provide this argument renders the issue undeserving of appellate consideration. Holland v. City of Tacoma, 90 Wn. App. 533, 537-38, 954 P.2d 290 (1998). We proceed to consider whether the trial court erred in granting summary judgment to Costco on Gibson's WLAD claim.

employee with a disability unless the accommodation would pose an undue hardship. Frisino v. Seattle Sch. Dist. No. 1, 160 Wn. App. 765, 777, 249 P.3d 1044 (2011). Generally, the best way for the employer and employee to determine a reasonable accommodation is through a flexible interactive process. Id. at 779. The duty to accommodate is continuing. Id. at 781. Employers may wish to test one mode of accommodation, and then test another. See id. "An employer's previously unsuccessful attempts at accommodation do not give rise to liability if the employer ultimately provides a reasonable accommodation." Id.

II. Standard of Review

We review summary judgment decisions de novo. Frausto v. Yakima HMA, LLC, 188 Wn.2d 227, 231, 393 P.2d 776 (2017). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences must be interpreted in the light most favorable to the non-moving party. Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 582, 5 P.3d 730 (2000).

WLAD is to be construed liberally to effectuate its purpose of remedying discrimination. Clipse v. Commercial Driver Servs., Inc., 189 Wn. App. 776, 790, 358 P.3d 464 (2015). Because of this, summary judgment is often inappropriate in WLAD cases. Frisino, 160 Wn. App. at 777. But, summary judgment is still appropriate where the plaintiff fails to raise a genuine issue of material fact on one or more of the prima facie elements of a WLAD claim. Id.

To state a prima facie case for failure to accommodate under WLAD, Gibson must show:

> (1) That he had an impairment that is medically recognizable or diagnosable or exists as a record or history; and
>
> (2) That . . .
>
> (a) [he] gave [Costco] notice of the impairment . . . ; . . .
>
> . . . .
>
> (3) That . . .
>
> (a) the impairment has . . . a substantially limiting effect on
>
> (i) his . . . ability to perform his . . . job; . . .
>
> . . . .
>
> (4) That he would have been able to perform the essential functions of the job in question with reasonable accommodation; and
>
> (5) That the employer failed to reasonably accommodate the impairment.

6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 330.33, at 364-65 (7th ed. 2019).

It is uncontested that Gibson has a disability which Costco knows prevents him from performing the essential functions of his job absent accommodation. The parties contest only elements (4) and (5).

III. June Leave Determination Did Not Violate WLAD

A. No Policy of Automatic Leave

Gibson claims that Costco automatically denied Gibson's request for accommodation at the end of his 12 week TTD period without engaging in any actual discussion with him regarding his job functions, the potential impact of his

requested accommodation, and alternative accommodations that could have allowed him to perform his job duties. This claim mischaracterizes the record.

Gibson requested leave in December 2017. He was granted 12 weeks leave.[3] When that leave expired in March 2018, he was medically cleared to work only five hours per day, four days per week. Costco offered and Gibson accepted a TTD which allowed him to work under those medical restrictions for 2 weeks. The TTD was later extended by agreement to May 31 and then again to July 5. This part-time TTD is not a form of required accommodation. See Davis v. Microsoft Corp., 149 Wn.2d 521, 534-36, 70 P.3d 126 (2003) (employer is not required by WLAD to provide a reduced work schedule as an accommodation).

On June 20, 2018, Costco management met with Gibson to discuss the upcoming end to his TTD. Gibson needed medical clearance to return to full-time employment and perform essential job functions. Gibson had not provided medical clearance to that point. He was informed that without it, he would be placed on leave.[4] Whether Gibson was regarded as still being on leave during his TTD or being returned to leave when the TTD expired, it is undisputed that he had not been reinstated and could not be without medical clearance. This was a correct statement of law and fact, not an inappropriate automatic leave policy.

[3] At this time, Gibson had roughly 205 hours of FMLA leave available. He exhausted those hours and covered the remainder through Costco's PML policy.

[4] Gibson was ineligible for FMLA or state law leave at this time point in time. His leave was based solely on Costco's internal PML policy.

B. No Policy of Full Release after TTD

Gibson claims that before his 2018 TTD ended, Costco specifically instructed him to provide a full-time work release from his doctor, not a full-duty release. He claims he was nonetheless placed on an unpaid leave solely because the release he provided was for a return to work full-time rather than full-duty. The record does not support this claim.

Gibson could be reinstated to his full-time job answering calls in member services only if medically cleared to perform all the essential functions of the job. Costco never claimed he must do so without accommodation of his disability. As of the June 20 meeting, he had not provided that clearance nor identified the accommodations necessary to return full-time.

Two days later, Gibson produced a doctor's authorization to return to full-time work. No limitation or accommodations were noted. On June 22, Gibson reported to member services to work a normal shift. He took unscheduled breaks throughout the day. He was told this was not acceptable and placed on leave. The record is clear that he had not provided medical documentation of his current accommodation needs, and had not obtained Costco's agreement to such accommodations. Only on July 21 did Gibson produce medical documentation of accommodations needed to return to his job full-time.[5] Costco did not violate the WLAD by not reinstating him without medical clearance nor by placing him on leave as a result. The full-duty claim lacks factual merit.

[5] The work restriction form was dated July 12. It indicated that Gibson would require breaks "up to 5-15 min. hourly," and that the accommodation would be needed until "[October 31, 2018] or treatment success."

C. No Failure to Interact on Accommodation

Gibson argues Costco failed to engage in the interactive process before placing him on leave in June 2018. He asserts that unless requested by the employee or to prevent discharge, a forced unpaid leave of several months cannot be considered a reasonable accommodation. To accommodate, the employer must affirmatively take steps to help the disabled employee continue working—either at their existing position or through attempts to find a position compatible with their skills and limitations. Griffith v. Boise Cascade, Inc., 111 Wn. App. 436, 442-43, 45 P.3d 589 (2002).

Costco had been engaging with Gibson since 2013. Costco was engaging in the interactive process on June 20, 2018 when it met with Gibson, and on June 22 when Gibson worked an additional shift. He was placed on leave because he had not responded in that process with the necessary medical information and, as a result, had not achieved agreed upon accommodations. Costco reached out to him repeatedly during June and July and continued reaching out until December when it received revised medical documentation of accommodation needs that it believed allowed Gibson to return to work. The record is also clear that Gibson did not respond to all of Costco's attempts to reach him. The record is clear that the reason Gibson was placed on leave in June and continued on leave for several months was not a failure of Costco to engage in the interactive process.

IV. The Accommodation Requested Was Not Reasonable

Gibson argues that, at the time of his leave in June 2018, he was able to perform the essential functions of his job. Costco counters that "reliable attendance" is an essential function, which Gibson was unable to provide. Gibson argues that he did not have attendance issues and that his breaks improved his cognitive focus.

An "essential function" is a job duty that is fundamental, basic, necessary, and indispensable to filling a particular position. Davis, 149 Wn.2d at 533. The ability to work a particular schedule can be an essential function. See id. at 535-36. Employers are not required to eliminate essential job functions to accommodate a disability. Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 643, 9 P.3d 787 (2000), overruled in part on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006). Nor is an employer required to reassign essential job functions to other employees. Id. at 644.

In March 2018, Gibson submitted medical clearance to return from leave for five hours a day, four days a week. That became the basis for his TTD. On May 1, 2018 Gibson submitted medical documentation indicating that he "[t]ake breaks as needed. 5-20 minutes to manage symptoms." Though Gibson provided a medical clearance to return to work full-time on June 22, it did not update any accommodation needs. The medical accommodation information provided to Costco was not updated again until July 21, 2018. It requested 5 to 15 minute breaks per hour, through October 31 or until treatment success.

Gibson's position involved answering phones and greeting visitors to the Lab. These functions require Gibson to be at his workstation. Costco introduced evidence that "reliable attendance and cognitive focus and engagement" are essential functions of Gibson's Member Services position. Gibson explains the purpose of the extra breaks he sought were to afford him time to engage in guided meditation, allowing him to "think more clearly" and "focus better and for longer periods of time"—an outcome clearly related to and important for Gibson's "cognitive focus and engagement" requirement. But, the purpose of the breaks and the need for such breaks is not in question. What is at issue is whether Gibson was performing the essential functions of his job if he was taking these breaks.

Gibson argues that he did not have attendance issues. He equates "attendance" with showing up to his scheduled shift. But, the issue is not whether showed up for work. The issue is whether he was capable of performing essential functions on a full-time basis with the requested accommodation, while he was present for a shift. If he is not, the requested accommodation is not reasonable.

Gibson is unable to perform an essential function while his breaks take him physically away from his workstation. The record is clear that the amount of break time accommodation he has requested was 5 to 20 minutes as needed. Yet, the weeks immediately prior to the June leave, while he was working a 5 hour shift on his TTD, his breaks often approached or exceeded the maximum duration, sometimes being up to 30 minutes long. More than once, his breaks (in total) exceeded 1 hour of his already-reduced 5 hour shift. The amount of time he was on break during the TTD was very significant. If viewed as a requested

accommodation, it is equivalent to converting a full-time position to a part-time position. WLAD does not require an employer to make such an accommodation. See Davis, 149 Wn.2d at 535-36. And, in June, Gibson had not provided Costco any medical documentation or even a personal assurance that he would be away from his work station less than he had been demonstrating during his part-time shifts on the TTD.

Gibson argues that his June leave was not about essential functions, because he was allowed to return to work with what he describes as the same breaks accommodation Costco had rejected in June. But, the new breaks restriction differed in ways that were significant to Costco. First, the medical documentation describing this restriction indicated that Gibson had developed new coping techniques. Second, the new medical documentation indicated that the breaks "would benefit" Gibson rather than being "needed." Third, the documentation indicated that the breaks may not even be needed, but that having them available would decrease Gibson's symptoms. Taken together, Costco believed this new documentation showed meaningful improvement that Costco thought could continue if Gibson were allowed to go back to work.

V. Conclusion

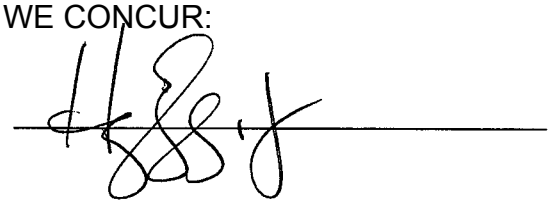
The evidence, viewed in the light most favorable to Gibson, fails to raise a genuine issue of material fact as to whether Costco reasonably accommodated him or engaged in an interactive process with him, or whether he would have been able meet the essential functions of his position with reasonable accommodation.

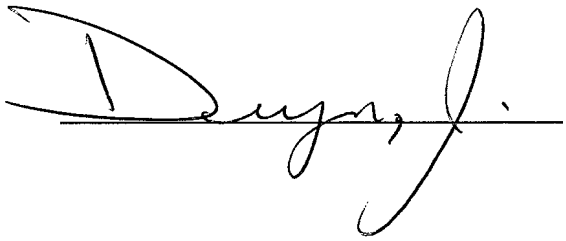
He fails to make a prima facie case under WLAD. The trial court did not err in granting summary judgment for Costco.

We affirm.

Appelwick, J.

WE CONCUR:





APPENDIX B

FILED
6/14/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ELLIOT GIBSON,

Appellant,

v.

COSTCO WHOLESALE, INC.,

Respondent,

DOES I through V, inclusive,

Defendants.

No. 80976-8-I

ORDER GRANTING MOTION TO PUBLISH

The respondent, Costco Wholesale Inc., has filed a motion to publish. The appellant, Elliot Gibson, has not filed an answer. The court has considered the motion, and a majority of the panel has reconsidered its prior determination not to publish the opinion filed for the above entitled matter on May 20, 2021 finding that it is of precedential value and should be published. Now, therefore, it is

ORDERED that the motion to publish is granted; it is further

ORDERED that the written opinion filed May 20, 2021 shall be published and printed in the Washington Appellate Reports.

Appelwick, J.
Judge

FILED
6/14/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ELLIOT GIBSON,

Appellant,

v.

COSTCO WHOLESALE, INC.,

Respondent,

DOES I through V, inclusive,

Defendants.

No. 80976-8-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Elliott Gibson, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

CIVIL RIGHTS JUSTICE CENTER, PLLC

July 14, 2021 - 9:40 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80976-8
Appellate Court Case Title:	Elliot Gibson, Appellant v. Costco Wholesale, Inc., Respondent

The following documents have been uploaded:

- 809768_Petition_for_Review_20210714093444D1435200_2937.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 20210714 Petition for Review of 80976-8-I.pdf

A copy of the uploaded files will be sent to:

- anilchian@civilrightsjusticecenter.com
- bonnie@winterbauerdiamond.com
- jge@civilrightsjusticecenter.com
- jhenderson@civilrightsjusticecenter.com
- mail@winterbauerdiamond.com
- mwong@civilrightsjusticecenter.com
- nicholas@winterbauerdiamond.com
- steven@winterbauerdiamond.com

Comments:

Sender Name: Jordon Henderson - Email: jhenderson@civilrightsjusticecenter.com
Filing on Behalf of: Darryl Parker - Email: dparker@civilrightsjusticecenter.com (Alternate Email: dparker@civilrightsjusticecenter.com)

Address:
2150 N 107th Street
Suite 520
Seattle, WA, 98133
Phone: (206) 557-7719

Note: The Filing Id is 20210714093444D1435200