

NO. 63994-3-I

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION I

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DENISE FRISINO, an Individual,

Appellant,

v.

SEATTLE SCHOOL DISTRICT NO. 1, a Municipal Corporation,

Respondent.

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BRIEF OF RESPONDENT

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Patricia K. Buchanan, WSBA No. 19892  
Daniel P. Crowner, WSBA No. 37136  
Attorneys for Seattle School District No. 1

PATTERSON BUCHANAN  
FOBES LEITCH & KALZER, INC., P.S.

2112 Third Avenue, Suite 500  
Seattle, WA 98121  
Tel. 206.462.6700

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## **I. STATEMENT OF THE CASE**

In 2000, after approximately nine years of teaching at Hamilton International Middle School (“Hamilton”), Denise Frisino began complaining of respiratory problems and of sensitivities to fragrances and chemicals. Clerk’s Papers (CP) at 415, 424, 1072. She attributed these symptoms to her classroom environment. CP at 415, 424, 1072.

On November 6, 2001, the Equal Employment Opportunity office (“EEO”) of Seattle School District No. 1 (“the District”) received an accommodation request from Frisino. CP at 567. On November 14, 2001, Rick Takeuchi, the District’s EEO office manager, tried to meet with Frisino and discuss her request. CP at 567-68. On November 28, 2001, Takeuchi met with Frisino to discuss her request. CP at 568.

Then, on December 17, 2001, Frisino received an independent medical examination (“IME”) from Dr. Michael S. Kennedy. CP at 568, 574-79. Dr. Kennedy concluded that Frisino’s symptoms seemed to be related to her classroom environment. CP at 577. Dr. Kennedy recommended that the “situation be rectified rather quickly.” CP at 579.

In response to Dr. Kennedy’s IME, the District provided Frisino with a HEPA air filter for her classroom. CP at 568. The District also ordered the Hamilton custodians to mop Frisino’s classroom twice per week. CP at 568. Additionally, Takeuchi contacted Ed Heller, the

District's Maintenance manager, in order to receive an estimate about the costs associated with moving Frisino to a different classroom at Hamilton. CP at 568. Heller and Terry Acena, Hamilton's principal, decided that the 2002 winter break would be the best time to move Frisino. CP at 568. So, in February 2002, the District followed-through with its accommodation, moving Frisino to a different classroom at Hamilton. CP at 568.

By March 2004, however, Frisino claimed that her symptoms worsened. CP at 425, 535. In response to Frisino's complaints about the environment in her new classroom at Hamilton, several individuals from the District and from various state agencies performed a walk-through inspection of Hamilton. CP at 535. Kathryn Brown, from the Washington State Department of Labor and Industries, collected air samples and bulk samples, which showed no elevated levels of mold within Hamilton. CP at 535. In fact, Brown concluded that: (1) the air quality at Hamilton was within normal limits and (2) the mold levels within Hamilton were lower than the mold levels outside Hamilton. CP at 535-36.

Nevertheless, on May 24, 2004, the District received a letter from Frisino's attending physician, Dr. Fernando Vega, in which he informed the District that: "Ms. Frisino has had significant reactions to the environment in the building she was previously assigned to for teaching drama. In order to avoid further pulmonary symptoms and otherwise

needless time loss, she needs to be placed in a clean environment next year.” CP at 536, 544, 568.<sup>1</sup>

Contrary to what Frisino claims in her statement of facts, (Br. of Appellant at 6),<sup>2</sup> the District responded to her accommodation request. On June 16, 2004, Richard Staudt, the District’s manager of Risk and Loss, contacted Frisino via e-mail and informed her that he had taken “two of the steps we agreed to as follow up to our meeting.” CP at 546. But after explaining how these steps were unsuccessful, Staudt concluded that “we are back to square one in identifying what specific environmental causes could be the factor.” CP at 546. Then Staudt cautioned:

I still want to figure out what we need to do to get the building clean enough for it to be safe for you to return. I know you feel that simply being back in another building will help, but I don’t know how we will be sure we aren’t putting you back into another environment that could also contain whatever it is causing your health problems unless we have identified what is different about Hamilton.

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<sup>1</sup> In June 2004, Frisino received an IME from Dr. Garrison Ayars, who concluded that “there is no clear-cut evidence of a significant, ongoing irritant odor or clear-cut abnormality found by industrial hygiene evaluation to explain an irritation. She has the classic symptoms of anxiety.” CP at 660, 1021. Dr. Ayars also noted that “[p]rick skin testing to inhaled allergens all negative. Nasal smear for eosinophils negative.” CP at 660, 1021. Frisino provided this IME report to the District during discovery. CP at 632, 988.

<sup>2</sup> The District takes exception to Frisino’s misrepresentations of the record and insertion of argument in violation of RAP 10.3(a)(5).

CP at 546.

On July 19, 2004, Staudt faxed a note to Frisino. CP at 548-49.

Among other things, he stated:

I will talk to Rick [Takeuchi] about your placement for next year but, if we are working within the regulations of the workers' compensation system, we will need your doctor to provide an objective, measurable standard to use in defining what is "clean." If your doctor prefers instead to release you to a particular classroom or school after having had a chance to evaluate what Rick [Takeuchi] is able to propose, that might be another option but all we have to go on right now is the indeterminate level of "clean."

CP at 549.<sup>3</sup> But neither Frisino nor her physicians provided any clarification regarding Dr. Vega's opinion that Frisino be placed in a "clean environment." CP at 536, 544.

On August 2, 2004, Frisino e-mailed Margo Holland, the District's Employment Services manager, inquiring about her placement for the 2004-05 school year. CP at 517, 522. Holland replied the same day, informing Frisino, "Please check the website today around noon. If there are positions of interest to you, contact the school and have an information sharing discussion." CP at 522. Holland then explained, "I need to have

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<sup>3</sup> Staudt also empathized with Frisino, noting that, "I think we all would love to find the 'smoking gun' here so we know what needs to be eliminated to ensure that you will have no future problems related to your environment." CP at 549.

information from Rick Takeuchi before I can contact you and ask for your selection.... Rick will get back to me soon.” CP at 522.<sup>4</sup>

As it happened, Takeuchi was out of the office until August 13, 2004. CP at 521. So, on August 3, 2004, the District contacted Staudt and informed him of Frisino’s inquiry. CP at 521. In response to being contacted by the District, Staudt noted that presently he did not have enough information to be “of some help.” CP at 521. As he explained, Frisino’s own definition of clean – “a school 5-10 years old, no off-gassing, no heavy chemicals, clean, with good air circulation” – was not helpful enough for the District to test whether it could find such a location for Frisino. CP at 521. The District needed more information regarding the potential causes of her health problems in order to successfully place her in what Dr. Vega termed a “clean environment.” CP at 521, 544.

Furthermore, on August 3, 2004, Staudt and Tim Hardin, from the Washington State Department of Health, visited Frisino’s classroom at Hamilton in order to determine whether any specific irritants had been

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<sup>4</sup> Again, the District takes exception to Frisino’s misrepresentations of the record and insertion of argument in violation of RAP 10.3(a)(5). Br. of Appellant at 6. For one, Holland never admitted that she failed to assist Frisino. CP at 517-18. For another, Holland actually was referring to February 2005, not August 2004, when she stated that “all District job openings were posted on the District’s website and were readily available to the public, including Ms. Frisino.” CP at 518.

overlooked during the previous inspection and testing. CP at 537. They did not discover any further health concerns during their visit. CP at 537.

While the District was accommodating Frisino at Hamilton, Frisino inquired about an open Language Arts position at Nathan Hale High School (“Nathan Hale”). CP at 522. At Frisino’s request, she met Lisa Hechtman, the Nathan Hale principal, to discuss this position. CP at 425, 486. Thereafter, on or about August 4, 2004, the District offered Frisino the open position at Nathan Hale and she accepted. CP at 515, 568-69. On at least one occasion before the start of the 2004-05 school year, Frisino visited her new classroom, room number 216. CP at 676.

But after the school year started in September 2004, Frisino began to complain of pulmonary and respiratory problems. CP at 537. She attributed these symptoms to her classroom environment at Nathan Hale. CP at 426, 537. In response to Frisino’s complaints, and the public’s general concern about potential mold problems, the District hired Clayton Group Services and the Seattle/King County Department of Health to perform mold inspections and air sampling at Nathan Hale. CP at 537.

In September 2004, Venetia Runnion, of Clayton Group Services, reported that she did not see fungal mold growth on any building materials within Nathan Hale. CP at 537. And Martin Rose, also of Clayton Group Services, reported that the types and concentration of airborne fungi

within Nathan Hale were lower than the types and concentration of airborne fungi outside Nathan Hale. CP at 537.

In October 2004, various individuals from the District and from the Seattle/King County Department of Health performed a walk-through inspection of Nathan Hale. CP at 537-38. These individuals noted past mold growth on the stairwell ceiling across from Frisino's classroom.<sup>5</sup> CP at 538. These individuals also noted several water-stained tiles in various areas, including Frisino's classroom. CP at 538. But most importantly, the individual from the Seattle/King County Department of Health concluded that there was no visible current mold growth in these areas. CP at 538.

In late October 2004, the District collected air samples from within Nathan Hale and air samples from outside in order to verify that the level of mold within Nathan Hale was much less than the level of mold outside. CP at 538. The District also performed moisture testing in various classrooms and areas adjacent to Frisino's classroom. CP at 538. The

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<sup>5</sup> At one time, this area had been encapsulated with ceiling shellac in accordance with industrial hygiene recommendations. CP at 538. The sample taken from this area revealed the presence of *Stachybotrys* mold. CP at 395. In response to this finding, the District notified Frisino and others on October 28, 2004, informing them that it was going "to re-encapsulate the NE stairwell ceiling where there is visible mold as well as to ... encapsulate those areas in Room 216, 218, 223, and the LRC office." CP at 393, 920.

moisture testing indicated that the classrooms and adjacent areas were dry and could not support any current mold growth. CP at 538.

Nevertheless, Frisino claimed that her symptoms worsened. CP at 426. On November 9, 2004, Frisino submitted an accommodation request to the District, supported by Dr. Vega. CP at 426, 569, 583-84. She sought temporary placement in a different classroom at Nathan Hale. CP at 426, 569, 586. Without further explanation, Dr. Vega noted that Frisino suffered from “allergy to environment.” CP at 583. And although the directions on the Health Care Provider Statement asked for specificity “in determining appropriate services and/or accommodations,” Dr. Vega made no recommendations.<sup>6</sup> CP at 583.

On November 18, 2004, in response to Frisino’s accommodation request, and her desire for a “possible room transfer,” Takeuchi met Frisino at Nathan Hale to discuss other classroom options at the school. CP at 426, 569. Takeuchi explained to Frisino that Nathan Hale had only two classrooms available for a transfer: (1) a classroom inside a portable and (2) a classroom inside the main building. CP at 569. Frisino,

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<sup>6</sup> Notably, Dr. Vega was of the opinion that Frisino was able to perform all of the essential duties of the job as described by her. CP at 584.

unsatisfied with these options,<sup>7</sup> refused a move to either classroom. CP at 426, 569. Instead, she elected to remain in her classroom. CP at 569.

On November 22, 2004, after working at Nathan Hale, Frisino reported to an emergency room, complaining of respiratory problems. CP at 426, 702. While Frisino attributed her respiratory problems to mold exposure at Nathan Hale, the emergency physicians noted that: (1) her chemistry results were normal; (2) her white blood cell count was normal; (3) her heart was normal; (4) and her lungs were normal. CP at 703.

The emergency physicians discharged Frisino and instructed her to follow-up with her own physicians. CP at 704. On November 30, 2004, Dr. Vega completed a prescription note for Frisino, which stated: "Ms. Frisino requests time off work until remediation of environmental conditions at Nathan Hale. I support her request." CP at 707.

During this time, the District retained an independent company, Global Tox,<sup>8</sup> to further investigate and inspect the mold problems at

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<sup>7</sup> According to Frisino, the portable was in poor condition, with water-stained tiles, missing tiles, a buckling floor, and windows that were nailed shut. CP at 426. According to Frisino, the other classroom within the building was a small, storage room with no exterior windows. CP at 426.

<sup>8</sup> Global Tox, now known as Veritox, is a privately owned corporation that provides consulting services in: (1) industrial hygiene; (2) human and environmental toxicology; (3) medical toxicology; (4) risk assessment; and (5) preventive, occupational, and emergency medicine. CP at 525.

Nathan Hale. CP at 525-26, 538. On November 30, 2004, Global Tox and many other individuals performed a walk-through inspection of Nathan Hale, including those areas of concern to teachers and parents. CP at 526, 530. Global Tox also reviewed relevant sampling data and correspondence, including that of the District and that of Clayton Group Services, related to the mold problems at Nathan Hale. CP at 526, 531.

On December 3, 2004, Global Tox issued a report of its findings from the November 30, 2004 inspection of Nathan Hale. CP at 529-32.

Among other things, the Global Tox report concluded:

- There is no emergency or immediate health risk to students due to the presence of mold in the school. An exception could be students with the most severe forms of immunocompromise. These students would be at similar risk in *any other school or public building*.

....

- There are small, localized areas of ceiling with water damage and potential visible mold. These areas should be repaired and cleaned of visible mold.
- There are areas of visibly water stained ceiling tiles. These tiles can be removed. If visible mold is found on the gypsum wall board (GWB) backing, it can be removed and replaced. However, there is no known exposure risk-related purpose for this work, since the ceiling is normally inaccessible and the pathway from potential mold above the tiles to the occupied space is limited.

CP at 529-30 (emphasis added).<sup>9</sup>

Based on the results and recommendations in the Global Tox report, the District began mold remediation work at Nathan Hale over the 2004-05 winter break.<sup>10</sup> CP at 538. The District retained an independent company, Superior Coit, to remove small, localized areas of visible mold from the TV studio, a couple of classrooms, Frisino's classroom, and the stairwell ceiling across from Frisino's classroom. CP at 538. Overall, Staudt estimated that Superior Coit discovered, and removed, less than five square feet of visible mold. CP at 538-39.

Eric Tabb, a Washington State Department of Labor and Industries hygiene consultant, inspected Superior Coit's mold remediation.<sup>11</sup> CP at 623. Tabb concluded that Superior Coit's mold remediation was done according to Environmental Protection Agency (EPA) standards. CP at

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<sup>9</sup> Contrary to what Frisino implies, (Br. of Appellant at 11), the missing ceiling tiles would not have provided a "pathway" for potential mold behind the gypsum wall board. CP at 529. As the District and the Global Tox report made clear, the underlying drywall had been painted to encapsulate these areas. CP at 393, 529, 920, 1562.

<sup>10</sup> Based on the Global Tox report that there was no emergency or immediate health risk due to the presence of mold, and based on the District's concerns about disrupting educational services with ongoing removal of water-stained ceiling tiles, the District scheduled the removal of water-stained ceiling tiles for the 2005 summer break. CP at 539, 1181.

<sup>11</sup> Frisino had filed a claim for time loss with the Washington State Department of Labor and Industries. CP at 711.

623, 629. In a Safety and Health Consultation Report, which was enclosed in a March 14, 2005 letter to Staudt, Tabb wrote the following:

- Walkthrough inspections were conducted with the consultation firm, Global Tox, and with the Department of Labor and Industries' Industrial Hygiene Consultation Branch.... The exploration, penetration and removal process was done according to an EPA Class II protocol – considerably stricter [than] the initial visible findings would indicate as being the required degree of safety under these circumstances.

CP at 623, 629.

On January 14, 2005, Dr. Douglas Robinson completed an independent psychiatric evaluation (IPE) of Frisino, at the request of the Washington State Department of Labor and Industries, as part of her claim for time loss. CP at 714-25. Although the District did not receive the results of this IPE until discovery in this case, Dr. Robinson concluded that Frisino's "psychiatric condition is preexisting. It was not caused or aggravated by industrial exposure. The physical symptoms ... are more likely than not due to the psychiatric disorder." CP at 725.

On January 18, 2005, Dr. Dorsett Smith completed an IME of Frisino, at the request of the Washington State Department of Labor and Industries, as part of her claim for time loss. The District received – and relied on – the results of this IME. CP at 524, 590-601. As Frisino notes in her statement of facts, (Br. of Appellant at 12), Dr. Smith concluded

that some of Frisino's symptoms were physical and some of her symptoms were psychological. CP at 590-601. But as Frisino omits in her statement of facts, (Br. of Appellant at 12-13), Dr. Smith specifically concluded that "[n]one of the diagnoses listed above are related to any work-related conditions." CP at 600. Dr. Smith specifically concluded that none of Frisino's exposure to molds, dust, and a variety of other substances in the workplace would be classified as "an injurious exposure." CP at 600.

Dr. Smith specifically opined:

3. I do not believe [Frisino] has an occupational disease that arose naturally or proximately out of her employment. I believe the patient is convinced that she has suffered some type of mold related allergy or toxicity which has been reinforced by nontraditional medical practitioners using nonscientific methodology and analysis. The patient has a long history of depression, anxiety and overuse of medical practitioners and anti-dating the onset of her symptoms.

4. The patient does not have any conditions that require further treatment or management based on the fact that these symptoms are related to a work exposure. The patient will continue to need psychological support and antidepressants.

5. The patient's condition is fixed and stable without evidence of any permanent partial impairment related to any work exposure.

6. I do not find any objective basis to support the patient's inability to work....

CP at 600-01.

On January 19, 2005, Frisino e-mailed Staudt and asked for an update on the District's mold remediation so that she could inform her doctors of its progress. CP at 551-52. In response, Staudt e-mailed Frisino, explaining to her the scope of the District's mold remediation and advising her that it was now appropriate for her to return to Nathan Hale. CP at 551. He explained:

As was communicated with staff and parents in writing and at the respective meetings, the scope of the work over the winter break consisted of removing the visible mold in the northeast stairwell, rooms 216, 218, 223 and three locations in the TV studio (room 220 & adjacent). The only place where waterstained ceiling tiles were to be removed without the presence of mold was in room 201, where the tiles were most severely impacted. All this work was completed as promised. Our second commitment, to remove the balance of the waterstained ceiling tiles in the school over the summer break, is unchanged. We will check for possible mold, remove that and replace new ceiling tiles at that time. We did send an update to all parents and staff of Nathan Hale the first week of January.

CP at 551.<sup>12</sup> He also explained, "I believe the work done over the break fully addressed the issues Dr. Vega identified in his letter of 11/30 and I have not seen anything from him that would require you to be out of the

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<sup>12</sup> During the 2005 summer break, the District removed the balance of the waterstained ceiling tiles, checking for possible mold. CP at 396-98, 1337. The District found further mold behind the ceiling tiles, but only in rooms 102, 214, 216, 219, 220, 222, 223, 224, 229, and 230. CP at 1337. And as Global Tox independently concluded, removal of the mold behind the ceiling tiles posed no exposure risk because "the pathway from potential mold above the tiles to the occupied space [was] limited." CP at 529.

building since January 3.” CP at 551. Finally, Staudt informed Frisino that “[i]f Dr. Vega needs access to the building or if there are specific conditions he would like us to check for, we will be glad to help him get his questions answered.” CP at 551.

Dr. Vega never requested access to Nathan Hale. CP at 539-40. Dr. Vega never provided the District with any questions about the mold remediation. CP at 539-40. And Dr. Vega did not provide the District with any specific conditions for which it should test and sample. CP at 539-40. Instead, Frisino refused to return to Nathan Hale. CP at 540.

On January 20, 2005, Staudt e-mailed Frisino about another recommendation from Dr. Jeffrey Cary that she not return to work until the environment is modified.<sup>13</sup> CP at 421, 554. Staudt informed Frisino that the Nathan Hale environment had been modified. CP at 554. He then reiterated the District’s position that “it was appropriate for you to return to work there as of 1/3/05.” CP at 554. Nevertheless, Frisino continued to refuse to return to Nathan Hale.<sup>14</sup> CP at 540.

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<sup>13</sup> On December 21, 2004, Dr. Cary had similarly recommended that Frisino “avoid irritants – no return to work in old environment – until modified.” CP at 421. But at that time, Frisino failed to provide the District with his recommendation. CP at 1079-80.

<sup>14</sup> Staudt also informed Frisino: “If you want to request a revision to your 504 accommodation, you should contact Rick Takeuchi .... If you want to

On February 1, 2005, Frisino sent a letter to Takeuchi, reiterating her physicians' position that she was to avoid respiratory irritants. CP at 586. Frisino claimed that she would return to Nathan Hale only following the District's completion of removing the water-stained ceiling tiles and of checking for mold. CP at 586. In the meantime, Frisino looked forward to returning to a "high school environment that is newer, good ventilation, free of fragrances, clean [and] with no heat extremes." CP at 586.<sup>15</sup>

On February 7, 2005, Holland sent a letter to Frisino, notifying her that "[t]o date, you have not returned to your position at Nathan Hale." CP at 524. "The purpose of this letter is to notify you officially that you have been cleared by the District's physician, Dorsett D. Smith, M.D.[,] to return to work and that you are expected to report by February 14, 2005." CP at 524. Holland informed Frisino that she either had to report to work or had to submit a completed health leave application signed by her attending physician. CP at 524. "Again, failure to respond or comply will be interpreted as abandoning your position and you will be terminated."

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apply for long-term medical leave, you would want to contact Beverly Johnson at the leave desk." CP at 554.

<sup>15</sup> Frisino concluded her letter by stating, "Let me know what other documentation I can provide for you to help in this situation." CP at 586.

CP at 524. Nevertheless, despite this warning, Holland advised Frisino that she could submit a revised accommodations request. CP at 524.<sup>16</sup>

On February 11, 2005, Frisino e-mailed Staudt, stating, “This is my second email requesting a simple answer. Is it Okay for me to go back to work in Room 216 at Hale?” CP at 556. Staudt replied, “Repeatedly since January 4, I have told you that it is okay for you to return to your classroom. I am not sure how to make it any more clear.” CP at 556. Again, Frisino continued to refuse to return to work at Nathan Hale. CP at 540.

Around this same time, Frisino submitted a revised accommodations request with the District, again supported by Dr. Vega. CP at 900-04. This time, Frisino unilaterally requested that the District place her in “a room with good [ventilation]” in “a different building.” CP at 902. Frisino unilaterally explained that her requested environment should have no perfumes, no gases, and no extreme temperature changes. CP at 902. But without further explanation on the Health Care Provider Statement, Dr. Vega simply noted that Frisino was “[s]ensitive to environment at work.” CP at 903. He recommended that Frisino be

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<sup>16</sup> Around this same time, Takeuchi provided Frisino with an accommodations request form. CP at 570.

transferred to “a site that is mold free.”<sup>17</sup> CP at 904. But contrary to what Frisino claims in her statement of facts, (Br. of Appellant at 15), neither Dr. Vega, Dr. Cary, nor Dr. Smith supported this request with any additional letters. CP at 244, 590-601, 607.

On February 16, 2005, apparently still unhappy with being cleared to work at Nathan Hale, Frisino e-mailed Staudt and requested the District’s permission “to sample” her classroom at Nathan Hale. CP at 558. Staudt replied:

If, as part of the medical accommodations process, your doctors would like to specify a level of ‘clean’ they feel is optimal for your health, we will be glad to test for those conditions they specify (CO2, VOCs, mold, particulates, etc.) so that we can identify any additional changes that might be appropriate. Having someone come in and test without knowing specifically what we should be testing for would not make a lot of sense at this point.

CP at 558. But neither Frisino nor her physicians ever provided the District with any specific conditions for which it should test and sample.

CP at 541. And Frisino continued to refuse to return to Nathan Hale. CP at 541, 970.

During this time, and without the permission of the District, Frisino instructed Dr. David Anderson, an aquatic toxicologist, to collect

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<sup>17</sup> In his December 12, 2008 deposition, Dr. Vega testified that it would not be possible for any site to be mold free. CP at 680, 689. “I guess I can say you can’t have anything that’s truly mold free.” CP at 689.

samples of the environment from her classroom at Nathan Hale. CP at 802-03. While Frisino relies on various excerpts from Dr. Anderson's declaration to support her statement of facts, (Br. of Appellant at 14), Frisino has failed to recognize that the trial court struck many of these excerpts. CP at 1824-25. The trial court agreed with the District that Dr. Anderson's samples were inherently unreliable and that any conclusions drawn from these samples were poisoned by their unreliability. CP at 1469-77, 1824-25.<sup>18</sup> As such, Frisino mistakenly relies on inadmissible evidence to support her statement of facts. *See* RAP 10.3(a)(5).

On March 4, 2005, Staudt explained the status of Frisino's accommodation in an e-mail to Jane Westergaard-Nimocks, the District's Human Resources director, and other District employees:

Wendy [Kimball, a Seattle Education Association union representative] has been in contact with me about what would be needed to have a reasonable chance of accommodating Denise's medical/psychological condition at Hale or elsewhere. Wendy and I agreed, and I advised Rick Takeuchi, that Denise would need to get her doctor to state what specific irritants are of concern and what objective, measurable levels of those irritants would be the upper limit acceptable. Then we would mutually agree on a Certified Industrial Hygienist, probably paid for by Denise or SEA since our paying anyone automatically taints their findings in Denise's eyes, to test for those irritants in her classroom. If the levels are okay at [Nathan] Hale, she would return or be separated. If they are not, she

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<sup>18</sup> Specifically, the trial court struck the following paragraphs of Dr. Anderson's deposition: 15; 16; 24; 34-36; 38-42; and 45. CP at 1825.

could propose another space she feels is more appropriate and we would have the CIH test that. Having seen no indications that her classroom at Hale is currently any worse than any other in the District, I believe the two most likely outcomes are her clearance to return to Hale if her doctor is at all reasonable or a clear impossibility to reasonably accommodate her if he is not.

Wendy agreed that this needs to be resolved quickly, so she was asking Denise to provide the required medical documentation immediately and we estimated that another two weeks (three, tops) for the testing and analysis would be the outside limit for wrapping this up.

CP at 934.<sup>19</sup> Within just hours after Staudt sent this e-mail, however, Kimball informed Staudt that Frisino would not be able to provide the information from her doctor as to what specific irritants were of concern. CP at 934, 969. Kimball assumed Frisino was not returning to work and was not applying for medical leave. CP at 969.

Then, on March 11, 2005, Frisino faxed a letter from Dr. Vega to Westergaard-Nimocks. CP at 607. In his letter, Dr. Vega wrote, "Ms. Frisino has ongoing issues with environmental irritants, presumably mold related, that are present in her work environment. She is advised to remain away from her current workplace or be transferred to a more accommodating environment." CP at 607.

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<sup>19</sup> In response to this e-mail, Takeuchi e-mailed Staudt, "I just left a message for Denise regarding what the District needs. I will send a letter to her Doctor to request the needed information." CP at 934.

On April 4, 2005, Takeuchi responded to Dr. Vega's letter, consistent with Staudt's March 4, 2005 e-mail. CP at 609-10, 934. Takeuchi relied on a conclusion in the Global Tox report, which explained that a mold-free environment in a school was not possible due to mold spores being ubiquitous. CP at 530-31, 609-10. In fact, the Global Tox report noted that, even if a school could be sterilized, the inexhaustible supply of mold from outdoors would enter, and once again be present on virtually all surfaces. CP at 530. In light of these conclusions from Global Tox, Takeuchi concluded his letter by asking for Dr. Vega's assistance:

Since the District is unable to provide a mold-free environment, the District would like to have your medical opinion as to what type of modifications can be made that would allow Ms. Frisino to work in her current worksite. At this point in time neither Ms. Frisino nor her health care providers have recommended any type of modifications that can be made in her worksite to accommodate her disability, other than to say that she needs a mold-free environment, which the District is not able to provide as documented by the environmental reports.

CP at 610.

But Dr. Vega did not respond to Takeuchi's letter by providing the District with any specific modifications to make at her worksite. CP at 571. Instead, on April 20, 2005, Dr. Vega responded to Takeuchi's letter by simply stating:

At this point Ms. Frisino's disability does not allow her to work at her current site and furthermore, it does not appear that modifications could be easily done to allow her to do so, given the reports on the conditions there. I recommend that she be relocated to a known "clean" environment and see how she responds.

CP at 612. Unfortunately, Dr. Vega never provided the District with any definition of, or any information about, a "known 'clean' environment."

CP at 697.

On April 25, 2005, Takeuchi wrote a letter to Frisino, in which he:

(1) summarized the District's accommodations since 2001 and (2) informed Frisino that the District could not honor her accommodation request to be transferred away from Nathan Hale in the absence of necessary medical information from her physicians.<sup>20</sup> CP at 614-22. Subsequently, Westergaard-Nimmocks recommended that the District terminate Frisino for abandoning her position at Nathan Hale. CP at 560.

On May 19, 2005, Frisino, Frisino's husband, Kimball, and Raj Manhas, the District's superintendent at that time, met to discuss her possible termination. CP at 559-61, 563. During this meeting, Frisino did not offer: (1) any information that contradicted the results and

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<sup>20</sup> Takeuchi explained, "From your initial accommodation request in November 2001 (while at Hamilton) to your latest accommodation request, the District has continuously dialogued with you and your doctors in an attempt to provide reasonable accommodations for your health condition." CP at 622.

recommendations in the Global Tox report or (2) any proposals that the District could put in place that would allow her to continue working at Nathan Hale or any other school. CP at 559-60, 565-66. Finally, on June 1, 2005, “[h]aving considered the history of events,” the District terminated Frisino’s employment for her “failure to return to work.” CP at 566.<sup>21</sup>

## II. ARGUMENT

### A. STANDARD OF REVIEW

On appeal from summary judgment, this court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Thus, the standard of review is de novo. Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c); *Pulcino v. Fed. Express Corp.*,

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<sup>21</sup> On June 27, 2005, the Washington State Department of Labor and Industries closed Frisino’s claim, noting:

This decision is based on a preponderance of medical opinion which indicates there are no objective medical findings of any conditions related to your employment at this time and you are able to work in your job of injury. Your employer has been working with you to accommodate your “504” condition restrictions.

CP at 711.

141 Wn.2d 629, 639, 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).<sup>22</sup>

While the moving party bears the burden of demonstrating that there is no genuine issue of material fact, *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Company*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), the nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. *Ranger Ins. Co. v. Pierce Co.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (citing *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

“If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute.” *Atherton*, 115 Wn.2d at 516. A material fact is one on which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). Generalizations and vague conclusions cannot defeat a summary judgment motion. *Thompson v. Everett Clinic*,

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<sup>22</sup> In 2007, the Legislature rejected our Supreme Court’s definition of “disability” adopted in *McClarty*. See *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009).

71 Wn. App. 548, 555, 860 P.2d 1054 (1993), *review denied*, 123 Wn.2d 1027 (1994).

Through summary judgment, courts pierce the formal allegations pleaded. *Geppert v. State*, 31 Wn. App. 33, 40, 639 P.2d 791 (1982). In weighing a summary judgment motion, courts place the emphasis on facts, which are regarded as events, occurrences, or something that exists in reality. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 22 (2003). Otherwise, “the whole purpose of summary judgments would be defeated if a case could be forced to trial by a mere assertion that an issue exists without a showing of evidence.” *Geppert*, 31 Wn. App. at 40. Thus, if the nonmoving party fails to satisfy its burden, then summary judgment is proper. *Atherton*, 115 Wn.2d at 516; *see also Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

**B. THE CORRECT INQUIRY OF A REASONABLE ACCOMMODATION UNDER THE WASHINGTON LAW AGAINST DISCRIMINATION**

Essentially, Frisino argues that the District failed to show that accommodating her request posed an undue hardship. Br. of Appellant at 17, 18, 23-26, 28-33. But this argument puts the proverbial “cart before the horse.” Instead, the inquiry is whether an accommodation was medically necessary, whether the District accommodated her, and whether that accommodation was reasonable. *Pulcino*, 141 Wn.2d at 643; *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 442, 45 P.3d 589 (2002)

(employee was “a step ahead of the process” in arguing that employer failed to show that accommodating her posed an undue hardship; employee first must show that the employer failed to accommodate her). Appropriately, this requirement puts the focus on what the District did.

Washington’s Law Against Discrimination (WLAD) makes it unlawful for an employer to discriminate against an employee based on the employee’s sensory, mental, or physical disability. RCW 49.60.180(2); *Pulcino*, 141 Wn.2d at 639; *Griffith*, 111 Wn. App. at 442. Washington courts liberally construe the WLAD in order to eliminate and prevent discrimination. RCW 49.60.020; *Holland v. Boeing Co.*, 90 Wn.2d 384, 387-88, 583 P.2d 621 (1978).

Under the WLAD, an employer must reasonably accommodate an employee’s disability unless it would cause undue hardship on the employer’s business. *Pulcino*, 141 Wn.2d at 639-40. But to trigger the employer’s duty of reasonable accommodation, the employee must give the employer notice of her disability. *Pulcino*, 141 Wn.2d at 643. “The employee has the burden of showing that *a specific reasonable accommodation was available to the employer* at the time the employee’s physical limitation became known and that accommodation was medically necessary.” *Pulcino*, 141 Wn.2d at 643 (emphasis added); *see also Lindblad v. Boeing Co.*, 108 Wn. App. 198, 203, 31 P.3d 1 (2001).

Essentially, therefore, an accommodation claim raises two issues: (1) whether the employee was disabled within the meaning of the law; and (2) whether the employer reasonably accommodated the employee's disability. *Pulcino*, 141 Wn.2d at 640; *see Doe v. Boeing Co.*, 121 Wn.2d 8, 13-18, 846 P.2d 531 (1993); *Snyder v. Med. Serv. Corp.*, 98 Wn. App. 315, 988 P.2d 1023 (1999), *aff'd*, 145 Wn.2d 233, 35 P.3d 1158 (2001). And as Frisino notes, (Br. of Appellant at 22), for the purposes of this appeal, the parties simply dispute: (1) whether the District reasonably accommodated Frisino's alleged disability, given the multitude of accommodations over the years and (2) whether the District could have provided any further reasonable accommodations, given the lack of specificity from Frisino and her physicians regarding the definition of, or information about, a "known 'clean' environment." CP at 612.<sup>23</sup>

"To accommodate, the employer must affirmatively take steps to help the disabled employee continue working – *at the existing position or through attempts to find a position compatible with her limitations.*" *Griffith*, 111 Wn. App. at 442-43 (citing *Doe*, 121 Wn.2d at 18; *Clarke v.*

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<sup>23</sup> But as the District made clear in its summary judgment motion, "The District does, however, reserve the right to challenge the alleged 'disability' status of plaintiff should this case proceed to trial." CP at 751.

*Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 120, 720 P.2d 793 (1986))  
(emphasis added).

Frisino directs this court's attention to *Davis v. Microsoft Corporation*, 149 Wn.2d 521, 536-37, 70 P.3d 126 (2003), arguing that the District failed to assist her in finding an alternate position. Br. of Appellant at 23-25. But reassignment is not the only method of accommodation; in fact, "[r]eassignment is *one* method of accommodation." *Pulcino*, 141 Wn.2d at 643 (emphasis added); *Doe*, 121 Wn.2d at 20 (the WLAD does not require an employer to offer the employee the precise accommodation she requests).<sup>24</sup>

In *Davis*, the plaintiff was unable to perform "the essential functions"<sup>25</sup> of his position as a systems engineer for Microsoft because he had contracted hepatitis C. *Davis*, 149 Wn.2d at 527-28, 532-36. Microsoft sought to accommodate his disability by reassigning him to a more structured position that would accommodate a regular workweek and

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<sup>24</sup> In fact, an employer "is not required to reassign an employee to a position that is already occupied, to create a new position, to alter the fundamental nature of the job, or eliminate or reassign essential job functions." *Pulcino*, 141 Wn.2d at 644 (citing *MacSuga v. County of Spokane*, 97 Wn. App. 435, 442, 983 P.2d 1167 (1999), *review denied*, 140 Wn.2d 1008 (2000)).

<sup>25</sup> "The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires." *Davis*, 149 Wn.2d at 533 (quoting 29 C.F.R. § 1630.2(n)(1) (2002)).

involve fewer urgent demands from customers. *Davis*, 149 Wn.2d at 528-29. But the plaintiff objected to Microsoft's efforts, insisting that the company was asking him "to embark on a snark hunt." *Davis*, 149 Wn.2d at 538. And our Supreme Court agreed with the plaintiff that judgment as a matter of law for Microsoft was improper. *Davis*, 149 Wn.2d at 538.

Similarly, in *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 629, 708 P.2d 393 (1985), the plaintiff was unable to perform the essential functions of his position as a Metro bus driver because he had contracted sarcoidosis, which left him almost blind in his right eye. Metro sought to accommodate his disability by referring him to an equal employment officer, who was instructed to assist the plaintiff in finding another position within Metro. *Dean*, 104 Wn.2d at 630. But Metro did not take enough affirmative steps to assist the plaintiff in the internal job search. *Dean*, 104 Wn.2d at 639. Ultimately, our Supreme Court concluded that Metro's attempt at reassignment was not a "reasonable accommodation." *Dean*, 104 Wn.2d at 639.

Given that the plaintiffs in *Davis* and *Dean* were unable to perform the essential functions of their positions, it makes perfect sense that their employers tried to accommodate them by reassignment. But here, there was no question that Frisino was able to perform the essential functions of her position. Br. of Appellant at 22. Furthermore, Frisino was not entitled

to reassignment, i.e., what she claims to have been her specific accommodation request. *See Griffith*, 111 Wn. App. at 443. As the Ninth Circuit Court of Appeals has stated in construing the WLAD:

The correct focus is whether the accommodation that [the employer] actually provided was reasonable....

....

For us to hold otherwise would contravene clear law established by Washington courts that, “[the antidiscrimination] Act does not require an employer to offer the employee the precise accommodation he or she requests.” If, rather than defending the reasonableness of the accommodation it chose, [the employer] were required to prove that [the employee’s] proposed accommodation would have imposed an undue burden, [the employee] would effectively be choosing the accommodation, not [the employer].

*Sharpe v. Am. Tel & Tel. Co.*, 66 F.3d 1045, 1050 (9th Cir. 1995) (citations omitted).

Under the WLAD, “[t]he best way [for the employer and the employee] to determine a reasonable accommodation is through a flexible, interactive process.” *MacSuga v. County of Spokane*, 97 Wn. App. 435, 443, 983 P.2d 1167 (1999), *review denied*, 140 Wn.2d 1008 (2000). A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information. *See Goodman v. Boeing Co.*, 127 Wn.2d 401, 408-09, 899 P.2d 1265 (1999); *MacSuga*,

97 Wn. App. at 444.<sup>26</sup> “And both employer and employee are equally responsible for successfully identifying a reasonable accommodation.” *MacSuga*, 97 Wn. App. at 443.

Finally, an employer needs to show that an accommodation imposed an undue burden only if it makes no accommodation. *Sharpe*, 66 F.3d at 1050; *Griffith*, 111 Wn. App. at 443.<sup>27</sup> “But where an employer makes an accommodation, ‘[i]f that accommodation was reasonable, then [the employer] satisfied its legal obligation, *and the inquiry is over.*’” *Griffith*, 111 Wn. App. at 443 (quoting *Sharpe*, 66 F.3d at 1050)).

### **C. THE DISTRICT PROVIDED FRISINO WITH REASONABLE ACCOMMODATIONS**

Here, as the trial court noted, there is no genuine issue of fact as to whether the District reasonably accommodated Frisino’s alleged disability.

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<sup>26</sup> In fact, “[t]he statutory requirements are satisfied by good faith discussions between the employer and employee.” *MacSuga*, 97 Wn. App. at 443.

<sup>27</sup> *Phillips v. City of Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989), the case on which Frisino relies, (Br. of Appellant at 23-24), is not to the contrary. See *Sharpe*, 66 F.3d at 1050. In *Phillips*, the employer refused to provide *any* accommodation to a disabled employee. See *Sharpe*, 66 F.3d at 1050. Under those circumstances, “any reasonable accommodation not requiring an undue burden [was] required.” *Phillips*, 111 Wn.2d at 911; see also *Sharpe*, 66 F.3d at 1050; see generally *Ansonia v. Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1985) (“[T]he extent of undue hardship on the employer’s business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.”).

CP at 1891-95. Over three years, the District exhaustively and laboriously took steps to gather sufficient information from Frisino, to retain qualified experts as needed, and to help Frisino continue working. The District did all that was required under the WLAD. Therefore, this court should find that summary judgment for the District was proper.

**1. Frisino Was Reasonably Accommodated  
at Hamilton**

As noted, “[t]he best way [for the employer and the employee] to determine a reasonable accommodation is through a flexible, interactive process.” *MacSuga*, 97 Wn. App. at 443. A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information. *Goodman*, 127 Wn.2d at 408-09; *MacSuga*, 97 Wn. App. at 444. And if an employer makes a reasonable accommodation, then it has satisfied its legal obligation; and the inquiry is over. *Griffith*, 111 Wn. App. at 443.

In response to Frisino’s late 2001 accommodation request, and her physician’s recommendation that “the classroom situation be rectified rather quickly,” (CP at 567, 579), the District initially provided Frisino with an air filter for her classroom and ordered the Hamilton custodians to mop her classroom floor twice per week. CP at 568. Thereafter, in early 2002, to further accommodate Frisino, the District moved her to a

different classroom at Hamilton, one with different flooring. CP at 521, 568. Frisino's symptoms abated for two years. CP at 425, 535.

When Frisino's symptoms intensified in 2004, the District and the Washington State Department of Labor and Industries tested the air quality at Hamilton, finding that it was within normal limits. CP at 425, 535-36. But when the District received a letter from Dr. Vega, informing it that Frisino needed to be placed in "a clean environment next year," (CP at 544), the District took further steps to identify the environmental cause of Frisino's symptoms. CP at 546. And even though the District was seeking to accommodate Frisino in her classroom at Hamilton, the District nevertheless was willing to reassign Frisino – to a different classroom or school – once her physicians provided an objective, measurable standard of "a clean environment." CP at 521, 546, 549. Unfortunately, Frisino and her physicians did not respond to the District's good faith requests for more information about her alleged disability. CP at 536, 544.

Instead, Frisino expressed dissatisfaction with the District's efforts to accommodate her at Hamilton.<sup>28</sup> CP at 521-22. She wanted to be

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<sup>28</sup> Frisino continues to fault the District for not accommodating her by engaging in a staffing adjustment before August 2004. Br. of Appellant at 28-29, 31-32. But during that time, the District chose to accommodate Frisino in her classroom at Hamilton. CP at 521, 535-37, 546, 549, 568. Moreover, Frisino fails to understand that under the WLAD she was not

transferred to another school. CP at 425. Ultimately, the District acceded to her request, offering her the open Language Arts position at Hale. CP at 568-69.

## **2. Frisino Was Reasonably Accommodated at Nathan Hale**

Relying on *Holland v. Boeing Company*, 90 Wn.2d 384, 583 P.2d 621 (1978), Frisino claims for the first time on appeal that the District purposefully transferred her to a position in which it knew that she was destined to fail. Br. of Appellant at 26-28.<sup>29</sup> But Frisino conveniently overlooks that the District had been trying to work with her and Dr. Vega to determine how it could test for “a clean environment,” whether at Hamilton, Nathan Hale, or any other school within the District. CP at 521, 544. And without more information shared by Frisino’s physicians about whether a specific reasonable accommodation existed for Frisino, the District was unsure how, when, or if, it could find “a clean environment.” CP at 521, 544. In other words, the District was taking affirmative steps to accommodate Frisino. *Contra Holland*, 90 Wn.2d at 391.

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entitled to a specific accommodation request. *Griffith*, 111 Wn. App. at 443.

<sup>29</sup> In her complaint, Frisino made no such allegation. CP at 8. Instead, Frisino alleged that the District failed to accommodate her “*beginning on November 30, 2004*, and continuing through the end of her employment.” CP at 8 (emphasis added).

Moreover, the transfer to Nathan Hale was not arbitrary.<sup>30</sup> *Contra Holland*, 90 Wn.2d at 391. After reviewing the positions that were available to her as a “504 status” employee in August 2004, Frisino voluntarily determined that “the only position” for which she was qualified (and for which she felt comfortable accepting) was the open Language Arts position at Hale.<sup>31</sup> CP at 425, 522. Frisino insisted that she would be fine at Nathan Hale. CP at 515. And on at least one occasion before the start of the 2004-05 school year, Frisino visited her new classroom. CP at 676. Thus, far from showing that the District engaged in an unfair practice as in *Holland*, the facts of this case indisputably show that the District engaged in a flexible, interactive exchange in order to meet Frisino’s request. *See, e.g., Goodman*, 127 Wn.2d at 408-09; *MacSuga*, 97 Wn. App. at 443.

Furthermore, when Frisino complained of renewed symptoms, which she attributed to her classroom environment at Nathan Hale, the District took affirmative steps to help her continue working at her existing

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<sup>30</sup> In fact, on the same day that Frisino expressed her interest in the open Language Arts position at Nathan Hale, the District continued to express its interest in accommodating Frisino at Hamilton. CP at 521-22.

<sup>31</sup> As our Supreme Court has made clear, the District was not required: (1) to reassign Frisino to a position that was already occupied or (2) to create a new position for Frisino. *See Pulcino*, 141 Wn.2d at 644.

position. CP at 537-38. These steps included: (1) visual mold inspections; (2) air sampling; and (3) moisture sampling. CP at 537-38. And when Frisino's symptoms worsened, with an apparent "allergy to environment," the District offered to move her to other classrooms within Nathan Hale, even though her physicians did not provide the District with any specific accommodation needs. CP at 426, 569, 583. Unsatisfied with these efforts, Frisino elected to remain in her original classroom. CP at 569.

After Dr. Vega supported Frisino's request for time off work due to apparent mold exposure, the District hired Global Tox to investigate and inspect the environmental problems at Nathan Hale. CP at 525-26, 529-32, 538, 707. Based on the results and recommendations in the Global Tox report, the District hired Superior Coit to remove small, localized areas of visible mold. CP at 538. Then, the District explained the scope of its mold remediation to Frisino and advised her that it was appropriate to return to Nathan Hale. CP at 551.

As if that was not enough, the District specifically informed Frisino that "[i]f Dr. Vega needs access to the building or if there are specific conditions he would like us to check for, we will be glad to help him get his questions answered." CP at 551. But Frisino and Dr. Vega did not have any discussions with the District regarding their approval – or

disapproval – of the District’s mold remediation. CP at 539-40. Instead, Frisino simply refused to return to Nathan Hale. CP at 540.

In the absence of any further recommendations from her physicians, the District repeatedly corresponded with Frisino about her refusal to return to Nathan Hale. CP at 524, 540, 554, 556, 586. But despite warning Frisino about a possible termination, the District continued to take affirmative steps to help her continue working. CP at 524, 554. In fact, the District advised Frisino that she could submit a revised accommodation request. CP at 524, 554.

### **3. The District Took Good Faith Efforts to Reasonably Accommodate Frisino with a Clean Environment**

Again, as noted above, Washington law is clear that “the employee has the burden of showing that *a specific reasonable accommodation was available to the employer at the time the employee’s physical limitation became known* and that *accommodation was medically necessary.*” *Pulcino*, 141 Wn.2d at 643 (emphasis added).

In response to the District’s advice, Frisino submitted a revised accommodation request. CP at 900-04. Dr. Vega supported Frisino’s request by noting that she was “[s]ensitive to environment at work.” CP at 903. Dr. Vega also recommended that she be transferred to “a site that is mold free,” which he later admitted was impossible. CP at 680, 689, 904.

Relying on *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001), Frisino claims that the District failed to investigate whether such an accommodation was feasible. Br. of Appellant at 29-32.<sup>32</sup> But as the court in *Duvall* made clear, the duty is “to gather sufficient information *from the disabled individual and qualified experts* as needed to determine what accommodations are necessary.” *Duvall*, 260 F.3d at 1136 (9th Cir. 2001) (emphasis added). Necessarily, this inquiry requires the disabled individual and qualified experts to share information, interact in the process, and have good faith discussions with the employer. See *Goodman*, 127 Wn.2d at 408-09; *MacSuga*, 97 Wn. App at 443-44.

Here, as part of its investigation to successfully identify a reasonable accommodation that was medically necessary for Frisino, the District welcomed her physicians to specify a level of “clean” they felt was optimal for her health. CP at 558. As the District made abundantly clear, “[W]e will be glad to test for those conditions they specify (CO2, VOCs, mold, particulates, etc.) so that we can identify any additional changes that might be appropriate.” CP at 558. But neither Frisino nor

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<sup>32</sup> Frisino also claims that the District ignored “specific instructions” from its own medical examiner to transfer Frisino to a more accommodating environment. Br. of Appellant at 30-31. But she ignores that Dr. Smith specifically concluded that “[Frisino] does not have any conditions that require further treatment or management based on the fact that these symptoms are related to a work exposure.” CP at 600.

her physicians provided the District with any specific conditions for which it should test and sample. CP at 541.

Undeterred, the District embarked on a plan to gather sufficient information from Frisino, her physician, and a qualified expert in order to determine what accommodations were medically necessary. CP at 934.

With the approval of Frisino's union representative, the District decided:

[Frisino] would need to get her doctor to state what specific irritants are of concern and what objective, measurable levels of those irritants would be the upper limit acceptable. Then we would mutually agree on a Certified Industrial Hygienist ... to test for those irritants in her classroom. If the levels are okay at [Nathan] Hale, she would return or be separated. If they are not, she could propose another space she feels is more appropriate and we would have the CIH test that.

CP at 934. But within hours of embarking on this plan, Kimball informed Staudt that Frisino would not be able to provide the information from her doctor as to what specific irritants were of concern. CP at 934, 969. Kimball assumed Frisino was not returning to work and was not applying for medical leave. CP at 969.

When Frisino and Dr. Vega insisted that she be transferred to accommodate her "ongoing issues with environmental irritants, presumably mold related," the District informed Dr. Vega that it would be impossible to provide a 100% mold-free environment. CP at 607, 610. The District based its decision on the recommendations in the Global Tox

report. CP at 530, 609-10. Nevertheless, the District continued to engage in discussions with Dr. Vega, asking him for his opinion “as to what type of modifications can be made that would allow Ms. Frisino to work in her current worksite.” CP at 610. But neither Dr. Vega nor Frisino responded to the District’s request for information. CP at 571.

Instead, Dr. Vega responded that “Frisino’s disability does not allow her to work at her current worksite.” CP at 612. He recommended that the District transfer Frisino to “a known ‘clean’ environment.” CP at 612.<sup>33</sup> Unfortunately, as Dr. Vega later admitted, he never provided the District with any definition of – or any information about – “a known ‘clean’ environment.” CP at 612, 697.

In fact, during his deposition, Dr. Vega admitted that: (1) he made no objective finding as to what irritants were causing Frisino’s symptoms; (2) he could not have identified any building or classroom within the District that would have allowed Frisino to continue working; (3) he could not have identified any environment that would have allowed Frisino to

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<sup>33</sup> During his deposition, Dr. Vega explained that examples of “a known ‘clean’ environment” could be hospital rooms, which are “really carefully monitored for humidity, carbon dioxide and microbes, namely bacteria and mold.” CP at 696-97. Of course, Dr. Vega agreed with the District’s attorney that it would not be feasible for the District to provide a sterile working environment. CP at 697.

continue working; and (4) he could not have provided the District with any parameters regarding testing. CP at 684, 690, 692, 696, 698.<sup>34</sup>

Because the District could not gather sufficient information from Frisino, Dr. Vega, or any of the other qualified experts to determine what level of “clean” would be acceptable to Frisino, it notified her that it could not honor her revised request. CP at 614-22.

After due notice to Frisino, and plenty of opportunities to respond to the District’s inquiries, the District proceeded to terminate Frisino for abandoning her position.<sup>35</sup> CP at 559-61. Yet even at this stage, the

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<sup>34</sup> Although Frisino chides the District for referring to her request as nothing more than “trial and error,” (Br. of Appellant at 30-31), even Dr. Vega referred to her request in this manner. CP at 680, 695. During his deposition, Dr. Vega answered questions from the District’s attorney as follows:

Q: So what could the district have done to provide a known clean environment for [Frisino]?

A: It would be a series of experiments is all I can think of, try this room and that room and this room and that room.

Q: Just kind of play trial and error with her until she finds something that sticks?

A: Right.

Q: But not knowing what any of the irritants were that were causing the problems?

A: Exactly right.

CP at 695-96.

<sup>35</sup> Frisino argues that the District failed to follow its “self-actuating accommodation policy” before terminating her. Br. of Appellant at 15, 32. But under this policy, an employee will be separated only if: (1) she is unable to perform the essential functions of the position or (2) the District

District's superintendent met with Frisino, her husband, and her union representative to discuss her proposed termination. CP at 563. And when given yet another opportunity to propose to the District's superintendent any type of modifications that the District could put in place that would help her to continue working at Nathan Hale or any other school, Frisino refused to share any information with the District. CP at 565-66.

While Frisino faults the District, (Br. of Appellant at 30), she fails to understand that she was equally responsible for successfully identifying a reasonable accommodation that was medically necessary. *See MacSuga*, 97 Wn. App. at 443-44. She too had a duty to act in good faith and to take reasonable steps to help the District successfully identify a reasonable accommodation that was medically necessary. *See Goodman*, 127 Wn.2d at 408-09; *MacSuga*, 97 Wn. App. at 443; *see also Pulcino*, 141 Wn.2d at 643. Simply expressing a need to be transferred to another building does not assist the accommodation process when the employee: (1) does not provide any further information showing that this accommodation was medically necessary; and (2) does not provide any explanation as to how

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cannot provide a reasonable accommodation. CP at 940. Here, there was no question that Frisino was able to perform the essential functions of her position. Br. of Appellant at 22. And, as discussed in this brief, there was no question that the District provided Frisino with reasonable accommodations. Thus, Frisino's reliance on this provision of the District's accommodation policy is misplaced.

or why a transfer would be any more accommodating than her current placement. And when the District repeatedly asked Frisino and her physicians to share more information about her alleged disability, they repeatedly failed to do so. CP at 539-41, 551, 558, 565-66, 571, 610.

Notably, a party does not act in good faith when it obstructs or delays the interactive process. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 535 U.S. 1011, 122 S. Ct. 1592, 152 L. Ed. 2d 509 (2002); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996); *S.L.-M. ex rel. Liedtke v. Dieringer Sch. Dist. No. 343*, 614 F. Supp. 2d 1152, 1161 (W.D. Wash. 2008).<sup>36</sup> And “[a] party that fails to communicate, by way of initiation *or response*, may also be acting in bad faith.” *Beck*, 75 F.3d at 1135 (emphasis added).

Simply put, Frisino failed to make reasonable efforts in the interactive process. CP at 539-40, 555-56, 571, 934. Without her sharing more information about how to successfully accommodate her alleged disability, it was unreasonable<sup>37</sup> to expect the District to indefinitely play a game of “trial and error” with no parameters. CP at 695-97. And because

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<sup>36</sup> In the absence of adequate state authority, federal authority is persuasive in interpreting chapter 49.60 RCW. *Xieng v. Peoples Nat. Bank of Wash.*, 120 Wn.2d 512, 531, 844 P.2d 389 (1993).

<sup>37</sup> See, e.g., *Pulcino*, 141 Wn.2d at 644 (certain types of requests are unreasonable as a matter of law).

Frisino repeatedly failed to provide additional information regarding her alleged disability, which the District requested in good faith, the District simply cannot be held liable for any alleged failure to make reasonable accommodations. *See Allen v. Pac. Bell*, 348 F.3d 1113, 1115 (9th Cir. 2003) (per curiam); *see also Steffes v. Stepan Co.*, 144 F.3d 1070, 1073 (7th Cir. 1998) (“Because [the employee] failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions, [the employer] cannot be held liable for failing to provide reasonable accommodations”); *Beck*, 75 F.3d at 1137.

#### **4. Summary Judgment Was Proper**

In sum, Frisino failed to carry her production of showing: (1) that a specific reasonable accommodation was available to the District at the time her alleged disability became known; and (2) that accommodation was medically necessary. There is no genuine issue of fact that the District satisfied its duty under the WLAD to reasonably accommodate Frisino’s alleged disability. Absent Frisino’s speculation and argumentative assertions that unresolved factual issues remain, there is nothing in the record from which this – or another – court can discern any attempt by the District to “sweep the problem under the rug.” In good faith, the District engaged in a flexible, interactive process with Frisino to accommodate her alleged disability.

The District's efforts to communicate with Frisino were reasonable. The District's accommodations that it provided were reasonable. The District satisfied its legal obligation. "[A]nd the inquiry is over." *Griffith*, 111 Wn. App. at 443.<sup>38</sup>

#### **D. FRISINO'S RETALIATION CLAIM MUST FAIL**

For over three years, the District exhaustively and laboriously took steps to help Frisino continue working. Apparently unappreciative of the District's efforts, though, Frisino claimed that the District violated RCW 49.60.210(1) when it terminated her for abandoning her position. Br. of Appellant at 33-39. But, even assuming that she established a prima facie case of retaliatory discharge, Frisino failed to meet her burden of production of showing that the District's stated reasons for her termination were pre-textual. *See, e.g., Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 618-19, 60 P.3d 106 (2002). Therefore, this court should find that summary judgment for the District was proper.

##### **1. Elements of a Retaliation Claim**

In order to establish a prima facie case of retaliatory discharge, an employee must show that: (1) she engaged in a statutorily protected activity; (2) she was discharged or had some adverse employment action

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<sup>38</sup> It is hard to imagine that any employer could ever meet its burden – whether at trial or on summary judgment – of showing that it reasonably accommodated an employee under the WLAD if that employee insisted on indefinitely playing a game of “trial and error” with no parameters.

taken against her; and (3) retaliation was a substantial motive behind the adverse employment action. *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 797, 799, 120 P.3d 579 (2005); *Renz*, 114 Wn. App. at 618-19; *Kahn v. Salerno*, 90 Wn. App. 110, 128-29, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998). If the employee establishes a prima facie case of retaliation,<sup>39</sup> then the burden of production shifts to the employer to produce admissible evidence of a legitimate reason for the discharge. *Renz*, 114 Wn. App. at 618.

But if the employer meets its burden of production, then the presumption of discrimination is removed. *Renz*, 114 Wn. App. at 618; *see also Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 182, 23 P.3d 440 (2001). The burden of production shifts back to the employee. *Renz*, 114 Wn. App. at 619. And the employee then must create a genuine issue of fact by showing that the employer's stated reason for the adverse employment action was pre-textual. *Renz*, 114 Wn. App. at 619; *see also Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 364, 753 P.2d 517 (1988).

“To overcome an employer's motion for summary judgment, the employee must do more than express an opinion or make conclusory

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<sup>39</sup> A prima facie case of retaliation establishes a rebuttable presumption of discrimination. *Renz*, 114 Wn. App. at 618.

statements.” *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992); see *Grimwood*, 110 Wn.2d at 359-60. “The employee has the burden of establishing *specific and material facts* to support each element of his or her prima facie case.” *Hiatt*, 120 Wn.2d at 66. “Ultimate facts or conclusions of fact are insufficient.” *Grimwood*, 110 Wn.2d at 360.

## **2. Frisino Cannot Create A Genuine Issue of Fact**

Here, the District’s articulated reasons for terminating Frisino were substantial. On January 19, 2005, the District informed Frisino that it was appropriate for her to return to Nathan Hale.<sup>40</sup> CP at 551. The District explained, “I believe the work done over the break fully addressed the issues Dr. Vega identified in his letter of 11/30 and I have not seen anything from him that would require you to be out of the building since January 3.” CP at 551. But Frisino refused to return to Nathan Hale. CP at 540. On January 20, 2005, the District again informed Frisino that “it was appropriate for you to return to work there as of 1/3/05.” CP at 554. But Frisino refused to return to Nathan Hale. CP at 540.

On February 7, 2005, the District informed Frisino that Dr. Smith had cleared her to return to Nathan Hale. CP at 524. The District informed her that she either had to report to work or had to submit a

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<sup>40</sup> Among other things, the District reasonably accommodated Frisino. Accordingly, there was no forbidden practice to oppose. See *Griffith*, 111 Wn. App. at 445.

completed health leave application signed by her attending physician. CP at 524. The District even warned Frisino, “Again, *failure to respond or comply* will be interpreted as abandoning your position and you will be terminated.” CP at 524 (emphasis added). But Frisino refused to return to Nathan Hale or to apply for a medical leave of absence. CP at 540, 565.

Instead of immediately terminating her, the District took affirmative steps over several months to help Frisino continue working at Nathan Hale. CP at 558, 565-66. Unfortunately, neither Frisino nor her physicians made reasonable efforts to share necessary information about her alleged disability with the District in this interactive process. CP at 541, 558, 565-66, 571, 697. Therefore, on April 24, 2005, the District notified Frisino that it was unable to honor her latest accommodation request. CP at 614-22. Finally, on June 1, 2005, almost six months after Dr. Smith had cleared Frisino to return to Nathan Hale, the District terminated Frisino’s employment for “failure to return to work.” CP at 566, 600-01.<sup>41</sup>

Facing these well documented reasons for her termination, Frisino did not challenge the factual contents of any affidavit or attached document in support of the District’s summary judgment motion. CP at

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<sup>41</sup> An employee still may be terminated for proper cause even when engaged in protected activity. *Kahn*, 90 Wn. App. at 129.

472-73. Instead, Frisino countered with her opinion that the District's well documented reasons for her termination were simply false "on [their] face." CP at 791. She also countered with her opinion that the District's well documented reasons for her termination were simply "pretextual, circular and not worthy of belief." CP at 791. And even now, Frisino counters with her ultimate facts and conclusory statements that "the District ... was presenting a façade of accommodation in order to justify terminating a troublesome employee." Br. of Appellant at 39.

But it is apparent that these phrases do not describe an event, an occurrence, or that which took place. *See Grimwood*, 110 Wn.2d at 360. Frisino's conclusory opinions do not amount to material facts admissible in evidence showing that there is a genuine issue for trial as to her retaliation claim. *See Grimwood*, 110 Wn.2d at 365; *see also Reed v. Streib*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965) (it is incumbent on a party to respond with some showing that related evidence was available that would justify a trial on the issue); *see also* CR 56(e). Therefore, summary judgment for the District was proper.

**E. THE DISTRICT IS ENTITLED TO ITS ATTORNEY FEES AND COSTS**

As the prevailing party, the District should be entitled to its attorney fees on appeal under RAP 14.2, which provides that "[a] commissioner or clerk of the appellate court will award costs to the party

that substantially prevails on review, unless the appellate court directs otherwise.” *See McClarty*, 157 Wn.2d at 231; *see also* RAP 18.1 (this court may award attorney fees and costs to a party “[i]f applicable law grants ... the right.”). Costs include statutory attorney fees and reasonable expenses that are enumerated in RAP 14.3. In addition, because there are no debatable issues on which reasonable minds would differ and there was no reasonable possibility of reversal, *see, e.g., Mahoney v. Shinopoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987), the District should be entitled to its attorney fees and costs under RAP 18.9(a), which authorizes an attorney fees award for responding to a frivolous appeal.

#### F. CONCLUSION

For the above-stated reasons, summary judgment for the District was proper. The trial court did not err. And the District should be entitled to its attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of March 2010.

PATTERSON BUCHANAN  
FOBES LEITCH & KALZER, INC., P.S.

By:   
Patricia K. Buchanan, WSBA No. 19892  
Daniel P. Crowner, WSBA No. 37136  
Attorneys for Seattle School District No. 1

DECLARATION OF SERVICE

On said day below I e-mailed and deposited in the U.S. mail, postage pre-paid, a true and accurate copy of the Brief of Respondent in Court of Appeals Cause No. 63994-3-I to the following parties:

Philip A. Talmadge  
Sidney Tribe  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
phil@tal-fitzlaw.com

Patrick B. Reddy  
Emery Reddy, PLLC  
600 Stewart Street, #1100  
Seattle, WA 98101  
reddyp@emeryreddy.com

John C. Montoya  
Law Offices of John C. Montoya, PLLC  
406 Boston Street  
Seattle, WA 98109  
john@jcmforlaw.com

Original sent by ABC Legal Messengers for filing with:  
Clerk's Office  
Court of Appeals, Division I  
600 University Street  
Seattle, WA 98101

I declare under penalty of perjury, under the laws of the State of Washington and the United States, that the foregoing is true and correct.

DATED this 15<sup>th</sup> day of March, 2010.

  
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Teri A. Watson