

71765-1

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No. 71765-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SARA HARTMAN,

Appellant,

v.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF GREATER
SEATTLE, D.B.A., DALE TURNER FAMILY YMCA,

Respondent.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

This case is about Sara Hartman (“Hartman”), an exemplary assistant teacher who was dismissed because the Young Men’s Christian Association of Greater Seattle (“YMCA”) was unhappy with her requests for accommodation and her activities with parents and staff regarding the HVAC units at her school.

Far from demonstrating that this case has no genuine disputed issues of material fact, the YMCA’s response brief demonstrates why this case must go to a jury. Both parties have presented competing theories about what transpired. Both theories have some evidentiary support. This case must go to the finder of fact to determine which evidence is the most persuasive.

B. ARGUMENT IN REPLY

The YMCA’s detailed factual response to Hartman’s detailed statement of the case amply demonstrates why this case was inappropriate for summary judgment. Each party presents two versions of the events in question, both supported by evidence in the record. Nowhere in the YMCA’s brief does it cite a case on point where summary judgment was granted with so many material facts in dispute. While the YMCA is

entitled to make its factual case that it did not discriminate or retaliate against Hartman, it must do so to a jury. Judgment as a matter of law in this case was inappropriate.

(1) Material Issues of Fact Exist As To Whether Hartman Suffered From a Disability that Required the YMCA to Provide Her With An Accommodation

In her opening brief, Hartman demonstrated that there was a material issue of fact as to whether she suffered from a disability that required the YMCA to provide her with a reasonable accommodation. Hartman did this by providing medical records that showed that (1) she suffered a substantially limiting impairment and (2) that there existed a reasonable likelihood that engaging in her job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect. Br. of App. at. 19-21; *See* RCW 49.60.040(7)(d) (defining disability for purposes of reasonable accommodation).

In response, the YMCA asks this Court to conclude, *as a matter of law*, that Hartman did not suffer from a substantially limiting impairment because she suffered from the common “cold” or “flu,” reasoning that this must be so because Hartman failed to take additional absences from work or see a doctor earlier. Br. of Resp. at 16. For three reasons, this Court

should reject the YMCA's analysis and conclude that Hartman has shown a genuine issue of material fact on this issue.

First, the YMCA fails to provide any evidence (e.g., medical records, expert opinions, witness declarations), other than its own speculation, that Hartman did not suffer from a substantially limiting impairment because she only suffered from the common cold or flu. To the contrary, the evidence provided by Hartman shows that she suffered *much more*, including "exposure to environmental toxic substances," "upper respiratory tract hypersensitivity reaction, site unspecified," inflammation and conjunctivitis, erythema and hyperemia, and inflammation and lesions in her throat. CP 373, 376.

Second, to Hartman's knowledge, no court has ever held that, *as a matter of law*, an individual did not suffer from a substantially limiting impairment because she failed to take more time off work or see a doctor earlier. An individual can still suffer a substantially limiting impairment while working (indeed, that is the basis of Washington accommodation analysis), and an individual can still suffer a substantially limiting impairment even though that individual did not see a physician prior to an arbitrary date and time. When to see a physician or take time off from work varies based on several factors (financial situation, threat of

attributed to the HVAC units and (2) she provided the YMCA with her medical diagnosis and doctor's recommendations for accommodation. Br. of App. at 27-29.

In response, the YMCA asks this Court to conclude, *as a matter of law*, that Hartman did not provide "sufficient" notice of her disability because she did not provide the YMCA with her medical records. Br. of Resp. at 18. Because the YMCA misunderstands Hartman's legal burden, this Court should reject the YMCA's analysis and conclude that Hartman has shown a genuine issue of material fact on this issue.

To Hartman's knowledge, no court has ever held that an employee must provide her employer with medical records to establish disability. To the contrary, the WLAD requires only that an employee give simple notice of her disability. *Sommer v. Dep't of Soc. & Health Serv.*, 104 Wn. App. 160, 163-64, 174-75, 15 P.3d 664 (2001) (noting that an employee had given notice of a disability requiring accommodation by notifying his supervisor of his depression, informing him later that the stress of his current position was potentially very hazardous to his health, and requesting a reassignment).

Hartman met her burden of providing the YMCA with notice of

her disability by repeatedly informing the YMCA about her substantially limiting symptoms, medical diagnosis, and proposals for accommodation. Upon receiving that information, the YMCA did not inquire further of Hartman. *Cf. Martini v. Boeing Co.*, 88 Wn. App. 442, 457, 945 P.2d 248 (1997) (finding that the employer had a duty to investigate further into the nature and impact of an employee's disability after it learned that he had symptoms of major depression). To the extent the YMCA wanted additional information about Hartman's disability, the YMCA had the burden to seek that information. The fact that Hartman did not volunteer her medical records does not negate the fact that she provided the YMCA with notice of her disability.

(3) Material Issues of Fact Exist As To Whether The YMCA Accommodated Hartman

In her opening brief, Hartman demonstrated that there was an issue of material fact as to whether the YMCA accommodated her disability. Hartman proved that (1) she requested a reasonable accommodation of removal of the toxins and restoration of ventilation in her classroom, (2) the accommodation was medically necessary to alleviate her substantially limiting symptoms, (3) the YMCA failed to reasonably accommodate Hartman, and (4) the YMCA failed to establish that accommodating

Hartman would be an undue hardship. Br. of App. at 29-34.

In response, the YMCA argues that (1) it accommodated Hartman by resolving the HVAC problems after Hartman quit or (2) it did not accommodate Hartman because she quit before the YMCA could accommodate her. Br. of Resp. at 20-22. The YMCA's arguments are incompatible; both contentions cannot be sustained. Either the YMCA accommodated Hartman, or it was unable to accommodate her. Regardless, this Court should reject the YMCA's analysis because it relies on contested issues of material fact.

(a) The YMCA Did Not Accommodate Hartman

The YMCA did not reasonably accommodate Hartman's disability by removing the toxins from the HVAC units and restoring proper ventilation to her classroom. Br. of App. at 31-34. In support of her argument, Hartman provided evidence that (1) the YMCA failed to properly clean and repair the HVAC units, and (2) the YMCA failed to respond to Hartman's requests for accommodation after its first attempt to clean and repair the HVAC units did not remove the cause of Hartman's substantially limiting impairment. Br. of App. at 31-34.

In response, the YMCA argues that it reasonably accommodated

Hartman by continuously working on the HVAC problems. Br. of Resp. at 20-22. For four reasons, the Court should reject the YMCA's arguments.

First, the YMCA fails to provide any evidence (e.g. work orders, receipts for payment of services rendered, declarations, etc.) that it did any work on the HVAC units when Hartman requested accommodation after the YMCA's first attempt at accommodating Hartman was unsuccessful. Instead, the YMCA coyly states that the "problems" resolved by October 2012. Br. of Resp. at 20. Conspicuously absent from its analysis, however, is mention of the undisputed fact that the YMCA conducted additional cleaning and maintenance on the HVAC units *following* Hartman's discharge. CP 338-39, 347. It was not until after that work was performed on the HVAC units that staff began noticing improved conditions. The YMCA offers no explanation for why it did not perform this work in June, July, August, or early September 2012.

Second, to Hartman's knowledge, no court has ever held that, *as a matter of law*, an employer need only attempt accommodation once to comply with the WLAD. The YMCA argues that by attempting to repair the HVAC units, it "accommodated" Hartman as a matter of law. Br. of Resp. at 20. However, the YMCA makes no attempt to counter Hartman's

evidence that her disability prevented her from returning to her classroom at the CDC until the toxins were removed and proper ventilation was restored to her classroom. CP 320. This argument also assumes that the only reason the YMCA performed “repairs” on the HVAC units at the CDC was because of Hartman’s disability. To the contrary, the repairs were made as a result of multiple complaints made to YMCA management about mold and poor air quality at the CDC – not Hartman’s accommodation requests. CP 293, 589, 528, 529-38, 601, 609, 613. The YMCA was required to do more than “attempt” accommodation for Hartman.

Third, the YMCA’s attempt at accommodation was not successful. Even if we assume that the YMCA’s first attempt at accommodation was reasonable, the record is replete with evidence that it was ineffective at removing the cause of Hartman’s substantially limiting impairment. In cases where an objective standard is not available to measure whether an accommodation is effective, a good faith interactive process is especially important. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 782, 249 P.3d 1044 (2011). During that process, the employer’s duty to accommodate is continuing. *Id.* Here, the YMCA admits that it did not

engage in the interactive process with Hartman to achieve accommodation. Br. of Resp. at 22. This is true even though Hartman repeatedly sought information related to her accommodation request and informed the YMCA that she was still suffering from substantially limiting symptoms following the YMCA's first attempt at accommodation. Br. of App. at 31-32.

Fourth, the YMCA failed to attempt additional efforts at accommodating Hartman. Where an employer fails to accommodate an employee, and the employee proposed accommodations that were not implemented, the employer has the burden of demonstrating that the requested accommodation would have caused undue hardship. *Easley v. Sea-Land Serv., Inc.*, 99 Wn. App. 459, 467, 994 P.2d 271, *review denied*, 141 Wn.2d 1007, 16 P.3d 1263 (2000). Limited or temporary attempts at accommodation do not excuse an employer from demonstrating that alternate proposed accommodations were an undue burden. *Erwin v. Roundup Corp.*, 110 Wn. App. 308, 40 P.3d 675 (2002).

The YMCA has not responded to Hartman's argument on appeal that it failed to provide evidence that her requested accommodation was an undue burden to the YMCA. Therefore, it apparently concedes the issue.

See In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (“Indeed, by failing to argue this point, respondents appear to concede it.”). However, at the very least, this is a question for the jury.

(b) Hartman Did Not Resign Before the YMCA Could Accommodate Hartman’s Disability

Hartman repeatedly sought accommodation for her substantially limiting impairment. Hartman demonstrated in her opening brief that (1) she repeatedly complained to the YMCA about experiencing limiting symptoms she attributed to the YMCA’s HVAC units and (2) she provided the YMCA with her medical diagnosis and doctor’s recommendations for accommodation. Br. of App. at 27-29. Hartman provided notice of her substantially limiting symptoms as early as June 2012. *Id.* She continued to complain in the months of July, August, and September 2012. *Id.*

In response, the YMCA states that it was not able to accommodate Hartman because she “quit” before the YMCA could exhaust all accommodation efforts. Br. of Resp. at 21. For two reasons, the Court should reject the YMCA’s argument.

First, the YMCA has not offered any evidence to establish what it did to “exhaust all efforts to try and fix the problem” or “accommodate”

Hartman while she was employed by the YMCA. Br. of Resp. at 21. Instead, the YMCA states only that “maintenance of the equipment and inclusion of outside fresh air appeared to clear up the situation.” *Id.* However, the “maintenance of the equipment” and “inclusion of outside fresh air” occurred *after* the YMCA constructively discharged Hartman; it similarly occurred more than *three* months after Hartman first complained to the YMCA about the HVAC units and poor air quality in her classroom. CP 338-39. Far from demonstrating that the YMCA exhausted all efforts to accommodate Hartman, the evidence shows that the YMCA ceased all attempts at accommodation after its first attempt proved unsuccessful.

Second, Hartman has provided sufficient evidence to demonstrate that she did not voluntarily “quit” her job but was forced to leave her position due to the YMCA’s failure to timely accommodate her disability. Br. of App. at 45-49. A reasonable jury could conclude from the YMCA’s failure to take *prompt* remedial measures in response to Hartman’s multiple requests for accommodation, as well as its complete failure to communicate with Hartman about what measures were being taken, created intolerable working conditions that forced Hartman to resign her position. *Hotchkiss v. CSK Auto Inc.*, 918 F. Supp. 2d 1108, 1122-23 (E.D.

Wash. 2013). The YMCA's contention that Hartman suddenly "quit" before it could accommodate her, in the *three* months in which she sought accommodation, is unavailing and not supported by any evidence in the record. At the very least, a jury should decide whether Hartman was forced to leave her position due to the YMCA's failure to promptly accommodate her or whether she voluntarily quit her job.

(4) Material Issues of Fact Exist As To Whether The YMCA Retaliated Against Hartman

Hartman similarly demonstrated that the YMCA retaliated against her for seeking accommodation. Hartman demonstrated that (1) she requested a reasonable accommodation for her disability, (2) the YMCA subjected Hartman to several erroneous disciplinary reprisals, and (3) the YMCA's disciplinary reprisals were causally connected to Hartman's request for accommodation. Br. of App. at 35-41.

In response, the YMCA asks this Court to conclude that, *as a matter of law*, Hartman did not engage in protected activity when she requested accommodation, Hartman was not subject to adverse employment actions, and Hartman cannot establish causality between the YMCA's adverse employment actions and Hartman's request for accommodation. Br. of Resp. at 23-30. The Court should reject each of the

YMCA's arguments.

First, the YMCA has offered no evidence to support its argument that Hartman did not engage in protected activity when she requested accommodation for her disability. Apparently aware of the weakness in its argument, the YMCA alternatively argues that Hartman's request for accommodation was frivolous because the YMCA was working to repair the HVAC units. Br. of Resp. at 23. The YMCA's attempt at repairing the HVAC units, far from demonstrating that Hartman's request for reasonable accommodation was frivolous, supports Hartman's argument that her request was, in fact, reasonable. Notwithstanding, even if this Court were to conclude that Hartman's request for accommodation was invalid, she still engaged in protected activity for seeking accommodation even if accommodation was not appropriate. *Cf. Hansen v. Boeing Co.*, 903 F. Supp. 2d 1215, 1218 (W.D. Wash. 2012) (Taking adverse action against an employee for requesting a disability accommodation is itself a form of discrimination).

Second, the YMCA has offered no evidence in support of its argument that it did not subject Hartman to adverse employment actions. While the YMCA admits that it subjected Hartman to discipline, changes

its standard payment policies and procedures as they relate to child registration at the CDC. Br. of App. at 41-45. The YMCA's attempt to diffuse this evidence, by offering an alternative interpretation, aptly demonstrates why Hartman's retaliation claim should not have been decided on summary judgment.

(5) Material Issues of Fact Exist As To Whether the YMCA Constructively Terminated Hartman

Hartman demonstrated that the YMCA constructively terminated her employment by making her work conditions so intolerable that she had no choice but to resign. Br. of App. at 45-48. She also pointed to evidence in the record that the YMCA's claim that she voluntarily quit her job is not credible. *Id.*

The YMCA responds that it did not create intolerable working conditions that forced Hartman to resign because (1) Hartman was not that sick (Br. of Resp. at 33), (2) the YMCA was working on the problem (Br. of Resp. at 34), (3) no other staff members quit (Br. of Resp. at 34), and (4) the YMCA's discipline of Hartman was justified (Br. of Resp. 35-39). For four reasons, the Court should reject the YMCA's arguments.

First, the YMCA fails to provide any evidence (e.g., medical records, expert opinions, witness declarations), other than its own

speculation, that Hartman was not that sick. To the contrary, the evidence provided by Hartman shows that she suffered “exposure to environmental toxic substances,” “upper respiratory tract hypersensitivity reaction, site unspecified,” inflammation and conjunctivitis, erythema and hyperemia, and inflammation and lesions in her throat while working at the CDC. CP 373, 376. The record also demonstrates that Hartman’s condition was caused by exposure to toxins in her workplace. *Id.* By deliberately creating conditions so intolerable as to make Hartman so ill that she had to leave work permanently is functionally the same as forcing her to quit. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 785, 249 P.3d 1044 (2011).

Second, the YMCA fails to provide any evidence (e.g., work orders, receipts for payment on services rendered, declarations, etc.) that the YMCA was “working” on the HVAC issues at any time after Hartman disclosed her medical diagnosis and renewed request for accommodation through her constructive termination several weeks later. At best, the YMCA can demonstrate additional work on the HVAC units at the CDC weeks after Hartman was forced to resign. The YMCA offers no explanation for why it was not able to perform this work in June 2012, when it first became aware of issues related to the HVAC units and

chronic and unexplained illnesses attributed to those units by staff and parents. The YMCA similarly offers no explanation for why it was not able to perform this work after Hartman disclosed her medical diagnosis and renewed request for accommodation in August 2012. A reasonable jury could conclude from the YMCA's failure to take *prompt* remedial measures in response to Hartman's request for accommodation created intolerable working conditions that forced Hartman to resign. *Hotchkiss v. CSK Auto Inc.*, 918 F. Supp. 2d 1108, 1122-23 (E.D. Wash. 2013).

Third, there is no evidentiary support for the YMCA's claim that no other employee resigned due to the intolerable working conditions. The evidence provided by Hartman, however, establishes that several staff members found the work environment at the CDC to be intolerable. CP 322-25. Staff members complained to the YMCA about chronic and unexplained symptoms such as headaches and bloody noses, as well as concerns about not being able to seek medical attention due to financial constraints. *Id.* They similarly expressed concern and fear for their own safety as well as the health and safety of the infant children attending the CDC. *Id.* A reasonable jury could conclude from the evidentiary record that the YMCA created working conditions so intolerable that a reasonable

person would have similarly felt compelled to resign.

Fourth, the YMCA cannot prove that its discipline of Hartman did not create intolerable working conditions. While the YMCA concedes that it subjected Hartman to discipline, it alleges that its discipline did not rise to the level of creating intolerable working conditions. In support of its argument, the YMCA relies on *Sneed v. Barna*, 80 Wn. App. 843, 912 P.2d 1035 (1996) for the proposition that job transfers and the assignment of unfavorable work duties do not give rise to intolerable working conditions. Br. of Resp. at 32. The YMCA's reliance on *Sneed* is misplaced.

In *Sneed*, the plaintiff alleged statutory violations of due process and constructive discharge stemming from a job transfer that resulted in the assignment of less desirable job duties. *Sneed*, 80 Wn. App. at 843. The *Sneed* plaintiff did not, however, allege violations of the WLAD or retaliation for seeking a reasonable accommodation related to health and safety concerns predominating in her employer's work environment. This case is unlike *Sneed* and more similar to *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 121 Wn. App. 295, 318, 88 P.3d 966 (2004), where an employee was made the subject of a retaliatory campaign to end his

employment after he reported several safety and health violations in the workplace. *Id.*

Like the employee in *Korlund*, Hartman reported safety and health violations in her workplace and was immediately subject to erroneous disciplinary reprisals as a result thereof. In support of Hartman's argument, she presented evidence of suspicious timing: that the YMCA's sudden doubts about her disability status coincided with Hartman placing her concerns and requests for accommodation in writing to the YMCA. CP 316, 320. Following Hartman's attempts at obtaining reasonable accommodation, several other employees similarly wrote letters to the YMCA about chronic and unexplained illnesses attributable to the HVAC units. CP 322-25.

The YMCA was not happy about Hartman's persistent efforts to obtain accommodation. Not only did the YMCA instruct Hartman to stop discussing HVAC issues, but it similarly threatened to terminate her employment if she did anything "disrespectful" in the future. CP 401-02, 465-66. The YMCA then altered Hartman's work schedule, removed job duties, solicited negative feedback, and removed Hartman's child from daycare – all within a matter of weeks of Hartman providing the YMCA

with her medical diagnosis and renewed request for accommodation. Br. of App. at 10-15. By punishing Hartman for requesting accommodation instead of providing Hartman with an accommodation, the YMCA made working conditions intolerable and, ultimately, forced Hartman's resignation. *Korslund*, 121 Wn. App. at 318.

In short, there is ample evidence to support Hartman's theory that the YMCA constructively discharged her employment by making her working conditions so intolerable that she had no choice but to resign.

C. CONCLUSION

As Hartman and the YMCA's briefs amply demonstrate, this case is rife with competing evidence and contradictory theories about whether the YMCA accommodated Hartman and whether it retaliated against her for her protected activity. This case was not appropriately dismissed as a matter of law; the trial court erred.

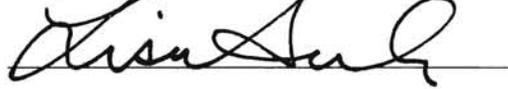
This Court should reverse summary judgment on Hartman's claims and remand the case for trial. Costs on appeal, including reasonable attorney fees should be awarded to Hartman.

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DATED this 5th day of November, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa A. Burke", written over a horizontal line.

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