

NO. 72259-0-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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CYMA G. TUPAS, a/k/a CYMA G. GREGORIOS

Plaintiff/Appellant

v.

STATE OF WASHINGTON d/b/a DEPARTMENT OF ECOLOGY

Defendant/Respondent

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REPLY BRIEF OF PLAINTIFF CYMA TUPAS

King County Cause No. 12-2-36393-5 SEA

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## **I. SUMMARY OF ARGUMENT**

The Response of the Department of Ecology (“the Department”) is replete with mischaracterizations and misstatements and is, in large part, nonresponsive to the issues raised by Appellant. Rather than address the issue on appeal concerning the trial court’s failure to enter findings and conclusions sufficient to support its order reducing lodestar fees, the Department instead opted to re-litigate the issues presented to the trial court. Most of the Department’s argumentative assertions were not adopted or addressed in the court order. The Department also attempts to cite as authority assertions in the fee declarations, but the trial court likewise did not incorporate these assertions into its order.

The Department further does not address any argument to the Appellant’s contention that the trial court erred by applying an across-the-board cut to the out-of-pocket costs incurred by Plaintiff in the presentation of her case to the jury and necessitated by the Department’s defense. Finally, the Department’s Response simply ignores the fact that by including the State of Washington in its legislative definition of “employer” in the WLAD, thereby subjecting the State to all available remedies thereunder, the State waived its sovereign immunity and accordingly can be obligated to pay prejudgment interest on the economic damages awarded by the jury herein.

## II. COUNTERSTATEMENT TO THE DEPARTMENT'S INTRODUCTION

The Department's statement that there were "more than a dozen claims" in this case is simple hyperbole. (Br. p. 1).<sup>1</sup> In her original complaint, Plaintiff initially brought two claims: national origin discrimination (Count One) and retaliation (Count Two). The Amended Complaint withdrew the national origin discrimination claim and added two claims: disability discrimination (Count One) and failure to accommodate (Count Two) (CP 745).<sup>2</sup> Thus, as described by the court below, "three claims [were] presented to the jury." (CP 691, ¶ 4).

Nor is the Department's statement that the trial court "reduced the 842,441.48 fee request by 25%" accurate. (Br. p. 1). The trial court reduced Ms. Tupas's lodestar fee request of \$543,695 by 25% and denied in totality her requested fee enhancement of \$271,847.50. (CP 691-91). Equally without record support is the Department's assertion that any different award of fees would have been a "windfall." There is simply no such finding by the trial court.

Many other assertions by the Department are also without support in the trial court's order awarding fees. Although the Department routinely refers to this case as "routine," nothing could be farther from the truth.

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<sup>1</sup> The term "Br." with a number there-following is a reference to the Brief of Respondent.

<sup>2</sup> The retaliation claim was retained and renumbered as Count Three (CP 745).

Several factors combined to make this case particularly difficult and the Department's assertion of this being a "routine" employment case is defied by the court record. Similarly, the court below made no finding that the work of Ms. Tupas's lawyers was "duplicative or unnecessary." To the contrary, the trial court expressly concluded that the "hours expended on this case by Plaintiff's attorneys and their paralegal are appropriate and reasonable..." (CP 691, ¶ 4). And although the Department makes an oblique allegation about the hourly rates of Plaintiff's lawyers, the trial court expressly found that the "hourly rates of Plaintiff's counsel are reasonable and within market rate." (CP 690-91).<sup>3</sup>

Finally, the Department's description of its defeat at trial by Ms. Tupas as "extremely limited success" defies logic and conveniently overlooks not only the magnitude of the monetary award, but also the considerable equitable relief that Ms. Tupas obtained: additional PERS Service Credit, modification of her personnel records to correct the stigma of "termination," the right to state that "she has never been involuntarily terminated," and reversal of the Department's decision that Ms. Tupas is "ineligible for rehire." (Order on Plaintiff's Motion for Injunctive Relief,

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<sup>3</sup> The trial court also rejected that Department's claims of block billing, noting that "many of the examples raised by the Department as examples of "block billing" are fairly specific." (CP 692).

Sub. Nom. 159C).<sup>4</sup> These efforts to recast the record below are ineffective, immaterial to appellate review and only serve to bolster the position of Ms. Tupas on appeal.

### III. ARGUMENT

#### A. Plaintiff Was the Prevailing Party Under WLAD

RCW 49.60, Washington's Law Against Discrimination, provides that if a plaintiff prevails, s/he may recover reasonable attorney's fees. There can be no question that Plaintiff is the prevailing party in this case. The jury ruled in her favor and awarded substantial damages. *See: Blair v. Wash. State University*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987), *citing Anderson v. Gold Seal Vineyard, Inc.*, 81 Wn.2d 863, 505 P.2d 790 (1985); *see also: Moritzky v. Herberlien*, 40 Wn. App. 181, 183, 697 P.2d 1023 (1985); *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007); *accord: Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983). Thus, as the prevailing party, Plaintiff is entitled to a reasonable fee.<sup>5</sup>

In determining what constitutes a reasonable fee award, the trial court should have been mindful that RCW 49.60.030, the attorney's fees

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<sup>4</sup> For the Court's convenience, the Order is set forth in the Appendix hereto.

<sup>5</sup> As noted in Appellant's opening brief, although the trial court's fee order described plaintiff as the prevailing party only with respect to her accommodation claim, the settled law in Washington establishes that the plaintiff is a prevailing party in a WLAD action if she "succeeds on any significant issue which achieves some benefit the party sought in bringing suit." *Blair v. Wash. St. Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987). Thus, Plaintiff was the prevailing party in this action, and the court's description is inaccurate.

provision, is “to be construed liberally in order to encourage enforcement of the Law Against Discrimination.” *Blair, supra* at 572. *See also*: RCW 49.60.020.<sup>6</sup> As the Washington Supreme Court has noted, in bringing an employment discrimination action, a prevailing party acts as a “private attorney general: by enforcing a public policy of substantial importance.” *Allison v. Seattle Housing Authority*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991). The importance of a fully compensatory award of fees in a WLAD case was described in *Perry v. Costco*, 123 Wn. App. 783, 809, 98 P.3d 1264 (2004) where the Court stated that cases advancing civil rights have a public benefit far beyond “pecuniary considerations only.” *Accord: Hume v. American Disposal Co.*, 124 Wn.2d 656, 675, 880 P.2d 988 (1994) (the legislative goal in enacting the fee-shifting provisions of the WLAD was “to enable vigorous enforcement of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations”); *see also Martinez v. City of Tacoma*, 81 Wn. App. 228, 914 P.2d 86 (Div. II, 1996).

By prevailing in her case, like Mr. Martinez, Ms. Tupas acted as a private attorney general and advanced the policies of the WLAD. She should have been entitled to a fully compensable fee award. Notably, when interpreting fee provisions in statutes other than WLAD, such as the

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<sup>6</sup> “The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof...”

Consumer Protection Act, RCW 19.86, Washington courts unequivocally have held that an attorney's fee award "is not unreasonable merely because it exceeds the damages awarded" in a particular case. *Keyes v. Ballinger*, 31 Wn. App. 286, 297, 640 P.2d 1077 (Div. I, 1982). *See also: St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wn. App. 653, 654, 656 P.2d 1130 (Div. III, 1983) (the court vacated a treble damages award of \$1,000, but sustained the attorney's fees award of \$5,000 holding that "attorney's fees may be awarded independently, without a showing of actual monetary damages."); *Tallmadge v. Aurora Chrysler Plymouth*, 25 Wn. App. 90, 655 P.2d 1275 (Div. I, 1979) (no damages; fees awarded).

Similarly, in interpreting the federal attorney's fee statute, 29 U.S.C. §1988, the U.S. Supreme Court has also rejected the argument that fees should be limited according to the extent the outcome of litigation was deemed successful. *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686 (1986). *See also: Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983); *McCann v. Coughlin*, 698 F.2d 112 (2nd Cir. 1983). Here, notwithstanding the losing party's protestations, Ms. Tupas acquired substantial relief, both monetary and equitable, and

clearly was the prevailing party entitled to fully compensatory fees and costs.<sup>7</sup>

**B. The Department's Defenses Required Investment of Substantial Time and Intertwined the Claims**

In its Answer to Plaintiff's Amended Complaint in which all three trial claims were set forth, the Department denied each of them (CP 762-65). Thus, Plaintiff had to engage in significant discovery to refute the Department's defenses and to survive summary judgment in order to get the case to trial. The gravamen of the Department's defenses were that Ms. Tupas could not be accommodated because she was unable to follow directions from her supervisor and that circumstance was not due to any disability of which the Department was aware. (*cf.* CP 751, ¶25 with CP 763, ¶25).<sup>8</sup> Since the Department denied that its supervisors were aware of Plaintiff's emotional disabilities and further denied any requirement to have initiated the interactive process in 2010, Plaintiff had to pursue discovery of her supervisors Iyer, Shervey and Fitzpatrick to determine what and when each knew of her disabilities, and also of her co-workers to challenge the employer's removal of Ms. Tupas from the workplace. (*cf.* CP 754 ¶31 with CP 763, ¶31) While some of such work addressed the

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<sup>7</sup> The Department refers to the 25% reduction in fees as "a small amount." Twenty-five percent of \$543,695, the lodestar amount, is \$135,924 – hardly a small amount.

<sup>8</sup> For the Court's convenience, the Amended Complaint and Answer thereto are contained in the Appendix for Appellant's Opening Brief.

retaliation claim, the same work produced evidence of the Department's failure to accommodate. (See trial exhibits 89, and 233).<sup>9</sup>

These facts clearly refute the Department's assertion that the "accommodation interactive process took place during a finite period of time – June 25, 2012 through October 15, 2012." (Br. p. 9). Instead, reports of Ms. Tupas's disabling conditions and the resulting obligation of the Department to initiate the interactive process actually began as early as November 2007, and certainly as of 2010. Plaintiff was entitled, if not required, to engage in discovery and present trial testimony about the duration of Ms. Tupas's disability and its interrelationship with the Department's defense that Ms. Tupas could not be accommodated.

The Department never wavered in its steadfast defense of its termination decision. Through the conclusion of trial, the Department argued the propriety of its decision to "disability separate" Cyma Tupas, that co-workers were concerned about her behaviors in the workplace, and that no duty to accommodate existed because she could not perform the essential job functions. (Br. p. 4-5). The very nature of the Department's defense theories necessitated that Plaintiff put on evidence to prove the employer's prior knowledge of her disability, its failure to accommodate

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<sup>9</sup> The trial exhibits are set forth in the Appendix following p. 24 of this brief.

her disability and the relatedness of her workplace behaviors to the disability itself.

A jury is entitled to view discipline for disability-related conduct either as discrimination or a failure to accommodate. *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1094-95 (9th Cir. 2007). Similar to the circumstances in *Gambini*, the Department alleged that Cyma Tupas had demonstrated irritability, erratic emotions and frightened her co-workers. Accordingly, Plaintiff both deposed and called a series of witnesses to testify about her job performance, prior conduct in the workplace and the lack of any meaningful accommodations. The following witnesses provided testimony on these issues: Iyer, Abassi, Burgess, Drabek, Shervey, Holton, Hargrove, Tran, Ortiz, Shoblom, and Evander. It is clear why the Department purposely understated how the witnesses related to Plaintiff's success at trial; its own defense theories required that Plaintiff broaden the presentation of evidence to demonstrate a long-term failure to accommodate, all of which pre-dated "a finite period of time" in the latter part of 2012. (Br. p. 9).

Significantly, none of this is reflected in the trial court's order on fees and, therefore, it is impossible to discern whether the trial court considered any of this evidence in deciding to reduce Plaintiff's fees by 25%. (CP 691). In fact, as argued in Appellant's opening brief, there is nothing in the

trial court's order that would allow this Court to understand which claim or claims the trial court considered sufficiently unrelated to the successful claim, or to enable it to evaluate such a wholesale reduction of fees.

**C. The Department's Brief Disregards the Appellate Issue Regarding the Flaws in the Order of the Trial Court**

Assignment of Error No. 1 states:

The trial court erred by reducing Plaintiff's attorney's fees and costs by twenty-five percent without establishing the specific basis for the reduction.

(App. Br. p. 1). The appellate issue then is not whether there were unsuccessful claims for which fees would not be awarded, but rather, whether the trial court erred in failing to identify *which* unsuccessful claims it found did not encompass a "common core of facts and related theories" to the failure to accommodate claim and *how* the facts and theories involved in those claims were wholly distinct from the successful failure to accommodate claim. The trial court's failure to detail the basis for its reduction inhibits meaningful review of the trial court's conclusions and necessitates a remand to the trial court. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). As in *Mahler*, the trial court's order contains nothing to resolve the foregoing issues.

Nothing in the Department's brief addresses those failings. The Department does not explain how the trial court's order demonstrates an

“articulable ground” for its arbitrary 25% reduction of both fees and costs, or how this Court can discern which claim or claims could be considered “unsuccessful” and sufficiently discrete as to justify the trial court’s decision. Instead, it spends 15 pages arguing that Ms. Tupas achieved only “limited success” (Br. pp. 17-22), that Plaintiff’s fees should have been segregated by claim (Br. pp. 18, 27-30), and that the disability discrimination claim did not share a common core of facts or legal theories (Br. pp. 25-30). Such arguments miss the mark, are wholly inconsequential and not properly before this Court.

While the Department was free to make such arguments in the trial court, in this Court it needed to demonstrate that the trial court’s order is sufficiently detailed and complete to sustain the 25% percent reduction. In other words, the Department needed to establish that the trial court “showed its work” so that this Court could discern which claims were “wholly distinct from any successful claim in both law and fact.” *Johnson v. State*, 177 Wn. App. 684, fn. 6, 313 P.3d 1197 (Div. I, 2013); *accord*, *Hensley v. Eckerhart*, 461 U.S. 424, 431, 103 S.Ct. 1933 (1983). It did not do so, and could not do so, because the trial court had not done so.

Instead, the Department's brief is replete with assertions that were both contested and not otherwise adopted by the trial court.<sup>10</sup> Citing to self-serving declarations it submitted from defense attorney Michael Reilly and others, the Department claims, *inter alia*, that the majority of the evidence pertained to national origin discrimination and retaliation (Br. pp. 9-11); that this was a "routine employment case" (Br. p. 16); that the fee request was "inflated" (Br. p. 17); that a "significant portion of the attorney fees could easily have been segregated by Tupas" (Br. p. 20); that Plaintiff's claims "involved different witnesses, different documents and encompassed different time periods: (Br. p. 22); that "91 percent of Tupas's amended claims were unsuccessful and thus Tupas enjoyed a mere 9 percent success rate" (Br. p. 26, fn. 4); and that "more than 88 percent of the Lonquist Firm's deposition time was spent on dismissed or unsuccessful claims." (Br. p. 27). These conclusory and unsupported assertions cite to the Declaration of Michael Reilly (CP 818 - 864), none of which were adopted by the trial court in its order awarding fees.

Indeed, most of the assertions in Mr. Reilly's Declaration were rejected by the trial court, thereby suggesting that nothing in the trial court's order is premised upon his unsubstantiated assertions. The order

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<sup>10</sup> The Department did not appeal.

contains a number of explicit findings that contradict Mr. Reilly's contentions:

2. The hourly rates of Plaintiff's counsel are reasonable and within the market rate;
3. The hourly rate charged by the Plaintiff's law firm for its paralegal ... is reasonable and within the market rate;
4. The hours expended on this case by Plaintiff's attorney and their paralegal are appropriate and reasonable;...
9. The quality of Plaintiff's attorneys [work] on this case was excellent;
13. Plaintiff's costs are reasonable...<sup>11</sup>

(CP 690-92). For those reasons, this Court should disregard the Department's arguments attempting to recast and reform the trial court's erroneous and insufficient order on fees.

#### **D. The Department's Cases Are Inapposite**

The Department cites *Kastanis v. Educ. Emp. Credit Union*, 122 Wn.2d 483, 502, 859 P.2d 26 (1994) for the proposition that "it is error to award a discrimination plaintiff all of her attorney's fees when she prevailed on only one of four claims." (Br. p. 19). But *Kastanis* did not involve claims all brought pursuant to RCW 49.60 with its broad statutory mandate of liberal construction and its policy of serving as a private attorney general to enforce important civil rights. The unsuccessful claims

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<sup>11</sup> Because the Department did not appeal, these findings are the law of the case.

in *Kastanis* were purely individual rights – wrongful discharge and negligent and intentional infliction of emotional distress, and held none of the policy reasons underlying recovery of fees for violations of WLAD. *Id.* at 487.

Another case cited by the Department, *Absher Const. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995), is not a WLAD case and was an appeal from a summary judgment on very limited facts. Although it involved a fee award, the type of case, sounding in contract, demanded none of the considerations applicable to a WLAD case.

Next the Department cites *Johnson v. Dep't of Transp.*, 177 Wn. App. 684, 693, 313 P.3d 1197 (Div. I, 2013) as supportive of its case. It is not, for two reasons: 1) the unsuccessful claim was a matter brought in an entirely different forum – an internal administrative proceeding; and 2) the trial court made specific findings that the administrative case did not involve a core of facts and legal theories common to both the administrative hearing and the court case. *Id.* at 693. Here, the trial court committed reversible error by reducing a prevailing plaintiff's fees without having made such specific findings. A closer analysis of *Johnson* reveals that it is actually more supportive of Plaintiff's position on appeal; despite the segregation of fees related to the administrative claim and work performed after the acceptance of offer of judgment, the court

awarded a multiplier due to the risk and difficulties incumbent with plaintiff's mental health condition, in addition to awarding all case costs, save for one exception. *See Johnson*, 177 Wn. App. at 688-91. Not only did the employer "disability separate" Ms. Johnson, but the case is also similar in the failure to accommodate a mental disability. *Id.*

Finally, *Brand v. Dep't of Labor & Indus.*, 91 Wn. App. 280, 295, 959 P.2d 133 (1998), *rev'd*, 139 Wn.2d 659 (1999) supports the Appellant's, not the Department's position. In the trial court, the *Brand* plaintiff claimed that she was totally disabled in accordance with the Industrial Insurance Act (IAA), RCW Title 51. Alternatively, she claimed that injuries to her knee and back were more severe than the Department of Labor & Industries and the Board of Industrial Insurance had found. The jury rejected all but one of her claims and increased the percentage of her injury from category one to category two, resulting in a one-time benefit of \$3,120. Success on her primary claim of total disability would have resulted in an award of \$113,583 and additional time loss compensation. Notwithstanding her limited success, the trial court awarded attorney's fees for legal services performed on all the issues before the court. When the

Court of Appeals reversed the attorney fee award,<sup>12</sup> plaintiff successfully petitioned the Washington Supreme Court.

In an *en banc* opinion, the Supreme Court held that “Central to the calculation of an attorney fee award ... is the underlying purpose of the statute authorizing the attorney fees. ... Given that attorney fees statutes may serve different purposes, *it is important to evaluate the purpose of the specific attorney fees provision and to apply the statute in accordance with that purpose.*” *Brand*, 139 Wn.2d at 667 (*emphasis supplied*). The *Brand* Court then identified the purpose of the fee provision as being “to ensure adequate representation for injured workers.” *Id.* It continued:

Consistent with the legislative intent ... the [act] should be given a liberal interpretation. The act is remedial in nature and is to be liberally applied to achieve its purpose. ...

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Nothing in the language of RCW 51.52.130 suggests that the award of attorney fees is dependent upon a worker’s overall success ... Nor is there any evidence that the Legislature intended to limit attorney fees to those attributable to successful claims, or to reduce the award when the worker receives little overall financial relief.

*Id.* at 668-69. Like the IIA, WLAD’s provision authorizing recovery of attorney fees has a broad remedial purpose of enabling injured workers to secure adequate legal representation. Like the IIA, WLAD is “remedial in nature” and must be given a liberal interpretation. Indeed, since the liberal

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<sup>12</sup> 91 Wn. App. 280, 959 P.2d 133 (1998).

interpretation is expressly written into WLAD, rather than relying on judicial interpretation like the IIA, WLAD is *a fortiori* to IIA. And like IIA, nothing in RCW 49.60.030 suggests that the “Legislature intended to limit attorney fee to those attributable to successful claims.” *Id.* at 669.

The *Brand* Court then discussed *Hensley*, noting that the U.S. Supreme Court had contrasted cases in which plaintiffs bring different claims based on different facts and legal theories from those cases in which the plaintiff’s claims are related to the extent that counsel’s work on the unsuccessful claims can be deemed to have been “expended in pursuit of the ultimate result achieved.” *Id.* The *Brand* Court expressly rejected the contention that an award of attorney fees should be limited to Brand’s successful claims, holding that “[a]lternative theories regarding the nature and extent of the worker’s injury cannot be said to be unrelated, inseparable claims.” *Id.* at 671-73.

This same conclusion is warranted here under WLAD. Although the worker’s “injuries” described in *Brand* are physical and economic, rather than emotional and economic, they are all injuries to workers protected by strong statutory policy. The attorney fee provisions of both IIA and WLAD have the same remedial basis: to ensure adequate representation to eliminate the injury inflicted upon workers by their employers. The *Brand* case stands for the proposition to award a plaintiff like Ms. Tupas the full lodestar

amount, and that a 25% reduction of this award constitutes an abuse of discretion by the trial court.

**E. The Trial Court’s Denial of a Multiplier Was Based Upon an Erroneous Finding**

The trial court denied Ms. Tupas’s request for a multiplier because it ruled that “[t]his was not a particularly high risk claim for plaintiff’s counsel to take on.” (CP 692 ¶12). In its brief, the Department adds the following language to that of the trial court: “because of many factual concessions made by the Department.” (Br. pp. 30-31). No such finding was made by the trial court.

Our Supreme Court has held that in determining whether a contingency multiplier is warranted, the trial court “must assess the likelihood of success at the outset of the litigation.” *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 598-99, 675 P.2d 193 (1983). The trial court disregarded that mandate, opting instead to rely on factors that occurred late in the case, such as “the Department’s concession that Ms. Tupas was disabled and that she was terminated because of her disability.” (CP 692).

But that was not the case at the time Ms. Tupas’s lawyers agreed to take her case. Upon initial representation, the case appeared primarily to be a failure to promote case based on national origin. Failure to promote

cases are notoriously difficult to win. The difficulty is all the more apparent when considering the Department's description of the then-known facts, that Ms. Tupas had "filed several complaints against her supervisor, Gerald Shervey, claiming that she had been subjected to his discriminatory and retaliatory behavior." (Br. p. 3). As the Department's brief continues:

The allegations were vague and did not specify the basis for the discrimination, although she later claimed it had been because of her national origin. The Department investigated each of Tupas's complaints, and each ensuing investigation determined that Tupas's allegations were without basis.

(Br. p. 3). The Department also accused Ms. Tupas of being "paranoid." Unbeknownst to the Department at that time, but known to the Plaintiff and her attorney, was the fact that Ms. Tupas earlier had been diagnosed as having "paranoid tendencies." Despite these highly risky factors, Ms. Lonquist agreed to undertake representation of Ms. Tupas.

Soon the case morphed into a disability discrimination/failure to accommodate case, despite the difficult fact that Ms. Tupas adamantly denied that she was disabled. As described in the Department's brief, additional risk factors developed:

In addition to investigating Tupas's complaints, because of Tupas's inappropriate behavior on several separate occasions, Human Resources conducted an investigation focused there. CP at 5, 176-77. During the course of this investigation some employees stated that they were concerned that Tupas's behavior

was disruptive to the workplace, and some expressed concern for their safety.

(Br. pp. 3-4).

These were the circumstances when Ms. Lonquist undertook this difficult and risky case.<sup>13</sup> At that time, the Department had made no “concession” that Ms. Tupas was disabled. To the contrary, the Department disclaimed any knowledge of a disability. Also at that time, the Department had neither terminated Ms. Tupas, nor “conceded” that she would be terminated due to a disability – the factors cited by the trial court for the conclusion that the case was “not a particularly high risk claim.” (CP 692). Other factors added to the high risk of the case at its outset. For example, in its Answer, the Department denied virtually all of the allegations in the Complaint and asserted 11 affirmative defenses, including failure to state a claim and describing the Complaint as “frivolous.” (CP 760).

Eleven months later, in its Answer to the Amended Complaint, the Department restated and retained its original 11 affirmative defenses. (CP 760). And as late as March 2014, on the eve of trial, the Department still viewed the case as frivolous and meriting only a nuisance value settlement

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<sup>13</sup> Adding to the risk were the facts that 1) Ms. Tupas had denied having a disability, 2) that English was not her native language, and 3) the employer and co-workers alleged that Plaintiff presented a danger to the workplace. Since she would serve as the primary witness in the case, these factors exacerbated the risk.

offer. (CP 632, 637). Nonetheless, the trial court held that “this was not a particularly high risk claim for plaintiff’s counsel to take on.” (CP 692).

The finding by the trial court is erroneous and violates the mandate of the *Bowers* Court requiring finding be based upon the risk at the outset of the case. *Bowers*, 100 Wn.2d at 598-99. In the words of one expert:

Disability discrimination failure to accommodate cases rarely have clear, objective evidence. They are extremely fact intensive, and as is demonstrated in the length of trial, the number of potential witnesses (28 listed by plaintiff), the number of witnesses who actually testified at trial, the volume of potential exhibits (438 on the joint statement of evidence), and the number of depositions and witness interviews. The work environment and all communications must be recreated for the trier of fact, along with interpretation and nuance of all the evidence. For these kinds of cases, the risk to plaintiffs and plaintiffs’ counsel is increased, particularly where a large corporation or governmental defendant is challenged by one lone employee. Many attorneys are not willing to assume those risks, being aware of the substantial resources available to defendants, the burdens of broad discovery and geographical location of documents and witnesses.

The risk of being able to prove liability as measured at the outset of the case was high.

(Declaration of Victoria Vreeland, CP 472-74).<sup>14</sup> The Department presented no evidence to rebut the expert’s assessment of the case as high risk. Although the trial court had such information before it, there is nothing in its order regarding a multiplier to establish that it even considered the expert’s opinion – another flaw in the trial court’s order.

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<sup>14</sup> See also, Declaration of John P. Sheridan, CP 491-505, at 504.

**F. In The Absence of a Response Regarding the Reduction in Costs, the Court Should Uphold the Appellant’s Position That the Trial Court Erred in Applying a 25% Cut to Plaintiff’s Costs**

Ms. Tupas relies on the argument made on pp. 36-37 of her opening brief, to which the Department made no response. A review of the cost accounting submitted to the trial court discloses no cost item that was separately and distinctly attributable only to an unsuccessful claim. There was no justification for the trial court’s reduction.<sup>15</sup>

**G. The Department’s Argument Against Pre-Judgment Interest Misses the Mark**

The Department’s reliance on *Foster v. Dep’t of Transp.*<sup>16</sup> is misplaced. In that case, there was no applicable statute in which the State had waived its sovereign immunity. But here, the Washington Legislature waived sovereign immunity in WLAD by expressly including the State in

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<sup>15</sup> In the trial court, Defendant contested only one specific expense: the deposition cost for Lori LeVander, who appeared as a defense witness at trial. Ms. LeVander’s testimony supported the defense that Ecology had a basis for Ms. Tupas’s disability separation because of her behavior in the workplace. Her deposition was therefore necessary in order to probe the scope of her knowledge about issues in this case, including the “successful claim.” Having challenged only one specific item, Defendant then asserted that there should be a percentage cut in Plaintiff’s costs. Defendant cited no case authority for its proposal that costs be cut on a percentage basis.

*Bowers* controls and precludes a percentage cut of costs expended. If the trial court wished to make reductions, those could only have been made on an item-by-item basis. Any other treatment of costs would contravene the Washington Law Against Discrimination which permits liberal recovery of out-of-pocket litigation expenses. *See*: RCW 49.60.030. In reviewing this provision, the *Blair* court expressly authorized a liberal recovery of the out-of-pocket litigation expenses that plaintiff, like Ms. Tupas, incurred in prosecution of her case in order to encourage private enforcement of the Law Against Discrimination. *Blair*, 108 Wn.2d at 570.

<sup>16</sup> 128 Wn. App. 275, 279, 115 P.3d 1029 (2005).

the definition of “employer” and thereby subjecting it to liability for damages and all other relief available under that remedial statute. RCW 49.60.040(11).

Nothing in *Maziar v. Dep’t of Corrections*<sup>17</sup> derogates from that conclusion. That case involved a claim under federal maritime law that permits an award of prejudgment interest. The *Maziar* Court held that because the U.S. Supreme Court has previously held that under the Eleventh Amendment to the U.S. Constitution states are immune from admiralty and maritime suits,<sup>18</sup> and because the State of Washington had not waived such immunity, the prejudgment interest authorized by federal law was not recoverable against the State. However, *Maziar* did not include a statutory definition where the State specifically incorporated itself into the definition of “employer.” RCW 49.60.040(11).

*Maziar* is thus clearly distinguishable from this case inasmuch as the Washington State Legislature waived any sovereign immunity to the relief available for violations by any covered employer (which the State clearly is) of the WLAD. RCW 49.60.040(11). An award or denial of prejudgment interest is reviewed for abuse of discretion. *Polygon NW Co. v. American Nat’l Ins.*, 143 Wn. App. 753, 790, 189 P.3d 777 (2008).

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<sup>17</sup> 180 Wn. App. 209, 327 P.3d 1251 (2014).

<sup>18</sup> *Citing Welch v. Texas Dep’t of Highways*, 483 U.S. 468, 472-73, 107 S. Ct. 2941 (1987).

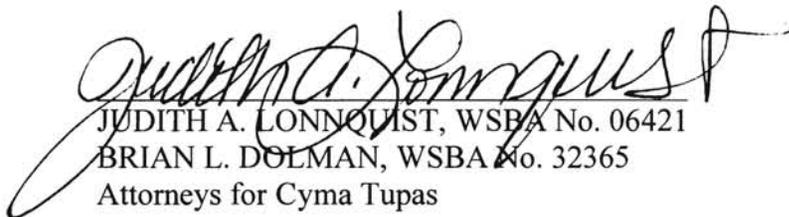
Here, the trial court's reliance on *Foster v. Dep't of Transp.*, 128 Wn. App. 275, 279, 115 P.3d 1029 (2005) was based on an erroneous legal interpretation, which is, *per se*, an abuse of discretion. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 886, 224 P.3d 761 (2010). Accordingly, this Court should reverse and remand the issue of prejudgment interest to the trial court with directions to award Ms. Tupas prejudgment interest on her award of back pay in the amount of \$96,580 from April 3, 2014, until paid.

#### CONCLUSION

For all of the reasons set forth in Appellant's Opening Brief and herein, Ms. Tupas respectfully requests that her appeal be upheld, that she be awarded attorney's fees and costs on appeal pursuant to RAP 18.1, and that the case be remanded to the Superior Court with instructions to reconsider its order on fees, to enter appropriate findings and an order, and award prejudgment interest as set forth above.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of January 2015.

LAW OFFICES OF  
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BRIAN L. DOLMAN, WSBA No. 32365  
Attorneys for Cyma Tupas

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

CYMA G. TUPAS,

Appellant,

v.

WASHINGTON STATE  
DEPARTMENT of ECOLOGY,

Appellee.

No. 72259-0-1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of January, 2015, I caused to be delivered a true and correct copy of the Reply Brief of Appellant and this document by method indicated below and addressed to the following:

Jana Hartman  
Attorney General of  
Washington  
Torts Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
Brooke Burbank  
Attorney General of  
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| <input checked="" type="checkbox"/> | VIA HAND DELIVERY   |

DATED this 22<sup>nd</sup> of January, 2015

  
Ann Holiday

# **APPENDIX**

**FILED**  
KING COUNTY, WASHINGTON

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DEPUTY

Honorable Helen Halpert

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

CYMA G. TUPAS, a/k/a CYMA G.  
GREGORIOS,

Plaintiff,

v.

STATE OF WASHINGTON, d/b/a  
DEPARTMENT OF ECOLOGY,

Defendants.

NO. 12-2-36393-5 SEA

ORDER GRANTING IN PART,  
DENYING IN PART, PLAINTIFF'S  
MOTION FOR INJUNCTIVE RELIEF

Hearing Date: July 11, 2014

THIS MATTER, having come before this Court for consideration of Plaintiff's  
Motion for Injunctive Relief, and having reviewed the following pleadings:

1. Plaintiff's Motion for Injunctive Relief
2. Declaration of Judith Lonnquist
3. Praecipe;
4. Supplemental Brief in Support of Plaintiff's Post-Trial Motions;
5. Defendant's Objection and Preliminary Response to Motion for Injunctive Relief;
6. Declaration of Suzanne Liabraaten in Support of Objection and Preliminary Response to Motion for Injunctive Relief;

ORDER GRANTING IN PART,  
DENYING IN PART, PLAINTIFF'S  
MOTION FOR INJUNCTIVE RELIEF - 1

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7. Plaintiff's Opposition to Motion for Continuance/Reply in Support of Motion for Injunctive Relief;
8. Declaration of Brian L. Dolman in Support of Plaintiff's Motion for Injunctive Relief;
9. Defendant's Response to Plaintiff's Motion for Injunctive Relief;
10. Declaration of Lisa Darnell;
11. Declaration of Wendy Holton;
12. Plaintiff's Reply in Support of Motion for Injunctive Relief; and
13. Declaration of Brian L. Dolman in Support of Plaintiff's Motions for Post-Trial Relief.

NOW, THEREFORE, being otherwise fully informed in the premises, the Court hereby FINDS and CONCLUDES the following:

1. On April 3, 2014, a jury found in favor of Plaintiff on her claim based on Defendant's failure to accommodate her disability. Defendant's <sup>failure</sup> refusal to accommodate Plaintiff's disability before terminating her employment is a form of disability discrimination under Washington's Law Against Discrimination;
2. Defendant continues to refer to Plaintiff's employment status as an Involuntary Disability Separation. ~~But for the failure to accommodate, Defendant would not have imparted this label upon Plaintiff;~~
3. ~~Referring to Plaintiff's last employment status as "terminated" and "disabled" have impacted Plaintiff's job search and will very likely have a negative influence on her job search into the future.~~ Regardless of Plaintiff's award of front pay damages, injunctive relief is appropriate to avoid any further discriminatory impact and barriers to re-entry associated with Plaintiff's job search;
4. ~~For a number of possible reasons, Plaintiff did not receive the benefit of being listed as a viable candidate within the General Government Transition Pool (GGTP). Plaintiff should receive the benefit of this job placement assistance program and injunctive relief is appropriate; and~~

ORDER GRANTING IN PART,  
DENYING IN PART, PLAINTIFF'S  
MOTION FOR INJUNCTIVE RELIEF - 2

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5. The Washington Law Against Discrimination specifically contemplates injunctive relief and this Court has the authority to award injunctive relief following the jury verdict in favor of Plaintiff. Other forms of injunctive relief are appropriate and awarded below.

NOW, THEREFORE, it is hereby ORDERED that Plaintiff's Motion for Injunctive Relief is hereby GRANTED/DENIED as follows:

A. PERS Service Credit - GRANTED/DENIED. Based on Defendant's partial payment of the jury award, contributions were made to Plaintiff's PERS Plan 3 account. The elapsed time of Plaintiff's damage award is 62.5 months and Defendant is ordered to provide Plaintiff an equivalent service credit for her contributions.

*after date of separation*

B. Sick Leave/Vacation Pay - GRANTED/DENIED.

C. Clarification of Plaintiff's Employment Record - GRANTED/DENIED.

*in part*

~~Defendant is prohibited from using the phrase, referring to Plaintiff, or otherwise conveying information to others that it considers Plaintiff as an "Involuntary Disability Separation." Defendant is ordered to clarify or otherwise amend Plaintiff's employment file to the status of a "voluntary resignation," except that Ecology (or a related agency) may maintain an internal, confidential file for purposes of record-keeping and may reference the litigation/nature of the prior employment.~~

*The parties shall agree and Ecology shall incorporate a statement into Plaintiff's personnel file stating that the jury determined the basis of her termination*

D. Employer References - GRANTED/DENIED. Defendant is ordered to provide

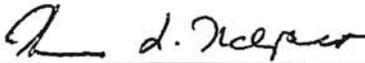
*NT* a neutral reference on behalf of Plaintiff to potential employers. All references *\* to be unbalanced. Plaintiff is specifically permitted to indicate her separation as a "voluntary resignation" She has never been involuntarily terminated*

1 shall be limited to dates of employment, position(s) of employment, grade or  
2 level of position, and salary. Defendant shall provide Plaintiff with a neutral  
3 reference statement on the letterhead for the Department of Ecology.  
4

5 E. **Eligibility for Rehire** - ~~GRANTED/DENIED~~. As above, Plaintiff is eligible to  
6 pursue new employment through the GGTP. Defendant is ordered to remove all  
7 references to Plaintiff as being *ineligible* for rehire.

8  
9 F. Defendant is to notify Plaintiff's counsel  
10 prior to disseminating Plaintiff's personnel file  
11 or any contents therein to any person.  
12

13  
14 DONE IN OPEN COURT this 11 day of July, 2014.

15   
16 \_\_\_\_\_  
17 Honorable Helen L. Halpert

18  
19 Presented by:

20 LAW OFFICES OF  
21 JUDITH A. LONNQUIST, P.S.

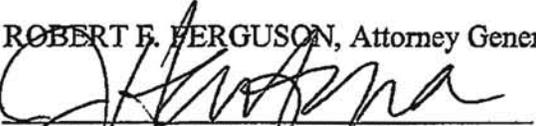
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23 JUDITH A. LONNQUIST, WSBA # 06421  
24 BRIAN L. DOLMAN, WSBA #32365  
25 Attorneys for Plaintiff  
26

ORDER GRANTING IN PART,  
DENYING IN PART, PLAINTIFF'S  
MOTION FOR INJUNCTIVE RELIEF - 4

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1 Approved as to Form and Content;  
2 Notice of Presentation Waived:

3 ROBERT F. FERGUSON, Attorney General

4 

5 JANA HARTMAN, WSBA #35524

6 JAMIE TAFT, WSBA #39642

Assistant Attorney General

Attorneys for Defendant

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ORDER GRANTING IN PART,  
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MOTION FOR INJUNCTIVE RELIEF - 5

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CASE NUMBER: 12-2-36393-5 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

CYMA G. TUPAS, a/k/a CYMA G.  
GREGORIOS  
Plaintiff,

v.

STATE OF WASHINGTON d/b/a  
DEPARTMENT OF ECOLOGY, KEVIN  
FITZPATRICK, GERALD SHERVEY, and  
WENDY HOLTON,  
Defendants.

NO. 12-2-36393-5 SEA

AMENDED COMPLAINT FOR  
DAMAGES AND OTHER RELIEF

**I. INTRODUCTION**

This action is brought pursuant to common law and RCW 49.60 to redress acts of retaliation and disability discrimination, including failure to accommodate a disability. Plaintiff seeks lost pay, benefits and employment opportunities, emotional distress damages, attorneys' fees and costs, injunctive and other relief.

**II. JURISDICTION AND VENUE**

1. Defendant Department of Ecology (DOE) does business in King County. Plaintiff resides in King County, and her workplace where the acts complained herein occurred is in King County.

1 2. This court has jurisdiction pursuant to common law and Chapter 49 RCW.

2 **III. PARTIES**

3 3. Plaintiff Cyma G. Tupas is a married woman residing in King County, Washington. She  
4 is an Asian-Pacific Islander (Filipina). She worked for Defendant for over 23 years.

5  
6 4. Defendant DOE employs more than eight employees and has its principal office in  
7 Olympia, Washington. It operates a Water Quality Program in its Northwest Regional Office  
8 (NWRO) in Bellevue, Washington, where, at all relevant times, Plaintiff was employed.

9  
10 5. Defendants Kevin Fitzpatrick, Gerald Shervey and Wendy Holton, at all relevant times,  
11 have been managerial and/or supervisory employees of Defendant DOE and have exercised  
12 authority over Plaintiff.

13 **IV. STATEMENT OF CLAIMS**

14 6. Plaintiff began work for Defendant in 1987 as an Environmental Technician, and has  
15 held various other technical and scientific positions since that time. She has received favorable  
16 evaluations and numerous awards over the course of her career.

17  
18 7. During the period from 1989 through 1997, Plaintiff held increasingly responsible  
19 Chemist positions for Defendant Department of Ecology. From approximately 1993 through  
20 1997 she held an Advisory Laboratorian 1 position, which was equivalent to a Chemist 3  
21 position in pay and qualifications.

22 8. In or around 1997, Plaintiff transferred into an Environmental Specialist 3 position in  
23 Defendant's Water Quality Program in its NWRO in Bellevue. In the fifteen years between  
24 Plaintiff's 1997 transfer and her termination in 2012, she was promoted only one time—to  
25 Environmental Specialist 4 in 2002. Other Environmental Specialist 3 compliance officers in all  
26 other regions were promoted at the same time in connection with a position reallocation.

1 9. In contrast, Amy Jankowiak, a Caucasian female who joined the Department as an  
2 Environmental Specialist 3 in the Water Quality Program in or around 2003, was promoted at  
3 least twice between 2003 and 2007, first into a Water Management Specialist position and then,  
4 in 2007, into an Environmental Specialist 5 position. In both cases, she wrote her own  
5 promotion-related documents.  
6

7 10. In or around September 2007, Plaintiff updated her Position Description and requested  
8 reallocation to Environmental Specialist 5 via the Water Quality Workforce Management  
9 Reallocation Process. Defendant Fitzpatrick denied her request for reallocation, stating that the  
10 upgrade request did not meet the business needs of the program.

11 11. Plaintiff's performance evaluations prior to November 2007 do not establish a legitimate  
12 reason to upgrade the less senior Ms. Jankowiak to an Environmental Specialist 5 position  
13 while Plaintiff retained a lower Environmental Specialist 4 placement. For example, in  
14 November 2006 Defendant Kevin Fitzpatrick, Plaintiff's second-level supervisor, appended a  
15 note to Plaintiff's evaluation stating "Cyma's dedication and professionalism are inspirational  
16 to her coworkers." Likewise, in November 2005, he had written "Cyma is one of the most hard-  
17 working and dedicated employees in the NWRO WQ section."  
18

19 12. Beginning in or around November 2007, Plaintiff voiced her concerns regarding  
20 management actions that she reasonably perceived as discriminating against her on the basis of  
21 her national origin. For example, she objected that she had been assigned additional duties and  
22 an excessive workload over an extended period of time without a corresponding promotion,  
23 increase in pay, or recognition. Similarly, she complained that Ms. Jankowiak was promoted  
24 into an Environmental Specialist 5 position with less experience than Plaintiff.  
25  
26

1 13. In or around December 2007, Plaintiff attended a mandatory meeting regarding  
2 communication. Defendant Wendy Holton, Defendant Kevin Fitzpatrick and Plaintiff's then-  
3 supervisor Raman Iyer represented the Department of Ecology in the meeting. Defendants  
4 accused Plaintiff of communication problems in connection with her complaints regarding Ms.  
5 Jankowiak's promotion to ES-5 and other discriminatory and unfair employment practices at  
6 Ecology. During this meeting, Defendant Fitzpatrick stood up, pounded his fists on the table  
7 and yelled at the Plaintiff..."How dare you complain of Amy's promotion!"

9 14. Following Plaintiff's complaints, her supervisors continued to hand-pick Caucasian  
10 employees who had not raised complaints of discrimination and retaliation for desirable out-of-  
11 grade assignments, acting appointments, and unposted promotions.

12 15. Plaintiff continued to object to Defendants' actions that she reasonably believed reflected  
13 discrimination or retaliation. Plaintiff's objections included complaints in December 2009,  
14 September 2010, October 2010, March 2011, April 2011, June 2011, July 2011, November  
15 2011, December 2011 and February 2012.

17 16. During the remainder of Plaintiff's employment, rather than addressing the reasonable  
18 concerns that Plaintiff continued to raise, Defendants embarked on a course of retaliation  
19 against her. For example, plaintiff frequently was singled out for scrutiny in connection with  
20 communication breakdowns that were initiated by others, particularly Defendant Shervey.

22 17. Despite her strong performance history and heavy workload, Defendants denied Plaintiff  
23 promotions for which she was qualified, including by framing job descriptions for promotional  
24 opportunities to favor Caucasian employees with no history of EEO activity.

25 18. During the night of the October 15, 2010, Plaintiff was exposed to possibly toxic  
26 materials when she opened the sample refrigerator in the office laboratory. During and after the

1 incident, Plaintiff was harassed by Defendants and Ecology employees for complaining of the  
2 accident, for asking for the building's sample management and after-hours safety procedures  
3 and for filing public disclosure requests related to the incident.

4 19. In March 2011, Plaintiff filed an Article 47 Formal Complaint against Defendant  
5 Shervey alleging harassment and violations of the union contract. Later in July 2011, the union  
6 filed its first grievance based on similar concerns.

7  
8 20. In 2011, when Defendants opened an Environmental Specialist 5 position in Plaintiff's  
9 program, they tailored several job qualifications to match the experience of Greg Stegman, a  
10 less experienced Caucasian employee in Plaintiff's program who had not engaged in any EEO  
11 activity. Plaintiff, who was well-qualified, applied for the position. It was given to Mr.  
12 Stegman.

13  
14 21. Also in August 2011, Defendant opened for internal transfer application a position as an  
15 Organics-Chemist 4 at Environmental Laboratory Accreditation Program (ELAP), for which  
16 Plaintiff applied. Plaintiff was not granted a transfer. Plaintiff applied again when competitive  
17 recruitment began but was not even given an interview despite having lab auditing experience.  
18 Instead, the position was given to Kamilee Ginder, an inorganic Chemist 2 who was Caucasian,  
19 who had not engaged in any EEO activity, and who, unlike Plaintiff, had not held a Chemist 3  
20 position or the equivalent. Ms. Ginder did not have the organics expertise or the lab auditing  
21 experience.  
22

23 22. Defendants also retaliated against Plaintiff by expanding her position without giving her  
24 the pay or title upgrades they had awarded her peers. For example, in December 2009,  
25 Defendant unilaterally rewrote Plaintiff's position description to add essential functions, key  
26 competencies, and duties that had not previously been part of her job.

1 23. After further overloading Plaintiff with work, Defendants applied additional pressure by  
2 scrutinizing minute elements of her performance such as the format in which she transferred  
3 information to the Attorney General's office, her file storage practices, and her notations on her  
4 Outlook Calendar. When Plaintiff became frustrated and complained that her peers were not  
5 held to the same standards as she was, Defendants belittled Plaintiff's concerns and criticized  
6 her further for challenging her peers' behavior and treatment.  
7

8 24. In the months immediately prior to Plaintiff's placement on home assignment, Defendant  
9 Shervey began creating "Performance Feedback Forms" to document his meetings with  
10 Plaintiff regarding items tangential to her primary functions, such as her handling of closed  
11 files. The form and number of these records had the effect of papering Plaintiff's file with  
12 pseudo-disciplinary records where Mr. Shervey did not have a legitimate basis for true  
13 discipline. The frequency and nature of the underlying performance conversations placed  
14 exceptional stress on Plaintiff between December 2011 and April 2012.  
15

16 25. Defendants also took other actions calculated to make Plaintiff uneasy and then criticized  
17 her guarded or skeptical response. For example, after her discrimination and retaliation  
18 complaints, Defendant Shervey often brought a "witness" when he spoke with Plaintiff, even  
19 about matters that otherwise might have seemed mundane. A frequent witness was Raman Iyer,  
20 who had been Plaintiff's supervisor at the time of her 2007 discrimination complaint. However,  
21 when Plaintiff began to insist that she too needed a witness present for her conversations with  
22 Mr. Shervey, Defendants responded as though Plaintiff was irrational and incapable of  
23 supervision. Further, Defendants sought to prevent Plaintiff from having a supportive witness  
24 or union representative present at meetings with Mr. Shervey. Defendants scheduled meetings  
25  
26

1 at a time or in a manner that prevented the witness from attending and on one occasion even  
2 stated that, although Plaintiff could have a witness attend, it could not be her chosen witness.

3 26. Defendants also exhibited general hostility toward Plaintiff following her complaints.  
4 Even after receiving written complaints from Plaintiff, Defendant Holton did not take  
5 reasonable steps promptly to investigate and remedy the behavior about which Plaintiff  
6 complained. First, Defendant Horton delayed her interviews with witnesses for several months  
7 after Plaintiff's original complaint. In those interviews, multiple witnesses described Mr.  
8 Shervey harassing Plaintiff, appearing irate in her performance review meetings, and refusing  
9 to let her speak or provide feedback during her evaluation process. Despite Mr. Shervey's  
10 unprofessional conduct, Defendants refused reasonable requests to change Plaintiff's  
11 supervisor, even when the specific supervisor she requested was a manager in her program and  
12 unit who occasionally supervised Plaintiff in her supervisor's absence.  
13  
14

15 27. Plaintiff had an exceptional discipline-free record over twenty-three years at the  
16 Department of Ecology. Then, after she raised concerns regarding discrimination and  
17 retaliation, Defendants began to look for opportunities to reprimand her. In January 2010,  
18 Defendant Shervey sought to discipline Plaintiff because she had not completed a project that  
19 had been assigned with no deadline. Similarly, in October 2010, Mr. Shervey reviewed  
20 Plaintiff's personnel file and proposed issuing discipline based in part on events that took place  
21 in 2007, before he was her supervisor. In direct response to a 2010 email in which Plaintiff  
22 complained about increased scrutiny, discrimination and retaliation, Mr. Fitzpatrick sought  
23 permission from Human Resources to put her on home assignment without any showing that  
24 she was a danger to herself or others. In each case, Defendant's own Human Resources  
25  
26

1 personnel indicated that Defendants did not have an adequate basis for the discipline they  
2 sought to impose.

3 28. Plaintiff suffers from anxiety, panic attacks and depression as well as a migraines,  
4 insomnia and heart palpitations. The stress she experienced as a result of the retaliation by  
5 Defendants intensified Plaintiff's symptoms associated with her disability and at times  
6 prevented her from working. On several occasions between April 2010 and her termination,  
7 Plaintiff applied for intermittent FMLA leave to address her disability As a result, Defendants  
8 were aware of her medical conditions.

9  
10 29. In October 2010, in the context of a discussion regarding Plaintiff's exposure to a  
11 possible toxic gas, Plaintiff told Mr. Shervey information about her health condition that he  
12 indicated he had not known previously. When Plaintiff returned to work following the  
13 exposure, Mr. Shervey was cold to her. He brought her paperwork and demanded that she fill it  
14 out, but did not ask her how she was feeling or express any regret about her exposure or the  
15 stress associated with the incident.

16  
17 30. In November 2010 following the accident, Plaintiff's psychiatrist completed FMLA  
18 forms requesting that Plaintiff be granted four weeks of leave between December and January  
19 2010 due to possible side effects from a change in medication. On the first day of the requested  
20 FMLA leave, Mr. Shervey had not yet approved her leave so Plaintiff went in to work. Rather  
21 than asking Plaintiff whether there had been a misunderstanding or otherwise initiating a  
22 professional cordial conversation with her, Mr. Shervey demanded that she leave. He then  
23 followed her out of the building and all the way to her car, despite Plaintiff protesting that she  
24 felt harassed.  
25  
26

1 31. In spite of Plaintiff's several FMLA requests—which included certifications that she had  
2 long-term ongoing disabling medical conditions—at no point prior to placing her on home  
3 assignment did Defendant initiate an interactive process to evaluate whether Plaintiff needed a  
4 reasonable accommodation to address her known disabilities.

5  
6 32. Instead, Defendants took actions certain to exacerbate her condition and to create hurdles  
7 to her continued success at the Department. For example, in January 2012, Mr. Shervey met  
8 with Plaintiff to instruct her that she could not take leave without pay with less than fourteen-  
9 day notice. Given the nature of her disabilities, Plaintiff could not predict her need for leave  
10 two weeks in advance.

11  
12 33. In June 2011, three witnesses confirmed that Mr. Shervey was unprofessional and  
13 harassing toward Plaintiff, was defensive and belittling, and became so disturbed in a series of  
14 performance review meetings that he would not permit Plaintiff to talk, was breathing heavily,  
15 and inadvertently spit on one of the attendees. Witnesses also described that Mr. Shervey  
16 inappropriately told Plaintiff that he would erase all of her feedback from the evaluation unless  
17 she agreed to sign the evaluation form. Even Mr. Shervey himself acknowledged that he was  
18 “adrenalized” and angry and should have delayed the meeting. No witness described any action  
19 by Ms. Tupas at the meeting to initiate a conflict with Mr. Shervey.

20  
21 34. Despite Mr. Shervey's conduct, Defendants did not place Mr. Shervey on home  
22 assignment, compel him to attend a medical examination, or even agree to reassign Ms. Tupas  
23 to a supervisor who was not hostile to her.

24 35. Instead, they retained Mr. Shervey in a position where he was empowered to place  
25 increasing pressure on Plaintiff. On one occasion, Defendant Fitzpatrick even put Mr. Shervey  
26 in-charge of the Section while he was on vacation. Also, in the four months leading up to

1 Plaintiff's placement on home assignment, Mr. Shervey formally documented four  
2 "Performance Review Form" meetings with her about subjects such as moving closed files,  
3 providing fourteen-day notice prior to taking leave without pay, modifying timesheets, and  
4 receiving advance permission to work beyond 6:00 pm.

5  
6 36. On February 13, 2012, Plaintiff timely filed a tort claim alleging discrimination and  
7 retaliation by Defendant.

8 37. On February 17, 2012, Plaintiff's psychiatrist, Dr. Nguyen, submitted an FMLA form  
9 requesting that Plaintiff be permitted to take intermittent leave due to anxiety, insomnia and  
10 depression.

11 38. On February 24, 2012, Raman Iyer, acting for Defendant Shervey, denied the Plaintiff's  
12 Automated Leave Form (ALF) FMLA-Sick Leave request for the same day.

13  
14 39. On March 8, 2012, Dr. Nguyen requested that the intermittent FMLA period be extended  
15 to permit Plaintiff to adjust her medications and work on stress management and sleep.

16 40. Defendants were aware of Plaintiff's ongoing medical condition prior to March 12, 2012.  
17 On that date, Defendant Shervey sent Plaintiff an email at 4:25 p.m. criticizing her for including  
18 too large a list of people on an email she had sent earlier in the day regarding a public records  
19 request.

20  
21 41. Without Plaintiff responding to Mr. Shervey's email or taking any other action that  
22 required further follow-up, approximately five minutes later, Mr. Shervey approached Plaintiff  
23 to discuss this email in person. When Plaintiff indicated that she had not yet read his email, Mr.  
24 Shervey continued to pursue the issue. Given the history of their interactions and the  
25 unfavorable nature of his comments, Plaintiff requested that Mr. Shervey allow her to have a  
26 union representative present for the conversation. When Mr. Shervey refused, Ms. Tupas asked

1 to have the conversation in a colleague's office so that she could witness the discussion. Mr.  
2 Shervey insisted that Ms. Tupas leave the colleague's office.

3 42. Although Ms. Tupas was clearly distressed, approximately a half hour later, Mr. Shervey  
4 again confronted Ms. Tupas, this time in an almost-empty office building at approximately 5:00  
5 p.m. Ms. Tupas again sought out a witness for the conversation, and Mr. Shervey again refused  
6 to talk to Ms. Tupas with a witness present.  
7

8 43. Defendants then solicited complaints regarding Ms. Tupas's March 12, 2012 behavior  
9 from select coworkers. Significantly, the witness to Ms. Tupas's last interaction with Mr.  
10 Shervey that evening—the only witness who does not report to Mr. Shervey or Mr. Iyer—  
11 indicated that both Mr. Shervey and Ms. Tupas appeared “modestly conflicted,” were “civil but  
12 not cordial,” and “seemed to be in control of their emotions.”  
13

14 44. Based on alleged concerns stemming from Ms. Tupas's behavior on March 12, 2012, on  
15 April 3, 2012, Defendant placed Plaintiff on home assignment and demanded that she submit to  
16 a medical examination by a psychiatrist of the Defendant's choosing, threatening her with  
17 termination if she did not attend. When she arrived at the medical examination, Plaintiff  
18 indicated to the doctor that she would prefer to have a representative present with her during the  
19 examination, and the doctor agreed to reschedule the appointment.  
20

21 45. After the April 19, 2012 medical appointment, Plaintiff received a written reprimand via  
22 e-mail for failing to undergo the examination without representation.

23 46. On May 3, 2012, Plaintiff attended the rescheduled examination, along with her legal  
24 representative. Before beginning the examination, the doctor asked the representative to  
25 identify herself and to spell her name. The doctor then stated that he was not comfortable  
26 conducting the examination with an attorney present. He accused Plaintiff of misrepresenting

1 her intentions at the prior appointment and stating that she planned to bring a union  
2 representative. Plaintiff explained that she had just said that she would like to have a  
3 representative present and had informed Defendant Wendy Holton, from the Department's  
4 Human Resources, of who the representative would be. The doctor repeated his accusation that  
5 Plaintiff had misrepresented herself previously. When Plaintiff's representative stated that she  
6 just planned to sit quietly and observe, the doctor expressly refused to speak to her and stated  
7 that he would not talk again until she was out of the room. Despite the aggressive behavior of  
8 Defendants' selected psychiatrist, Plaintiff participated in the examination, believing that she  
9 faced termination otherwise.  
10

11 47. On June 25, 2012, Defendant notified Plaintiff that it believed that she "may have a  
12 disability that necessitates reasonable accommodation," and required that she submit medical  
13 and accommodation forms.  
14

15 48. Defendant repeatedly extended Plaintiff's home assignment for a total of six months,  
16 even after Defendant's own forensic psychiatrist found that Plaintiff was not a danger to herself  
17 or others, which had been the basis for her removal from the workplace.

18 49. During the course of Plaintiff's home assignment, Defendants repeatedly denied her  
19 access to the tools that she required in order to perform her duties from home. When an  
20 Ecology employee indicated that she could provide Ms. Tupas with the tools she was  
21 requesting, Defendant Fitzpatrick indicated that she should not do so. At the same time,  
22 Defendants insisted that Plaintiff remain at her home and available to them for the entire  
23 workday throughout her six month assignment.  
24  
25  
26

1 50. Plaintiff returned the forms that her personal physician had completed, verifying that  
2 Plaintiff could safely work fulltime as long as she were permitted to telecommute one morning  
3 a week.

4 51. On October 2, 2012, Plaintiff was advised by Human Resources that she could not be  
5 reasonably accommodated amongst the 11 (eleven) vacancies found in the Plaintiff's region.  
6 Contrary to Defendants' own policy statements, Defendants did not seek feedback from  
7 Plaintiff's health care provider regarding Plaintiff's ability to perform the duties each position  
8 entailed.  
9

10 52. On October 3, 2012, Defendant DOE notified Plaintiff that it was instituting a disability  
11 separation and terminating her employment.  
12

13 53. As a result of the discrimination and retaliation, and Defendant DOE's failure to redress  
14 it, Plaintiff suffered and continues to suffer economic damages and severe emotional distress.  
15

16 **COUNT I**

17 Defendants have discriminated against Plaintiff on the basis of a disability, in violation  
18 of RCW 49.60.180.

19 **COUNT II**

20 Defendants failed reasonably to accommodate the Plaintiff, in violation of RCW  
21 49.60.180.

22 **COUNT II**

23 Defendants have retaliated against Plaintiff, in violation of RCW 49.60.210.  
24

25 WHEREFORE, Plaintiff respectfully requests the following relief:  
26

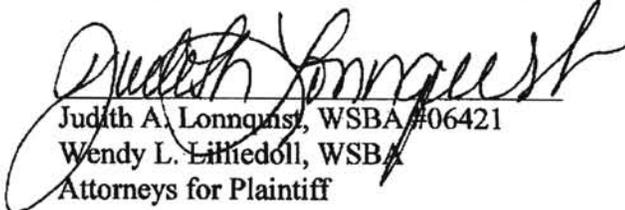
A. Back pay and other economic damages;

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- B. Emotional distress damages;
- C. Pre-judgment interest;
- D. Reasonable attorney's fees and litigation expenses pursuant to RCW 49.48.030 and/or RCW 49.60.030(3);
- E. Injunctive relief;
- F. Tax relief;
- G. Costs;
- H. Such other relief as the Court deems appropriate.

Dated this \_\_\_\_ day of October, 2013.

LAW OFFICES OF JUDITH A.  
LONNQUIST, P.S.



Judith A. Lonnquist, WSBA #06421  
Wendy L. Liffedoll, WSBA  
Attorneys for Plaintiff



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The Honorable Dean S. Lum  
Trial Date: March 17, 2014

**STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT**

CYMA G. TUPAS, a/k/a CYMA G.  
GREGORIOS,

Plaintiff,

v.

STATE OF WASHINGTON d/b/a  
DEPARTMENT OF ECOLOGY,  
KEVIN FITZPATRICK, GERALD  
SHERVEY, and WENDY HOLTON,

Defendants.

NO. 12-2-36393-5SEA

DEFENDANT'S ANSWER TO  
PLAINTIFF'S AMENDED  
COMPLAINT FOR DAMAGES AND  
OTHER RELIEF

Defendants, State of Washington, Department of Ecology ("DOE"), Kevin Fitzpatrick, Gerald Shervy, and Wendy Holton (collectively, "Defendant"), in answer to the Plaintiff's Amended Complaint, admit, deny and allege as follows:

**I. INTRODUCTION**

The statements contained in the introduction are not appropriate allegations. The Defendant therefore denies the same. The Defendant further denies every allegation stated in the Plaintiff's Amended Complaint unless specifically admitted herein.

**II. JURISDICTION AND AVENUE**

1. Although the Defendant admits that DOE does business in King County, the Defendant lacks knowledge or information sufficient to formulate an answer to the remainder of the allegations contained in paragraph 1, and the Defendant therefore denies the same.

1 2. Paragraph 2 states allegations or contentions of law that require no answer.  
2 Notwithstanding the foregoing, the Defendant denies the same.

3 **III. PARTIES**

4 3. Defendant admits that the Plaintiff was employed by DOE. Defendant lacks knowledge  
5 or information sufficient to form an opinion as to the remaining allegations contained in  
6 paragraph 3, and the Defendant therefore denies the same.

7 4. Admitted.

8 5. Denied.

9 **IV. STATEMENT OF CLAIMS**

10 6. Defendant admits that the Plaintiff began working for DOE in 1987. Defendant denies  
11 the remainder.

12 7. Defendant admits that the Plaintiff was, at various times, employed by DOE as a  
13 Chemist and Advisory Laboratorian I. Defendant denies the remainder.

14 8. Defendant admits that in or around 1997, the Plaintiff became an Environmental  
15 Specialist 3 in Defendant's Water Quality Program in its Northwest Regional Office in  
16 Bellevue. Defendant admits that in 2002, Plaintiff became an Environmental Specialist 4.  
17 Defendant denies the remainder.

18 9. Defendant admits that Amy Jankowiak joined the Department as an Environmental  
19 Specialist 3 in the Water Quality Program in or around 2002. Defendant denies the remainder.

20 10. Defendant admits that in or around September 2007, Plaintiff requested reallocation to  
21 Environmental Specialist 5 via the Water Quality Workforce Management Process. Defendant  
22 admits that Kevin Fitzpatrick denied her request for reallocation, stating that her request did  
23 not meet the business needs of the program. Defendant denies the remainder.

24 11. Defendant admits that in November 2006, Defendant Kevin Fitzpatrick commented that  
25 "Cyma's dedication and professionalism are inspirational to her co-workers." Defendant  
26 admits that in November 2005, Kevin Fitzpatrick wrote "Cyma is one of the most hard-

1 working and dedicated employees in the NWRO WQ section.” Defendant denies the  
2 remainder.

3 12. Defendant admits that Plaintiff voiced her concerns regarding management actions.  
4 Defendant denies the remainder.

5 13. Defendant admits that in or around December 2007, Plaintiff attended a mandatory  
6 meeting at which Ms. Holton, Mr. Fitzpatrick, and Mr. Iyer were present. Defendant denies  
7 the remainder.

8 14. Denied.

9 15. Defendant admits that Plaintiff objected to Defendants’ actions. Defendant denies the  
10 remainder.

11 16. Denied.

12 17. Denied.

13 18. Denied.

14 19. Admitted.

15 20. Defendant admits that in 2011, Defendant opened an Environmental Specialist 5  
16 position in Plaintiff’s program. Defendant admits that in 2011, Plaintiff applied for the  
17 position of Environmental Specialist 5. Defendant admits that Greg Stegman was hired for the  
18 position of Environmental Specialist 5. Defendant denies the remainder.

19 21. Defendant admits that in August 2011, it posted an internal transfer position as a  
20 Chemist 4 at the Environmental Laboratory Accreditation Program (ELAP). Defendant admits  
21 the Plaintiff applied for this position. Defendant admits that Plaintiff was not granted a  
22 transfer. Defendant admits that Plaintiff applied again when the position was re-posted as an  
23 open, competitive recruitment. Defendant admits that Camilee Ginder became the Chemist 4.  
24 Defendant denies the remainder.

25

26

1 22. Defendant admits that in December 2009, Defendant Shervey revised Plaintiff's  
2 position description to add essential functions and key competencies. Defendant denies the  
3 remainder.

4 23. Denied.

5 24. Defendant admits that Defendant Shervey created Performance Feedback Forms.  
6 Defendant denies the remainder.

7 25. Defendant admits that Raman Iyer was Plaintiff's supervisor in 2007. Defendant  
8 denies the remainder.

9 26. Denied.

10 27. Denied.

11 28. Defendant admits that Plaintiff applied for FMLA leave. Defendant lacks knowledge  
12 or information sufficient to form an opinion as to whether Plaintiff suffers from anxiety, panic  
13 attacks, depression, migraines, insomnia and heart palpitations, and the Defendant therefore  
14 denies the same. Defendant denies the remainder.

15 29. Defendant admits that in October 2010, Plaintiff told Defendant Shervey information  
16 about her health condition that he had not known previously. Defendant denies the remainder.

17 30. Defendant admits that on the first day of the requested FMLA leave Plaintiff went in to  
18 work. Defendant admits that Mr. Shervey followed Plaintiff out of the building. Defendant  
19 admits that Plaintiff accused Mr. Shervey of harassing her. Defendant denies the remainder.

20 31. Denied.

21 32. Denied.

22 33. Denied.

23 34. Defendant admits that Mr. Shervey was not placed on home assignment or compelled  
24 to attend a medical examination. Defendant denies the remainder.

25 35. Defendant admits that Mr. Shervey was an acting section manager during a period of  
26 Mr. Fitzpatrick's absence while on annual leave. Defendant admits that Mr. Shervey

1 documented meetings with Performance Review Forms about subjects such as moving closed  
2 files, providing fourteen day notice prior to taking leave without pay, modifying timesheets,  
3 and receiving advance permission to work beyond 6:00 p.m. Defendant denies the remainder.

4 36. Defendant admits that on February 13, 2012, Plaintiff filed a tort claim alleging  
5 race/national origin discrimination and retaliation for having complained of discrimination.  
6 Defendant denies the remainder.

7 37. Defendant admits that on February 17, 2012 Dr. Nguyen signed a FMLA form.  
8 Defendant admits that Dr. Nguyen indicated Plaintiff suffers from insomnia and feeling  
9 depressed. Defendant denies the remainder.

10 38. Admitted.

11 39. Defendant admits that on March 8, 2012, Dr. Nguyen wrote a letter recommending that  
12 Plaintiff extend her FMLA. Defendant denies the remainder.

13 40. Defendant admits that Defendant Holton was aware of some of Plaintiff's medical  
14 conditions prior to March 12, 2012. Defendant denies the remainder.

15 41. Defendant admits that Defendant Shervey discussed an email with Plaintiff. Defendant  
16 admits that Plaintiff requested a union representative. Defendant denies the remainder.

17 42. Denied.

18 43. Denied.

19 44. Defendant admits that based, in part, upon concerns stemming from Plaintiff's behavior  
20 on March 12, 2012, Defendant placed Plaintiff on home assignment on April 3, 2012 and  
21 required that she submit to a medical examination by a psychiatrist of the Defendant's  
22 choosing. Defendant denies the remainder.

23 45. Defendant admits that after the April 19, 2012 medical appointment, Plaintiff received  
24 a written reprimand via email for failing to undergo the examination. Defendant denies the  
25 remainder.

26

1 46. Defendant admits that on May 3, 2012, Plaintiff attended the examination with her  
2 legal representative. Defendant lacks knowledge or information sufficient to form an opinion  
3 as to the remaining allegations contained in paragraph 46, and the Defendant therefore denies  
4 the same.

5 47. Defendant admits that on June 25, 2012, Defendant notified Plaintiff that it believed  
6 she had a disability that necessitated reasonable accommodation. Defendant admits that it  
7 asked that Plaintiff submit medical and accommodation forms. Defendant denies the  
8 remainder.

9 48. Defendant admits it extended Plaintiff's home assignment for a total of six months.  
10 Defendant denies the remainder.

11 49. Denied.

12 50. Denied.

13 51. Defendant admits that on October 2, 2012, Plaintiff was advised by Human Resources  
14 that she could not be reasonably accommodated. Defendant denies the remainder.

15 52. Admitted.

16 53. Denied.

### 17 **COUNT I**

18 The paragraph entitled "Count I" contains allegations or contentions of law, which  
19 require no answer. The Defendant therefore denies, and the Defendant further denies every  
20 allegation stated in the Plaintiff's Amended Complaint unless specifically admitted herein.

### 21 **COUNT II**

22 The paragraph entitled "Count II" contains allegations or contentions of law, which  
23 require no answer. The Defendant therefore denies, and the Defendant further denies every  
24 allegation stated in the Plaintiff's Amended Complaint unless specifically admitted herein.

25 ///

26 ///



1 11. That the employment decisions at issue in this case were based upon reasonable  
2 factors other than disability and/or retaliation.

3 **VII. RESERVATION OF RIGHTS**

4 The Defendant believes that discovery may reveal factual bases for additional  
5 affirmative defenses and reserves the right to amend its Answer and Affirmative Defenses to  
6 Plaintiff's Amended Complaint at such time as the facts underlying any further affirmative  
7 defenses are discovered.

8 WHEREFORE, the Defendant prays that the court dismiss the Plaintiff's Amended  
9 Complaint with prejudice, that the Plaintiff take nothing by her Amended Complaint, and that  
10 the Defendant be allowed its costs and reasonable attorney fees herein, including those  
11 available under RCW 4.84.185.

12 DATED this 12th day of November, 2013.

13 ROBERT W. FERGUSON  
14 Attorney General

15  
16 /s/ Jana Hartman  
17 JANA HARTMAN, WSBA No. 35524  
18 Assistant Attorney General  
19 Attorney General's Office  
20 800 Fifth Avenue, Suite 2000  
21 Seattle, Washington 98104-3188  
22 Telephone: (206) 464-3803  
23 E-mail: janaf@atg.wa.gov  
24  
25  
26





**Heller, Amy (ECY)**

---

**From:** Wagner, Lydia (ECY)  
**Sent:** Tuesday, November 13, 2007 3:15 PM  
**To:** Iyer, Raman (ECY)  
**Cc:** Fitzpatrick, Kevin (ECY)  
**Subject:** concern

**Sensitivity:** Confidential

Hi Raman,

I'm expressing concern over Cyma Tupas. I sat next to her this morning in the Enforcement Work Group meeting and couldn't help but notice a significant change in her from the last time I saw her. Enough so that I feel compelled to say something.

Specifically, these are my observations:

- Her hands were shaking quite a bit during the entire meeting and more at certain times.
- She appeared to be perspiring when the room itself was on the cold side. I'm warm blooded and I figure if the room is cold to me then it must be cold for other people.
- Her facial color appeared to be paler at the end of the meeting than in the beginning.
- She appeared to react defensively and mildly aggressive when the discussion began regarding an issue that could impact her workload.

I don't know Cyma very well but have sat in numerous meetings with her since 2005. The physical and emotional changes I saw today are a dramatic difference from previous meetings. Generally she is rather quiet with the exception of asking the occasional question or reiterating a comment or point previously made by someone in the group.

No response is necessary. I just wanted to let you know of my concern. Please call if you have any questions about anything I've mentioned in this e-mail.

Lydia C. Wagner  
WQ/SWRO  
360-407-6291



**Department of Ecology Memorandum**  
Water Quality Program  
Northwest Regional Office

DATE: December 6, 2010  
TO: Wendy Holton  
FROM: Gerald Shervey, PE  
RE: Cyma Tupas Odd behavior last week  
CC: Susan Bragg, Kevin Fitzpatrick

---

I am writing to document some of Cyma Tupas' behavior over the last week that seems odd or irrational. I had to remind her how to look up codes for timesheet entry, she mistakenly told a coworker documents were missing from a file, and she filled out 12 leave slips where only two were needed. Regarded together over several days of work, these incidents seem odd because they are routine tasks that seem to be giving Cyma difficulty.

1. On 12-1-10 I sent Cyma an email in response to her question about what job and task codes to use for some of her typical work and reminded her the codes are listed in the spreadsheet we all use for timesheets. I talked to her and she verified she knew these codes are listed in timesheet spreadsheet. Two hours later she sent another email again asking what codes to use for a two hour period. We ended up meeting with a shop steward in attendance because Cyma wanted special codes for a fume exposure incident in our sample prep room and wanted to charge the time to spill response work. Cyma has two assigned codes to use in the program related to permit enforcement work and job and task codes have no codes for fume exposure. Timesheet coding is routine work that she has done successfully for at least the last two years.
2. On 12-2-10 Cyma left a file of an enforcement case with a coworker who collaborated on the case. She emailed the co-worker, "I found the red folder in the enforcement cabinet and the main NOP & RFE documents are not there."  
  
The file did contain the documents, which are the main documents for the work. When the coworker returned the file and said the documents were in the file, Cyma took the file back with no explanation.
3. Also on 12-2-10, Cyma filled out leave slips for a medical leave from 12-6-10 through 12-31-10. She filled out slips for each Monday & Tuesday, each Wednesday, and each Thursday & Friday separately. When I commented to her that she could fill out one slip for each half month pay period, she said that she works different hours on different days and they would not match up. I said that she could show leave from the initial hour to the final hour and the hours of work each day don't matter. She said, "Really, I already did them so its OK."

90370148

Ex. 89

Automated Leave eForms (ALF) - Windows Internet Explorer

http://ecytops3/leave/

Automated Leave eForm (ALF)

Dept. of Ecology  

**Internet**

**Automated Leave eForm**

ALF Inbox

Home  
 Leave Form  
 View Requests  
 Help  
 Administration

	Cyma Tupas	Leave Without Pay	12/8/2010 7:00:00 AM	12/8/2010 12:00:00 PM	5	Pending
	Cyma Tupas	Leave Without Pay	12/9/2010 8:00:00 AM	12/10/2010 6:00:00 PM	19	Pending
	Cyma Tupas	Leave Without Pay	12/13/2010 8:00:00 AM	12/14/2010 6:00:00 PM	16	Pending
	Cyma Tupas	Leave Without Pay	12/14/2010 7:00:00 AM	12/15/2010 12:00:00 PM	8	Pending
	Cyma Tupas	Leave Without Pay	12/16/2010 8:00:00 AM	12/17/2010 6:00:00 PM	19	Pending
	Cyma Tupas	Leave Without Pay	12/20/2010 8:00:00 AM	12/21/2010 12:00:00 PM	16	Pending
	Cyma Tupas	Leave Without Pay	12/22/2010 7:00:00 AM	12/23/2010 12:00:00 PM	5	Pending
	Cyma Tupas	Leave Without Pay	12/23/2010 8:00:00 AM	12/24/2010 6:00:00 PM	19	Pending
	Cyma Tupas	Leave Without Pay	12/23/2010 8:30:00 AM	12/23/2010 5:00:00 PM	8	Pending
	Cyma Tupas	Leave Without Pay	12/29/2010 7:00:00 AM	12/29/2010 12:00:00 PM	5	Pending
	Cyma Tupas	Leave Without Pay	12/30/2010 8:00:00 AM	12/31/2010 6:00:00 PM	19	Pending

 Family Medical

I wrote a separate memo today about Cyma coming to work on a day that her doctor said she should be on leave. She cancelled the leave slip today at 8:35 am(I had not approved it). When I told her she had to leave the office, she said I had not approved the leave slip. When I told her she had already cancelled it, she again replied I had not approved it. An hour after she agreed to leave the office, she was still here working.

These incidents seem to show a pattern of forgetfulness or irrationality for how to do routine tasks in our section that Cyma has done successfully in the past. I am concerned whether she is capable of carrying out her job functions.