

FILED
COURT OF APPEALS
DIVISION II

2013 JUN 29 AM 9:07

DOCKET NO. 44295-7 -II

STATE OF WASHINGTON
BY 
CERKOT

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MARTHA LEAH WOODS, Appellant,

v.

**WASHINGTON STATE DEPARTMENT OF CORRECTIONS,
and TERRI VAN AUSDLE and "JOHN DOE" VAN AUSDLE and
their
marital community, Respondents.**

APPELLANT'S REBUTTAL BRIEF

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Used for both text and citations*

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DISCHARGE: Mendoza discharged Woods in a manner neither she nor WFSE could have predicted. She was trying to return to work from an industrial injury. A vacant, funded position was being held and an interactive process had begun two weeks prior. DOC is liable for loss of Woods' job and benefits.	9
ACCOMMODATION: DOC ceased communications with Woods, L&I, and doctor, upon discharge. Woods submitted excellent qualifications for the position. DOC created an artificial barrier by pretending to move the job out of commuting range. DOC was employer of record with L&I. Woods was released to "full time light modified duties". After Woods' discharge, the Voc Counselor and doctor continued to review and approve the position. Woods was traumatized in her former job and DOC was aware. This could have triggered another interactive process but did not.	10
TIME LOSS FORMS: DOC claimed in its final rebuttal memorandum, Woods certified to L&I she could not do <u>any</u> job in order to receive Time Loss. Judicial Estoppel inappropriate when benefit does not take into account possible accommodations. Woods did not certify she could not do any job, only that her injury kept her from her present job. The	15

trial court based its dismissal on DOC's notion that Woods certified she could not do any job.

BREACH OF CONTRACT: DOC breached duty of good faith. Woods' training was not begun for two to three months; training was very late; Grieve and Appeal are CBA terms. Woods only agreed not to grieve or appeal "necessity" of training, not to create an unenforceable contract. Training was to be six months. A trial is needed to examine extrinsic evidence. 16

OTHER VIOLATIONS: Other contract violations are named. Environment was not minimally supportive of learning. Woods was mistreated; not allowed to ask questions; positive trainer feedback was changed to negative; DOC bases performance data solely on Van Ausdle's testimony, which was impeached. Woods' negative record was not corrected even when DOC investigator ordered it. Coworkers were afraid of retaliation from Van Ausdle. 18

DOC does not deny Van Ausdle used different trainers teaching different methods on the same tasks, so Woods could be deemed in error with either method she used. Van Ausdle was demoted for creating a HWE, then shown to be incompetent at understanding and performing the same work Woods was doing. Van Ausdle was not competent to assess Woods' performance. Her incompetence tainted Woods' record.

Employees need a higher standard of care in a training setting than they do to perform a job they already know. Woods also disclosed her mental frailty to DOC and Van Ausdle. Van Ausdle's attitudes and behavior interfered with Woods' learning.

HOSTILE WORK ENVIRONMENT: 23

Extreme:

A trial is needed to weigh the frequency and severity. Woods suffered painfully and daily. Totality of circumstances can only be weighed at trial. Mendoza initiated a HWE investigation based on Woods' complaints.

Imputable to DOC: Woods told Muccilli, Byrd, Allen and Mendoza - all upper management.

Based on Protected Status: Woods was initially treated well in the unit. On January 6, 2006, Van Ausdle wrote a positive review on Woods. On January 19, 2006, Woods disclosed her mental frailty to Van Ausdle. Van Ausdle's record of that meeting disappeared suspiciously, but she documented Woods was traumatized at her previous job. Negative treatment began on January 19, and Evaluation on February 21 was more drastically negative even though it covered the same period as the January 6 review.

Mendoza named Woods in the investigation where Van Ausdle was found guilty of creating a HWE against co-worker. Woods was treated worse than any other staff member in her unit.

STATUTE OF LIMITATIONS: Woods stopped work on L&I on or about August 4, 2006. Woods worked sporadically after that and altercations occurred. Van Ausdle tracked Woods' off duty activity on the internet and printed up statements Woods posted on internet sites from November 2006 to June, 2007. 26

Provided one act occurs within the statute, previous acts may be included for assessing liability.

RETALIATION AND DISPARATE TREATMENT: 26
There was no business reason or provision in the CBA for Mendoza to discharge Woods. Woods engaged in several protected activities just prior to her discharge

and upper management communicated urgently about this. Woods requested public disclosure and spoke to the governor's office. Van Ausdle most likely contributed to Woods' discharge by bombarding Mendoza with emails and materials about Woods.

No additional factors justify dismissal. DOC claims Woods should be treated as a probationary employee although she was permanent with 16 yrs. Seniority. Woods need only show retaliation was part of the reason for discharge. A comparator is one who does the same work. Johnson and Garcia did the same work as Woods and lodged complaints against Van Ausdle but were not treated the same. Woods' performance data is in doubt.

Mendoza also had the two HWE investigations conducted differently showing prejudice to Woods.

NEGLIGENT HIRING AND RETENTION: Van Ausdle was an unfit supervisor and employee who grabbed subordinates in between the breasts and lifted up their blouses. DOC authored the report and knew. Van Ausdle also failed to meet minimum requirements as supervisor and in personal relations in the past. Negligent Retention and Discrimination claims are not mutually exclusive in these circumstances. 30

DISCRIMINATION: The law mandates liberal construction. Causation may be inferred on timing alone. The uncanny timing and circumstances surrounding Van Ausdle's change in opinion of Woods suggests pretext. 31

REPORT OF GARY NAMIE: DOC misstates the issues around the Namie report. Woods only requested including the science from the report. The court stated it needed to conduct a 'Frye hearing' but no such hearing was conducted. DOC erroneously informed the court that the Oyemaja report, upon which the Namie report was based, was never dis- 31

closed to it. Woods' counsel pointed out the error to DOC's counsel, who promised to inform the court of the error but never did.

IMPROPER USE OF REBUTTAL MEMORANDUM: 31
 DOC raised many issues either in rebuttal or at appeal that Woods had no opportunity to rebut with evidence; particularly that Woods certified to L&I that she could not do any job.

- 4. **CONCLUSION: The issues surrounding this case are too complex to be decided at summary judgment. There was insufficient time and opportunity for the trial court to determine the merits. Woods asks the court to remand for trial and award attorneys fees based on the violations and errors noted in this Brief and in Appellant's Brief. 32**
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ARGUMENT

DOC distorts issues and facts by misstating them and ignoring pertinent details of the case, as laid out below:

DISCHARGE: DOC discharged Woods on July 26, 2007, *CP 144 ¶8, 143 ¶5*, during Time Loss and Voc. Assessment. She lost all benefits. *CP 17 ¶ 9-12, CP 98 ¶ 22-25. CP 103 ¶ 13-16.* This process started when she sought light modified duty under the RTW program. *CP 94 ¶ 3-7. CP 272 ¶ 14-17, CP 294 ¶5-8 & 12-16.* DOC asked her to revert to her old job class as well, *CP 261 ¶ 6-7.* and engaged her L&I doctor. *CP 72 ¶ 2.* Nothing in the CBA mentions discharge as a management option for a voluntary reversion . *CP 140 last ¶ (§3: "voluntary" ; §4: "involuntary").* DOC did not involuntarily revert Woods but claims she reverted herself *ibid* . Mendoza did not offer Woods a register (*RB 3*) - he discharged her. *ibid*. Before Woods gave her reversion notice, she asked twice what the process was, but DOC merely instructed her to start it by giving the effective date of the reversion. *CP 553 ¶ 19-25.* Her notice made it very clear it was contingent upon no break in service. *CP 654 bottom email: "effective the date I start the new job...I cannot agree to a break in service."* She reiterated the same to Francisco. *CP 654 top email.* Her conversation with WFSE shows this. *CP760 middle + top.* She had an explicit right to return to work when her injuries healed. *appxs 3,4*

underline. RB12. Contrary to RB 1 + 12, at no time whatsoever did DOC inform Woods or WFSE she would be discharged if the attempt was unsuccessful, or failure to respond within a given time would result in her discharge. *CP 295 ¶5-9.* Contrary to some of the briefs, Woods did not request this reversion in 2006, but 2007. Woods saw her doctor July 12 & 26 also in 2007. *CP 59, 97- 98,* not in 2006.

A funded vacant position was available for Woods, contrary to DOC *RB 25.* CX38 was open and advertised, *CP 59 bottom email,* and not filled until October, *CP 799 footnote, long* after her discharge. Woods gave the Sec. Supervisor job description to Finkleman. *CP 98 ¶ 1-2.* The Voc. Counselor became involved on July 11, 2007. *CP 98 ¶ 22-25.* It was returned on October 29th for Finkleman's signature. *CP 655 ¶ 3-6.* A doctor with a busy practice can't be expected to remember five years prior. *RB 13.*

DOC claims Woods never provided it with accommodation information. Woods was covertly discharged only two weeks after the interactive process started. *CP 554 ¶ 4-7 CP 72 (letter did not mention discharge)+ ibid.* Woods was discharged before the doctor could decide what accommodation she needed. The courts have stated:

"An employer who discharges, reassigns, or harasses for a discriminatory reason faces a disparate treatment claim; an employer who fails to accommodate the employee's disability, faces an accommodation claim." *Pulcino 141 Wash.2d at 640, 9 P.3d 787 quoting Hill v BCTI Income Fund -I, 97 Wash. App, 657, 667, 986 P.2d 137 (1999).*)

ACCOMMODATION: DOC represents itself as patiently waiting for Woods' accommodation needs from June - September 2007. *RB24 ¶ 2 | 4-7*. However, DOC broke off communications when it discharged her. *CP 63 top, last communication.*, Her first doctor's appointment, on June 26, 2007, (before she found out the specific travel information.), she provided a copy of the job description. *CP 98 | 1-2*. The notes clearly state it was provided in June 2007. *CP 99 | 17-21*. (On July 11th the Voc. Counselor got involved and later returned it for his signature.) *CP 98. CP 101 | 3-6*. The process could not begin until Woods received the travel information to give her doctor on July 2, 2007. *CP 650 ¶ ;1 CP 79 ¶ 4CP 19 | 4-9*. She informed Francisco of her July 13 appointment on July 9, 2007. *CP 19 | 10-12*. The accommodation Woods anticipated was two days of telecommuting while she relocated to Olympia. *CP 262 | 17-19*. She told DOC the doctor would likely approve. *CP 261 | 18-21*. DOC never requested expedition or a deadline, *Ibid* or checked on the status. Therefore, an interactive process had begun, to determine which accommodation Woods needed. *ibid*. After discharge, two weeks after her scheduled appointment, *ibid*, Woods attempted unsuccessfully to re-establish communications in the email on August 3. *CP 63 top*. There is no record DOC communicated with her, L&I, or Finkleman after that.

The WLAD imposes an affirmative duty on the employer to take positive steps to determine the nature and extent of the disability. *Sommer v. DSHS*, 104 Wn. App. 160, 172, 174-575 (2001). The WAC identifies the path for employers to obtain medical information about a handicap. *WAC162-22-090. Appx1 underline*. DOC could have contacted the doctor or L&I any time to discuss any issue or inform them of the urgent need for information. *ibid*. The burden of obtaining medical information, and necessarily for that process, is on the employer. *ibid* The notice obligating the employer need not be a complete identification of the disability, *Goodman v. Boeing Co.*, 127 Wn.2d 401, 406-407. For a large state agency, an active L&I claim, along with the employee's interest in returning to work, is ample constructive notice. DOC acknowledged that notice and engaged the doctor, then ceased communications upon Woods' discharge. *ibid*. The court sought a letter identifying Woods' needs, *RP pg 16 | 21-25* but a letter could not have been written in two weeks. Woods submitted excellent performance evaluations as a W/R Secretary Supervisor, demonstrating she was qualified for CX38. *CP 342-351*. Where an employee has performed a particular job, or a substantially similar one, with good marks, this strongly supports the conclusion that she is qualified to perform the job at issue. *Mobley v. Allstate Insurance Co.*, 531 F.3d 539 (7th Cir. 2008). *see RB 11*.

During this process, it appears DOC created an artificial barrier to Woods by pretending to move the job from Port Orchard to Olympia on June 28, 2007, creating a lengthy commute. *CP 68 ¶ 2.*¹ Woods lived in Gig Harbor near the Port Orchard W/R and she had done CX38 for brief periods. *CP 59 ¶ 2.* Contrary to RB 12, the position provided support for Peninsula W/R, Pt. Orchard, *CP 490 ¶ 1*, supervised the support staff in Olympia W/R, and was responsible for both. *CP 490, CP 462 top 1/3 position duties.* According to the Position Action file CX38 was never actually moved to Olympia but remained in Pt. Orchard in the W/R supported by the position, which DOC filled after discharging Woods. *CP 656 at bottom:* The court was aware of this. *CP 525.*

Neither did DOC communicate with L&I who kept asking for light duty work for Woods even after her discharge. *CP 775 ¶ 3, CP 553 ¶ 8-19.* L&I was obviously and by necessity relevant in this interactive process. DOC was the employer of record and who received copies of all information under that claim, as all employers do. *CP 774-776, (see bottom of page: "employer's copy" and top of page: "EMPL").*

Woods' doctor released her to: "full time light modified duties" on "objective medical findings". *CP 94 ¶ 3-7 and CP 96 blk 11;* and merely

¹ DOC's description of the job at RB 12 is inaccurate. The job did support functions for Peninsula W/R and simply supervised the Olympia support staff. Had the position actually moved to Olympia, it would have left NO support staff located in Peninsula W/R.

mentioned a new supervisor could be helpful, CP 94 | 25. There is no evidence DOC asked if some change could enable Woods to return to her unit. Further, an employer's duty continues even after termination.

Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 561-63, 829 P.2d 196 (Div. 1, 1992), *aff'd*, 124 Wn.2d 634, 880 P.2d 29 (1994).

DOC claims, RB 23, Finkleman never approved the position. In Finkleman's deposition, he reports he approved it on November 6. CP 655 | 3-9. Since Woods was no longer a state employee, the Voc. Counselor saw no need to rush. State and Federal authorities agree:

Davis v. Microsoft Corp., 149 Wn.2d 521, 547, 70 P.3d 126 (2003) (citing state and federal decisions describing the process required as interactive). See also *Goodman v. Boeing*, 127 Wn.2d 401, 899 P.2d 1265 (employer did not reasonably accommodate because it failed to affirmatively ascertain the nature and extent of employee's disability). Even an accommodation on a trial basis would not have been an undue hardship as a matter of law. *Frisino v. Seattle School Dist. No. 1*, 63994-3-1, *15, Wn.App. _ (March 21, 2011).

Failure to engage in the Interactive Process is a separate and distinct basis for liability:

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391, 122 S.Ct. 1516 (2002); *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128 (9th Cir. 2001); see, also, *Wysinger v. Auto. Club of So. Cal.*, 157 Cal.App.4th 413, 69 Cal.Rptr.3d 1, 10 (Ct.App.2007) (employer exonerated for failure to accommodate but liable for failure to engage in the interactive process.): "An employer may claim there was no available reasonable accommodation. But if it did not engage in a good faith interactive process, it cannot be known whether an alternative job would have been found. The interactive process determines which accommodation is

required. Indeed, the interactive process could reveal solutions that neither party envisioned."

DOC fails to state it stopped the process prematurely by discharging Woods without notice and not communicating with her after. *Ibid.* Additionally, Woods' statements on January 19, 2006, that she was traumatized in her former job, *ibid*, could have triggered another interactive process. In *Goodman v. Boeing*, 127 Wn.2d 401, 408 (1995), the Washington Supreme Court held that an employer who... "does not ascertain the nature and extent of the employee's limitations or disability, does not call her into the office and affirmatively assist her with finding an accommodation, has failed to accommodate that employee." *Id.*, at 408. DOC did nothing to affirmatively search for other work, which was Woods' right under the IIA. *appx 3*. Passively waiting for Woods to detect other jobs; holding her to an undisclosed deadline are not real measures. The burden of persuasion in proving inability to accommodate is on the employer: *Mantolete v. Bolger*, 767 F.2d 1416, 1423-24 (9th Cir. 1985)

TIME LOSS FORMS: *Cleveland v. Policy Management Systems Corp.* 526 U.S. 795, 119 S. Ct. 1597, 1598, 143 L. Ed. 2d 966 (1999) renders Judicial Estoppel inappropriate in these circumstances, when an application for a benefit does not take into account a possible accommodation. *AB 23 (iii)*. DOC also misrepresents the Time Loss

forms, which deal with lost earning capacity. *RB23*. Woods signed the forms, including appositive statements indicating they only apply to past tense. *CP 773, under Worker's Statement*. In the same forms, the doctor released Woods to "full time light modified duties" - "Now"- *under Doctor's Statement - i.e. CP 767*. L&I continued writing to DOC asking for light duty work for Woods. *ibid*. Clearly, Woods, the doctor, and L&I thought Woods was a viable employee. If not, why was a Voc. Counselor appointed? *ibid*. In order to receive time loss, an injured worker only needs to certify that her injury kept her from her job. DOC intentionally took that statement out of context. ²The court based its entire dismissal on DOC's argument *RP 27* ¶18-23.

BREACH OF CONTRACT: "There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance: *Badgett v. Security State Bank, 116 Wn.2d 563, 807 P.2d 356 (1991)* The actions of DOC indicate otherwise. ³DOC claims they did everything by the CBA, but nothing in the CBA mentions discharge for a failed voluntary reversion attempt or under the IIA. *ibid*. DOC did not

² This is the issue DOC only raised in final rebuttal.

³ The CBA was never disclosed in discovery but all CBAs protect the rights of injured workers given by the IIA.

discharge Woods for poor performance, just cause, or Disability Separation.

DOC claims Woods was trained from the beginning of her stay. *RB 5* Woods received no training for over two months. *CP 146 | 16-19*. She spent the first three months copying, filing, and reading the Records Guide. *CP 154 1st blk, RH side | 4-5* The Records Guide was not job specific training as specified in the contract. *CP 257 | 18-25, CP 26 ¶ 3 | 2-3*. There was no action taken on establishing Woods' training needs until December 5, 2005, and ⁴neither Woods nor her supervisor were involved in establishing training needs, which violates the contract. *CP 26 ¶ 3 | 1-2 "between the supervisor...and Martha Woods". see CP 564 ¶ 1: "no plan for her input"*.

Only six months of Woods' trial service was to be training. The rest was to be time for her to hone her skills. *CP 26 ¶ 3 | 4-6*. : *"lack of training or experience alone will not be sufficient reason for reversion within the first six months of trial service."* (counsel's underline)

The role of any court is to ascertain the mutual intentions of contracting parties, see *Grant County Constructors v E.V. Lane Corp.*, 77 *Wn2d 110, 459 P2d 947 (1969)*. Extrinsic evidence can be examined at trial. At summary judgment the meaning of the words must be construed

⁴ Van Ausdle gave conflicting stories as to who created Woods' training plan. See pg below:

in the light most favorable to Woods. *AB 17 ¶1* The words "No later than September 30, 2005" mean exactly that. *CP 559 ¶ 6*. Contrary to DOC, *RB 17*, performance that is more than two months late is not negligible in training. To determine if Woods could have learned her job with full training time, a jury should be allowed to examine all factors, including Woods' intelligence.

"Grieve" and "Appeal" are CBA terms unrelated to tort action. Woods only agreed not to grieve/appeal disputes on "the **necessity** for training". *CP 26 ¶3 | 6-8*. Under DOC's current interpretation, had they denied training altogether and she would have had no tort rights.

OTHER VIOLATIONS: Woods was never allowed to complete 12 month trial service. *CP 25 ¶ 4, 11-2*. There was no completed evaluation. (EDPP) *CP 25 ¶4 | 3-4 and 10-11 CP 788 | 17-20 CP 546 | 6-8*; Rumors of "mental problems" followed her despite Progress House staff being ostensibly silenced. *CP 298 ¶4, 114-18; CP 545 | 6-11*; breaches in the CBA, *CP 25 ¶ 4, 113*; + *ibid* Fiala blocked Woods from placing a rebuttal in the file. *CP 788 14-11*. Investigations not abated *CP 788 11-14*.

The main issue is that DOC failed to provide Woods with an environment minimally supportive of learning. *AB 29*. A reasonable person would have been unable to learn. According to Laura Nelson, Woods was "distraught and upset quite a bit" because of having to deal

with Van Ausdle CP 34 ¶1. DOC does not deny any of the daily mistreatment. CP 547 | 7 to CP 551 | 15. The witnesses corroborate: *Laura Nelson, Desiree Hess, Mary Bell, Robert Villanueva and Laura Garcia, CP 34-36.* For example, Van Ausdle forced Woods out of the building for lunch. On one occasion Woods had to pay for her lunch twice-corroborated by Garcia. CP 36 end. Woods was not allowed to ask questions or for input. CP 34 ¶6 | 6: and CP 35¶ 6 | 4. Also Van Ausdle: CP 186 bottom of page. Instead, Van Ausdle deliberately changed trainer feedback to skewed negativity:

"Ms. Garcia stated that she was training Ms. Woods on completing warrants and Ms. Van Ausdle brought her into her office wanting to know how Ms. Woods was doing with the training and was she distracted at all. Ms. Garcia stated, "No but that you are aware that she has a son going to Iraq". According to Ms. Garcia, Ms. Van Ausdle then twisted her words and informed Ms. Woods that she was distracted during her training. Ms. Garcia stated that Ms. Woods was an intelligent woman and caught on quickly when she was training.her." (*Southerland CP 36¶4*) (*See CP 181 ¶2 Van Ausdle*) *investigative report certified by Francisco: CP 16|6-8*

It appears Van Ausdle controlled the feedback and even changed it. DOC describes Woods' work negatively, *RB 10* based solely on Van Ausdle's record, but Van Ausdle's testimony was impeached. CP 515 | 9-14 & footnote. Van Ausdle stated under oath:

One of my first tasks was to develop a formal training plan for Ms. Woods. On December 5, 2005 I met with Ms. Woods and went over the plan." CP 146|21-23. (*Declaration of Terri Van Ausdle*)

Later under oath she stated: "I didn't create it." CP 416 | 19-23.

Woods' counsel pointed this out to the court. CP 515. Again, despite witnesses' statements of Van Ausdle yelling, Van Ausdle declared under oath she never got upset nor raised her voice or had any hostile interactions; and as to the yelling, she stated: "Absolutely not". CP 423 | 17 - 424 | 11. Witnesses to Van Ausdle yelling at Woods: CP 34 ¶6 Desiree Hess; CP 35 ¶3 Mary Bell; CP 36 ¶3 Laura Garcia CP 36 ¶2 15-6. DOC plays down Southerland's other report RB10 in which Van Ausdle was found guilty of creating a HWE; there Van Ausdle denies yelling, despite multiple witnesses: CP 707 ¶7; CP 677 "2.": "I don't yell." If there is an issue of credibility, the motion for summary judgment should be denied. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138, 95 A.L.R.3d 225 (1977). An issue of credibility is present if the movant presents contradictory evidence. *Dunlap v. Wayne*, 105 Wn.2d 529, 536, 716 P.2d 842 (1986); (citing *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966) (1963). Summary judgment is not proper when credibility issues involving more than collateral matters exist. *Morinaga v. Vue*, 85 Wash.App. 822, 828, 935 P.2d 637 (1997). There is enough inconsistent testimony between Van Ausdle's testimony and others' to preclude summary judgment.

Woods' record was never corrected even when Van Ausdle was ordered to. DOC continues to claim Woods asked a telephone caller what

ethnic "flavor" they were, *CP 208* | 16 even though its own investigator recommended the record corrected:

"Recommend when it is alleged that an employee has made a derogatory racial comment that Ms. Van Ausdle conduct an investigation into the matter to determine its merit. In the case of Ms. Woods and her allegedly making a comment "What flavor are you" to Heidi Stomsvik, Ms. Van Ausdle should have contacted her as a part of the investigation prior to documenting the behavior into Ms. Woods employee file and giving the accusation merit. In addition, Ms. Stomsvik has stated that no derogatory racial comments were said to her (See Attachment 4). Recommend that documents in Ms. Woods employee file that speak specifically to the incident around the, "what is the flavor" incident are removed due to the incident never be properly investigated." *Southerland CP 39* ¶ 1.

Woods had merely said, "What flavor?" *CP 572, 573*. The Record also shows Woods "interrupting" her supervisor. *CP 185* ¶ 1. On this date she was at home after surgery and heavily medicated. *CP 260* | 14-21.

DOC ignores this kind of evidence consistently. In weighing statements by coworkers, a jury could factor in staff's fear of retaliation by Van Ausdle, as follows:

"Management is to be made aware, via this report, that because of their provided testimony for this investigation, several of the Pierce County Records staff has expressed concern that there may be retaliation against them by Ms. Van Ausdle. Management may need to strategize this element of the investigation if she is allowed to return to the Pierce County Records Unit." *CP 393* ¶ 7 | 6-10

DOC does not deny Van Ausdle had multiple trainers using different methods to train Woods on the same tasks, so Woods would be deemed in error regardless of which method she used. *CP 547* | 12-16.

Van Ausdle lacked the ability to assess Woods' work, (*RB 10*) *see CP*

52715-25 . After Van Ausdle's demotion, October 1, 2009, Nelson

attempted to train Van Ausdle how to do the same work Woods did:

".....As in regards to other new staff having been trained on J&S's, no, I would not say Terri is up to speed, has no basic concept of Jail vs Prison, Felony vs /Misdemeanor, no concept at all regarding field/case management aspect, what causes "tolling", etc." *CP 398¶5* .

She had four correct J&S's in 12, *CP 401¶ 8*. Woods was not evaluated by

someone qualified. (contract issue) DOC is silent about these materials but

they are in the record. A jury should be allowed to examine the matter

along with Woods' intelligence, capabilities, and assess how little or much

Van Ausdle's incompetence tainted Woods' record. In public disclosure,

The following note is from Fleming's file:

"1-19-2010 mtg w/scott. Bonnie F. Melanie G Sandy R + me: TV: Scott doesn't want her as a supv. Incompetent at performing the work + as supv Go for Termination" *CP 410*

This is after three months of training Van Ausdle. Van Ausdle's testimony

upon which DOC relies, *RB 10*, is impeached due to her incompetence and

sabotage. If one thought an employee was distractable, why would one

make her cubicle function as the unit's kitchen? *CP 549 | 5-8 +ibid*. Van

Ausdle wanted Woods to appear distracted. Hundreds of insignificant

issues are documented in Van Ausdle's 1000+ page file - too large to

examine in open court. *CP 548|6-11*. If a reasonable person could

possibly learn in this environment, such a person would have had a

negative record regardless. An employee may be able to perform a job she knows in a difficult environment, but unable to learn the same job "from scratch" . *Davis v. Monroe County Bd. of Educ.*, 74 F. 3d 1186 - Court of Appeals, 11th Circuit 1996, reversed based on fellow 5th grader's behavior similar to Van Ausdle's. Even in the demanding atmosphere of police training, the standard of behavior is high: *Mosby-Grant v. City of Hagerstown*, 630 F. 3d 326 - Court of Appeals, 4th Circuit 2010 . Additionally, Woods disclosed her mental frailty to Van Ausdle, *ibid* and Dr. Ellis disclosed it to DOC. *Ibid CP 561-563*.

Van Ausdle's attitudes and resulting behaviors interfered with Woods' learning as well. *CP 579 under "Conclusion"; CP 548 19-25 ; CP 551 | 6-11. 548|18-549|4*. According to a manager, Van Ausdle targeted staff with big breasts. *CP 548 | 18-20, CP 578 ¶|2 | 6-*, (which Woods also had) *CP 237*. DOC breached the implied covenant of good faith when it ignored Woods' pleas and refused to give her what a reasonable person needed to learn her job effectively. *ibid.*, *Old Dutch Farms Inc. v. Milk Drivers & Dairy Employees*, 222 F.Supp. 125, 130 (D.C.1963).

HOSTILE WORK ENVIRONMENT: Extreme: Contrary to DOC. *RB 29*, a trial is needed to weigh the frequency of the behavior with the severity, *Glasgow*, 103 Wn.2d at 406-07. Woods suffered, painfully, almost daily. *CP 547 | 7-11*. Van Ausdle followed her around constantly,

documenting every minutia behavior and action including when Woods went to the bathroom and how long it took. CP 548 | 6-8. The “totality of the circumstances” test obliges the court to consider carefully “the social context in which particular behavior occurs and is experienced by its target.” *Glasgow vs. Georgia-Pacific Corp* 103 Wn.2d 401, 693 P.2d 708, 51 Fair Empl.Prac.Cas. (BNA) 880, 38 Empl. Prac. Dec. P 35,627.⁵ For Woods, this social context includes trying to learn a new job and having a documented mental frailty. CP 160, 2nd column, 5th blk. For instance, what message did it give to coworkers when they went into Woods' cubicle to prepare their lunch while Woods was trying to work? A holistic perspective is necessary. *Williams v. General Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999) Each successive episode has its predecessors and the environment created may exceed the sum of the individual episodes.” *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991). **Imputable to DOC:** Woods told Muccilli about the HWE; CP 580 ¶4-5. and Byrd and Allen: CP 667 final email. Mendoza initiated a HWE investigation based on Woods' complaints on November of 2006. CP 29. DOC therefore knew. **Based on Protected Status:** Woods was initially treated well in the unit. CP 147 | 10-12. Then on January 19, 2006, Woods told Van Ausdle of her mental disability. CP

⁵ both these components (learning a new job and mental frailty) are missing in all DOC's legal authorities.

546 | 20 - 547 | 2. Van Ausdle agreed this was the date of this preview session. CP 419 | 8-10. She admitted she took notes from that meeting. CP 417 | 13-17. And despite keeping every possible detailed note of Woods, she stumbled and hesitated when asked what happened to those meeting minutes. CP 419 | 19-21. Van Ausdle did, however, document Woods was traumatized at her previous job. CP 160 5th blk, left hand, | 13. Prior to January 19, on January 6, Van Ausdle gave Woods a good review - It contains positive attributes and examples of diligence. CP 567-568. Van Ausdle's opinion and treatment of Woods changed drastically after January 19, 2006. *ibid.* Conspicuously, the February 21 draft EDPP mentioned none of the positive traits noted in her January 6 review, even though this EDPP only covers the entire period to only six days beyond CP 157 top: "Evaluation Period: From g..9-12-05 To 1-12-06". .

Van Ausdle was found guilty of creating a HWE against another staff. CP 356 - 395. Mendoza named Woods in that very investigation, stating concerns about how Van Ausdle treated her CP 391 ¶1 | 2-8, ¶4 | 7-9. Johnson named Woods as well. CP 672 ¶3 | 8-9.

DOC claims Van Ausdle treated Woods no worse than she treated others RB pg 30¶2. But none of Woods' co-workers were kicked out for lunch, had their cubicle become a kitchen, were called at home hourly after surgery, etc. or had feedback changed to negative. *ibid.* A jury

should be allowed to weigh this against the fact Van Ausdle knew of Woods' mental frailty. *Ibid*

STATUTE OF LIMITATIONS: Contrary to RB, Woods stopped work on or about August 4, 2006, *CP 15110-12*, worked only sporadically after that; altercations occurred, including Van Ausdle denying pay. *CP 49¶ 4 - 50 ¶1. CP 16118 - 1715*. There is also the incident on February 7th. *CP 55116-11*. Furthermore, Woods worked on Monday, July 31st, 2006, and in early August. *ibid*. And Van Ausdle held almost daily meetings with Woods where she criticized, belittled and humiliated her. *CP 54719-10*. Many meetings undoubtedly occurred after July 30th. Even when Woods was not in pay status, Van Ausdle tracked her on the internet and sent Woods' blog posts to Mendoza. *CP 603-611*. The courts have ruled that:

,".....provided that an act contributing to the claim occurs within the filing period, a court may consider the entire time period of the hostile environment for purposes of determining liability. *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004) (citing *Morgan*, 536 U.S. at 117, 122 S.Ct. 2061)."

RETALIATION AND DISPARATE TREATMENT: DOC asserts a business reason for discharging Woods. *RB 6*. There was no allowance in the CBA or IIA for a manager to discharge an employee for trying to take a voluntary reversion or RTW option. *ibid*. A jury could find compelling evidence of duplicity on this alone. Additionally, Woods

was on Time Loss with seven months just reinstated. *ibid* CP 98 | 13-14. She asked Mendoza for yet another investigation into a new discriminatory email one month prior to her discharge, and Mendoza never responded but forwarded it.. CP 612 top. She ran a support group for victims and was communicating with upper management on behalf of the group. *see footnote #9: late discovery*; CP 526 | 20-24. ⁶Woods also made public disclosure requests on behalf of her support group. *Ibid*, CP 526 | 20-24. Woods involved the legislature in March, 2007, CP 667 ¶ 2, "*Lane, John (GOV)*", and requested public disclosure of the report prepared by Allen on her group. CP 667 ¶8 Mendoza refused to give Woods a copy of the HWE investigation on her. CP 667 ¶ 9. There was no legitimate reason for his denial. Fiala also determined it would be best to have a "larger discussion" about Woods with Mendoza; Byrd gave consent for that meeting on March 14, 2007. She states: "please move with dispatch". CP 666 ¶ 1. All these events were in very close proximity to Woods' discharge.

A strong inference linking Van Ausdle to Woods' discharge is also in the record contrary to DOC RB 4: Van Ausdle sent Mendoza so many

⁶ On July 5, 2013, DOC produced, for the first time, approx. 30 emails that were not handed over in discovery. Counsel has not yet had time to respond. These were emails to Mendoza about Woods around the time of her discharge, and were regarding her public disclosure requests. Had she received them in discovery she could have presented them as evidence.

emails about Woods she could not get her own work done CP 391 ¶ 112-8 and ¶ 417-9; she tracked Woods on the internet and sent Mendoza everything Woods posted. CP 603-611 "cc Armando Mendoza" and 6/3/2007 at bottom of pages. CP 587 whole page. A jury could find Van Ausdle caused Mendoza to discharge Woods so he could get his own work done and be free of the barrage of negative materials regarding Woods. Woods needs only to show that the retaliation was a substantial factor in the discharge, and not the principal reason. An employer that is even partly motivated by retaliation violates the statute. *Kahn v. Salerno*, 90 Wn.App. 110, 951 P.2d 321 (1998) and citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18(1991).

There are no additional factors justifying Woods' dismissal. DOC never separated Woods for poor performance or Disability-Separation. *ibid.* A jury could find that being discharged while on Time Loss is an adverse employment action. A jury could also decide the discharge was a result of retaliatory sabotage by Van Ausdle even though Mendoza did it. A jury could reasonably determine it was based on spurious information created either by Van Ausdle's maliciousness, incompetence, or both. *ibid.*

DOC suggests Woods should be treated like a probationary employee RB 39. Woods was a permanent state worker with 16 yrs. seniority. CP 484 last item "seniority date 1/19/91". A comparator is

always defined as one who does substantially the same work. *Domingo v. Boeing Employees Credit Union*, 124 Wash. App. 71, 81, 98 P.3d 1222, 1227 (2004). DOC does not deny Garcia and Johnson did the same work but it claims they are not comparators. RB 3. Both women lodged complaints against Van Ausdle and neither were treated like Woods. Due to Van Ausdle's incompetence and maliciousness, Woods' performance data is in doubt. *ibid*. If Woods can show negative treatment based on protected class, a comparator is not necessary. *See AB 39*.

DOC states the 2009 (Johnson) investigation proves Van Ausdle treated everybody the same. *RB 30*. Mendoza had the two HWE investigations conducted differently, resulting in prejudice to Woods. In Woods', Southerland interviewed Woods first, and nobody spoke to her again, *CP 29-40* and Mendoza would not give her a copy of the report.. *ibid* . But Southerland interviewed Johnson a second time **after** Van Ausdle gave her statement, so Johnson could rebut Van Ausdle. *CP 362 27*. Southerland found HWE in favor of Johnson but not Woods, even though Woods was treated far worse and had evidence of protected status. *ibid*. A jury could call into question Mendoza's motives in conducting these investigations differently.

When adverse employment decisions are taken within a reasonable period of time after complaints of discrimination have been made, retaliatory intent may be inferred:

. Davis v. Team Elec. Co., 520 F.3d 1080, 1094 (9th Cir. 2008) (“We have held that “causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity”); *Nidds v. Schindler Elevator Corp., 113 F.3d 912, 9119 (9th Cir. 1996)* (“temporal proximity” between filing of a complaint and discharge may be sufficient to find a causal link where a complainant's layoff occurred only four months after he filed a discrimination complaint) *Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)* (“causation ... may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision”).

NEGLIGENT HIRING AND RETENTION: Woods has shown that Van Ausdle was an unfit supervisor and employee. *CP 274 | 12-25*. In February, 2006, she grabbed two subordinates in between the breasts and lifted up their blouses. *CP 518, CP 548-549, CP 574-579*. DOC authored this report. *CP 579*. Woods reported it to the safety officer *CP 548 | 18-25*. No action was taken. *CP 296, CP 527-528, CP 555-556*. Even back in the 1980s, Van Ausdle abused supervisory powers and failed to meet minimum requirements (*in "Personal Relations" CP 711, left hand, and "Supervisory". CP 714*) DOC failed to ascertain whether she was competent enough to assess a trainee. *Ibid* The court allowed both discrimination and negligent supervision claims to stand in *Robinson*, and should likewise in Woods'. *AB 40. An employer may be liable to a third*

person for the employer's negligence in hiring or retaining a servant who is incompetent. Peck v. Siau, 65 Wash.App. 285, 288 (1992). (RB 43)

DISCRIMINATION: RCW 49.60.020 *appx 5* mandates liberal construction. The Supreme Court view[s] with caution any construction that would narrow the coverage of the law.” *Marquis v. City of Spokane, 130 Wn.2d 97, 108 (1996)*. Courts hold that causation can be inferred from timing alone:

Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 507 (9th Cir. 2000) Contrary to RB 1 (“[E]vidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant.”)

The uncanny timing of Van Ausdle's dramatic change in opinion of Woods on January 19, 2006, could be seen as discrimination by a jury.

REPORT OF GARY NAMIE: DOC misconstrues the arguments. Woods only requested inclusion of the scientific information in the report *RP pg 7 | 16-19*. Upon hearing this, the court stated "it would have to be a Frye hearing" *RP pg 7 | 25*. But then failed to conduct one.. ⁷Contrary to DOC, CP 794 *end*, the Oyemaja report, which the Namie report was based on, was disclosed to DOC *see footnote*.

⁸IMPROPER USE OF REBUTTAL MEMORANDUM:

⁷ Woods' counsel pointed out to DOC's counsel that he had discussed it in Finkleman's deposition. Mr. Ahearn promised in an email to correct the record with the court, but never did. There was no opportunity to present this email as evidence.

⁸ *see AB pg 22*

DOC also claimed the following for the first time in their Motion for Summary Judgment final rebuttal memorandum or Respondents' Brief. Woods had no opportunity to rebut with evidence: 1) That Woods certified to L&I she couldn't do any job *CP 746 ll 1-7*; 2) That Woods failed to place her name on the register. *RB 14 ¶ 2*; 3) That Woods never objected to her experience in the unit *RB 18 ¶3*. 4) That Woods requested Accommodation for Light Duty in the Spring of 2007 *RB 20 ¶ 2*; 5) ¶25) That Woods was a probationary employee *RB 39*; 6) That Woods did not seek to withdraw her request to revert *RB 12 . ¶ 1*; 7) That Woods never complained about some of the touching or being kicked out of the building for lunch. *CP 803 footnote* 8) that DOC tacitly procured the right to bring these things up for the first time in rebuttal. *RB 24 footnote*.

CONCLUSION

The details in this case are complex and at the very least require thorough examination by a jury. There was insufficient time or opportunity for the trial court to reasonably determine the merits of this matter at a summary judgment hearing. Woods asks the court to Remand for trial and award reasonable attorneys' fees based on the violations and errors noted above, and in AB.

CERTIFICATE OF SERVICE:

I hereby certify that I caused a true and correct copy of this brief to be served on all parties, as follows:

PARTY	METHOD OF SERVICE
Garth Ahearn, WSBA #29840 ATTORNEY GENERAL OF WASHINGTON P. O. Box 2317 Tacoma WA 98402-2317 (253) 593- 5243 GarthA@ATG.WA.GOV	Hand delivered
Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402 (253) 593-2970	Hand delivered

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

Dated this 29th day of July, 2013, at Tacoma, Washington



Robert Kim WSBA #25042

APPENDIX 1 - Health Care Opinions

WAC 162-22-090 (1-3)

(1) Employers may seek a health care professional's opinion on whether a person's disability affects the proper performance of a particular job. The employer may also seek a health care professional's opinion on possible effective accommodations that would enable the person with a disability to properly perform the job. The health care professional's opinion will be given due weight in view of all the circumstances, including the extent of the health care professional's knowledge of the particular person and job, and the health care professional's relationship to the parties.

(2) ommitted

(3) Employers are advised to provide the health care professional with the necessary information about the particular job and to inform the health care professional of the need for an individualized opinion.

APPENDIX 2 - Reasonable Accommodation

WAC 162-22-065

(1) Reasonable accommodation means measures that:

- (a) Enable equal opportunity in the application process;
- (b) Enable the proper performance of the particular job held or desired;
- (c) Enable the enjoyment of equal benefits, privileges, or terms and conditions of employment.

(2) Possible examples of reasonable accommodation may include, but are not limited to:

(a) Adjustments in job duties, work schedules, or scope of work;

(b) Changes in the job setting or conditions of work;

(c) Informing the employee of vacant positions and considering the employee for those positions for which the employee is qualified.

APPENDIX 3

RCW 41.06.490 (1-5)

State employee return-to-work program.

In addition to the rules adopted under RCW 41.06.150, the director shall adopt rules establishing a state employee return-to-work program. The program shall, at a minimum:

- (1) Direct each agency to adopt a return-to-work policy. The program shall allow each agency program to take into consideration the special nature of employment in the agency;
- (2) Provide for eligibility in the return-to-work program, for a minimum of two years from the date the temporary disability commenced, for any permanent employee who is receiving compensation under RCW 51.32.090 and who is, by reason of his or her temporary disability, unable to return to his or her previous work, but who is physically capable of carrying out work of a lighter or modified nature;
- (3) Require each agency to name an agency representative responsible for coordinating the return-to-work program of the agency;
- (4) Provide that applicants receiving appointments for classified service receive an explanation of the return-to-work policy;
- (5) Require training of supervisors on implementation of the return-to-work policy, including but not limited to assessment of the appropriateness of the return-to-work job for the employee; and

APPENDIX 4 - L&I

RCW 51.32.090 (4) and RCW 51.48.02 (1)

(4)(a) The legislature finds that long-term disability and the cost of injuries is significantly reduced when injured workers remain at work following their injury. To encourage employers at the time of injury to provide light duty or transitional work for their workers, wage subsidies and other incentives are made available to employers insured with the department.

(b) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described.

.....

RCW 51.48.02 (1)

(1) No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title. However, nothing in this section prevents an employer from taking any action against a worker for other reasons including, but not limited to, the worker's failure to observe health or safety standards adopted by the employer, or the frequency or nature of the worker's job-related accidents.

APPENDIX 5 - DISCRIMINATION

RCW 49.60.020- Construction of chapter.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter.....

APPENDIX 6 - TIMELINE OF EVENTS IN CHRONOLOGICAL ORDER REFERENCED WITH CLERKS PAPERS.

These events are already well noted in the record and this brief, and are listed herewith so the court may more easily view them.

EVENTS RUNNING UP TO WOODS' DISCHARGE			
Protected Activity	Location	Date	DOC Actions
Woods complains of HWE. Mendoza orders an investigation	<i>CP 29 top of page</i>	11/1/2006 completed on 3/2007	Mendoza will not give Woods a copy
Woods talks to DOC on behalf of her support group. And requests public disclosure	<i>CP 526 16-18 + late discovery</i>	4/1/2007 and ongoing	Numerous meetings and emails about Woods (late discovery)
Van Ausdle prints up Woods' blog posts dating back to 11/2006 and mails them to Mendoza	CP 603 - 611	6/3/2007	none
Woods inquired about RTW options and gave reversion notice contingent upon no break in svc.	<i>CP 59 top of page</i>	6/9/2007	none
Woods asks Mendoza for another investigation into a new, discriminatory email.	<i>CP 612 entire pg</i>	6/26/2007	no response, but Mendoza forwarded it.
Woods Receives the travel information to take to her doctor (10% travel time)	<i>CP 650 top of page</i>	7/2/2007	none
L&I reinstated Time Loss for 7 months, December to July and ongoing (<i>it was previously stopped</i>)	<i>Cp 98 13-14</i>	7/12/2007	none
Woods has first and second appointment with her doctor after receiving travel information	<i>CP 59, 97-98</i>	7/12/2007 and 7/26/2007	none
Mendoza discharges Woods	<i>CP 79-80</i>	7/26/2007	letter of July 26, 2007

APPENDIX 7 - TABLE OF ABBREVIATIONS

Allen: Diversity chief Harrison Allen:
Blonien: Deputy Administrator Scott Blonien:
Byrd: Acting DOC Secretary Mary Leftridge-Byrd:
CBA: Collective Bargaining Agreement
CX38: The vacant Secretary Supervisor position:
Discharge: Woods' separation ending state employment and benefits
DOC: Respondent Washington State Department of Corrections:
Doctor: Woods; L&I doctor Lowell Finkleman
Dowler: HR Manager Todd Dowler:
Fiala : Administrator Anne Fiala:
Finkleman: Woods' L&I doctor Lowell Finkleman:
Fleming: Records Program Manager Carrie Fleming:
Francisco: HR Manager Bonnie Francisco:
Garcia: Coworker Laura Garcia:
HWE: Hostile Work Environment:
IIA: Industrial Insurance Act:
Johnson: Coworker Becky Johnson:
L&I: Washington State Department of Labor and Industries:
Mendoza: Field Administrator Armando Mendoza:
Muccilli: Field Administrator Bonnie Muccilli:
Nelson: Records Manager Cynthia Nelson
RTW Option: Return to Work Option under the IIA:
RTW Program: State Employees Return to Work Program:
Southerland: Diversity Investigator Charles Southerland:
Time Loss: Time Loss Compensation under the IIA:
Van Ausdle: Respondent Terri Van Ausdle:
Voc Assessment: Assessment by L&I appointed Voc. Counselor:
Voc. Counselor: L&I appointed Vocational Counselor:
W/R: Work Release:
WFSE: Washington Federation of State Employees:
Woods: Appellant Martha Woods

For Citations:

Briefs: *AB, RB*

Report of Proceedings: *RP*

Clerks' Papers: *CP*

Paragraph: ¶

Page: *pg* (omitted if right after AB, RB, RP or CP)

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