

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

NO. 288986

**WELLPINIT SCHOOL DISTRICT NO. 49,
Petitioner**

v.

**JOHN L. HALE AND ROBBIN,
Respondent**

**REPLY AND RESPONSE BRIEF OF
WELLPINIT SCHOOL DISTRICT NO. 49**

EVANS, CRAVEN & LACKIE, P.S.
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A. Petitioner's Reply Argument.

1. The Record Herein Simply Does Not Support Mr. Hale's Contentions In This Appeal.

The appeal by the Wellpinit School District ("WSD") contests the fact that Mr. Hale has a "disability", and further his need for accommodation for that alleged disability. During his employment Mr. Hale twice protested treatment by other WSD employees and he challenged the WSD's management of curriculum and programs in a number of aspects. He never claimed to be unable to work while he was employed and never submitted evidence to the WSD that he was "disabled", nor has he in this action. Yet in response to the WSD appeal and in support of his own appeal, Mr. Hale makes the following sweeping statement:

The record does establish that Mr. Hale had a medically diagnosable mental impairment. Therefore, the record establishes that he had a disability under RCW 49.60.040(7)(a-c). The record also establishes that plaintiff [Hale] notified the employer of his disability as early as August 25, 2002 and again on January 3, 2003. Finally, the record establishes that Mr. Hale's anxiety disorder and depression had a substantially limiting effect on his ability to perform his job. Because the district failed to engage in the interactive process and respond to Mr. Hale's request for intervention, he ultimately became so ill he could not work. He never requested a change in supervisors as a form of accommodation. But he qualified for reasonable accommodation. RCW 49.60.040(7)(d).

...

. . . Mr. Hale suffered from anxiety disorder and depression, a long standing mental health condition. Conflict with his supervisors superimposed on that condition aggravated the condition. The condition has a substantially limiting effect on his ability to perform his job. . . .

Brief of Respondent/Cross Appellant, p. 25, 26. This sums up Mr. Hale's case at the Trial Court level and on appeal, without citation to any portion of the record which supports those statements.

In particular throughout his appeal argument Mr. Hale makes conclusive statements, including (1) that Mr. Hale's work environment was "severely impacting [his] health" and that he "repeatedly" notified the WSD of such, *Brief of Respondent*, p. 8; (2) that his "disability" had a substantially limiting effect on his ability to perform his job, *Brief of Respondent*, pp. 11, 13, 14-15, 16, 18, 25, 26, 27; and (3) that Dr. Wigert "testified" that Mr. Hale had "long-standing history of anxiety and depression "that was being significantly aggravated by his work environment, *Brief of Respondent*, pp. 14, 16. None of those statements are supported by citation to the record of evidence before the Trial Court. As such, they should be disregarded. RAP 10.3(a)(5) requires that each factual statement in a brief be accompanied by a reference to the record. This court should not consider such unsupported argument. See *Eugster v. City of Spokane*, 118 Wn.App. 383, 424-425, 76 P.3d 741 (2003).

The record that was presented to the Trial Court demonstrates that Mr. Hale's case is based solely on a pre-existing anxiety and depression condition and nothing else. His unsupported statements of "a substantially limiting effect" of his condition on his ability to perform his job, and that he notified the WSD of his need for accommodation, are completely unsupported. The record actually shows:

- That Mr. Hale's alleged symptoms or conditions were not intolerable, but rather he could not stand the "hostility" of Messrs. Kristiansen, Riedlinger and Magden; he could not identify any other condition of his employment that he found "intolerable." CP 133.
- His letters of "notice" claimed neither disability nor a need for accommodation, but rather railed at the treatment he received from his supervisors and more critically against the management of WSD programs in which he was involved. CP 201, 274-275.
- Mr. Hale's own physician merely provided letters that identified pre-existing anxiety and depression but did not relate, in a medically objective manner, an exacerbation of either of those conditions to Mr. Hale's workplace or duties. Rather, the physician merely reported what Mr. Hale told him, without any evidence of causation. CP 204, 276.

Based upon the arguments set forth at the Trial Court level and herein, the Wellpinit School District respectfully submits that Mr. Hale has completely failed to present a case raising an issue of fact against his former employer under the Washington Law Against Discrimination.

2. Initiation Of The "Interactive Process" Was Mr. Hale's Responsibility.

Mr. Hale certainly voiced complaints to his employer, regarding both supervisor issues and WSD program management, but he never specifically complained of an inability to perform his job *because of his alleged disability*, nor did he attempt to involve the WSD beyond one discussion with Mr. Riedlinger regarding his complaints of August 25, 2002 and January 3, 2003, which Mr. Hale found "productive." CP 80-81, 85-86. Without citation to supporting evidence Mr. Hale merely claims a disability and the right to an accommodation – the only accommodation that could possibly be gleaned from his complaints was a change of supervisors and then the overall management of the school district programs within which Mr. Hale was employed. Upon that record Mr. Hale now claims that the WSD ignored the "interactive process."

First, even though Mr. Hale points to his pre-existing anxiety and depression conditions as "disability", the fact remains that he has never provided evidence that those conditions somehow impaired his ability to perform his job or medical documentation explaining a reasonable likelihood that engaging in his job functions at the WSD without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect. RCW 49.60.040(7)(d)(i) and

(ii). In August 2002 he simply complained about treatment by a supervisor and then, over four months later, submitted a letter from a doctor that stated his pre-existing condition and reported that Mr. Hale felt that his work made it worse. CP 204. There was nothing in the letter from Mr. Hale in either August 2002 (CP 201) or January 2003 (CP 274-275) that claimed an inability to perform and the need for accommodation. He was merely complaining about personnel and management issues. Please refer to Sections D.2 and 3 of the *Brief of Petitioner* herein.

Even if Mr. Hale had informed the WSD of a "disability" (which is certainly not conceded herein) Washington law requires more than merely a complaint from an employee in WLAD litigation. Mr. Hale submits that he must merely show he had a "condition" of some sort and that he is therefore disabled. That assumption is incorrect.

We hold that if challenged, the employee must come forward at summary judgment or trial with competent evidence establishing a nexus between the disability and the need for accommodation. This ensures that an employer violates its duty to accommodate only where the employee has proved a medical nexus exists and the employer fails to provide reasonable accommodations.

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 142, 94 P.3d 930 (2004). That case is virtually identical with the facts presented herein.

Mr. Riehl had been an employee of Foodmaker for seven years, the latter few during which Mr. Riehl experienced some physical issues

requiring hospitalization, sick leave and reduced hours. Then his position was combined with that of another employee, in essence firing Mr. Riehl. He put in for other positions with Foodmaker but he was not rehired. Mr. Riehl filed a complaint in part for Foodmaker's failure to accommodate his claimed disability of anxiety and post-traumatic stress disorder. He also claimed disparate treatment by his employer when it failed to rehire him, but that claim is not presented by Mr. Hale.

In this case Mr. Hale's complaint letters to the WSD fail to mention, even once, an alleged disability. He complained that his treatment by certain WSD employees makes him nauseous and somewhat sleepless. CP 201. In August 2002 Mr. Hale failed to inform the WSD of his "anxiety" or "depression" diagnoses even though they existed in April 2002. CP 204. He merely stated that he was nauseous. In that first complaint, dated August 25, 2002 (CP 201), complained only about his treatment by a supervisor, Magne Christiansen, and then Mr. Hale admitted in that letter that he was not yet adept at a certain software but claimed that it will not take long to become proficient, representing that he was "very excited about our project and really want this high school to be successful." *Id.* If anything is to be gleaned from that letter (now claimed to be the first notification of "disability" to WSD) Mr. Hale required separation from Mr. Christiansen in order to excel at his job. There was

no claim of disability and no request for accommodation but rather only a report of co-workers in conflict and a request for intervention.

Further, even if Mr. Hale's August 2002 letter was notification of a disability he never submitted competent evidence providing a medical nexus between his claimed disability and accommodation.

This requirement is not burdensome; it simply requires evidence in the record that a disability requires accommodation. Competent evidence establishing a nexus between a disability and the need for accommodation will vary depending on how obvious or subtle the symptoms of the disability are. Medical expert testimony may or may not be required depending on the obviousness of the medical need for accommodation in the sound discretion of the court. Where the disability and need for accommodation is obvious, such as a broken leg, the medical necessity burden will be met upon notice to the employer, and the inquiry will not be if accommodation is needed, but rather what kind of accommodation is needed. However, in the case of depression or PTSD, *a doctor's note may be necessary to satisfy the plaintiff's burden to show some accommodation is medically necessary.*

Riehl v. Foodmaker, Inc., 152 Wn.2d at 148 (emphasis supplied). In other words, the employee may not merely claim to be suffering discomfort and stress and automatically trigger an accommodation. This has been the WSD's position all along. Mr. Hale was unhappy with his supervision and the direction of certain programs being offered by the WSD. CP 201 and 274-275. It made him upset. That was not notice of a disability that needed accommodation.

. . . we retain the medical necessity element because it prevents employees from requesting accommodations based on their own perception of a need for accommodation where there is no medical confirmation that such need exists.

Id. at 148 n. 5. Like *Riehl*, in this case there is no medical confirmation that Mr. Hale's "abnormalities required . . . accommodation and the need to accommodate his alleged 'disability' was not obvious", requiring greater documentation to survive summary judgment." *Id.* at 148-149. Mr. Hale never claimed to be disabled, only unhappy with supervisors and program management. The note from his doctor reported anxiety and depression but did not state he was disabled by those conditions in any way. CP 204. Mr. Hale never triggered the "accommodation" requirement. Therefore, he failed to initiate the "interactive process" which he now claims was ignored by the WSD.

“Reasonable accommodation is an interactive process between the employee and the employer.” *Davis v. Microsoft Corp.*, 109 Wn.App. 884, 892, 37 P.3d 333 (2002), *aff'd*, 149 Wn.2d 521, 70 P.3d 126 (2003) (citing *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408-09, 899 P.2d 1265 (1995)). An employee, when requesting a disability accommodation, must advise the employer of her disability and the extent of the limitations. *Davis v. Microsoft Corp.*, 109 Wn.App. at 892 (citing *Goodman*, 127 Wn.2d at 408)). An employee who claims a failure to accommodate has the burden

to show that “a specific reasonable accommodation was available to the employer at the time the employee's physical limitation became known and that accommodation was medically necessary.” *Pulcino*, 141, Wn.2d at 643 (citations omitted).

The basis of Mr. Hale's claim is totally unsupported by the record:

. . . Mr. Hale suffered from an anxiety disorder and depression, a long standing mental health condition. Conflict with his supervisors superimposed on that condition aggravated the condition. The condition had a substantially limiting effect on his ability to perform his job.

Brief of Respondent, p. 26. Beginning with the end of the first sentence – “a long standing mental health condition” – and right through to the end of the quoted argument, Mr. Hale has failed to cite any evidence presented to the trial court that supports those contentions. No one can tell how long his anxiety and depression conditions had existed. There is no objective medical evidence that his conditions were exacerbated by any perceived “conflict”, only Mr. Hale's report to his doctor. CP 204. In fact, during October and December 2002 Mr. Hale's condition was improving. CP 285. The only record provided to the WSD by Mr. Hale to WSD employment before he resigned merely reports that Mr. Hale had a previous (but of unknown duration) condition which Dr. Wigert explained had been under control with medication. CP 204. Dr. Wigert did not render any opinion

that Mr. Hale's condition was exacerbated by his working conditions, or that he required accommodation. In fact, Mr. Hale himself never notified the WSD that he believed that he was disabled in any way. Instead he wrote letters to his superiors and the school board railing at the manner in which the District ran its programs yet did not miss a day of work. He failed to present a shred of competent evidence that his condition "had a substantially limiting effect on his ability to perform his job", never crossing the threshold of a prima facie case under RCW 49.60.040(7)(d)(i). There was no disability presented to the WSD which required discussion under the "interactive process."

3. The Only Accommodation That Could Be Inferred From Mr. Hale's Complaints Is Not Available Under The WLAD.

Mr. Hale argues that WSD has missed the point of the claim because, while *Snyder v. Medical Service Corporation*, 145 Wn.2d 233, 35 P.3d 1158 (2001) holds that the WLAD does not impose upon an employer a duty to accommodate by finding the allegedly disabled employee a different supervisor, Mr. Hale claims now that he never requested a new supervisor. *Brief of Respondent*, p. 4. Whether Mr. Hale's letters to WSD in August 2002 and January 2003 (CP 201, 274-275) support that contention is a matter of interpretation. Neither of the letters specifically requests a different supervisor and yet neither can be read with

any other meaning. After-the-fact at deposition even his own physician, Dr. Wigert, could think of no accommodation other than changing Mr. Hale's supervisor. CP 289.

In its particulars Mr. Hale's appeal argument shows precisely why his WLAD claim fails. In August 2002 and January 2003 Mr. Hale notified the WSD that he was unhappy with his treatment by a supervisor and also with the management of certain WSD programs. CP 201. He merely requested Mr. Riedlinger's (and later the School Board's, CP 274-275) intervention regarding what he perceived to be unprofessional treatment by a supervisor and then in a much larger sense Mr. Hale got to the heart of his complaints: that the District's recognize and deal with what Mr. Hale believed were widespread and significant problems with the way the District and its curriculum were managed. Mr. Hale never, at any time, claimed "disability" or the need for accommodation in the manner of interchange between the employee and employer mandated by the WLAD.

Both parties herein cite *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 35 P.3d 1158 (2001). In that case the court recognized that the duty to reasonably accommodate an employee's claimed disability does not arise until the employee makes the employer aware of his or her disability. *Id.* at 239. Mr. Hale claimed discomfort but not "disability." His doctor reported medical conditions but again, not "disability." CP 204.

Mr. Hale never claimed that he needed an accommodation in order to perform his job, other than the fact that he was unhappy with "staff" and was concerned with education and management issues. CP 274-275. If he was claiming a right to accommodation then that accommodation required the WSD to revamp a great deal of its curriculum and management practices; an unreasonable request. The letters were not sufficient notice and even if they were, the "accommodation" sought was unreasonable. See *Dedman v. Washington Personnel Appeals Board*, 98 Wn.App. 471, 989 P.2d 1214 (1999).

Mr. Hale did not notify the WSD of any medical concerns until he provided his doctor's letter by his own, dated January 3, 2003. CP 204, 274-275. Therein he merely claimed discomfort, the doctor reported certain conditions but again there was no claim of "disability" or a condition that accommodation was needed under RCW 49.60.040(7)(d)(ii). *Id.* Mr. Hale quit six weeks later in a letter of resignation that contained the first mention of "disability" based upon "unprofessional and unfair" working conditions effecting not only Mr. Hale but also *his students*. CP 277-278. Under the rule of *Snyder v. Medical Services Corp.*, supra, the WSD had no duty to accommodate because (1) Mr. Hale failed to notify the WSD of a "disability" within the context of the WLAD, and (2) if he did so notify the WSD it was on the

date he quit his employment. There was no duty to accommodate under the facts. *Snyder v. Medical Service Corp.*, 145 Wn.2d at 239-240.

Reasonable accommodation is an interactive process between the employee and the employer. An employee has the duty to advise the employer of his disability and attending limitations. He must also explain his qualifications for potential jobs. The employer then has a duty to take affirmative measures to make known vacant job opportunities to the employee and to determine whether the employee is in fact qualified for those positions. The employee has a corresponding duty to apply for positions for which he might be qualified.

Davis v. Microsoft Corp., 109 Wn.2d 884, 892, 37 P.2d 333 (2002). Mr. Hale's claim fails in each aspect of the "interactive process." He was complaining about personnel and management issues.

The duty of an employer reasonably to accommodate an employee's disability does not arise until the employer is "aware of [the employee's] disability and physical limitations." . . . [T]his triggers the employer's burden to take "positive steps" to accommodate the employee's limitations.

Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995), cited in *Maxwell v. State Department of Corrections*, 91 Wn.App. 171, 179, 956 P.2d 1110 (1998). In August 2002 he complained of stomach aches and trouble sleeping. CP 201. In December 2002 (not provided to the WSD until January 2003) his physician noted Mr. Hale's reported stress. CP 204. On January 3, 2003 Mr. Hale reported "severe medical problems for me" and also complained about:

The disrespectful way I have been treated by Wellpinit staff, which has affected my health and health care costs, probably for the rest of my life. (See enclosed letter from Dr. Robert Wigert, my attending physician.)

CP 274, citing CP 204. Mr. Hale had reported stress to his doctor, a condition not uncommon in the workplace. Those letters and the letter dated August 25, 2002, constitute all of the "notice" that Mr. Hale provided to WSD.

. . . [employee] Maxwell never notified [employer] DOC about his possible need for accommodation or that he was taking prescription medication which might affect his behavior or require special treatment. "The employee, of course, retains a duty to cooperate with the employer's efforts by explaining her disability and qualifications." *Goodman*, 127 Wash.2d at 408, 899 P.2d 1265 (citing *Dean [v. Municipality of Metro. Seattle]*, 104 Wash.2d [627] at 637-38, 708 P.2d 393 [1985]). "Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions." *Goodman*, 127 Wash. 2d 401-408-09, 899 P.2d 1265.

Maxwell v. State Department of Corrections, 91 Wn.App. at 178.

Hale's August 25, 2002 letter was no more an "initial notice" (*Brief of Respondent*, p. 7) of disability was at best a stray comment. Mr. Hale complained that he did not appreciate comments made by Mr. Riedlinger, that his "stomach ached" and that he had trouble sleeping after talking with him. *Id.* Mr. Hale's citation to *Goodman v. Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995), apparently as authority that Mr. Hale's August

25, 2002 letter was adequate notice of disability, is an absolute stretch. Nothing in Mr. Hale's letter alerted WSD of a disability; rather, it alerted the WSD that a personality conflict was present between Mr. Hale and Mr. Riedlinger. Thereafter Dr. Wigert merely reported what Mr. Hale told him and that *Mr. Hale attributed* to his claimed disability. CP 204.

Even if Dr. Wigert's letters are considered as documentation, was it "interactive" for Mr. Hale to submit Wigert's first letter with his own on January 3, 2003 (*Brief of Respondent*, p. 17, CP 274-275, therein failing to request an accommodation) and then to submit the second Wigert letter only weeks later *with his resignation?* CP 277-278 . "The District failed to respond to the letters from Mr. Hale and his treating physicians." *Brief of Respondent*, p. 19. The WSD did not have a meaningful opportunity to respond. Yet given the complaints registered by Mr. Hale, what exactly was the issue that the District was to respond to? Management and curriculum complaints? Clearly, all that WSD knew was that Mr. Hale did not like Mr. Riedlinger or other staff. There are no "undisputed facts" that WSD "knew of Mr. Hale's condition/disability" or that it "failed to engage in any interactive process to explore reasonable accommodations." *Brief of Respondent*, p. 8. These arguments by Mr. Hale demonstrate the utter lack of merit in his disability claim.

One argument requires specific examination. Mr. Hale now represents that he requested the intervention of a school psychologist "to explore accommodations in the work environment that might assist in managing his anxiety and depression. (CP 215-216). This request was also ignored." *Brief of Respondent*, p. 9. Please review that cited testimony. Mr. Hale actually testified:

Q. I know that we've had your deposition broken into three days, but recognizing that, can you think of any act or conduct of anyone employed by the Wellpinit School District that you believe caused you harm or was in some way inappropriate or wrongful directed toward you that we have not discussed in your deposition?

...
A. I think the only other one I can think of was Mr. Riedlinger's refusal to let Jared Lange, the school psychologist, come.

Q. Come down to Fort Simcoe?

A. Correct.

Q. Okay. When did that happen?

A. I asked a couple of times, mainly talking to Mr. Lange, sometimes I called him sort of for counseling to talk about things. And I know after early January when I really got sick I remember asking him to please come and assess, see if Mr. Riedlinger would let him come and assess the situation and assess the environment there so that maybe I could get some help. And he just replied that he wasn't allowed to come.

Q. Did he tell you why he wasn't allowed to come or anything Reid said?

A. No.

CP 215-216. Mr. Hale has not offered any evidence that his requests were purposefully ignored or otherwise blocked. This testimony shows that he did in fact have access to the school psychologist and that he may have requested directly to the psychologist that the psychologist intervene in a personnel matter. There is no evidence that Mr. Hale made that request through his supervisors. According to Mr. Hale, the answer by the psychologist was that "he wasn't allowed to come." There could have been a variety of reasons including school district procedure but that leads to speculation. There simply is no evidence to support Mr. Hale's assertion at p. 9 of his *Brief*. Hyperbole such as this is the backbone of Mr. Hale's claims.

B. Argument In Response To Mr. Hale's Appeal.

1. It Is Impossible To Summarily Rule That Mr. Hale Was "Disabled" Under This Record.

This court may decline to address the existence of a disability when reasonable accommodation is the dispositive issue. *Christiano v. Spokane County Health District*, 93 Wn.App. 90, 93-94, 969 P.2d 1078 (1998), cited in *Wilson v. Wenatchee School District*, 110 Wn.App. 265, 270, 40 P.3d 686 (2002). That being said, should this Court consider Mr.

Hale's claim of "disability" it must be noted that Mr. Hale has neither claimed nor introduced evidence demonstrating that he ever missed a day of work or was in any way unable to function in his job due to his alleged depression or anxiety. Rather, he contends that the influences or presence of others make it more difficult to do his job. There is no evidence that Mr. Hale's condition had a "substantially limiting effect" on his ability to perform his job. See *Becker v. Cashman*, 128 Wn.App. 79, 114 P.2d 1210 (2005); RCW 49.60.040(7)(d)(i). But Mr. Hale seeks redress under more than just the "substantially limiting" standard of RCW 49.60.040(7).

Mr. Hale relies heavily on the letters written by his physician, Dr. Robert Wigert. CP 204, 276. Since Mr. Hale has completely failed to demonstrate any impairment on his ability to perform in his job, in order to present a claim of disability Mr. Hale was required to provide "medical documentation establishing a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." RCW 49.60.040(7)(d)(ii). Mr. Hale's argument on this appeal combines both subsections (i) and (ii) of RCW 49.60.040(7)(d) to make his case of disability. Yet if his claim is examined under the proper standard – being (ii) – it is clear that he failed to present substantial evidence of disability.

Not only is summary judgment in his favor on the issue unwarranted, the record cannot support a finding of disability even after trial.

Throughout his appeal argument Mr. Hale mixes "substantially limiting effect" in subsection (i) with the medical documentation and reasonably likelihood burden in (ii). The two standards are exclusive. Mr. Hale complains that he put the WSD on notice of his alleged condition by letter dated August 25, 2002 (CP 201) and yet that letter merely complains of that the boorish behavior of one certain individual made his stomach hurt; a personnel issue and not a plea of "disability."

After that Mr. Hale claims that "Hale's treating physician, Dr. Robert Wigert, testified that he had a long-standing history of anxiety and depression that was being significantly aggravated by his work environment." *Brief of Respondent*, p. 14. That is quite a jump from the August 25, 2002, letter complaining of personnel issues. Mr. Hale submits that this Court should grant summary judgment on that critical issue based upon letters from a doctor, now mixing RCW 49.60.040(7)(d)(ii) into the analysis. Yet the letters submitted by Mr. Hale, from Dr. Wigert, fail to "establish a reasonably likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." Dr. Wigert was merely reporting what Mr. Hale told him and in

the end that included the report that Mr. Hale would be quitting his job "due to the effects of the employment on his health issues." CP 276. The problem at WSD stemmed from Mr. Hale's intolerance of his supervisor (CP 204) and "staff", as well as the management of students and programs. CP 274-275. There is no indication in either of Dr. Wigert's letters that Mr. Hale could not perform his job duties because of "disability." The evidence showed that Mr. Hale was simply intolerant of his employer. The accommodation Mr. Hale required is simply not available. *Wilson v. Wenatchee School District*, 110 Wn.App 265, 40 P.3d 686 (2002).

The controlling standard of accommodation in this case is found at RCW 49.60.040(7)(d), which states:

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish the reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

Neither Dr. Wigert nor any other health care provider ever made a connection between Hr. Hale's claimed condition and the need for an accommodation. Dr. Wigert never did "[note] the job conditions were aggravating his symptoms." *Brief of Respondent*, p. 17. Mr. Hale did not meet the controlling standard of subsection (ii) before the trial court and he cannot meet that standard now. The evidence submitted by Mr. Hale

falls far short of "mak[ing] it clear that his anxiety disorder and depression made it difficult for him to cope with the terms and conditions of his employment" (*Brief of Respondent*, pp. 17-18) or that "Dr. Wigert's letter stated the diagnosis and indicated that Mr. Hale's work environment was aggravating his condition." *Brief of Respondent*, p. 18. Great license with the evidence is taken by Mr. Hale, who has demonstrated only that he believed that he could not work with three certain individuals. CP 133.

2. The Trial Court Exercised Its Discretion Regarding The Evidence Considered At The Summary Judgment Hearing.

An appellate court reviews the grant or denial of a summary judgment de novo. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn.App. 791, 65 P.3d 16 (2003). The admission of evidence is within the trial court's discretion and will not be overturned absent an abuse of discretion. *Herring v. Dept. of Social and Health Services*, 81 Wn.App. 1, 914 P.2d 67 (1996). That discretion is abused when the decision regarding evidence is based on untenable grounds or in a manifestly unreasonable manner. *Id.*

In this case and under the *Order Denying Plaintiff's Motion To Strike* (CP 533-535), the Trial Court found that the challenged evidence was relevant and therefore admissible on the issue of whether Mr. Hale's claimed disability was a personality conflict under *Snyder v. Med. Serv.*

Corp., 145 Wn.2d 233, 35 P.3d 1158 (2001) (CP 534), a case which both parties have argued extensively. Mr. Hale argues that his post-termination statements regarding his inability to work with his specific supervisors at WSD are not relevant to the ultimate issue of whether he requested a different supervisor as an accommodation, even though the ultimate issue is whether he was entitled to accommodation at all. The evidence was offered by the WSD to show that Mr. Hale's only complaint with the WSD was a personnel issue – that he found it impossible to work with Messrs. Riedlinger, Christiansen and/or Ms. Magden.

The record of documents developed by Mr. Hale *at the time of his employment* showed only that he was unhappy with the perceived rude behavior by one of his supervisors and later "staff." The offered exhibits were all consistent with that evidence but more specific in their presentation. Overall Mr. Hale's complaints were directed at WSD policy and management, curriculum and teaching methods. He could not work with the people that he was assigned to work under. His post-termination statements confirming those facts constitute admissions against interest and are admissible. *McClure v. Delguzzi*, 53 Wn.App. 404, 407, 767 P.2d 146 (1989); ER 801(d)(2). Mr. Hale's general protestations under ER 401 and 403 are without merit.

C. Conclusion.

Mr. Hale's complaints while employed at the Wellpinit School District in 2002 and 2003 required a complete overhaul of the management of programs and staffing. His objective is obvious from the closing of his letter to the School Board dated January 3, 2003, wherein he stated:

I am sorry I have been forced to take this step, but I believe Wellpinit School District risks losing its good reputation due to the current situation.

CP 275. That "situation" was mismanagement of programs. Mr. Hale was not concerned with his health; he was driven by a compulsion to correct incompetence and mismanagement by his employer, at least as he perceived the overall situation. In his resignation he justified his actions with this statement:

My life's passion has been business and organizational management, and you both know I am working for my Doctorate in that discipline. I am sure you can understand how frustrating it is to be dominated by such an unqualified and incompetent principal.

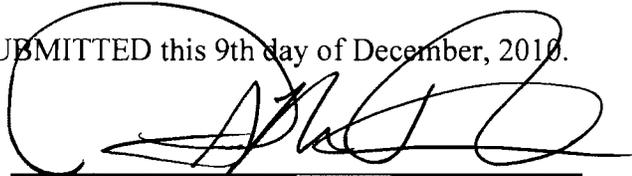
CP 277. Mr. Hale felt underutilized and unappreciated. His complaints did not focus on "disability" and the need for accommodation; he just could not tolerate who he worked for or the tasks assigned. *Id.*

Based upon the foregoing arguments and authorities, Petitioner Wellpinit School District No. 49 respectfully submits that the Trial Court

committed error when it denied the District's Motion for Summary Judgment herein. There is simply no basis for a trial of issues involving "disability" and a right to accommodation under the Washington Law Against Discrimination, RCW 49.60. In that regard, it is impossible to find that Mr. Hale is in fact "disabled" as he contends.

Wellpinit School District No. 49 respectfully requests that this Court deny Mr. Hale's appeal and reverse the Trial Court's denial of the *Defendant's Motion For Summary Judgment* (CP 473-474), dismissing Mr. Hale's claim under RCW 49.60 with prejudice.

RESPECTFULLY SUBMITTED this 9th day of December, 2010.

A handwritten signature in black ink, appearing to read 'P. Risken', is written over a horizontal line. The signature is stylized and somewhat cursive.

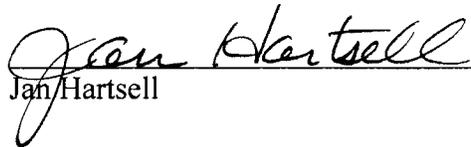
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Wellpinit School District No. 49

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 9th day of December, 2010, a true and correct copy of the foregoing ***Reply and Response Brief of Petitioner Wellpinit School District No. 49***, was served upon the following parties and their counsel of record in the manner indicated below:

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<input type="checkbox"/>	U.S. Mail
<input checked="" type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Facsimile



Jan Hartsell