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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

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DIVISION III
OF THE STATE OF WASHINGTON

WELLPINIT SCHOOL DISTRICT NO. 49.,
Petitioner

v.

JOHN L. HALE AND ROBBIN HALE,
Respondent/Cross Appellant

BRIEF OF RESPONDENT/CROSS APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	3
II. ASSIGNMENT OF ERROR.....	5
III. STATEMENT OF CASE.....	5
IV. SUMMARY OF ARGUMENT.....	11
V. ARGUMENT.....	12
A. The record demonstrates as a matter of law that plaintiff had a “disability” under <i>RCW 49.60.040(7)</i>	12
B. The evidence demonstrates that Mr. Hale’s disability/impairment qualified for reasonable accommodation under <i>RCW 49.60.040(7)(d)</i>	15
C. The trial court erred in denying Plaintiff’s motion to strike evidence regarding his post termination statements to governmental agencies.....	20
D. <i>Snyder v. Medical Services Corporation</i> has no application to this case because Mr. Hale never requested a different supervisor as a reasonable accommodation...	23
VI. CONCLUSION.....	28

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Barnett v. U.S. Air</i> , 228 F.3d 1105, 1114 (9 th Cir. 2000).....	27
<i>Goodman v. Boeing Co.</i> , 127 Wn. 2d 401, 899 P.2d 1265 (1995).....	7, 27
<i>Hale v. Wellpinit School Board</i> , 165 Wn. 2d 494, 198 P. 3d 1021 (2009).....	3, 10
<i>Kimbro v. Atlantic Richfield Co.</i> , 889 F.2d 869, 879 (9 th Cir. 1989).....	14, 27
<i>McClarty v. Totem Electric International</i> 157 Wn. 2d 214, 137 P.3d 844 (2006).....	3, 10
<i>Palmer v. Circuit Court of Cook County</i> 117 F.3d 351 (7 th Cir. 1999).....	26
<i>Snyder v. Medical Service Corporation</i> 145 Wn. 2d 233, 35 P.3d 1158 (2001).....	4, 5, 10, 12, 20, 23, 24
<i>Stewart v. County of Brown</i> , 86 F.3d 107, 111 (7 th Cir. 1996).....	26
<i>Wheeler v. Catholic Archdiocese of Seattle</i> 64 Wn. App, 552, 829 P.2d 196 (1992) Affd. 124 Wn.2d 634, 880 P.2d 29 (1994).....	15
 Statutes:	
RCW 49.60.180(2).....	3
RCW 49.60.040(7).....	3-5 7, 9, 10-13, 15, 29
RCW 49.060.040(7)(d).....	26
RCW 49.060.040(7)(a-d).....	28

I. INTRODUCTION

Plaintiff, Respondent, John L. Hale, brought this lawsuit against his former employer, Wellpinit School District No. 49, alleging three separate causes of action: (1) Disability Discrimination under RCW 49.60.180, (2) Negligent Infliction of Emotional Distress, and (3) Breach of Contract. Plaintiff has voluntarily dismissed the negligence and breach of contract claims. Only the disability discrimination claim remains.

On December 29, 2006, defendant Wellpinit School District moved for summary judgment seeking dismissal of the disability discrimination claim. The trial court granted that motion, holding that Mr. Hale failed to establish that he had a “disability” under the definition of that term adopted by the Supreme Court in *McClarty v. Totem Electric*, 157 Wn. 2d 214, 137 P.2d 844 (2006).

Mr. Hale sought discretionary review by the State Supreme Court. On January 19, 2009 the Supreme Court reversed the summary judgment order dismissing his disability discrimination claim. The court held that the legislative definition of “disability” in RCW 49.60.040(7), enacted after the *McClarty* decision, applied to Mr. Hale’s case. *Hale v. Wellpinit School District*, 165 Wn. 2d 494, 198 P.3d 1021 (2009).

On remand the case was set for trial on March 8, 2010. Prior to the trial date both parties moved for summary judgment. Plaintiff moved for partial summary judgment, asking the court to rule as a matter of law that he had a disability under RCW 49.60.040(7). Defendant Wellpinit School District moved for summary judgment seeking dismissal of plaintiff's claim. The district argued (1) Mr. Hale had no disability under the statute, and (2) it had no duty to accommodate him by providing him with a different supervisor. See *Snyder v. Medical Services Corporation*, 145 Wn. 2d 233, 35 P.3d 1158 (2001). Mr. Hale countered the accommodation argument by pointing out that the record contained no evidence that he ever requested a change in supervisor as an accommodation. Plaintiff also moved to strike evidence submitted by the district in the summary judgment proceeding relating to post termination statements he made to various governmental agencies regarding his ability to work.

The trial court denied plaintiff's motion to strike evidence. It further found that the record contained factual questions which precluded summary judgment in favor of either party. The court denied both parties motions.

Both parties sought interlocutory review. Two essential issues are presented. The first issue is whether the record supports

a finding that Mr. Hale had a disability under RCW 49.60.040(7). The second issue concerns whether the Supreme Court's decision in *Snyder v. Medical Services Corporation*, 145 Wn. 2d 233 (2001) can be used against a disability discrimination plaintiff who never requested a change in supervisor as a reasonable accommodation.

II. ASSIGNMENT OF ERROR

No. 1. The trial court erred in denying plaintiff's motion for partial summary judgment on the issue of disability.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

No. 1. Whether the record establishes as a matter of law that plaintiff Hale had a disability under RCW 49.60.040(7)?

No. 2. Whether the trial court erred in denying plaintiff's motion to strike evidence of his post termination statements on applications for government benefits?

No. 3. Whether the trial court erred in denying plaintiff's motion for partial summary judgment on the issue of disability under RCW 49.60.040(7)?

III. STATEMENT OF THE CASE

Plaintiff/Respondent, John Hale was originally hired by the Wellpinit School District in February of 2002. He was initially hired to provide technical support for the district's computer system. (CP 226-228). Subsequently, Mr. Hale was assigned to the

Wellpinit Alliance Program at Fort Simcoe, outside of White Swan, Washington. (CP 169-171, 239). The Fort Simcoe site is located 250 miles from Wellpinit. (CP 172).

It was difficult for Mr. Hale to find appropriate living accommodations when he was assigned to Fort Simcoe. Wellpinit Superintendent Reed Reidlinger represented to Mr. Hale that the district would assist him by arranging for appropriate housing. (CP 175) It did not. Mr. Hale was relegated to occupying a single wide mobile home with Phyllis Magden, the classroom teacher assigned to the Fort Simcoe site with him. (CP 175-177). Soon after his assignment to Fort Simcoe, Hale was married. His new wife, Robbin Hale, joined him and Ms. Magden in the single wide mobile home. (CP 172-173).

By late summer 2002, Mr. Hale was experiencing significant difficulties in his working environment, with particular respect to his supervisor, Magna Kristiansen. On August 25, 2002, Hale wrote to Superintendent Riedlinger and explained that the working environment was causing significant adverse effects on his health. (CP 117). The August 25, 2002 letter stated in relevant part:

His (Kristiansen's) attacks, almost always over the phone, so no one else can hear, have begun to bother me physically, in that I become nauseated

when I talk to him. My stomach aches for hours after phone conversations, and after the worst calls, I have trouble sleeping . . . I am making an appointment with the doctor to get something for the nausea and the pain, but it takes a long time to get an appointment. Therefore, I am asking that you talk with me about the problems when you visit this week. I believe a respectful meeting could be set up to resolve the issues, and we can talk about that.

Superintendent Riedlinger testified that he has no recollection of responding to this letter. (CP 245-250). Mr. Hale testified that Riedlinger's only response was to express his "sympathy" through Phyllis Magden. (CP 185-186).

Mr. Hale's August 25, 2002 letter was an initial notice to the district that he had a "disability" under RCW 49.60.040(7). See, *Goodman v. Boeing, Co.*, 127 Wn. 2d 401, 899 P.2d 1265 (1995). The district failed to respond in any fashion to Hale's concerns that the working environment was adversely affecting his health. (CP 185-186). Plaintiff's health condition deteriorated and he sought medical attention. On December 20, 2002 his treating physician, Dr. Robert Wigert, directed a letter "To whom it may concern" which stated:

John Hale is a patient that I saw in April of 2002 for the first time. He is a 56-year- old gentleman that suffers from anxiety disorder and depression. When I first saw Mr. Hale in April, he seemed to be fairly stable on his regimen of Zoloft and BuSpar.

Subsequent to that time he has had increasing problems with depression and anxiety and I have had to add another medication, Wellbutrin, with increasing doses.

At this point John feels the major stress in his life is job related. He attributes this to difficulties with his direct supervisor, who he feels treats him in a very unprofessional manner. When his anxiety attacks become prominent he has physical symptoms of chest pain and nausea.

(CP 273).

Mr. Hale provided Dr. Wigert's letter to Superintendent Riedlinger, and the Wellpinit School Board, with a cover letter dated January 3, 2003. (CP 274). Riedlinger could recall no efforts made by him, or anyone else within the district to respond to the work environment/health concerns reflected in Dr. Wigert's December 20, 2002 letter and Mr. Hale's letters of August 25, 2002 and January 3, 2003. (CP 253-263). Therefore, the undisputed facts demonstrate that as of early January 2003, the district (1) had notice of Mr. Hale's health condition/disability, and (2) failed to engage in any interactive process to explore reasonable accommodations for his disability.

The working environment was severely impacting Mr. Hale's health. He repeatedly notified the district of his concerns about the working environment, and the adverse impact on his health. The district ignored plaintiff's letters, and the

documentation from his physician. Mr. Hale asked for intervention from a district school psychologist, Jared Lange, to explore accommodations in the work environment that might assist in managing his anxiety and depression. (CP 215-216). This request was also ignored. The district failed to engage in any interactive process to explore accommodations. Finally on February 17, 2003, Mr. Hale's treating physician, Dr. Wigert, wrote a letter advising the district that his health condition had deteriorated to the point he could no longer continue to work. (CP 276). Because of his deteriorating health condition, and in consultation with his physician, Mr. Hale submitted his letter of resignation on February 23, 2003. (CP 277).

On April 24, 2006, Plaintiff Hale filed this lawsuit in Stevens County Superior Court alleging claims of, inter alia, disability discrimination under *RCW 49.60.040(7)*. (CP 3). On September 24, 2007, the trial court granted defendant's motion for summary judgment, holding that Mr. Hale failed to establish he had a "disability" under the recent Supreme court definition of that term in *McClarty v. Totem Electric*, 157 Wn. 2d 214, 137, P.3d 844 (2006). (CP 304, 419). Hale sought discretionary review of that decision in the state Supreme Court. On January 15, 2009, the Supreme Court reversed the trial courts summary judgment ruling,

holding that the legislative definition of “disability” in RCW 49.60.040(7), enacted after the *McClarty* decision, applied retroactively to Hale’s case. *Hale v. Wellpinit*, 165 Wn. 2d 494, 198 P.3d 1021 (2009).

On remand, both parties moved for summary judgment. Defendant Wellpinit sought summary judgment of dismissal, arguing (1) Mr. Hale had no disability, and (2) it had no duty to accommodate him by providing a different supervisor. (CP 468-472). Plaintiff moved for partial summary judgment, asking the trial court to rule as a matter of law that he had a disability under RCW 49.60.040(7). (CP 442-450).

In the summary judgment proceeding before the trial court, the district relied on *Snyder v. Medical Service Corporation*, 145 Wn. 2d 233, 35 P.3d 1158 (2001), and argued vigorously that it had no duty to accommodate Hale by providing him a different supervisor. Defendant renews that argument on appeal. The district introduced evidence of several post termination statements made by Hale to various governmental agencies about his ability to work. Plaintiff moved to strike that evidence as irrelevant because there was no evidence in the record that he ever requested a change in supervisors as a form of reasonable accommodation. (CP 478-

487). The trial court denied plaintiff's motion to strike. (CP 533-535).

On February 22, 2010, the trial court entered an order denying both parties' motions for summary judgment. (CP 533). Both parties sought interlocutory review. The threshold issue presented is whether the record establishes that Mr. Hale had a disability under RCW 49.60.040(7). The secondary issue is whether a defendant employer can rely on *Snyder* to defeat a disability discrimination/failure to accommodate claim when the plaintiff never requested a change in supervisor as a form of accommodation.

IV. SUMMARY OF ARGUMENT

The trial court erred in denying plaintiff's motion for partial summary judgment on the issue of disability under RCW 49.60.040(7). The undisputed facts establish as a matter of law that Mr. Hale suffered from medically diagnosable and cognizable mental conditions, i.e., anxiety disorder and depression. These were known to the employer, and had a substantially limiting effect on Hale's ability to perform his job. The court should reverse the trial court and hold that Mr. Hale had a disability under RCW 49.60.040(7) as a matter of law.

There is no evidence in the record that Mr. Hale ever requested a change in supervisors as an accommodation. Therefore, his post termination statements made in applications for governmental benefits regarding his ability to work under appropriate management have no relevance to defendant's argument premised on *Snyder v. Medical Service Corporation*, 145 Wn.2d 233 (2001). The trial court erred in denying plaintiff's motion to strike that evidence in the summary judgment proceeding below.

There is no evidence in the record to support a finding that Mr. Hale ever requested a change in supervisors as a form of accommodation. Therefore, defendant's argument challenging his disability premised on *Snyder* fails.

This court should remand to the trial court, holding that Mr. Hale had a disability as a matter of law under RCW 49.60.040(7). The case should proceed to trial on the issues of (1) whether defendant breached its duty to reasonably accommodate plaintiff's disability, and (2) plaintiff's damages.

V. ARGUMENT

A. The record demonstrates as a matter of law that plaintiff had a "disability" under RCW 49.60.040(7).

The trial court denied plaintiff's motion for partial summary judgment, holding that the evidence demonstrated a triable issue of fact concerning whether Mr. Hale had a "disability" under the Washington Law Against Discrimination (WLAD). This was clearly error. The undisputed evidence in the record establishes that Hale had medically cognizable and diagnosable mental conditions, i.e., anxiety disorder and depression. The undisputed evidence further establishes that Hale's mental condition/disability was known to the district and had a substantially limiting effect on his ability to do his job. See, RCW 49.60.040(7)(d). Therefore, the evidence establishes as a matter of law that plaintiff had a "disability" under the WLAD.

RCW 49.60.040(7)(a) defines "disability" as the presence of a sensory, mental or physical impairment that:

- (i) is medically cognizable or diagnosable;
- (ii) exists as a record or history; or
- (iii) is perceived to exist whether or not it exists in fact.

RCW 49.60.040(7)(c) provides in relevant part:

- (c) For purposes of this definition, 'impairment' includes, but is not limited to:

...

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to, cognitive limitation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

The record demonstrates that Mr. Hale suffered from anxiety disorder and depression. These were mental impairments that were medically cognizable and diagnosable, and existed in his medical records. 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. This diagnosis was also reflected in two letters that Dr. Wigert provided to the district through Mr. Hale, notifying the defendant of Hale's disability and the effect of the work environment on his health.

Whether an employee had a disability is generally a question for the trier of fact. However, where the evidence is undisputed, and reasonable minds can reach only one conclusion, the court can decide the issue as a matter of law. See e.g., *Kimbrow v. Atlantic Richfield*, 889 F.2d 869(9th Cir. 1989); *Wheeler v. Catholic Archdiocese of Seattle*, 64 Wn. App., 552, 829 P.2d 196 (1992), *affd.* 124 Wn.2d 634, 880 p.2d 29 (1994): It is undisputed that Mr. Hale had an abnormal mental condition (anxiety disorder,

depression) that was medically diagnosable, and had a substantially limiting effect on his ability to perform his job. The record establishes as a matter of law that plaintiff had a disability under RCW 49.60.040(7).

B. The evidence demonstrates that Mr. Hale's disability/impairment qualified for reasonable accommodation under RCW 49.60.040(7)(d).

RCW 49.60.040(7)(d) provides:

Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish 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.

Therefore, to qualify for reasonable accommodation in employment, Mr. Hale's disability had to be "known." Further, his

impairment had to have a “substantially limiting effect” upon his ability to perform his job, or the terms and conditions of his employment. Alternatively, Mr. Hale must have notified the district of the existence of his impairment and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would have a substantially limiting effect.

First, the evidence demonstrates that Hale’s impairment was “known.” On August 25, 2002, Mr. Hale wrote to Wellpinit Superintendent Riedlinger and advised him that the working conditions were making him physically ill, and he was seeking medical attention. On December 20, 2002, Dr. Wigert wrote a note “To whom it May Concern” confirming that Hale suffered from anxiety disorder and depression, and indicating that his work environment was aggravating these conditions. Hale submitted this note to the district with his letter dated January 3, 2003. This evidence establishes that plaintiff’s disability/impairment was “known” to the employer.

Second, the evidence supports a finding that Mr. Hale’s anxiety disorder and depression had a substantially limiting effect on his ability to perform his job. Plaintiff’s August 25, 2002 letter

reflects that he was experiencing nausea, and stomach pain in connection with interactions with Mr. Kristiansen. His January 3, 2003 letter to the Wellpinit School Board states that Mr. Riedlinger (superintendent) had failed to respond to his concerns that the working environment was making him physically ill. That letter was supported by the December 20, 2002 note from Dr. Wigert confirming the diagnoses of anxiety disorder and depression, and noting that the job conditions were aggravating his symptoms. When the district failed to respond and engage in an interactive process to explore accommodation, Mr. Hale's health condition deteriorated. On February 17, 2003, his physician, Dr. Wigert, wrote a letter advising the district that Mr. Hale's health condition had deteriorated to the point he could no longer continue to work. This evidence demonstrates that plaintiff's disability had a substantially limiting effect on his ability to perform his job.

This same evidence demonstrates that Mr. Hale's impairment had a substantially limiting effect on the terms or conditions of his employment. See RCW 49.60.040(7)(d)(i). He suffered from anxiety disorder and depression. He was being treated for those conditions with medication. His letters and the supporting documentation from his physician make it clear that his anxiety disorder and depression made it difficult for him to cope

with the terms and conditions of his employment. He was becoming increasingly ill because of his underlying mental health condition and the work environment.

There is no question that his anxiety disorder and depression were “known.” The evidence further demonstrates that plaintiff’s impairment had a substantially limiting effect on his ability to perform his job, and on the terms or conditions of his employment. Ultimately, when the district failed to respond to the issues regarding plaintiff’s health and working conditions, his health deteriorated to the point he could no longer work. Therefore, the evidence supports a finding that Mr. Hale’s disability/impairment qualified for reasonable accommodation under RCW 49.60.040(7)(d)(i).

Further, there is no question that Mr. Hale put the district on notice of his impairment. He did this initially with his August 25, 2002 letter to Superintendent Riedlinger. He did it again with his January 3, 2003 letter to the school board and the enclosed “To Whom it May Concern” letter from Dr. Wigert dated December 20, 2002. Dr. Wigert’s letter stated the diagnoses and indicated that Mr. Hale’s work environment was aggravating his condition. The obvious point of this notification to the district was to inform it that the work environment was making Mr. Hale increasingly ill

and making it increasingly difficult to perform his job. This evidence supports a finding that medical documentation established “a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect.” RCW 49.60.040(7)(d)(ii). Indeed, the evidence demonstrates that is precisely what happened in this case. The district failed to respond to the letters from Mr. Hale and his treating physicians. On February 17, 2003, Dr. Wigert wrote that Mr. Hale could no longer “continue his present employment due to the effect of the employment on his health issues.” (CP 276).

Therefore, the evidence supports findings that Mr. Hale notified his employer of the existence of his impairment, and medical documentation established 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. Mr. Hale’s disability qualified for reasonable accommodation under RCW 49.60.040(7)(d)(ii).

C. The trial court erred in denying plaintiff’s motion to strike evidence regarding his post termination statements to governmental agencies.

Relying on *Snyder v. Medical Service Corporation*, 145 Wn. 2d 233(2001), Defendant Wellpinit argued strenuously to the trial court (and now on appeal) that it had no duty to accommodate Mr. Hale by providing him with a different supervisor. This argument fails because there is simply no evidence in the record that Hale ever requested a different supervisor as an accommodation.

To support its *Snyder* argument the district submitted a number of post termination statements made by Hale in applying for a variety of governmental benefits. Plaintiff moved to strike this evidence as irrelevant and unduly prejudicial. ER 401, 403. The trial court denied this motion and considered the evidence in the summary judgment proceeding below. This was clearly error.

First, there is no evidence in the record to support a finding that Hale ever asked for a change in supervisors as a form of accommodation. When asked questions in his deposition about what he expected the district to do when he notified it of his disability, Mr. Hale testified as follows:

Q. And so when you initially sent the August 25th, 2002 letter to Mr. Riedlinger clarifying the difficulties that Magne, Chris and you were having, what was your expectation or hope as to what Mr. Riedlinger would do?

A. I assume he and I and Magne would sit down and discuss what the problems were and resolve the issues.

Q. Now, was Chris – and that's Chris Schott?

A. Uh-huh.

Q. Yes?

A. Yes. I'm sorry.

Q. He was a supervisor of you as well?

A. No, I don't think so.

Q. And so if I understand what you're telling me correctly, when you sent the August 25th, 2002 letter to Mr. Riedlinger, your expectation was that Mr. Riedlinger would do something to ease the tension or the difficulties between you and one of your supervisors and one of your coworkers?

A. Correct.

(CP 213-214)

Hale continues:

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. (Mr. McFarland) 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.

(CP 215-216)

Defendant, Wellpinit submitted evidence in the summary judgment proceeding that Hale told the Washington State Department of Employment Security he could work under appropriate management. It submitted similar evidence of statements made by Hale to the Social Security Administration over one year following his termination. The trial court denied plaintiff's motion to strike this evidence. That was clearly error.

The district submitted no evidence to support its argument that it had no duty to provide plaintiff with a different supervisor as an accommodation. The undisputed facts demonstrate that Hale never requested a different supervisor as an accommodation. The fact that in the months and years after his termination he stated to

governmental agencies that he could have worked in the district under a different supervisor does not support a finding that he requested a different supervisor as a form of accommodation. Because Mr. Hale never made any such request, the evidence of his post termination statements to the Department of Employment Security and the Social Security Administration was irrelevant and unduly prejudicial. ER 401, 403. The trial court erred in denying plaintiff's motion to strike this evidence.

D. *Snyder v. Medical Services Corporation* has no application to this case because Mr. Hale never requested a different supervisor as a reasonable accommodation.

Defendant Wellpinit School District's entire argument in opposition to plaintiff's disability discrimination claim is premised on *Snyder v. Medical Services Corporation*, 145 Wn.2d 233 (2001). In *Snyder* the Supreme Court held that there was no duty to accommodate an alleged disability by providing an employee with a different supervisor. *Snyder* has no application to this case, and defendant's argument fails, because there is no evidence in the record to support a finding that Mr. Hale ever requested a change in supervisor as an accommodation.

In *Snyder*, the plaintiff suffered from post traumatic stress disorder. She told her employer she could no longer work under

her supervisor and asked if she could report to a different person or be transferred to another department. See *Snyder*, 145 Wn.2d, at 237-238. The employer refused and the plaintiff sued, alleging failure to reasonably accommodate her disability. The Supreme Court, relying on the same line of federal ADA cases cited by Wellpinit, held that the employer had no duty to accommodate the plaintiff by providing her with a different supervisor.

In *Snyder*, the plaintiff specifically requested that she be provided a different supervisor to accommodate her PTSD condition. Unlike the plaintiff in *Snyder*, Mr. Hale never made any request that defendant accommodate his disability by allowing him to work under a different supervisor. There is no witness who has testified that Hale made any such request. There is no affidavit, or declaration, or deposition testimony in the record to support a factual finding that Hale ever requested a different supervisor as a form of accommodation.

Long after the employment relationship ended, counsel for the district asked Mr. Hale in his deposition if he could have continued working for the district under a different supervisor. He said that he could. But defense counsel's post-termination deposition question does not support a finding that Hale requested a different supervisor as a reasonable accommodation. It is more

than a little disingenuous for an employer to ask a disability discrimination plaintiff whether an accommodation not required under the law would have satisfied him, and then argue it had no duty to offer that accommodation when the plaintiff never asked for the accommodation in the first place.

The record does establish that Mr. Hale had a medically diagnosable mental impairment. Therefore, the record establishes that he had a disability under RCW49.60.040(7)(a-c). The record also establishes that plaintiff 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 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).

In *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997), the Seventh Circuit held that an employer does not have to provide a different supervisor as a reasonable accommodation under the ADA. However, the court also observed:

The judge was certainly correct that a personality conflict with a supervisor or coworker does not establish a disability within the meaning of the disability law, *Stewart v. County of Brown*, 86 F.3d 107, 111 (7th Cir.1996), even if it produces anxiety and depression, as such conflicts often do. Such a conflict is not disabling; at most it requires the worker to get a new job. But if a personality conflict triggers a serious mental illness that is in turn disabling, the fact that the trigger was not itself a disabling illness is no defense.

117 F.3d, at 352.

In the instant case, defendant Wellpinit appears to argue that Mr. Hale's "personality conflict" with his supervisor was not a disability which qualified for reasonable accommodation. However, 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 had a substantially limiting effect on his ability to perform his job. He did not request a change in supervisors. He requested intervention, – i.e., the interactive process – to explore reasonable accommodation. The district failed to respond and engage in the interactive process.

Any one of a number of accommodations could have plausibly enabled Hale to keep his job. He specifically requested Mr. Riedlinger to intervene to facilitate the communication with his supervisors. Riedlinger failed to do so. The district could have

offered a leave of absence. It could have offered to transfer Hale back to the main Wellpinit School District site where he was originally employed. (CP 521-524). Hale had no duty to request any such accommodation. See *Kimbrow v. Atlantic Richfield*, 889 F.2d 869 (9th Cir. 1989). But the district had an affirmative duty to engage in the interactive process to explore plausible forms of accommodation. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995). *Barnett v. U.S. Air*, 228 F.3d 1105 (9th Cir. 2000). The record demonstrates it failed to do so.

The issue before the court is whether the evidence establishes as a matter of law that Mr. Hale had a disability under the WLAD. The undisputed facts establish:

- (1) Hale had a medically diagnosable mental condition – anxiety disorder and depression;
- (2) Hale’s anxiety disorder and depression were known to defendant; and
- (3) Hale’s anxiety disorder and depression had a substantially limiting effect on his ability to perform his job, and on the terms and conditions of his employment.

Therefore, the undisputed facts establish as a matter of law that Mr. Hale had a disability under RCW 49.60.040(7)(a-d).

VI. CONCLUSION

The trial court denied defendants motion for summary judgment seeking dismissal of plaintiff's disability discrimination claim under the WLAD. That decision should be affirmed. However, the trial court erred in denying plaintiff's motion for partial summary judgment on the issue of disability under RCW 49.60.040(7). Plaintiff/Respondent Hale, respectfully requests the court to reverse the trial court's decision denying his motion for partial summary judgment, and hold as a matter of law that he had a "disability" under the WLAD. This case should proceed to trial on the issues of (1) whether defendant breached its affirmative duty to accommodate plaintiff's disability, and (2) plaintiff damages.

RESPECTFULLY SUBMITTED this 22nd day of October, 2010.

PAUL J. BURNS, P.S.

By: 
PAUL J. BURNS, WSBA #13320
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 20th day of October, 2010, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

Michael E. McFarland Evans, Craven & Lackie 818 West Riverside, Suite 250 Spokane, WA 99201-0910	<input type="checkbox"/> Regular Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail
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PAUL J. BURNS