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Supreme Court No. 78728-0
Court of Appeals Case No. 33174-8-II

SUPREME COURT
OF THE STATE OF WASHINGTON

LONGVIEW FIBRE COMPANY, INC.,

Petitioner,

v.

STACY L. HEGWINE,

Respondent.

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ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF CASE	3
III. ARGUMENT	9
A. The Court of Appeals Correctly Concluded that a Failure to Accommodate Analysis is Inapplicable to Pregnancy Discrimination Claims.	9
B. Fibre Unlawfully Discriminated Regardless of a Duty to Accommodate.	13
C. Fibre Failed to Comply with its Proposed Accommodation Legislation.	14
D. Fibre’s Claim of “Business Necessity” was Properly Rejected by the Court of Appeals.	16
IV. REQUEST FOR ATTORNEY FEES	20
V. CONCLUSION	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Allison v. Housing Auth.</i> , 118 Wn.2d 79, 821 P.2d 34 (1991)	20
<i>Curtis v. Security Bank of Wash.</i> , 69 Wn. App. 12, 847 P.2d 507 (1993)	11
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003)	14
<i>Davis v. Microsoft Corp.</i> , 109 Wn. App. 884, 37 P.3d 333 (2002), <i>aff'd</i> , 149 Wn.2d 521, 70 P.3d 126	15
<i>Easley v. Sea-Land Service, Inc.</i> , 99 Wn. App. 459, 994 P.2d 271 (2000)	14
<i>Goodman v. Boeing Co.</i> , 127 Wn.2d 401, 899 P.2d 1265 (1995)	15
<i>Hama Hama Co. v. Shorelines Hearings Bd.</i> , 85 Wn.2d 441, 536 P.2d 157 (1975)	12
<i>Hegwine v. Longview Fibre Co., Inc.</i> , 132 Wn. App. 546 (2006)	3
<i>Hill v. BCTI Income Fund-I</i> , 97 Wn. App. 657, 986 P.2d 137 (1999), <i>aff'd in part, vacated in part</i> , 144 Wn.2d 172, 23 P.3d 440	15
<i>Johnson v. Goodyear Tire & Rubber Co.</i> , 790 F.Supp. 1516, 1523 (E.D.Wash.,1992)	18
<i>Johnson v. Si-Cor, Inc.</i> , 107 Wn. App. 902, 28 P.3d 832 (2001)	10
<i>Kastanis v. Educational Employees Credit Union</i> , 122 Wn.2d 483, 859 P.2d 26 (1993), <i>amended</i> , 122 Wn.2d 483, 865 P.2d 507 (1994)	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Kuest v. Regent Assisted Living</i> , 111 Wn. App. 36, 43 P.3d 23 (2002)	11
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 922 P.2d 43 (1996)	11
<i>Rhoad v. McLean Trucking Co.</i> , 102 Wn.2d 422, 686 P.2d 483 (1984)	12
<i>City of Spokane v. Marr</i> , 129 Wn. App. 890, 120 P.3d 652 (2005)	10
<i>State v. Bunting</i> , 115 Wn. App. 135, 139, 61 P.3d 375 (2003)	12
<i>State v. Enloe</i> , 47 Wn. App. 165, 734 P.2d 520 (1987)	12
<i>State ex rel. Ewing v. Reeves</i> , 15 Wn.2d 75, 129 P.2d 805 (1942)	12
<i>Watson v. Ft. Worth Bank & Trust</i> , 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)	18
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982)	11
<i>Xieng v. Peoples Nat'l Bank</i> , 120 Wn.2d 512, 844 P.2d 389 (1993)	20

///

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TABLE OF AUTHORITIES

<u>Statutes</u>	<u>Pages</u>
RCW 49.48.030	20
RCW 49.60	9
RCW 49.60.010	11
RCW 49.60.020	11
RCW 49.60.030(2)	20
RCW 49.60.180	9

Other Authorities

RAP 18.1(j)	20
WAC 162-12-140(3)(n)	13
WAC 162-22	10
WAC 162-26	10
WAC 162-30	10
WAC 162-30-020(2)	9
WAC 162-30-020(3)(c)	13
WAC 162-30-020(4)	11
 F. Frankfurter, <i>Some Reflections on the Reading of Statutes</i> , in 1 <i>Benjamin N. Cardozo Memorial Lectures</i> 215, 223 (1970)	 12

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I. INTRODUCTION

Fibre argues that discretionary review is appropriate because “whether an employer must hire a pregnant applicant who cannot perform duties of the position without conducting an accommodation analysis is a matter of first impression and an issue of substantial public importance.” Petition for Review at 6. Notably, Fibre does not contend that it complied with the existing regulations promulgated by the Washington Human Rights Commission (WHRC). Nor does Fibre contend that the Court of Appeals misapplied the existing law. Instead, it is Fibre’s hope that the Court will

accept review, discard existing regulations, and create contrary law. Fibre's proposed legislation would retroactively excuse its unlawful conduct and permit employers to presume that a pregnant woman is disabled. The employer could then discriminate based upon an alleged inability to provide an accommodation never requested.

It should come as no surprise that the Court has not previously been asked to discard properly enacted pregnancy discrimination laws and replace them with its own legislation. It is the duty of the legislature to create the law. It is the duty of the courts to interpret the law. It is the duty of both to respect the separation of powers which is the hallmark of the American legal system. Fibre's arguments are properly directed to lawmakers, not the Court.

Even if the Court were to accept Fibre's invitation to perform a legislative function, the substantive result would not change in the present case. This is true because the appellate court held that Fibre committed discrimination, *irrespective of whether there was a duty to accommodate*. In fact, the appellate court found that Fibre unlawfully discriminated in virtually all aspects of its interaction with Hegwine. The appellate court held that: 1) Fibre impermissibly assumed that Hegwine was temporarily disabled due to pregnancy, 2) Fibre impermissibly assumed that it could not accommodate

any temporary disability that may have existed, 3) a disability discrimination analysis did not apply to the case, and 4) Fibre wrongly fired Hegwine due to her pregnancy. *Hegwine*, slip op. at 1.

The Court of Appeals properly considered the specific facts of the case, the evidence presented at trial, and the applicable legal authorities. The Court of Appeals' opinion is well reasoned and presents no issue of substantial importance. Fibre's Petition for Review should be denied.

II. STATEMENT OF CASE

Hegwine relies upon the Statement of Facts set forth in the Brief of Appellant submitted to the Court of Appeals and those facts identified by the Court in *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546 (2006), (hereinafter cited as "Hegwine").¹ In the interest of brevity, only selected facts are repeated here.

In late 2000, Ms. Hegwine applied for a position in the Longview Fibre Company ("Fibre") customer service department as a "customer service clerk/order checker." CP (Clerk's Papers) 14; RP (Report of Proceedings) (3/14) 5:19-24. The "primary duties" of the Fibre customer service department are to write orders, schedule shipments, and invoice shipments.

¹ For consistency, subsequent references to the decision will cite to the slip opinion.

RP (3/14) 4:18-24. No lifting requirements were specified in the job listing. Ex. (Exhibit) 1, p. 1.

During Hegwine's interview, she was told that the lifting requirement for the Order Checker position was 25 pounds. CP 14; RP (3/15) 194:9-17; RP (3/14) 12:25 - 13:12. Hegwine was selected as the successful applicant and was offered the position on February 21, 2001. RP (3/14) 24:1-12; CP 14 at Finding of Fact ("FF") 1. Hegwine accepted the offer on the same day. RP (3/15) 180:19 - 181:18; Ex. 23. Hegwine was given a start date of March 1, 2001. CP 14; RP (3/14) 21:19-25, 70:20 - 72:8, 100:21 - 101:7.

On February 23, 2001, at the direction of Fibre, Hegwine submitted to a physical examination by Dr. Ostrander, Fibre's Corporate Medical Director. In response to a questionnaire, Hegwine disclosed she was pregnant, and her delivery date was June 16, 2001. CP 14, FF 2. Ostrander immediately directed Hegwine to obtain a medical clearance from her doctor. *Id.*

On March 1, 2001, Hegwine reported to work at 8:00 a.m. and was instructed to watch a series of videos. RP (3/14) 23:20 - 24:5. In addition, she was given information on health insurance plans, Longview Fibre Company mill rules, general employee benefits, employee pension plans, a parking sticker, and a payroll number. RP (3/14) 24:8 - 28:14; Ex. 2, 3, 5, 6, 24, 25, and 26. These are all items typically provided to new Longview

Fibre employees. RP (3/14) 217:25 - 218:12. In addition, she filled out a W-4 form. RP (3/15) 185:18-23. After Hegwine asked about pregnancy leave, she was asked to leave the mill site. RP (3/15) 28:18 - 31:5.²

Hegwine's obstetrician, Daniel Herron, provided a release dated February 23, 2001, indicating she could lift 30 pounds to her waist and 20 pounds to her shoulders and overhead, up to two hours each day. CP 15; Ex. 1, p. 4. Subsequently, Cox spoke to Fibre nurse Marilyn Sapp regarding Hegwine's issue. RP (3/15) 198:17 - 199:3. Sapp later advised Dr. Herron's office that Fibre now required Hegwine to be able to lift 40 pounds. RP (3/14) 220:19 - 221:6. In response, Dr. Herron faxed a revised release to Fibre allowing Hegwine to lift up to 40 pounds (to her waist, to her shoulders and overhead) up to two hours each day. RP (3/14) 191:11 - 192:10; Ex. 1, p. 5.

On March 5, 2001, Dr. Ostrander spoke directly to Dr. Herron and was again advised that Hegwine was capable of lifting 20 pounds frequently and 40 pounds occasionally to infrequently. CP 15; RP (3/15) 42:6-14, 50:10-23; Ex. 1, p. 6.

Fibre subsequently involved its Equal Employment Opportunity Coordinator, Margaret Rhodes. RP (3/14) 110:23-24, 113:11-15. Rhodes

² Fibre subsequently refused to pay Hegwine for work performed on March 1, 2001, claiming she was not an employee. She eventually secured payment with the assistance of the Washington Human Rights Commission and the Washington Department of Labor and Industries, RP (3/14) 42:11-24.

was advised by her superiors that Hegwine potentially had a temporary disability due to pregnancy, in the form of a lifting restriction. RP (3/14) 121:2-8. She investigated the possibility of accommodating a temporary lifting restriction. RP (3/14) 126:17-19.

Fibre's past practice was to transfer those with temporary back injuries to "sedentary relief clerk" positions. RP (3/14) 129:4-13. In addition, it was "typical" that Fibre employees in the same department possessed overlapping job skills and would cover for one another in the event of illness. RP (3/14) 28:12-16, 130:15-21. The Customer Service Department was no exception. RP (3/14) 130:10-14, 4:13, 28:4-11.

Rhodes concluded that Hegwine could perform the job of Order Checker with available accommodations. RP (3/14) 170:17-21; Ex. 13, p. 7. Rhodes further concluded that accommodation could be provided without significant difficulty or expense. Ex. 13, p. 10. She recommended that Hegwine in fact be accommodated. RP (3/14) 132:1-5. Rhodes' superiors, however, advised that they would not make any accommodation for Hegwine's pregnancy. RP (3/14) 133:8-13.

The ultimate decision regarding Hegwine's employment was made by Robert Arkell, Fibre's Senior Vice President of Industrial Relations and General Counsel. CP 17; RP (3/14) 207:3-13. At trial he conceded that, other than lifting restrictions due to pregnancy, Hegwine was in every way qualified to perform the Order Checker position. RP (3/14) 208:19 - 209:18, 225:2 -

226:8. He testified that Fibre's policy is to treat temporary disabilities due to pregnancy like "any other illness." RP (3/14) 211:15-24. According to Arkell, Fibre treats pregnant women the same as any other successful job applicant, "unless there is some kind of a disability or limitation that is attached to the pregnancy." RP (3/15) 212:1-12.

Despite the recommendation of his EEO Coordinator, Arkell admitted that he never considered providing pregnancy leave to Hegwine. RP (3/14) 227:22 - 228:23. He further testified that he considered Rhodes' opinions and recommendations to be "irrelevant." RP (3/15) 217:11 - 219:8.

Ultimately, Carlene Cox was instructed by her superiors to contact Hegwine and read from a prepared script. RP (3/15) 167:15 - 169:25. On March 16, 2001, Hegwine was told that she had never been hired and Fibre was withdrawing the offer of employment. CP 17; RP (3/14) 41:17-24. The stated reason was that Hegwine's "availability" prevented her from performing the job. CP at 17, Ex. 11.

At trial, Fibre contended that an Order Checker would be required to lift 60 pounds to perform the essential functions of the position. However, the unrefuted evidence proved otherwise. RP (3/14) 13:15 - 14:23, 26:3-11, 16:3-7, 27:22-25; RP (3/15) 100:18-25, 101:1-7, 31:3-16, 30:22-25, 27:12-21.

In addition, neither Hegwine nor Dr. Herron was ever advised by anyone at Fibre of a supposed 60 pound lifting requirement. RP (3/14)

192:21 - 193-1, 221:7-15; RP (3/15) 201:4-12. In fact, Hegwine was not told of any such requirement until after the commencement of litigation. RP (3/14) 52:11 - 53:10.

Dr. Herron testified that had he been aware that Hegwine's job was dependent upon the ability to lift 60 pounds, he likely would have provided his approval to perform the job even without accommodation. RP (3/14) 193:17 - 194:14, 205:21 - 206:8. In fact, Dr. Herron testified that he regularly provides work approval to his pregnant patients despite the need to lift as much as 60 pounds. RP (3/14) 193:2-16.

The Court of Appeals summarized the pertinent facts as follows:

(1) the job advertisement listed no lifting requirements; (2) in the interview only 25 pounds was mentioned as a lifting requirement; (3) Hegwine never suggested any pregnancy related limitations to Fibre or its doctor; (4) when Fibre learned Hegwine was pregnant through its mandatory physical, it immediately assumed she had restrictions that her doctor would have to identify; (5) when Hegwine's doctor's permission exceeded the 25 pound lifting requirement, Fibre changed the requirement and told her it was 40 pounds; (6) when Hegwine's doctor submitted a second form responding to the new 40 pound lifting requirement, Fibre's doctor talked to Hegwine's doctor and obtained a third form, still allowing lifting adequate to do the job as explained by Fibre; (7) Fibre then told Hegwine to leave its premises and not return until it had the alleged situation all sorted out; (8) only after Hegwine was removed did Fibre undertake a job analysis that resulted in an even greater lifting requirement--60 pounds; (9) Fibre did not communicate this new requirement to either Hegwine or her doctor; (10) instead, it told Hegwine that her "availability" precluded her from performing the job and therefore "rescinded" her job offer; and finally (11) Fibre altered its position and argued at trial that it rescinded its offer, not because of Hegwine's

"availability," but because she could allegedly not perform an essential function of the job that was determined after it rescinded its offer.

Hegwine, slip op. at 18-19.

III. ARGUMENT

A. The Court of Appeals Correctly Concluded that a Failure to Accommodate Analysis Is Inapplicable to Pregnancy Discrimination Claims.

As noted by the Court of Appeals, *Hegwine*'s Complaint alleged, *inter alia*, that Fibre discharged her from employment because of her gender and her pregnancy, in violation of RCW 49.60 and Washington public policy. *Hegwine*, slip op. at 7-8. She did not allege disability discrimination. On appeal, Fibre conceded that a disability discrimination analysis was inappropriate in the pregnancy context, acknowledging:

A plaintiff claiming disability discrimination based on a failure to accommodate under RCW 49.60.180 must first demonstrate that she has a sensory, mental or physical *abnormality*. [Citations omitted.] Pregnancy, even though it inevitably carries with it some degree of physical incapacity, is not an abnormal condition. To the contrary, pregnancy is a normal, "expectable incident in the life of a woman." WAC 162-30-020(2).

Brief of Respondent, at 26-27. In fact, an entire section of Fibre's appellate brief appears under the heading "Disability Accommodation Analysis Not Applicable." *Id.*, at 26. Consistent with the positions of both parties on appeal, the Court of Appeals concluded that "pregnancy and any related condition is not a disability under Washington law and, therefore, the

trial court erred in considering this claim to be a disability discrimination claim.” *Hegwine*, slip op. at 15.

After admitting on appeal that this is not a failure to accommodate case, Fibre now faults the appellate court for agreeing with its argument. Petition for Review, at 1. Reverting to its trial court position, Fibre now contends that this court should permit employers to perform “an accommodation analysis similar to that involved in disability claims,”³ even though it admits that pregnancy is not a disability. The doctrine of judicial estoppel prevents Fibre from changing its position on this issue yet again.⁴

In any event, the Court of Appeals correctly determined that pregnancy and pregnancy related conditions are not “disabilities” under Washington law. *Hegwine*, slip op. at 14. The Court noted that the regulatory scheme for pregnancy discrimination (WAC 162-30) is entirely separate from that for disability discrimination (WAC 162-22 and 162-26). *Hegwine*, slip op. at 14-15. In contrast to the disability discrimination regulations, the WHRC declined to provide for an accommodation analysis in WAC 162-30 and, instead, required an employer to provide a leave of

³ Petition for Review, at 5.

⁴ “[Judicial estoppel] precludes a party from gaining advantage by asserting one position in a court proceeding and later seeking a second advantage by taking a clearly inconsistent position.” *City of Spokane v. Marr*, 129 Wn. App. 890, 893, 120 P.3d 652 (2005), citing, *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001).

absence when a woman is unable to work due to pregnancy or childbirth. WAC 162-30-020(4).⁵ Unlike recognized disabilities, pregnancy is always a temporary condition and one beneficial to the state of Washington. The legislature has specifically declared that discrimination against families with children “menaces the institutions and foundation of a free democratic state.” RCW 49.60.010; *Kuest v. Regent Assisted Living*, 111 Wn. App. 36, 43, 43 P.3d 23 (2002).

This Court should decline Fibre’s invitation to legislate. The appellate court was appropriately deferential to the regulations promulgated by the WHRC, stating: “[a] court must give great weight to the statute’s interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent.” *Hegwine*, slip op. at 13 (quoting, *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996)). Here, the agency’s regulations further the statutory mandate that the Washington Law Against Discrimination (WLAD) be liberally construed to achieve its purpose of “eliminating and preventing discrimination.” RCW 49.60.020; *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) (statutory provisions against discrimination are liberally construed and exceptions narrowly confined); *Curtis v. Security*

⁵ This provision dispels Fibre’s argument that, absent an accommodation analysis, a pregnant woman could be “required to perform their job responsibilities despite physical limitations related to pregnancy.” Petition for Review at 6-7.

Bank of Wash., 69 Wn. App. 12, 15, 847 P.2d 507 (1993).

The jurisprudence of Washington courts makes it clear that the courts cannot substitute their judgment or usurp the prerogative of the legislature. *State v. Bunting*, 115 Wn. App. 135, 139, 61 P.3d 375 (2003). Courts should decline to read into a statute matters which are not there, or modify a statute by construction. *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 426, 686 P.2d 483 (1984). Further, a court may not read into a statute things which it conceives the legislature has left out unintentionally. *Rhoad*, 102 Wn.2d at 427, 686 P.2d 483. See also, *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987); *State ex rel. Ewing v. Reeves*, 15 Wn.2d 75, 85, 129 P.2d 805 (1942).

As the Court in *Hama Hama Co. v. Shorelines Hearings Board* concisely stated:

To go beyond the ascertainment of the meaning of the words used by the legislature. . . is to usurp a power which our democracy has lodged in its elected legislature . . . A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation.

85 Wn.2d 441, 457-58, 536 P.2d 157 (1975) citing, *F. Frankfurter, Some Reflections on the Reading of Statutes* in 1 *Benjamin N. Cardozo Memorial Lectures* 215, 223 (1970).

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B. Fibre Unlawfully Discriminated Regardless of a Duty to Accommodate.

Fibre takes no issue with the appellate court's conclusion that it discriminated against Ms. Hegwine in two different respects *even before any alleged duty to accommodate would have arisen*. First, Fibre impermissibly inquired into Hegwine's pregnancy. Second, once learning of the pregnancy, Fibre impermissibly assumed that the pregnancy resulted in a temporarily disability. Central to the decision of the Court of Appeals was the recognition that Hegwine never suggested she had any disability or requested any accommodation. *Hegwine*, slip op. p. 7. Yet Fibre immediately treated her as though she were disabled.

An employer is prohibited by WAC 162-12-140(3)(n) from asking questions about pregnancy prior to hiring. At trial, Fibre did not dispute that it required Hegwine to complete extensive medical questionnaires which clearly violated this regulation by requiring her to disclose whether she was pregnant. *Hegwine*, slip op. at 14 and 16.

Further, it is an unfair labor practice to base employment decisions on negative assumptions about pregnant women. WAC 162-30-020(3)(c). Fibre does not dispute that it unlawfully assumed that Hegwine's pregnancy resulted in a disability. Instead of putting her to work, Fibre required Hegwine to obtain a release from her doctor even though she neither claimed disability nor requested accommodation. Fibre does not fault the Court of

Appeals for concluding that Fibre violated the clear language of the regulation by compelling Hegwine to respond to the assumption that she was disabled due to pregnancy. *Hegwine*, slip op. at 16. As a result, even if the Court were to newly create an accommodation element in pregnancy discrimination actions, it would not change the substantive result of the present case.

C. Fibre Failed to Comply with its Proposed Accommodation Legislation.

Fibre conveniently ignores the Court of Appeals conclusion that “Fibre’s claim that it could not accommodate Hegwine’s pregnancy fails even when reviewed.” *Hegwine*, slip op. at 15-16, fn. 17. The appellate court’s meticulous review of the record revealed “insufficient evidence that Fibre took any affirmative steps to accommodate Hegwine’s temporary lifting restriction or that reasonable accommodations were unavailable.” *Id.* Even under the accommodation analysis espoused by Fibre, an employer would still be required to explore and extend such accommodations which would permit an employee to perform the essential functions of the job. *Easley v. Sea-Land Service, Inc.*, 99 Wn. App. 459, 468, 994 P.2d 271 (2000); *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533, 70 P.3d 126 (2003) (“A disabled individual is qualified for an employment position if, *with or without* reasonable accommodation, he 'can perform the essential functions of the employment position' at issue.”) (emphasis added).⁶ Otherwise, pregnant

⁶ In this respect, the trial court unquestionably erred in concluding that under a disability accommodation analysis: “Fibre had an obligation to

women would enjoy less protection than workers with recognized disabilities. The Court noted, however, that Fibre’s own final report indicates that no potential accommodations were considered following the decision that she was incapable, *without accommodation*, of performing essential job functions. *Hegwine*, slip op. at 15-16, fn. 17.

The appellate court also accurately points out that Fibre did not fulfill its obligation to seek and share information once it learned Hegwine was pregnant. *Id.* "Reasonable accommodation" of disabled employees requires an interactive process between the employee and the employer. *Davis v. Microsoft Corp.*, 109 Wn. App. 884, 37 P.3d 333 (2002), *aff'd*, 149 Wn.2d 521, 70 P.3d 126. The obligation “envisions an exchange between employer and employee where each seeks and shares information . . .” *Goodman v. Boeing Co.*, 127 Wn.2d at 408. The goal of this exchange is to achieve the best match between the employee's capabilities and available positions. *Hill v. BCTI Income Fund-I*, 97 Wn. App. 657, 986 P.2d 137 (1999), *aff'd in part, vacated in part*, 144 Wn.2d 172, 23 P.3d 440; *Goodman v. Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Fibre’s petition does not dispute the Court of Appeals’ conclusion that it failed to sufficiently interact with Hegwine and collect the information necessary to perform any obligation to accommodate. To the contrary, the Court of Appeals concluded that Fibre

accommodate [Ms. Hegwine’s temporary pregnancy-related lifting restriction] *unless* it caused Ms. Hegwine to be unable to perform an essential function of the job.” CP 17 (emphasis added).

actively avoided communication with Hegwine by not informing her of the alleged change in lifting requirements.

In short, even if the Court were to accept review and conclude that an accommodation analysis is appropriate, the exercise would be meaningless since Fibre failed to produce sufficient evidence to prevail under the analysis.

D. Fibre’s Claim of “Business Necessity” was Properly Rejected by the Court of Appeals.

As an alternative basis for review, Fibre contends that the Court of Appeals improperly rejected its claim that discrimination against Hegwine was justified by business necessity. Fibre contends that the Court incorrectly concluded that business necessity is an affirmative defense which Fibre waived because it was not affirmatively pled. Fibre relies solely upon *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 859 P.2d 26 (1993), *amended*, 122 Wn.2d 483, 865 P.2d 507 (1994). However, in *Kastanis* it was undisputed that the defendant produced sufficient evidence of business necessity at trial. *Kastanis*, 122 Wn.2d at 492. In the present case, Fibre failed to do so.

As the appellate court noted, the business necessity defense was raised for the first time on appeal. *Hegwine*, slip op. at 19. As a result, the term “business necessity” appears nowhere in the trial court’s Findings of Fact and Conclusions of Law. CP 14-18. Furthermore, Fibre’s argument to the Court of Appeals that a business necessity is proven if an employer can establish an

inability to reasonably accommodate directly contradicts its position that an accommodation analysis is inappropriate.⁷

Regardless, the evidence at trial established that Fibre's alleged lifting requirement was not an essential function of the Order Checker position and, as a result, would not even trigger an accommodation analysis in the disability context. The appellate court stated:

When the evidence is interpreted in Fibre's favor, at best, it establishes that, without accommodation, the order checker would lift 60 pounds only infrequently and for very brief periods of time. People who had done the job described how they did it and the varying weight of the bins the order checker lifted. But their testimony only showed that the lifting required about one minute from building to truck, that a hand truck could be used, and that the lifting was to and from the hand truck in and out of the back of the pick-up truck. The total time involved in the bin delivery was 30 to 45 minutes a day. And the evidence revealed that those doing the order checker job asked for and got help from other employees when the bins were heavy.

Essential job functions do not include marginal functions of the position. But the manner of performance of a job function is not the proper focus when determining what the essential job functions are; the proper focus is the task to be performed. The job position was order checker. Fibre has never contended that Hegwine could not check orders.

Hegwine, slip op. at 17, fn. 19 (citations omitted).

Further, the Court of Appeals correctly concluded that, "Fibre presented no evidence at trial supporting a conclusion that business necessity precluded it from hiring a pregnant woman to fill the order checker position."

⁷ Brief of Respondent, pp. 26-29.

Hegwine, slip op. at 19. To establish business necessity, an employer “has the burden of producing evidence that its employment practices are based on 'legitimate business reasons,' and of proving that legitimate goals are 'significantly served by' the practice at issue.” *Johnson v. Goodyear Tire & Rubber Co.*, 790 F.Supp. 1516, 1523 (E.D. Wash., 1992) (quoting *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 997-98, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988)). Here, the Court of Appeals properly concluded that Fibre failed to respond to Hegwine’s prima facie case of discrimination with sufficient evidence of a legitimate reason for discharge.

Hegwine, on the other hand, presented the testimony of Fibre’s own Equal Employment Coordinator, Margaret Rhodes. Through her investigation, Ms. Rhodes concluded that, even assuming the existence of a disability, Ms. Hegwine could perform the essential functions of the Order Checker position with available accommodations. RP (3/14) 170:17-21. It was Ms. Rhodes’ opinion that the accommodation could be provided without significant difficulty or expense. Ex. 13, p. 10. She recommended that Ms. Hegwine in fact be accommodated. RP (3/14) 132:1-5. Ms. Rhodes’ superiors, however, advised that they would not make any accommodation for Ms. Hegwine’s pregnancy. RP (3/14) 133:8-13.

Fibre presented no substantive evidence to refute Ms. Rhodes’ testimony. According to Jerry Dow, Fibre’s Human Resources Manager, the only reason why Fibre chose to not continue Hegwine’s employment was a

belief that she could not perform the lifting requirements of the position because of her pregnancy. RP (3/14) 230:2-9, 242:19 - 243:1. By his own admission, Dow made no effort to determine whether or not a pregnant woman in Washington must be accommodated for pregnancy-related disabilities. RP (3/14) 244:12-17. He testified that Fibre has no specific policy with regard to hiring pregnant women. RP (3/14) 245:17-19. He acknowledged that Fibre typically attempts to accommodate employees with lifting restrictions due to injuries by reassignment, leave of absence, transfer to sedentary positions, and/or assigning strenuous tasks to a relief clerk. RP (3/14) 245:20 - 247:19. However, he had no knowledge of these options being considered for Hegwine. RP (3/14) 247:20-21.

Once again, it makes no difference in this case whether “business necessity” is properly characterized as an affirmative defense. Regardless, the appellate court properly concluded that Fibre had failed to raise an issue of fact on the issue. *Hegwine*, slip op. at 15-16, fn. 17. The evidence at trial establishes that Fibre’s business necessity argument is disingenuous. Fibre’s discrimination was not based on a business necessity but rather its unlawful presumptions that Hegwine was disabled and that the disability was so severe that she could not be accommodated. This is precisely the type of discriminatory conduct prohibited by the regulations promulgated under the WLAD.

IV. REQUEST FOR ATTORNEY FEES

This portion of the brief is submitted to comply with the requirements of RAP 18.1(j), which provides in relevant part:

If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.

Upon denial of the Petition for Review, Hegwine will have met all the criteria for an attorney fee award.

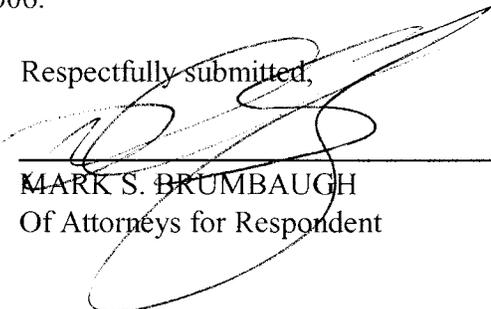
Further, RCW 49.60.030(2) has been interpreted as authorizing an award of attorney fees on appeal. *Allison v. Housing Auth.*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991); see, also, *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 844 P.2d 389 (1993). Further, RCW 49.48.030 provides for an award of reasonable attorney fees against the employer upon Hegwine's recovery of unpaid wages.

V. CONCLUSION

Hegwine respectfully asks the Court to deny Fibre's request for discretionary review.

DATED: June 23, 2006.

Respectfully submitted,



MARK S. BRUMBAUGH
Of Attorneys for Respondent

CERTIFICATE

I certify that on this day I caused a copy of the foregoing Answer to Petition for Review to be served on Petitioner's attorneys as follows:

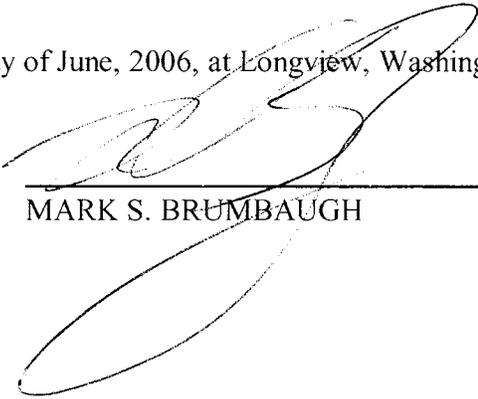
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DATED this 23rd day of June, 2006, at Longview, Washington.



MARK S. BRUMBAUGH