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No. 33174-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STACY L. HEGWINE,

Appellant,

vs.

LONGVIEW FIBRE COMPANY, INC.,
a Washington corporation,

Respondent.

BRIEF OF APPELLANT

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COURT OF APPEALS, DIVISION II
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STACY L. HEGWINE,

Appellant,

vs.

LONGVIEW FIBRE COMPANY, INC.,
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Respondent.

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court's finding that Fibre took no adverse employment action against Ms. Hegwine due to her "pregnancy-related condition" in violation of RCW 49.60 and WAC 162-30 was not supported by substantial evidence.
2. The trial court's conclusion that Fibre had no duty to accommodate Ms. Hegwine's temporary pregnancy-related disability, so long as the disability affected an essential job function, was contrary to Washington law.

3. The trial court's finding that Ms. Hegwine could not perform the essential functions of the Order Checker position was not supported by substantial evidence.
4. The trial court's finding that the ability to lift 60 pounds, rather than the task of delivering IBM reports, was an essential function of the job was not supported by substantial evidence.
5. The trial court's finding that the job of Order Checker Clerk could not be reasonably modified to accommodate Ms. Hegwine's temporary disability was not supported by substantial evidence.
6. The trial court's ruling that Fibre had no duty to grant Ms. Hegwine a leave of absence if her temporary disability could not be accommodated was contrary to Washington law.

B. Issues Pertaining to Assignments of Error

1. The only evidence at trial, including the testimony of each Fibre witness, was that Ms. Hegwine's pregnancy-related condition was the sole reason that she was fired/not hired. Did Fibre violate RCW 49.60 and WAC 162-30 as a matter of law? If not, was there

substantial evidence supporting the trial court's ruling that Fibre did not violate RCW 49.60 and WAC 162-30?

2. The uncontradicted evidence at trial was that Fibre repeatedly increased the lifting "requirements" of the position in response to Ms. Hegwine's establishing her ability to meet them, and that Fibre only conveyed a lifting requirement of 60 pounds to Ms. Hegwine after litigation had been commenced. Did this practice violate Fibre's obligation to reasonably accommodate Ms. Hegwine under RCW 49.60 and WAC 162-30?
3. Has an employer fulfilled its obligation to explore reasonable accommodations when it fails to disclose to the disabled employee/applicant the actual requirements of the job and the evidence establishes that, had the requirements been known, the employee would have been released by her doctor to continue employment without accommodation?
4. Fibre admitted that the investigation of its Equal Employment Opportunity coordinator determined that reasonable accommodations were available and that Washington law required them to be temporarily extended so that Ms. Hegwine could perform the essential functions of the Order Checker Clerk. The Fibre employee who made the decision to fire/not hire Ms. Hegwine admitted at trial that he was

not aware of his EEO coordinator's determinations, but considered them to be "irrelevant." In failing to provide temporary and admittedly reasonable accommodations, did Fibre violate RCW 49.60 and WAC 162-30 as a matter of law? If not, was there substantial evidence supporting the trial court's ruling that Fibre did not violate RCW 49.60 and WAC 162-30?

5. Does an employer have a duty to extend available reasonable accommodations to a pregnant woman which will permit her to perform the essential functions of her job?
6. The uncontradicted evidence at trial was that one of the tasks of the Order Checker Clerk was to deliver internal documents to different departments. Delivery of IBM reports involved occasional and brief lifting of mail bins weighing up to 60 pounds. Was the delivery of the IBM reports, as opposed to the ability to lift 60 pounds, an essential function of the job?
7. Does an employer have an obligation to provide leave to a pregnant woman who is unable to perform the essential functions of her job due to a pregnancy-related disability?

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II. STATEMENT OF THE CASE

This appeal arises from a claim brought under the Washington Law Against Discrimination (RCW 49.60) and the regulations promulgated by the Washington Human Rights Commission. In particular, Ms. Hegwine alleged that Longview Fibre Company (hereinafter, "Fibre") violated RCW 49.60 by failing to employ her in the position of Order Checker because she had a temporary lifting restriction due to pregnancy, despite her ability to perform the essential functions of the position. Alternatively, Fibre failed to explore and temporarily provide available reasonable accommodations for the period that her lifting ability was limited due to pregnancy. Lastly, Ms. Hegwine alleged that Fibre failed to provide pregnancy leave pursuant to WAC 162-30-020(4) in the event that her lifting restrictions could not be reasonably accommodated.

III. STATEMENT OF THE FACTS

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. A secondary duty is processing the incoming and outgoing mail. RP (3/14) 4:18-24. Ms. Hegwine became aware of the position through a newspaper ad.

RP (3/14) 7:10-17. The only qualifications listed in the ad were two years full-time related experience, PC abilities, and demonstrated communication skills. Ex. (Exhibit) 1, p. 1.

Ms. Hegwine was interviewed by Carlene Cox and Ron Samples on February 21, 2001. CP 14; RP (3/15) 142:2-5. Ms. Cox was employed by Fibre from June 1998 to May 2002 in the human resources department. RP (3/15) 138:19 - 139:18. Mr. Samples was a Fibre employee for 41 years prior to retiring on May 1, 2001, the last 26 years as manager of the customer service department. RP (3/14) 4:2-11.

A total of three or four applicants were interviewed for the open order checker position. RP (3/14) 7:15-19. After interviews, Ms. Hegwine was selected as the successful applicant. RP (3/14) 24:1-12. During Ms. Hegwine's interview, Ron Samples represented 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. At that time, there was no written job description for the order checker position. RP (3/14) 9:21-23.

Ms. Hegwine was offered the position on February 21, 2001. CP 14. As part of the hiring process, Ms. Cox completed a "candidate checklist," indicating that Ms. Hegwine accepted the offer on the same day. RP (3/15) 180:19 - 181:18; Ex. 23. Ms. Cox understood that it was necessary to make an offer of employment before requesting that Ms. Hegwine submit to a physical examination. RP (3/15) 184:17-20. Ms. Cox gave Ms. Hegwine a

start date of March 1, 2001. CP 14; RP (3/14) 21:19-25; 70:20 - 72:8; 100:21 - 101:7.

On March 1, 2001, Ms. Hegwine came 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 Ms. Hegwine asked about pregnancy leave, she was asked to leave the mill site. RP (3/15) 28:18 - 31:5.

After seeking the assistance of the Washington Human Rights Commission and the Washington Department of Labor and Industries, Ms. Hegwine was eventually paid for the work she performed for Fibre on March 1, 2001. RP (3/14) 42:11-24.

At trial, Fibre's Director of Human Resources, Michael Fitzpatrick, acknowledged that Ms. Hegwine accepted a job offer. However, he testified that Ms. Cox erroneously offered Ms. Hegwine the position without having obtained the proper medical clearance. RP (3/15) 114:20 - 115:4; 123:10-22.

Ms. Hegwine's obstetrician, Daniel Herron, had provided a release dated February 23, 2001, indicating she could lift 30 pounds to her waist and

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20 pounds to her shoulders and overhead, up to two hours each day. Fibre had received the release by noon on March 1, 2001. CP 15; Ex. 1, p. 4.

As Ms. Hegwine was leaving the Fibre grounds, Ms. Cox met her at the gate and suggested she contact her physician about her restrictions. RP (3/15) 195:18 - 196:25. Soon thereafter, Ms. Cox spoke to Fibre nurse Marilyn Sapp regarding Ms. Hegwine's issue. RP (3/15) 198:17 - 199:3. Ms. Sapp subsequently advised Dr. Herron's office that Ms. Hegwine would need to be able to lift 40 pounds. RP (3/14) 220:19 - 221:6. Later on March 1, 2001, Dr. Herron faxed a revised release to Fibre allowing Ms. 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. It was the doctor's understanding that this would permit Ms. Hegwine to continue to work at Fibre. RP (3/14) 204:1 - 204:22.

On March 5, 2001, Dr. Ostrander, Fibre's Medical Center Director, spoke directly to Dr. Herron and was told Ms. 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. Dr. Ostrander did not advise Dr. Herron that Ms. Hegwine would need to be able to lift more to continue at Fibre. RP (3/15) 68:24 - 69:5.

Fibre subsequently involved its Equal Employment Opportunity Coordinator, Margaret Rhodes. RP (3/14) 110:23-24; 113:11-15. Ms. Rhodes was a Fibre employee from February of 1998 through Veterans

Day (November 11) 2002. RP (3/14) 110:16-21; 112:25 - 113:2. Her duties included discrimination training. RP (3/14) 112:22-24. She previously had spent 20 years in the military, 11 as Superintendent of Military Equal Opportunity; conducting training, investigating complaints of discrimination, and counseling. RP (3/14) 110:25 - 111:13.

Ms. Rhodes was asked by her supervisors to complete a job description form ("EMP 5") for the customer service clerk/order checker position, in general, and an "ability to perform the job" evaluation form ("EMP 7") for Ms. Hegwine, in particular. RP (3/14)116:15-18; 117:10-2; Ex. 13, 14 and 15. The EMP 5 and EMP 7 forms were created in the early 1990s and were modeled after the federal Americans with Disabilities Act. RP (3/15) 207:8-20. The forms were not modified in response to the pregnancy discrimination regulations later enacted by the Washington Human Rights Commission. CP 16; RP (3/15) 215:20 - 216:16. In fact, Ms. Rhodes possessed no forms specific to Washington pregnancy discrimination regulations. RP (3/14) 132:20 - 133:7; 178:21 - 179:19.

Ms. Rhodes was advised that Ms. Hegwine potentially had a temporary disability due to pregnancy, in the form of a lifting restriction. RP (3/14) 121:2-8. She understood that this restriction would last three to four and a half months. RP (3/14) 167:22 - 168:4. Given her experience as an Equal Employment Opportunity Coordinator, Ms. Rhodes knew that Washington State regulations required that a pregnant woman with a

temporary disability either be accommodated or be put on leave. RP (3/14) 126:5-16. For that reason, she investigated the possibility of accommodating the 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. The Customer Service Department consisted of approximately 22 workers. RP (3/14) 4:13. Among them were employees who had previously performed the task of delivering the IBM reports and knew how to do so. RP (3/14) 28:4-11.

Through her investigation, Ms. Rhodes concluded that Ms. Hegwine could perform the job of Order Checker with available accommodations. RP (3/14) 170:17-21. The recommended accommodation was temporary transfer to a sedentary relief clerk position. She noted that extending this accommodation was Fibre's past practice with employees. Ex. 13, p. 7. Ms. Rhodes further concluded that this 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. As a result, Ms. Rhodes

completed the requested forms without addressing the availability of accommodations. Ex. 14 and 15; RP (3/14)173:3 - 174:19.

The ultimate decision regarding Ms. 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. He conceded that, other than lifting restrictions due to pregnancy, Ms. 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 Mr. Arkell, "an individual who is pregnant is treated by Fibre as any other successful applicant in the job, unless there is some kind of a disability or limitation that is attached to the pregnancy." In his mind, this is a "neutral" policy. RP (3/15) 212:1-12.

Mr. Arkell further testified that Ms. Rhodes never conveyed her belief that Washington law required accommodations to be extended to Ms. Hegwine. However, even if she had, Mr. Arkell stated that he would have considered the opinion of his EEO coordinator to be "irrelevant" and he would have simply disregarded her. RP (3/15) 217:11 - 219:8. Mr. Arkell never considered providing pregnancy leave to Ms. Hegwine, because he did not consider her an employee. RP (3/14) 227:22 - 228:23.

Carlene Cox was instructed by her superiors to contact Ms. Hegwine and rescind the job offer. RP (3/15) 167:15 - 169:25. On March 16, 2001,

Ms. 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. According to Jerry Dow, Fibre's Human Resources Manager, the only reason why Fibre chose to not continue Ms. 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, Mr. 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. In addition, 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 Ms. Hegwine. RP (3/14) 247:20-21.

In May of 2001, Matt Peerboom, with the assistance of Debi Manavian, created a written job description for the Customer Service Clerk/Order Checker position. RP (3/15) 102:15-20. Mr. Peerboom has been the Fibre Customer Service Manager since May 2001. RP (3/15) 102:9-12. Debbie Manavian was the Fibre Order Writer Supervisor. RP (3/15) 5:23 - 6:10. According to Mr. Peerboom, the "essential functions of the job" are the "responsibilities" listed in the Longview Fibre Company Job

Description they created. RP (3/15) 109:14 - 110:1; Ex. 17. One of those responsibilities is to “process and distribute IBM reports each morning.” Ex.17. It is the accomplishment of this task, not the manner of accomplishment, that is ultimately important to Fibre. RP (3/15) 112:18 - 113:22.

The task involves picking up four to six plastic postal bins filled with IBM printouts and delivering them to the accounting building, approximately 500 feet away. RP (3/14) 13:15 - 14:23. Without modification, each loaded bin weighs between 30 to 60 pounds. RP (3/14) 15:18-19. The actual transport of the bins is performed with the help of a Daihatsu pickup truck, capable of carrying as many as 20 bins at one time. RP (3/14) 26:3-11. In other words, the truck is equally capable of carrying eight 30 pound bins, as four 60 pound bins. RP (3/14) 27:8-11. It takes less than a minute to carry a bin to the Daihatsu from the administration building. RP (3/15) 100:18-25. Occasionally, even a healthy Order Checker would need help carrying a bin and “it was simply a matter of asking for assistance from another employee.” RP (3/15) 101:1-7.

A hand truck could be used to bring the reports from the administration building to the truck. RP (3/15) 31:3-16. Similarly, a hand truck was available to transport the bins from the Daihatsu to the accounting building. RP (3/15) 30:22-25; 27:12-21. In short, the Order Checker need only lift the documents from the hand truck to the Daihatsu, and back off the

Daihatsu onto another hand truck. Once in Customer Service, the reports were broken up by someone other than the Order Checker. RP (3/15) 11:7 - 12:1. The entire process of driving to pick up the bins and delivering the materials to accounting amounted to 30 to 45 minutes of the order checker's eight hour workday. RP (3/14) 16:3-7; 27:22-25.

Dr. Herron was never advised by anyone at Fibre of a supposed 60 pound lifting requirement of the Order Checker position. RP (3/14) 192:21 - 193-1; 221:7-15. Ms. Cox conceded that she never conveyed a 60 pound lifting requirement to Ms. Hegwine or Dr. Herron, nor did anyone else at Fibre to the best of her knowledge. RP (3/15) 201:4-12. In fact, Ms. 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 Ms. Hegwine's job was dependent upon the ability to lift 60 pounds, he likely would have provided his approval to perform the job without accommodation. RP (3/14) 193:17 - 194:14; 205:21 - 206:8. In fact, Dr. Herron regularly provides work approval to his pregnant patients despite the need to lift as much as 60 pounds. RP (3/14) 193:2-16.

IV. SUMMARY OF ARGUMENT

After correctly concluding that Ms. Hegwine's pregnancy resulted in a temporary lifting restriction which constituted a "pregnancy-related

condition,” as defined in WAC 162-30-020(2)(b), the trial court erred in failing to conclude that Fibre’s failure to employ Ms. Hegwine was a violation of RCW 49.60 and WAC 162-30. Alternatively, the court erred in concluding: (1) Ms. Hegwine was unable to perform the essential functions of the job without accommodation; (2) Fibre need not provide reasonable accommodations which would allow Ms. Hegwine to perform essential job functions; (3) Reasonable accommodations were not available; and; (4) Fibre need not provide pregnancy leave if no reasonable accommodation was available.

V. ARGUMENT

A. The Standard of Review

Where a trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court’s conclusions of law and judgment. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Id.* The appellate court will defer to the trier of fact with respect to credibility determinations or conflicting testimony. *Weyerhaeuser v. Health Dep’t*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). Conclusions of law are reviewed de novo. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210, 936 P.2d 1163, *rev. den.*, 133 Wn.2d 1022, 950 P.2d 476 (1997).

B. The Washington Law Against Discrimination is Liberally Construed to Prevent Discrimination

Both the Washington law against discrimination¹ (WLAD) and its federal counterpart² (Title VII) provide that it is unlawful to discharge or discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, race, creed, color, or national origin, or presence of any sensory, mental, or physical handicap. RCW 49.60.030(1)(a); *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 829 P.2d 196 (1992), *rev'd on other grounds*, 124 Wn.2d 634, 880 P.2d 29. Additionally, Washington law prohibits discrimination based on marital status. RCW 49.60.180(3).

Both Title VII and the WLAD render it unlawful for an employer to refuse to hire or to discharge because of gender. As a result, it is immaterial whether Ms. Hegwine is characterized as an existing employee or, instead, as a job applicant. Under Title VII, an employer may not “limit, segregate, or classify [its] employees or *applicants for employment* in any way which would deprive or tend to deprive [them] of employment opportunities . . .” 42 U.S.C. §2000e-2(a)(2) (emphasis added). Under the WLAD, the right to be free from discrimination includes the right “*to obtain* and hold employment without discrimination.” RCW 49.60.030(1)(a). As a result, it

¹RCW ch. 49.60

²42 U.S.C. §§ 2000e *et seq.*

is an unfair practice for an employer “[t]o refuse to hire any person” because of their membership in a protected class. RCW 49.60.180(1). The regulations addressing pregnancy discrimination are consistent with the principles of the WLAD. See, WAC 162-30-020(3) (unfair practice to refuse to hire a woman because of pregnancy or childbirth).

While Plaintiff alleged no violations of federal law in the present case, federal interpretations of Title VII may be instructive on discrimination claims brought under Washington law. *Baker v. Kaiser Aluminum & Chemical Corp.*, 951 F.Supp. 953 (E.D. Wash. 1996). However, the United States Congress has expressly provided that Title VII does not preempt or supersede state laws which define sex discrimination more comprehensively than federal law. 42 USCA § 2000e-7; 42 USCA § 2000h-4.

Washington courts will only follow federal authority when doing so furthers the purpose of RCW 49.60:

While . . . federal cases are a source of guidance, we bear in mind that they are not binding and that we are free to adopt those theories and rationale which best further the purposes and mandates of our state statute.

Grimwood v. University of Puget Sound, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988). In particular, it has been recognized that “state courts have generally declined to follow [federal law] in interpreting their own state statutes prohibiting sex discrimination in employment with respect to cases
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involving sick leave or disability benefits.” 99 ALR 5th 1, § 2 (citations omitted).

Washington discrimination laws are generally more robust than those authorized under Title VII. *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493 (C.A. 9 Wash. 2000). Washington courts have recognized that the WLAD "embodies a public policy of 'the highest priority.'" *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (quoting *Allison v. Housing Auth.*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991)). It has been held that both sex discrimination and disability discrimination in employment contravene a clear mandate of public policy in Washington. *Sedlacek v. Hillis*, 104 Wn. App. 1, 3 P.3d 767 (2000), *aff'd in part, rev'd in part*, 145 Wn.2d 379, 36 P.3d 1014.

Since 1949, these words have introduced the Washington Law Against Discrimination (WLAD):

The legislature hereby finds and declares that practices of discrimination against any of its inhabitants . . . are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010. It is statutorily mandated that the 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

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liberally construed and exceptions narrowly confined); *Curtis v. Security Bank of Wash.*, 69 Wn. App. 12, 15, 847 P.2d 507 (1993).

C. Pregnancy is Afforded Special Status Under the Washington Law Against Discrimination

The Washington Human Rights Commission (WHRC) has been charged with responsibility for implementing the WLAD. RCW 49.60.120 provides in relevant part:

The [human rights] commission shall have the functions, powers and duties:

* * *

(3) to adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter, and the policies and practices of the commission in connection therewith.

Consistent with this directive, the Washington Human Rights Commission (WHRC) has formulated regulations regarding pregnancy issues. WAC 162-30. These regulations were designed to “equalize employment opportunity for men and women.” WAC 162-30-020(1). The regulations recognize that “[p]regnancy is an expectable incident in the life of a woman” and that “[d]iscrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.” WAC 162-30-020(2).

The regulation provides, in relevant part:

It is an unfair practice for an employer, because of pregnancy or childbirth, to:

- (i) Refuse to hire or promote, terminate, or demote, a woman;
- (ii) Impose different terms and conditions of employment on a woman.

WAC 162-30-020(3). “‘Pregnancy’ includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions.” WAC 162-30-020(2)(a). “‘Pregnancy related conditions’ include, but are not limited to, related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy.” WAC 162-30-020(2)(b).

Further, an employer is required to provide a leave of absence to a woman for the period of time that she is sick or temporarily disabled due to pregnancy or childbirth. WAC 162-30-020(4).

While these regulations provide guidance, the Court has recognized that “the prohibition against sex discrimination under RCW 49.60.180 . . . clearly encompassed discrimination based on a woman's potential to become pregnant and her need to have time away from work for childbearing, prior to the change in the administrative code, specifically including this form of discrimination.” *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 43 P.3d 23 (2002).

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D. Plaintiff Proved Her Claim of Pregnancy Discrimination as a Matter of Law

Plaintiff's Complaint alleges, *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. CP 3. As a result, Ms. Hegwine was required to prove only that (1) she was pregnant; (2) Defendant treated her adversely; and (3) her pregnancy was a substantial factor in the adverse action. WPI 5th 330.01. These elements can be established through circumstantial, indirect and inferential evidence *Hill v. BCIT Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001). Of the three elements, only the last was in dispute.

Given the uncontroverted evidence at trial, the provisions of WAC 162-30 compel a finding in favor of Ms. Hegwine. By its terms, the regulation renders it unlawful to refuse to hire or to terminate a woman due to pregnancy-related medical conditions. The "sole exception" to this rule is if an employer demonstrates a "business necessity for the employment decision." WAC 162-30-020(3)(b).

After considering the evidence presented, the trial court found that Fibre's decision was based on a lifting restriction "due solely to the pregnancy" and properly concluded that the lifting restriction was a "pregnancy-related condition" as defined in WAC 162-30-020(2)(b). CP 17.

At no time did Fibre raise the affirmative defense of “business necessity.” CP 8-13. Nor did Fibre produce evidence at trial which would support the defense. As a result, the trial court made no finding regarding the defense.

The facts are clear: Ms. Hegwine was either terminated or not hired due solely to a pregnancy-related condition, and no overriding business necessity for the decision was shown. As a matter of law, Fibre’s action violated Washington law.

E. Plaintiff Proved Disability Discrimination as a Matter of Law

Rather than attempting to establish a “business necessity” for failing to employ Ms. Hegwine, Fibre defended its employment actions by claiming that its decisions were based on Ms. Hegwine’s inability to perform the essential functions of her job. As a result, the trial court applied a disability discrimination analysis and treated the case as a “failure to accommodate” action. This was unnecessary since pregnancy discrimination was independently established. Nevertheless, the result is the same under a disability discrimination theory.

Under Washington law an employer may not “discharge or bar *any person* from employment because of . . . any sensory, mental, or physical disability,” much less a pregnant woman. RCW 49.60.180(2) (emphasis added). Rather, an employer must reasonably accommodate an employee’s

disability unless to do so would impose an undue hardship on the employer's business. WAC 162-22-080(1) provides:

It is an unfair practice for an employer to fail or refuse to make reasonable accommodations to the sensory, mental, or physical limitations of employees . . . unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.

A plaintiff need not establish an employer's intent to discriminate; the failure to reasonably accommodate is itself discriminatory. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 640, 9 P.3d 787 (2000).

Failure-to-accommodate claims are premised on the recognition that “[i]dentical treatment may be a source of discrimination in the case of the handicapped, whereas *different* treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.” *Holland v. Boeing Co.*, 90 Wn.2d 384, 388, 583 P.2d 621 (1978) (emphasis in original). Of course, this observation is equally applicable to restrictions due to pregnancy. “The central idea is that an employer cannot fire an employee for poor job performance if the poor job performance was due to [a disability] and reasonable accommodation would have rectified the problem.” *Parsons v. St. Joseph's Hosp.*, 70 Wn. App. 804, 807, 856 P.2d 702 (1993).

A light duty restriction by a doctor triggers an employer's duty of reasonable accommodation. *Pulcino v. Federal Express Corp.*, 141 Wn.2d

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629, 9 P.3d 787 (2000). Further, a disability need not be permanent to trigger the protections of the WLAD. *Id.*

The employer's notice of a disability "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). "To accommodate, the employer must affirmatively take steps to help the disabled employee continue working at the existing position or through attempts to find a position compatible with her limitations." *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 442, 45 P.3d 589 (2002); *Sommer v. Department of Social and Health Services*, 104 Wn. App. 160, 15 P.3d 664 (2001), *rev. den.*, 144 Wn.2d 1007, 29 P.3d 719. An employer may not simply treat a disabled employee like any other job applicant. *Curtis v. Security Bank of Washington*, 69 Wn. App. 12, 847 P.2d 507 (1993), *rev. den.*, 121 Wn.2d 1031, 856 P.2d 383; *Staub v. Boeing Co.*, 919 F.Supp. 366 (W.D. Wash. 1996).

"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). The employer has a duty to acquire enough information to accommodate the employee's disability. *Wurzbach v. City of Tacoma*, 104 Wn. App. 894, 17 P.3d 707 (2001), *rev. denied*, 144 Wn.2d 1017, 32 P.3d 284.

In applying a disability discrimination analysis, the trial court in the present case erred in concluding that: (1) Fibre had no duty to accommodate Ms. Hegwine; (2) Ms. Hegwine could not perform an essential function of the job, and (3) no reasonable accommodations were available.

1. Fibre had a Duty to Accommodate Ms. Hegwine's Temporary Pregnancy-Related Disability, If Necessary

The trial court erred in concluding: "Fibre had an obligation to 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).

A prima facie failure to accommodate claim is made where (1) the employee has a disability, (2) the employee is, *or with reasonable accommodation will be*, able to perform the essential functions of the job, and (3) the employer failed to reasonably accommodate the disability. *Easley v. Sea-Land Service, Inc.*, 99 Wn. App. 459, 468, 994 P.2d 271 (2000). "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.” *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533, 70 P.3d 126 (2003) (quoting 42 U.S.C. § 12111(8)) (emphasis added).

In this respect, Washington law is consistent with federal anti-discrimination law that “requires an employer to make whatever accommodations are reasonably possible in the circumstances so as to allow the employee to perform the functions essential to his position.” *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1017 (7th Cir. 1996) (ADA case) (emphasis added). See, also, *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) (under sections 501 and 504 of the Rehabilitation Act, “an individual with handicaps is 'qualified' if she can perform the essential functions of her position with reasonable accommodation. If she can perform these functions without reasonable accommodation, so much the better--she is, of course, still qualified”); *Lyons v. Legal Aid Soc’y*, 68 F.3d 1512, 1515 (2d Cir. 1995) (the standard is the same under the ADA and the Rehabilitation Act).

Accordingly, the trial court erred in ruling that Fibre had no duty to explore and extend reasonable accommodations which would permit Ms. Hegwine to work, once it was determined that the pregnancy-related disability affected the ability to perform an essential function of the job.

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2. Fibre Failed in its Obligation to Explore the Necessity and Availability of Reasonable Accommodations

Instead of engaging in an interactive process, Fibre chose to conceal the requirements of the position from Ms. Hegwine and her doctor. This is not surprising, since the decision-makers at Fibre testified that they had no intent to accommodate Ms. Hegwine.

After investigation, Fibre's EEO Coordinator Margaret Rhodes concluded that reasonable accommodations were available. RP (3/14) 170:17-21. Further, she concluded that accommodations could be extended without significant difficulty or expense. Ex. 13, p. 10. She recommended that Ms. Hegwine in fact be accommodated. RP (3/14) 132:1-5. In response, her superiors advised that they would not make any accommodation for Ms. Hegwine's pregnancy. RP (3/14) 133:8-13. Jerry Dow, the Fibre Human Resources Manager, admitted that he 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.

While the ultimate decision-maker, Robert Arkell, disputed that Ms. Rhodes ever conveyed her belief that Washington law required that accommodations be made, this fact is immaterial. Mr. Arkell conceded that he would have considered Ms. Rhodes' opinion to be "irrelevant" and he would have simply disregarded her. RP (3/15) 217:11 - 219:8.

3. Ms. Hegwine Could Perform the Essential Functions of the Position Without Accommodation

According to Jerry Dow, Fibre's Human Resources Manager, the only reason why Fibre chose to not continue Ms. 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. Had Fibre fulfilled its obligation to fully involve Ms. Hegwine in the accommodation process, they would have discovered that she was qualified for the position without any accommodation whatsoever. The only time Ms. Hegwine would be asked to lift up to 60 pounds is in delivering four to six bins of IBM reports. RP (3/14) 13:15 - 14:23. The weight of the bins ranged from 30 to 60 pounds. RP (3/14) 15:18-19. This task takes no more than 45 minutes each day. RP (3/14) 16:3-7; 27:22-25. Most of the time expended in the achievement of the task involves the use of a hand truck and Daihatsu vehicle, requiring no lifting whatsoever. RP (3/15) 30:22 - 31:16. Ms. Hegwine would need only lift the bins from the hand truck to the Daihatsu, and back off the Daihatsu onto another hand truck.

Dr. Herron testified that, had he been aware that Ms. Hegwine's job was dependent upon the ability to lift 60 pounds, he likely would have provided his approval to perform the job without accommodation. RP (3/14) 193:17 - 194:14; 205:21 - 206:8. In fact, Dr. Herron regularly provides work approval to his patients who work in a local chicken processing plant or are

involved in nursing care, despite the need to lift as much as 60 pounds. RP (3/14) 193:2-16. Unfortunately, Fibre failed to advise Ms. Hegwine or Dr. Herron of any 60 pound requirement until after the commencement of litigation.

In short, the undisputed testimony provided at trial established that Ms. Hegwine was in fact capable of lifting 60 pounds. Fibre could have easily ascertained this fact had it fulfilled its obligation to exchange pertinent information with Ms. Hegwine. Rather than provide accurate information to Ms. Hegwine or her doctor, Fibre continued to increase the lifting “requirements” of the job as Ms. Hegwine established her ability to meet them. Ultimately, Fibre settled on a 60-pound minimum and, rather than engage in an interactive process and risk the possibility that Ms. Hegwine would be released to perform the work, chose to conceal this fact and simply terminate her.

4. Ms. Hegwine Could Perform the Essential Functions of the Job With Reasonable Accommodation

Even had Fibre produced evidence to establish that Ms. Hegwine’s pregnancy affected her ability to perform an essential job function, it is clear that she was capable of performing the duties of her position with available accommodations.

a. Lifting 60 pounds is not an essential job function.

As a preliminary matter, it is necessary to identify the “essential functions” of the Order Checker position. Plaintiff contends that the court erred in concluding that lifting 60 pounds was an essential function of the position in which Ms. Hegwine was hired.

The term “essential functions” is derived from the Americans with Disabilities Act³ (ADA), and it has been defined in the regulations of the federal Equal Employment Opportunity Commission (EEOC) as follows: “The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position.” *Davis*, 149 Wn.2d at 533 (emphasis omitted) (citing 29 C.F.R. § 1630.2(n)(1) (2002)). “[A]n 'essential function' is a job duty that is fundamental, basic, necessary, and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.” *Davis v. Microsoft Corp.*, 149 Wn.2d at 533. *See, also, Easley v. Sea-Land Service, Inc.*, 99 Wn. App. 459, 994 P.2d 271 (2000), *rev. denied*, 141 Wn.2d 1007, 16 P.3d 1263.

Obviously, it is the accomplishment of the task, not the method of accomplishment, which is essential. Matt Peerboom and Jodi Smith, among others, agreed that it is the delivery of computer reports that is essential, not

³42 U.S.C. §§ 12101-12213

the ability to lift 60 pounds. The Washington State Department of Personnel has recognized that this is the proper interpretation of the term “essential job function,” stating: “An essential function analysis may contain information on the manner in which a job currently is performed, but should not include that ability to perform the job in that manner is an essential function, unless there is no other way to perform the function without causing undue hardship.” *Identifying Essential Job Functions*, Washington State Department of Personnel, Personnel Services Division, page 13.⁴

- b. Available reasonable accommodations were not extended to Ms. Hegwine.

“Reasonable accommodation” is defined by WAC 356-05-333 as:

Reasonable alterations, adjustments, or changes . . . in the job, workplace and/or term or condition of employment which will enable an otherwise qualified person of disability . . . to perform a particular job successfully, as determined on a case-by-case basis.

The duty to reasonably accommodate a disability extends to measures which will help an individual perform his or her job (*Doe v. Boeing Co.*, 121 Wn.2d 8, 18, 846 P.2d 531 (1993)), or avoid termination (e.g., *Clarke v. Shoreline School Dist.*, 106 Wn.2d 102, 119-21, 720 P.2d 793 (1986)). Recognized types of accommodation include (a) making “changes to a work

⁴Exhibit 1 to Plaintiff’s Post-Trial Memorandum of Law. To be provided via Supplemental Designation of Clerk’s Papers and Exhibits filed August 30, 2005.

station,” (b) providing “enhanced . . . equipment,” (c) modifying the work place, (d) providing leaves of absence (*Doe*, 121 Wn.2d at 17 n. 4, and 21 n. 5.), (e) providing light duty (*Pulcino*, 141 Wn.2d at 645) and (f) taking affirmative steps to help an employee find another position (*Davis*, 149 Wn.2d at 536; *Pulcino*, 141 Wn.2d at 643-44). The WHRC has recognized that changing minor job functions can be a reasonable accommodation. *See*, www.hum.wa.gov/employer/faq_preg_matern.htm.

In the present case, 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. The Customer Service Department consisted of approximately 22 workers. RP (3/14) 4:13. Among them were employees who had previously performed the task of delivering the IBM reports and knew how to do so. RP (3/14) 28:4-11. Even without medical restrictions, an Order Checker would occasionally need help carrying a bin and other employees were available to assist. RP (3/15) 101:1-7. It is clear that any assistance provided would take a matter of minutes.

Taking these facts into account, Ms. Rhodes concluded that Ms. Hegwine could perform the job of Order Checker with available accommodations. RP (3/14) 170:17-21. She noted that extending the

available accommodation was Fibre's past practice with employees. Ex. 13, p. 7. With regard to the Customer Service Department in particular, the evidence was not refuted. Ron Samples, Carlene Cox, and Matt Peerboom all testified that there were numerous existing employees who previously performed the duty of delivering mail and IBM reports, and would be available to do so in the event of injury or sickness.

Jerry Dow 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, despite his position as Human Resources manager, he had no knowledge of these options being considered for Ms. Hegwine. RP (3/14) 247:20-21. In short, it is clear that reasonable accommodations were available, but not extended.

c. Fibre failed to produce evidence of undue hardship.

The duty to accommodate is a wide-ranging one and an employer must provide a reasonable accommodation except when doing so would impose an "undue hardship." *Phillips v. Seattle*, 111 Wn.2d 903, 911, 766 P.2d 1099 (1989); WAC 162-22-075. An accommodation for a handicapped employee is reasonable if its costs do not exceed its benefits. *MacSuga v. Spokane County*, 97 Wn. App. 435, 442, 983 P.2d 1167 (1999), *rev. den.* 140

Wn.2d 1008, 999 P.2d 1259 (2000). An employer's failure to reasonably accommodate the sensory, mental, or physical limitations of a disabled employee constitutes discrimination unless the employer can demonstrate that such accommodation would result in an undue hardship to the employer's business. *Snyder v. Medical Serv. Corp.*, 98 Wn. App. 315, 988 P.2d 1023 (1999) (citing *Doe v. Boeing Co.*, 121 Wn.2d 8, 16, 18, 846 P.2d 531 (1993)).

“Undue hardship” is an affirmative defense, which must be pled. Fibre, however, did not plead the defense. CP 8-14. In addition, Fibre failed to offer any evidence that providing accommodations would constitute an undue hardship. To the contrary, the fact that the company regularly provides the identified accommodations suggests otherwise. The only direct testimony on this issue came from Ms. Rhodes, who stated: “I didn’t feel that the accommodations would be undue, and that we could – Fibre could support those accommodations.” RP 170:14-21; C.T. 13, p. 10. She estimated the cost of accommodating Ms. Hegwine at less than \$5,000.00. RP 130:22 - 131:11.

F. Absent Another Reasonable Accommodation, Ms. Hegwine was Entitled to Leave

Ultimately, the accommodation analysis matters little. As stated above, even if the Court had properly determined that Fibre need not extend

available accommodations to Ms. Hegwine, it was nevertheless obligated to provide leave for the actual period of her disability. When a woman's pregnancy results in a temporary disability, an employer is required to provide either a reasonable accommodation or a leave of absence. WAC 162-30-020(4)(a) provides in relevant part: "An employer shall provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth." Further, the employer must provide leave to a pregnant woman even if the employer's general leave policy does not provide comparable leave to employees disabled by other causes. WAC 162-30-020(4)(b).

The use of the term "woman" rather than "employee" in these provisions is notable. Clearly, the HRC intended to extend the regulations to both existing employees and applicants. This reading is consistent with the remainder of the regulation which declares it an unfair practice to refuse to hire or terminate a woman because of pregnancy. WAC 162-30-020(3)(a).

IV. REQUEST FOR ATTORNEY FEES

This portion of the brief is submitted to comply with the requirements of RAP 18.1(b).

RAP 18.1 provides for an award of attorney fees on review where a statute authorizes such an award. Although RCW 49.60.030(2) does not expressly provide for attorney fees on review, it has been interpreted as

authorizing such an award. *Allison v. Housing Auth.*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991). As a result, attorney fees are properly awarded to a prevailing plaintiff in a discrimination appeal. *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 844 P.2d 389 (1993). Further, Ms. Hegwine's claim seeks recovery of unpaid wages. In the event that Ms. Hegwine is successful in recovering wages, RCW 49.48.030 provides for an award of reasonable attorney fees against the employer.

V. CONCLUSION

Despite properly concluding that Ms. Hegwine's lifting restriction was a pregnancy-related condition, the trial court erroneously concluded that Fibre was entitled to deny her continued employment based solely upon the existence of the condition, in contravention of RCW 49.60, WAC 162-30, and Washington public policy. This conclusion was error as a matter of law.

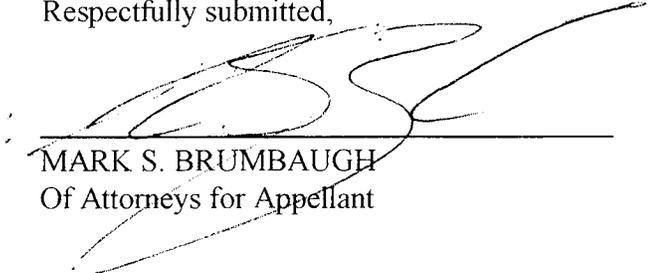
Further, the trial court erred both in resorting to a disability discrimination analysis and the actual application of disability discrimination law to the evidence presented at trial. Specifically, the trial court erred in concluding (1) that Ms. Hegwine required accommodations to perform an essential job function; (2) that Fibre fulfilled its obligation to explore reasonable accommodations, (3) that reasonable accommodations were not available; and (4) that available reasonable accommodations need not be extended by Fibre.

Lastly, the trial court erred in concluding that Fibre need not provide leave to Ms. Hegwine in the event her pregnancy truly prevented her from performing the duties of her position.

Appellant respectfully requests that the trial court be reversed and that the case be remanded for an award of appropriate damages.

DATED: September 1, 2005.

Respectfully submitted,



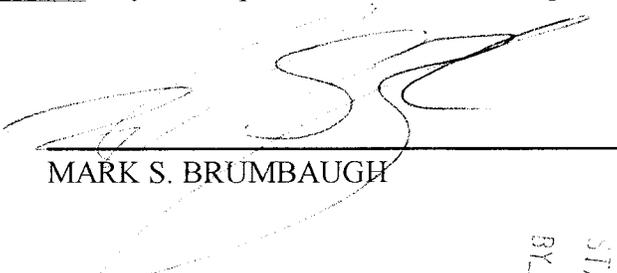
MARK S. BRUMBAUGH
Of Attorneys for Appellant

CERTIFICATE

I certify that on this day I caused a copy of the foregoing Brief of Appellant to be hand delivered to Respondent's attorney at the following address:

William L. Dowell
Attorney at Law
1000 Twelfth Avenue
Longview, WA 98632

DATED this 2 day of September, 2005, at Longview, Washington.



MARK S. BRUMBAUGH

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