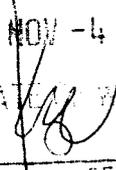


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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 33174-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STACY L. HEGWINE,

Appellant,

vs.

LONGVIEW FIBRE COMPANY, INC.,  
a Washington corporation,

Respondent.

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I.. INTRODUCTION .....	1
II. PREGNANCY DISCRIMINATION .....	1
A. Ms. Hegwine Established a Prima Facie Claim of Pregnancy Discrimination. ....	2
B. Fibre Failed to Plead or Establish a Business Necessity ...	4
C. Absent Accommodation, Ms. Hegwine was Entitled to Leave. ....	6
III. DISABILITY DISCRIMINATION .....	8
A. A Pregnancy-Related Restriction Constitutes a “Disability”. ....	9
B. Lifting 60 Pounds is not an “Essential” Job Function. ...	11
C. Lifting 60 Pounds is not a “Job Function”. ....	13
D. Fibre Failed to Adequately Explore Available Accommodations. ....	14
E. Reasonable Accommodations were Available. ....	16
IV. CONCLUSION .....	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<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 . . . . .	14
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003) . . . . .	11, 13, 17
<i>Doe v. Boeing Co.</i> , 121 Wn.2d 8, 846 P.2d 531 (1993) . . . . .	6, 10
<i>Easley v. Sea-Land Service, Inc.</i> , 99 Wn. App. 459, 994 P.2d 271 (2000), <i>rev. denied</i> , 141 Wn.2d 1007, 16 P.3d 1263 . . . . .	13, 14
<i>Erwin v. Roundup Corp.</i> , 110 Wn. App. 308, 40 P.3d 675 (2002) . . . . .	17
<i>Garrett v. Morgan</i> , 127 Wn. App. 375, 112 P.3d 531, 533 (2005) . . . . .	9
<i>Goodman v. Boeing Co.</i> , 127 Wn.2d 401, 899 P.2d 1265 (1995) . . . . .	14
<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 . . . . .	14
<i>Johnson v. Goodyear Tire &amp; Rubber Co.</i> , 790 F.Supp. 1516 (E.D.Wash.,1992) . . . . .	5
<i>Kuest v. Regent Assisted Living</i> , 111 Wn. App. 36, 43 P.3d 23 (2002) . . . . .	3, 4
<i>MacSuga v. Spokane County</i> , 97 Wn. App. 435, 983 P.2d 1167 (1999), <i>rev. den.</i> 140 Wn.2d 1008, 999 P.2d 1259 (2000) . . . . .	17
<i>Maxwell v. Dept. of Corrections</i> , 91 Wn. App. 171, 956 P.2d 1110 (1998) . . . . .	10
<i>Multicare Medical Center v. Department of Social and Health Services</i> , 114 Wn.2d 572, 790 P.2d 124 (1990) . . . . .	7

TABLE OF AUTHORITIES (continued)

<u>Cases</u>	<u>Page</u>
<i>Phillips v. City of Seattle</i> , 111 Wn.2d 903, 766 P.2d 1099 (1989) .....	10
<i>Pulcino v. Federal Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787 (2000) .....	10
<i>Riblet v. Ideal Cement Co.</i> , 57 Wn.2d 619, 358 P.2d 975 (1961) .....	10
<i>Snyder v. Medical Serv. Corp.</i> , 98 Wn. App. 315, 988 P.2d 1023 (1999) .....	6
<i>State v. Fjermestad</i> , 114 Wn.2d 828, 791 P.2d 897 (1990) .....	8
<i>State v. Burke</i> , 92 Wn.2d 474, 598 P.2d 395 (1979) .....	7, 8
<i>Sunnyside v. Fernandez</i> , 59 Wn. App. 578, 799 P.2d 753 (1990) .....	8
<i>Watson v. Ft. Worth Bank &amp; Trust</i> , 487 U.S. 977, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988) .....	5
<i>Wurzbach v. City of Tacoma</i> , 104 Wn. App. 894, 17 P.3d 707 (2001), <i>rev. denied</i> , 144 Wn.2d 1017, 32 P.3d 284 .....	15

Statutes

RCW 49.60 .....	3, 4
RCW 49.60.010 .....	3, 4
RCW 49.60.180 .....	3
RCW 49.60.180(1) .....	5, 6

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
<u>Other Authorities</u>	
WAC 162-22-080(1) .....	17
WAC 162-30-020 .....	3
WAC 162-30-020(1) .....	8
WAC 162-30-020(2)(b) .....	2
WAC 162-30-020(3)(a)(i) .....	3, 7
WAC 162-30-020(3)(b) .....	4, 5
WAC 162-30-020(4)(a) .....	6, 7
29 C.F.R. § 1630.2(n)(1) (2002) .....	13
42 U.S.C. § 12111(8) .....	11, 17
Webster's Encyclopedic Unabridged Dictionary of the English Language 2185 (1996) .....	8

COURT OF APPEALS, DIVISION II  
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STACY L. HEGWINE,

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vs.

LONGVIEW FIBRE COMPANY, INC.,  
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**I. INTRODUCTION**

Ms. Hegwine contends that the trial court erroneously applied Washington law to the facts of this case, whether her claim is viewed as a claim of sex discrimination or disability discrimination. This brief will address the arguments made by Longview Fibre Company (“Fibre”) in the Brief of Respondent.

**II. PREGNANCY DISCRIMINATION**

Fibre makes two arguments with regard to Ms. Hegwine’s claim of pregnancy discrimination: 1) Ms. Hegwine did not meet her burden of proof;

and 2) the decision to not employ Ms. Hegwine was dictated by a “business necessity.” Both arguments fail.

A. Ms. Hegwine Established a Prima Facie Claim of Pregnancy Discrimination.

The parties agree that Ms. Hegwine established a prima facie case of gender discrimination upon a showing that (a) she belongs to a protected class; (b) she suffered an adverse employment action; and (c) she suffered an adverse employment action because of her sex/pregnancy. Brief of Respondent, p. 19. In a footnote, Fibre also concedes that Ms. Hegwine need only show that her pregnancy was a “substantial factor” in the adverse action. Brief of Respondent, p. 19, fn. 6. Further, for purposes of this appeal, Fibre has conceded that Ms. Hegwine made the required showing and established a prima facie case of gender discrimination. Brief of Respondent, p. 19.

Nonetheless, Fibre vehemently argues that Ms. Hegwine’s pregnancy was not a substantial factor in the adverse decision. The court, however, 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.

These findings alone establish a violation of the Washington Law Against Discrimination. It is an unfair practice to refuse to hire a woman because of a pregnancy-related condition. WAC 162-30-020(2), (3)(a)(i). It was error for the court to conclude otherwise.

In apparent recognition of this fact, Fibre essentially asks the Court to invalidate the pregnancy regulations. However, Division I has previously 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*, 111 Wn. App. 36, 43, 43 P.3d 23 (2002). In *Kuest*, the Court noted that the legislature has specifically declared that discrimination against families with children “menaces the institutions and foundation of a free democratic state.”<sup>1</sup>

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<sup>1</sup> The legislative purpose of RCW 49.60 provides:

This chapter ... is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or

The *Kuest* Court enforced the regulation, holding that an employer violates RCW 49.60 if it terminates a woman based on her potential to become pregnant. *Id.*

B. Fibre Failed to Plead or Establish a Business Necessity.

The sole exception to the prohibition against failing to hire due to pregnancy is where an employer can demonstrate a business necessity for the decision. WAC 162-30-020(3)(b). “Business necessity” is an affirmative defense which must be pled and for which the Defendant carries the burden of proof. Fibre does not dispute that it failed to plead the defense. Consequently, the term “business necessity” does not appear in the court’s Findings of Fact and Conclusions of Law. CP 14-18. Nevertheless, Fibre requests that this Court excuse its failure to plead the defense and rule that business necessity is proven if an employer can establish an inability to reasonably accommodate. This is an odd argument in light of Fibre’s current

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physical disability ... 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.

position that a disability accommodation analysis is not appropriate<sup>2</sup>. In any event, “business necessity” under WAC 162-30-020(3)(b) is not synonymous with an inability to reasonably accommodate.

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, Fibre made no such allegation or offer of proof and the trial court made no such finding.

Fibre additionally argues that its decision to withdraw employment is authorized by the proviso of RCW 49.60.180(1):

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination *because of such disability* shall not apply if the particular

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<sup>2</sup> Brief of Respondent, pp. 26-29.

disability prevents the proper performance of the particular worker. (Emphasis added.)

The argument lacks merit. By its terms, the application of this provision is limited to *disability* discrimination claims. It is doubtful that Fibre is seriously contending that age, sex, marital status, race, creed, color, and national origin are “disabilities.” As a result, the proviso offers no assistance to Fibre on appeal of this pregnancy discrimination claim.

Of course, even in cases of alleged disability discrimination, the proviso is subject to the well-established reasonable accommodation analysis. Contrary to Fibre’s assertion, an employer cannot simply decide to “not hire an applicant who cannot perform the job.” Brief of Respondent, p. 21. Instead, it must take affirmative steps to determine whether the applicant can perform the job with reasonable accommodation. The accommodation must be provided unless the employer proves that doing so would impose an undue hardship. *Snyder v. Medical Serv. Corp.*, 98 Wn. App. 315, 988 P.2d 1023 (1999) (citing *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993)).

C. Absent Accommodation, Ms. Hegwine was Entitled to Leave.

Fibre apparently agrees that Fibre would be required to extend pregnancy leave to Ms. Hegwine under WAC 162-30-020(4)(a) if she had

been hired unconditionally. However, Respondent argues that Ms. Hegwine was not entitled to pregnancy leave because she was not an “employee.” While her employment status is debatable, the point is ultimately irrelevant. It matters not whether Ms. Hegwine is classified as an applicant, a conditional hire, or an employee.

Fibre offers no authority or argument to support its position that pregnant applicants can be treated differently than pregnant employees. The regulation is unambiguous. An employer may not “refuse to hire” a woman because of a medical condition related to pregnancy. WAC 162-30-020(3)(a)(i). Similarly, the regulatory provisions relating to pregnancy leave do not distinguish between applicants and employees, and apply equally to any pregnant “woman” regardless of her employment status<sup>3</sup>. Again, the only exception is if the employer carries its burden of demonstrating a business necessity for the action.

The rules of statutory construction apply to the interpretation of an administrative regulation. *Multicare Medical Center v. Department of Social and Health Services*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990); *State v.*

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<sup>3</sup> “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. . . .” WAC 162-30-020(4)(a).

*Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). Since “woman” is a nontechnical statutory term, it may be given its dictionary meaning. See, *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990); *Sunnyside v. Fernandez*, 59 Wn. App. 578, 581, 799 P.2d 753 (1990). Thus, a “woman” is simply “the female human being (distinguished from man).” Webster's Encyclopedic Unabridged Dictionary of the English Language 2185 (1996).

This reading is consistent with the regulation's stated purpose of “equalizing employment opportunity for men and women.” WAC 162-30-020(1). Fibre seeks to ignore one indisputable fact: women become pregnant, men do not. The purpose of the WLAD is not accomplished by treating pregnancy-related disabilities the same as any disability suffered by a man, because only women will be disabled due to pregnancy. In promulgating the regulation, the Washington Human Rights Commission properly recognized that a woman's employment opportunities are only truly equalized if the issue of pregnancy is removed from the equation.

### **III. DISABILITY DISCRIMINATION**

It is interesting that Fibre now argues on appeal that a disability accommodation analysis is not applicable to this case. Ms. Hegwine

presented this case as a claim of discrimination based on pregnancy and failure to comply with promulgated regulations relating to pregnancy. See, e.g., RP (3/15) 220:6 - 221:21. It was Fibre's trial counsel, not Ms. Hegwine, who urged the court to adopt a disability discrimination analysis. RP (3/15) 259:18 - 261:12; RP (3/15) 270:5 - 276:18. Having successfully convinced the court to consider a theory which had not been pled, Fibre is judicially estopped from arguing on appeal that a disability accommodation analysis is inapplicable. See, e.g., *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531, 533 (2005) (judicial estoppel "serves to preclude a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court").

Consequently, Ms. Hegwine prevails on this appeal if she establishes a prejudicial error of law with regard to the court's application of either Washington pregnancy discrimination law or disability discrimination law.

A. A Pregnancy-Related Restriction Constitutes a "Disability".

Fibre argues that pregnancy is not a disability because it is not an "abnormality." Brief of Respondent, p. 26. This argument was never raised with the trial court and, as a result, is not properly addressed on appeal.

*Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 358 P.2d 975 (1961). Regardless, the argument fails. The decisive factor is not whether the condition is unusual (as Fibre suggests), but whether the condition causes abnormal behavior. See, e.g., *Maxwell v. Dept. of Corrections*, 91 Wn. App. 171, 178, 956 P.2d 1110(1998). To establish a physical abnormality, an employee need only show “that he or she has a condition that is medically cognizable or diagnosable, or exists as a record or history.” *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 641, 9 P.3d 787 (2000). Here, the trial court found, based upon uncontroverted evidence, that Ms. Hegwine was pregnant. CP 14-18. Pregnancy is indisputably a medically cognizable condition which results in physical limitations.

Regardless, whether an employee has a handicapping condition is generally a question for the trier of fact. *Doe*, 121 Wn.2d at 15 (citing *Phillips v. City of Seattle*, 111 Wn.2d 903, 909, 766 P.2d 1099 (1989)). Here, the trial court concluded that Ms. Hegwine’s lifting restriction was a pregnancy-related condition and “Fibre had an obligation to accommodate that *temporary disability* unless it caused Ms. Hegwine to be unable to perform an essential function of the job.” CP 17 (emphasis added). While this was

an inaccurate statement of the law<sup>4</sup>, it is clear that the trial court applied a disability discrimination analysis and found that Ms. Hegwine was in fact temporarily disabled. Fibre has never disputed that Ms. Hegwine was temporarily disabled due to her pregnancy and has assigned no error to the trial court's conclusion.

B. Lifting 60 Pounds is not an "Essential" Job Function.

"Essential" job functions do not include marginal functions of the position. *Davis v. Microsoft Corp.*, 149 Wn.2d at 533. The evidence presented at trial established that, *without accommodation*, the Order Checker would be asked to lift 60 pounds only infrequently and for extremely brief periods of time.

The task involves picking up four to six plastic postal bins filled with IBM printouts at the administration building 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 10 and 60 pounds.

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<sup>4</sup> "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).

RP (3/14) 15:18-19; RP (3/15) 105:13-15. Depending on the time of month, the number of bins could range from 5 to 15 per day. RP (3/15) 106:4-16. The actual transport of the bins is accomplished with a Daihatsu pickup truck, capable of carrying as many as 20 bins at one time. RP (3/14) 26:3-11. 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.

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. 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. The actual transport of one bin from the administration building to the truck took "probably less than a minute." RP (3/15) 100:18-25.

In the event that Ms. Hegwine's pregnancy actually prevented her from lifting 60 pounds, an issue would only arise when she was presented

with a need to lift a 60-pound bin containing one continuous report which could not be separated into separate bins. Even then, the task of physically lifting the bins and loading them on the truck would amount to a maximum of 15 minutes of the work day, and that assumes 15 bins to deliver. Clearly, the actual lifting of 60 pounds was a marginal function of the Order Checker position.

C. Lifting 60 Pounds is not a “Job.Function”.

Further, the lifting of 60 pounds cannot be considered a “job function.” Fibre continues to contend that it is the manner of performing a task and not the task itself that constitutes a “job function.” Notably, it cites no authority in support of its position and makes no attempt to distinguish the authority cited by Ms. Hegwine. In fact, Fibre seems to acknowledge the trial court’s error by seeking to recast the lifting requirement as an “element” of the job, rather than a job function. Brief of Respondent, p. 27.

It is clear that it is the task to be performed, not the manner of performance, that is properly examined when determining what constitutes an “essential job function.” *Davis v. Microsoft Corp.*, 149 Wn.2d at 533 (citing 29 C.F.R. § 1630.2(n)(1) (2002)). *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. The trial court erred in concluding otherwise.

D. Fibre Failed to Adequately Explore Available Accommodations.

Fibre correctly states that it was not required to contact Ms. Hegwine's doctor to determine whether reasonable accommodations were available. However, it did have a legal obligation to provide *Ms. Hegwine* with accurate information. Fibre makes no attempt to dispute this point.

"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.

Rather than provide accurate information to Ms. Hegwine, Fibre continued to increase the lifting “requirements” of the job as Ms. Hegwine established her ability to meet them. Contrary to Fibre’s suggestion, Ms. Hegwine did not “[s]uddenly . . . recall that a 25-pound lifting restriction had been mentioned” during her initial interview. Brief of Respondent, p. 33. Instead, interviewer Carlene Cox admitted that Mr. Samples made this representation. RP (3/15) 194:9-17. Not surprisingly, the trial court found that the representation was in fact made. CP 14.

The court further found that Ms. Hegwine’s doctor amended the lifting restriction to 40 pounds based on information subsequently received from Fibre personnel. CP 15. Dr. Herron believed that the change was in response to learning that the job required the ability to lift 40 pounds. RP (3/14) 199:9-15.

Ultimately, Fibre settled on a 60 pound minimum. While it may be true that this was established “through a careful analysis,” Fibre does not contest that it failed to convey the new requirement to Ms. Hegwine. RP

(3/15) 201:4-12. Rather than engage in an interactive process and risk the possibility that Ms. Hegwine would be released to perform the work, Fibre chose to conceal this fact and simply terminate her.

Notably, 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. Unfortunately, because Fibre failed to advise Ms. Hegwine of any 60 pound requirement until after the commencement of litigation, she was not permitted the opportunity to establish her ability to meet the requirement.

In short, the undisputed facts reveal that Fibre failed to fulfill its obligation of seeking reasonable accommodations for Ms. Hegwine.

E. Reasonable Accommodations were Available.

Having erroneously concluded that the lifting of 60 pounds was essential and a job function, the trial court improperly ended its analysis<sup>5</sup>. Assuming, for the sake of argument, that lifting 60 pounds is properly

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<sup>5</sup> The trial court erroneously concluded: "Fibre had an obligation to accommodate the temporary disability unless it caused Ms. Hegwine to be unable to perform an essential function of the job." CP 17 (emphasis added).

considered an essential job function, the question remains: Could the delivery of the reports be accomplished by providing reasonable accommodations? Unfortunately, the court failed to recognize that Fibre was obligated to employ Ms. Hegwine if the provision of reasonable accommodations would allow her to perform the essential functions of the job. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 533, 70 P.3d 126 (2003) (quoting 42 U.S.C. § 12111(8)).

An employer's failure to reasonably accommodate the 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. WAC 162-22-080(1). *Erwin v. Roundup Corp.*, 110 Wn. App. 308, 40 P.3d 675 (2002). In establishing undue hardship in accommodating a disabled employee, the burden of proof lies on the employer. *Id.* 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). 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.

Fibre's claim that Ms. Hegwine's perceived lifting restriction could not be reasonably accommodated boils down to one statement: "The person filling the position was required to work alone, and had no authority to separate the reports into smaller, lighter weight batches." Respondent's Brief, p. 16. The first part of this statement is simply not supported by any evidence produced at trial. The only witness to directly address this issue was Jodi Smith, who testified that even a healthy Order Checker would need help carrying a bin on occasion and "it was simply a matter of asking for assistance from another employee." RP (3/15) 101:1-7. She agreed that it would take perhaps a minute for another employee to assist in carrying a bin. RP (3/15) 100:21 - 101:7.

It is clear that other employees were available to render brief assistance as needed. In particular, there were other employees in the administration building who were available when the reports were picked up. RP (3/15) 99:18 - 100-23. 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.

In light of this unrefuted trial testimony, it is not surprising that Fibre's Equal Employment Opportunity Coordinator concluded after investigation that Ms. Hegwine could perform the job of Order Checker with available accommodations. RP (3/14) 170:17-21. The trial court erred in concluding otherwise. While it is true that Fibre was not required to accommodate Ms. Hegwine by eliminating or reassigning essential job functions, no such accommodation was requested or required. Instead, another employee would only occasionally be called upon to assist Ms. Hegwine for mere minutes, and for a temporary period of approximately twelve weeks. As a matter of law, Fibre simply failed to carry its burden of showing that extending this accommodation would result in an undue hardship.

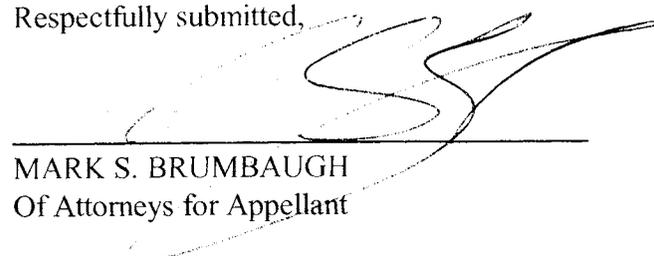
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#### IV. CONCLUSION

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

DATED: November 4, 2005.

Respectfully submitted,



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MARK S. BRUMBAUGH  
Of Attorneys for Appellant

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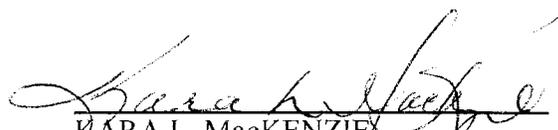
CERTIFICATE  
OF SERVICE

Kara L. MacKenzie states: That she is now, and was at all times hereinafter mentioned, over the age of eighteen (18) years, not a party to the above-entitled action nor interested therein, and competent to be a witness therein.

That on November 2, 2005, in Longview, Cowlitz County, Washington, she served William L. Dowell with (1) MOTION FOR ACCEPTANCE OF LATE FILING, and (2) REPLY BRIEF OF APPELLANT, in the above-entitled action, by delivering to and leaving with said William L. Dowell, personally, a copy of said documents.

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

DATED this 4th day of November 2005, at Longview, Washington.

  
KARA L. MacKENZIE

Walstead Mertsching PS  
1000 Twelfth Avenue, Suite 2  
PO Box 1549  
Longview, Washington 98632-7934  
(360) 423-5220