

No. 33174-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STACY L. HEGWINE,

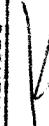
Appellant,

v.

**LONGVIEW FIBRE COMPANY,
a Washington corporation,**

Respondent.

BRIEF OF RESPONDENT

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DIVISION II
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Nancy Williams, WSBA #11558
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000

William L. Dowell, WSBA #3311
1000 Twelfth Avenue, Suite 2
Longview, WA 98632
(360) 423-5220

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I. INTRODUCTION

Stacy L. Hegwine appeals the judgment of the Superior Court of Washington for Cowlitz County that Longview Fibre Company ("Fibre") had no obligation to hire her when lifting restrictions associated with her pregnancy made her unable to perform an essential element of the position for which she had applied. She argues that, because of her pregnancy, she should have been treated more favorably than a person with similar restrictions caused by a condition other than pregnancy and hired anyway. Her position is unfounded. The judgment of the court is well supported by findings of fact based on substantial evidence and should be upheld.

II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR AND ISSUES RELATED TO SAME

A. ASSIGNMENTS OF ERROR

Ms. Hegwine's Assignments of Error are unclear as they do not identify by number the specific Findings of Fact and Conclusions of Law¹ to which she takes exception. Further, her Assignments of Error blur the distinction between Findings of Fact and Conclusions of Law and twist the wording to exaggerate the actual holdings of the trial court.

¹ In this case, the trial court—apparently erroneously—labeled both sections of its Findings of Fact and Conclusions of Law as "Conclusions of Law." See CP 14, 17. Clearly the initial section is intended to state the trial court's factual findings.

For example, Ms. Hegwine's Assignment of Error No. 1 states that the trial court found "that Fibre took no adverse action against Ms. Hegwine due to her 'pregnancy-related condition'" apparently in reference to Conclusion of Law No. 3. Brief of Appellant at 1. Yet Ms. Hegwine then states that this "finding was not supported by substantial evidence," which is the standard of review for a finding of fact rather than a conclusion of law. This Assignment of Error also misstates the import of the trial court's Conclusion of Law No. 3, which stated:

Because the lifting requirement was an essential function of the job, and Ms. Hegwine's temporary lifting restriction prohibited her from performing that function, Fibre was not obligated to hire her and then grant her a leave of absence.

CP 16.²

Similarly, Ms. Hegwine's Assignment of Error No. 3 also appears to refer to Conclusion of Law No. 3, yet she again states that the "finding . . . was not supported by substantial evidence." Brief of Appellant at 2. This confusion of findings and conclusions requires the reader to try to

² References to the Clerk's Papers are abbreviated "CP" followed by the page number. References to the Record of Proceedings are abbreviated "RP" followed by the date in parentheses and the page and line numbers of the cited portion of the transcript. References to trial exhibits are abbreviated "Ex." followed by the exhibit number and, where applicable, the page number. References to the deposition testimony of Ronald Samples are abbreviated "Samples Dep.," followed by the page and line numbers.

make sense of the Assignments of Error to determine exactly what portions of the trial court's ruling Ms. Hegwine challenges.

A fair reading of Ms. Hegwine's Assignments of Error indicates that she does not challenge Findings of Fact Nos. 1 through 7, 9 and 10, and 12 through 15. She also appears to assign error only to the first sentence of Finding of Fact No. 11, and not to the remainder.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Ms. Hegwine's statement of Issues Pertaining to Assignments of Error is also disjointed. Fibre reframes the issues pertaining to the Assignments of Error as follows:

1. Did Fibre violate RCW 49.60.180 when it withdrew a conditional offer of employment because Ms. Hegwine's lifting restrictions prevented her from performing an essential element of the offered job?
2. Did Fibre properly conduct an accurate job analysis to identify the specific physical requirements necessary to perform essential functions of the job in order to determine whether Ms. Hegwine could perform the essential functions?
3. Did Fibre properly rely on statements of Ms. Hegwine's physician as to her physical capacity?

4. Did the opinions and unsupported legal conclusion of Fibre's former equal employment opportunity coordinator affect the propriety of Fibre's withdrawal of its conditional offer of employment to Ms. Hegwine when it determined that her lifting restriction prevented her from performing an essential function of the job in question?

5. Is an employer required to "accommodate" a pregnant job applicant by excusing her performance of an essential element of the job in question?

6. Was the ability to lift 60 pounds essential to the delivery of Fibre's IBM reports?

7. Does an employer have an obligation to hire a pregnant applicant who is unable to perform the essential functions of the job in question only to immediately put her on leave and get someone else to perform the required duties?

III. STATEMENT OF THE CASE

A. FACTS OF CASE

For its statement of the facts of the case, Fibre relies on the trial court's Findings of Fact, to which Ms. Hegwine assigned error to only Findings Nos. 8 and 11³:

1. Stacey Hegwine applied for clerical employment at Longview Fibre Company (Fibre) in late 2000. Carlene Cox from Human Resources and Ron Sample from Customer Service interviewed her on February 16, 2001. She was offered the position of Order Checker Clerk in the Customer Service Department on February 21, 2001. That offer was and at all times remained contingent on her passing a physical examination administered by Fibre. Ms. Hegwine was told at the time of the interview that the job included the lifting of about 25 pounds on a daily basis. At the same time she was given a report date of March 1, 2002.

2. On February 23, 2001, Ms. Hegwine reported to Fibre for a physical exam. At that time she disclosed that she was pregnant, and her child was due to be delivered on June 16, 2001. Dr. Ostrander, the Fibre

³ Findings of fact that are not assigned error are deemed verities on appeal. Dumas v. Gagner, 137 Wn.2d 268, 280, 971 P.2d 17 (1999). Thus, all of the trial court's Findings of Fact in the instant case are deemed verities with the exception of Finding of Fact Number 8 and the first sentence of Finding of Fact Number 11, to which Ms. Hegwine assigned error. The challenged findings are addressed below.

physician, asked her to obtain releases from her own doctors for the pregnancy and for a gall bladder condition. Clearance was received, somewhat late but without incident, regarding the gall bladder condition.

3. At some time between February 21, 2001, and March 1, 2001, Ms. Hegwine advised her then current employer, Premiere Home Furnishings, that she had accepted employment with Fibre.

4. Ms. Hegwine promptly forwarded the release to Dr. Herron, the physician attending her pregnancy. On March 1, 2001, Dr. Herron's office forwarded that release to Fibre (Ex. 1, page 4). Dr. Herron noted that Ms. Hegwine was due to deliver on June 16, 2001, and that due to her pregnancy she temporarily had lifting restrictions. She should not lift more than 30 pounds to waist height and not more than 20 pounds to shoulder height or higher for more than two hours per day. He indicated that Ms. Hegwine would not perform the work described without accommodation to comport with this temporary lifting restriction. This information was communicated to Carlene Cox. At that time Ms. Hegwine was on Fibre property going through employee orientation. These lifting restrictions meant that Ms. Hegwine had not yet completed and passed her physical exam. Because of this Ms. Cox asked her to leave the mill site. Ms. Cox had violated Fibre procedures in having Ms. Hegwine report for orientation prior to receiving medical clearance.

5. Based on information received from Fibre personnel, Ms. Hegwine asked Dr. Herron to amend the lifting restriction to 40 pounds, which he did. He sent a second medical release (Ex. 1, page 5) to Fibre by facsimile about 45 minutes after sending the first.

6. Because of the two inconsistent documents, Dr. Ostrander contacted Dr. Herron on March 5, 2001. In that conversation Dr. Herron indicated that during Ms. Hegwine's pregnancy she could lift no more than 20 pounds frequently, 40 pounds occasionally to infrequently, and could stand from 4 to 6 hours per day. While Dr. Herron indicated in testimony that he might have increased that limitation if asked, that was not communicated to Dr. Ostrander.

7. This information was provided to Ms. Cox, who gave it to her supervisor. It went up the chain of command to Robert Arkell, Vice-president [of Industrial Relations] and General Counsel. He directed that an evaluation of the job requirements be conducted. Margaret Rhodes, Equal Employment Opportunity Coordinator of Fibre, performed this evaluation. She worked with the person actually performing the job at the time, Jodi Smith, and her supervisor. Her report was contained in an EMP-5 form (Ex. 1, page 7). This report noted that the job required picking up boxes of reports weighing up to 60 pounds. Those boxes had to be carried 15-30 feet and down 3-4 steps.

8. This lifting requirement was not one that could be amended or modified. Single reports could fill an entire 60-pound bin. The Order Checker Clerk was not permitted nor qualified to break up those reports into smaller, lighter bundles. The ability to lift and carry 60 pounds was an essential element of the job.

9. Because the job description appeared to conflict with Ms. Hegwine's temporary restrictions, Mr. Arkell directed that an evaluation of her ability to perform that job be performed. Ms. Rhodes did this on a company-supplied form, EMP-7. That form had been developed by Fibre to comply with federal ADA requirements. It was not modified in light of subsequent state law or rules.

10. Ms. Rhodes prepared an initial, hand-written EMP-7. This document included information on possible accommodations that could be made for Ms. Hegwine. This was not provided to her superiors. She subsequently prepared and submitted a typed EMP-7 (Ex. 1, page 13). This document indicated that Ms. Hegwine's temporary restriction prevented her from performing an essential function of the job and therefore did not address potential accommodation.

11. The job of Order Checker Clerk could not be modified to accommodate Ms. Hegwine's temporary lifting restriction. At that time there was no other light-duty position available as a temporary assignment

until the restriction had been lifted. The only possible accommodation that could have been given to Ms. Hegwine would have been to hire her as the Order Checker Clerk and then immediately place her on maternity leave. Such leave was available to company employees, as opposed to new hires.

12. Based on Ms. Rhodes' report, Mr. Arkell determined that Ms. Hegwine did not meet the essential job requirements. He directed that she be advised she would not be given that job.

13. On March 16, 2001, Ms. Cox called Ms. Hegwine. As directed by her superiors, she kept the conversation quite short and in conformity with a script she had already written out (Ex. 11). She advised Ms. Hegwine Fibre was withdrawing its offer of employment, as she was unable to perform the job that had been offered. She also indicated that Fibre would consider Ms. Hegwine for employment in the future.

14. The decision to withdraw the offer of employment was made by Mr. Arkell. That decision was not based on Ms. Hegwine's pregnancy. It was based on her lifting restriction. That lifting restriction was a temporary one due solely to the pregnancy.

15. The starting salary for the Order Checker Clerk was \$1800 per month. At no subsequent time did Ms. Hegwine seek employment with Fibre. She did attempt to return to her former position with Premier

Home Furnishings. That position had already been filled. After the birth of her child she sought and obtained employment with the Longview School District as a bus driver. She also worked part-time for Weyerhaeuser Co., for a brief period at Pier One imports, and received unemployment (Ex. 7). The differential between her earnings and benefits actually earned from June of 2001 thorough March 15, 2005, was \$35,992.33. She is currently employed in a secretarial position at the Drug Abuse Prevention Center where she earns \$1440 per month.

B. PROCEDURAL BACKGROUND OF CASE

On June 27, 2003, Ms. Hegwine served and filed a complaint against Fibre in Cowlitz County Superior Court, alleging, inter alia, that she had been discharged by Fibre because of her sex and pregnancy, in violation of the Washington Law Against Discrimination ("WLAD"), Chapter 49.60 RCW, specifically RCW 49.60.180. CP 5. The matter was tried to Judge Stephen M. Warning on March 14 and 15, 2005. On March 30, 2005, Judge Warning entered Findings of Fact and Conclusions of Law, CP 14-18, and on April 11, 2005, entered Judgment in favor of Fibre, CP 19-25. Ms. Hegwine appealed the judgment against her. CP 26-33.

IV. ARGUMENT

A. STANDARD OF REVIEW

When a trial court has weighed the evidence and reached a judgment, the role of the appellate court is limited to ascertaining whether findings of fact are supported by substantial evidence, and, if so, whether the findings of fact support the judgment. Dumas v. Gagner, 137 Wn.2d 268, 280, 971 P.2d 17 (1999); Willener v. Sweeting, 107 Wn.2d 388, 393, 730 P.2d 45 (1986); Morgan v. Prudential Ins. Co. of Am., 86 Wn.2d 432, 437, 545 P.2d 1193 (1976). Findings of fact that are erroneously described as conclusions of law are reviewed as findings of fact, i.e., reviewed for support by substantial evidence. Willener, 107 Wn.2d at 394. Findings of fact that are not assigned error are deemed verities on appeal. Dumas, 137 Wn.2d at 280.

B. NO ERROR IN FINDINGS OF FACT NOS. 8 AND 11

Ms. Hegwine assigned error to two of the trial court's Findings of Fact. Both are supported by substantial evidence.

1. **Lifting 60 Pounds an Essential Function of Order Checker Job**

Ms. Hegwine assigned error to the substance of the trial court's Finding of Fact No. 8, which stated as follows:

8. This [60 pound] lifting requirement was not one that could be amended or modified. Single reports could fill an entire 60-pound bin. The Order

Checker Clerk was not permitted nor qualified to break up those reports into smaller, lighter bundles. The ability to lift and carry 60 pounds was an essential element of the job.

CP 16. Substantial evidence about the requirements for performing and the criticality of this task supported this Finding of Fact.

a. Jodi Smith Testimony

The trial court heard testimony of Jodi Smith, who had actually held the Order Checker Clerk position at Fibre. ("I was the one that did the job." RP (3/15) 90:8-9.) Ms. Smith described the duties of the job, which began each day with "getting the morning reports." RP (3/15) 73:5-14. She started each morning at 7:30 a.m. in order to be able to get the reports distributed by 8 a.m., when the rest of the employees arrived. RP (3/15) 79:15-25. She worked by herself during that first half hour of the day. RP (3/15) 77:14-16. It was her job to carry bins containing the reports by herself. RP (3/15) 101:12-13.

Ms. Smith estimated that there might be up to 15 bins of computer reports to pick up and deliver each day, depending on the time of the month. RP (3/15) 89:12-23. A single report could fill a bin, RP (3/15) 99:18-20, and, based on her actual weighing of a bin, she knew that a bin could weigh 60 pounds, RP (3/15) 74:7-13, 75:11-14. She believes that some bins weighed more than 60 pounds. RP (3/15) 75:17-21.

According to Ms. Smith, she had no authority to separate the reports into smaller batches. RP (3/15) 78:2-6.

b. Debi Manavian Testimony

Ms. Smith's testimony, although authoritative, was not the only evidence regarding the lifting duties of the Order Checker Clerk. Her immediate supervisor, Debi Manavian, testified as to her role in developing a job description for the position. RP (3/15) 7:7-8:1, Ex. 17. Although the description was drafted in May 2001, the job requirements were at that time the same as they had been as of March 1, 2001. RP (3/15) 8:11-16.

The Order Checker Clerk started daily at 7:30 a.m. so as to deliver computerized reports by 8 a.m. RP (3/15) 10:14-20. Bins containing the reports weigh from 50 to 60 pounds, and could contain just a single report. RP (3/15) 13:6-10, 28:12-16. The Order Checker Clerk was not to break the reports into smaller batches. RP (3/15) 11:7-12:1. Not only would breaking up the reports take from four to five times longer, thus making it impossible to get all tasks done in an eight-hour day, RP (3/15) 26:6-10, it would also compromise the integrity of the reports, RP (3/15) 29:21-23.

Ms. Hegwine's attorney tried to get Ms. Manavian to agree that there was really no lifting requirement for the job but rather just the requirement that the reports somehow get delivered. He asked her to

agree that the job requirement would be fulfilled if the delivery of the reports were "magically done," without lifting. RP (3/15) 24:19.

Ms. Manavian responded emphatically: "I don't believe in magic. That person has to do these jobs." RP (3/15) 24:23-24.

c. Ronald Samples Testimony

The deposition testimony of Ronald Samples was admitted into the record. Mr. Samples, who was formerly Fibre's Manager of Customer Service and Ms. Manavian's supervisor, described how the Order Checker Clerk was required to pick up bins of IBM data processing material, carry and load them into a small truck, then unload and deliver them. Samples Dep. 15:5-14. He estimated that the bins could range in weight from 30 to 60 pounds. Id. 15:18-19. No other employee was available to assist the Order Checker Clerk with this task. Id. 16:25-17:3. There was time pressure to have the reports delivered on time. Id. 18:16-18.

Ms. Hegwine's attorney asked Mr. Samples if the reports could not have been broken up among more bins that would be lighter in weight. Samples Dep. 26:19-24. Although the question was objected to, Mr. Samples stated that he "wouldn't want [the Order Checker Clerk] breaking those reports apart, though. . . . She wouldn't be expected—we wouldn't want her doing that. People don't want their reports broken up." Id. 27:2-5.

d. Matt Peerboom Testimony

Matt Peerboom, Mr. Samples' successor, testified that he worked with Ms. Manavian to develop the job description for the Order Checker Clerk position. RP (3/15) 102:15-20. He opined that the computer reports to be picked up and delivered by the Order Checker Clerk ranged in weight from 10 to 50 pounds. RP (3/15) 105:13-15. He confirmed that the Order Checker Clerk had no authority to separate the reports into smaller batches. RP (3/15) 104:19-21, 108:16-109:2. Depending on the time of month, the number of bins containing the reports could range from five to 15 per day. RP (3/15) 106:4-16.

Mr. Peerboom also confirmed that a Job Evaluation Sheet developed in March 2001 to evaluate the duties of the Order Checker Clerk position accurately described the requirements of the job.⁴ RP (3/15) 110:13-111:4, Ex. 14. The portion of the Job Evaluation Sheet describing the lifting and carrying requirements of the position states:

1. Bending/squatting, picking up boxes (weighing up to 60 lbs.), carrying 15-30 ft. while maneuvering down 3-4 steps.

⁴ Margaret Rhodes, who drafted the Job Evaluation Sheet, RP (3/14) 136:12-25, testified that she determined the requirements after visiting the job site, speaking with the supervisor, and observing and participating in the tasks of the job. RP (3/14) 121:17-122:14.

2. Packing mail (weighing up to 50 lbs.) up and down stair cases.

Ex. 14, p. 4.

In summary, there was substantial evidence to support the trial court's Finding of Fact No. 8.

2. No Available Modification of Order Checker Job

Ms. Hegwine also assigned error to the first sentence of the trial court's Finding of Fact No. 11, which stated: "The job of Order Checker Clerk could not be modified to accommodate Ms. Hegwine's temporary lifting restriction." The testimony described above also provides substantial support for this Finding of Fact.

The first duty of the Order Checker Clerk each day was to pick up, carry, load and deliver massive computerized reports. To do so, she was required to arrive at work a half hour earlier each day than other employees in order to have the reports delivered by 8 a.m. The person filling the position was required to work alone, and had no authority to separate the reports into smaller, lighter weight batches. To do so could compromise the integrity of the reports. A single report could fill a bin, and bins could weigh up to 60 pounds. Depending on the time of month, the Order Checker Clerk could be required to carry from five to 15 bins of such reports per day from the pick-up point down several stairs to a truck, load them into the truck, then unload and deliver them to another building.

Given these facts, all of which are set out in the record, there is substantial evidence supporting the trial court's finding that the task could not be modified so as to be within Ms. Hegwine's lifting restrictions. Her attorney's wishful questioning about having the task "magically done" presented nothing more than speculation. Witnesses whose credibility was evaluated by the trial court uniformly testified that the ability to lift and carry 60 pounds was indeed a daily requirement of the job that could not be changed without compromising the reports.⁵

C. NO ERROR IN TRIAL COURT'S CONCLUSIONS OF LAW

The trial court concluded that Ms. Hegwine's lifting restriction was a pregnancy-related condition requiring accommodation unless it rendered her unable to perform an essential function of the job; that the ability to lift 60 pounds was an essential function that she could not perform; and that therefore Fibre was not obligated to hire her only to put her on leave as an accommodation. In other words, the trial court interpreted RCW 49.60.180 (and WAC 162-30-020) as not requiring an employer to hire a pregnant woman, unable due to pregnancy to fulfill an essential function

⁵ Ms. Hegwine adduced evidence that, if the Order Checker Clerk missed a day of work that someone else would cover the task. E.g., RP (3/15) 94:1-12. That is a far different situation from having someone in the position who cannot perform the essential task, day in and day out.

of the position, if it would not have hired a man (or woman) with a similar temporary lifting restriction. In this, the trial court was correct.

Ms. Hegwine did not prove at trial that she had suffered discrimination because of her sex/pregnancy. There was no violation by Fibre of the WLAD.

1. Ms. Hegwine's Burden of Proof

To establish her claim of sex discrimination because of her pregnancy, plaintiff must prove that Fibre *intentionally* discriminated against her based on her sex. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 361-64, 753 P.2d 517 (1988). Her claim is subject to the three-part, burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). See Grimwood, 110 Wn.2d at 362-64. Under the burden-shifting analysis, Ms. Hegwine was first required to establish a prima facie case of intentional discrimination. McDonnell Douglas, 411 U.S. at 802-03; Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994); Xieng v. Peoples Nat'l Bank, 63 Wn. App. 572, 578, 821 P.2d 520 (1991), aff'd, 120 Wn.2d 512, 844 P.2d 389 (1993). To make a prima facie case, she must show 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. See Grimwood, 110 Wn.2d at 362.⁶

Fibre will assume for purposes of this appeal that Ms. Hegwine made out a prima facie case, requiring Fibre to articulate a legitimate, nondiscriminatory reason for not hiring her. See Burdine, 450 U.S. at 253-54; McDonnell Douglas, 411 U.S. at 802-03; Grimwood, 110 Wn.2d at 364. Fibre's reason, supported by substantial evidence, was simple and straight-forward: according to the stated opinion of her personal physician, the lifting restrictions associated with Ms. Hegwine's pregnancy prevented her from performing an essential element of the Order Checker Clerk position. To prevail, Ms. Hegwine then had the burden to show that Fibre's explanation was a pretext for what was in fact a discriminatory purpose. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180-87, 23 P.3d 440 (2001).⁷ "The ultimate question in every

⁶ Under the WLAD, the third factor is framed as a "substantial factor" test. Marquis v. City of Spokane, 130 Wn.2d 97, 114, 922 P.2d 43 (1996); Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995).

⁷ See also McDonnell Douglas, 411 U.S. at 802-03; Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir. 1996); Wallis, 26 F.3d at 889; Schuler v. Chronicle Broad. Co., 793 F.2d 1010, 1011 (9th Cir. 1986); Kuyper v. Dep't of Wildlife, 79 Wn. App. 732, 738-39, 904 P.2d

employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Ms. Hegwine has come forward with absolutely no evidence that Fibre's reason for not hiring her was motivated by a purpose to discriminate against her as a pregnant woman. There is nothing whatever in the trial record to suggest that anyone at Fibre had a bias against Ms. Hegwine due to her pregnancy. To the contrary, unchallenged Findings of Fact establish Fibre's commitment to obtaining an accurate analysis of the requirements of the Order Checker Clerk position to determine whether or not she could perform it within the restrictions imposed by her physician.

2. Ability to Perform Essential Functions a Requisite to Hiring

a. RCW 49.60.180

Ms. Hegwine argues that, because her lifting restrictions were related to her pregnancy, Fibre was obliged to hire her despite her inability to perform an essential element of the Order Checker Clerk position. That is not what Washington law requires.

793 (1995); Hatfield v. Columbia Fed. Sav. Bank, 68 Wn. App. 817, 824, 846 P.2d 1380 (1993).

RCW 49.60.180 in pertinent part makes it an unfair practice for an employer

[t]o 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 . . . , unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

RCW 49.60.180(1).⁸ Thus, the very statute on which Ms. Hegwine's claim is based contains the important proviso that its prohibition shall not apply if a disabling condition prevents the *proper performance of the particular worker involved*. This principle is central to statutes prohibiting employment discrimination: hiring should be based on qualifications, but an employer need not hire an applicant who cannot perform the job. According to the medical restrictions imposed by Ms. Hegwine's own personal physician, she could not perform what the trial court, based on

⁸ Ms. Hegwine states that Title VII, like the WLAD, provides that it is unlawful to discriminate against any person in terms or conditions of employment because of, *inter alia*, age or presence of any sensory, mental or physical handicap. Brief of Appellant at 16. Although federal law prohibits employment discrimination based on age and disability, these provisions are found in the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, not in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.

substantial evidence, found to be an essential element of the Order Checker Clerk position.

Ms. Hegwine entirely ignores the proviso contained in RCW 49.60.180(1), instead glibly citing cases that endorse the liberal interpretation to be given to the WLAD and the concept that state law may in some situations afford workers greater protection than federal law. Although Fibre does not challenge the generalized judicial pronouncements emphasized by Ms. Hegwine, it strongly contests the import that she assigned to them in relation to her claims. Those generalizations cannot subvert the express intent of the statute. The prohibition on discrimination does not require an employer to hire an applicant who cannot properly perform the job in question.

b. WAC 162-30-020

Ms. Hegwine seems to argue that, if an applicant's disabling condition is caused by pregnancy, the proviso in the statute is trumped by the sex discrimination regulations promulgated by the Washington State Human Rights Commission ("WSHRC") at Chapter 162-30 WAC. WAC 162-30-020 states in pertinent part:

WAC 162-30-020 Pregnancy, childbirth, and pregnancy related conditions. (1) Purposes. The overall purpose of the law against discrimination in employment because of sex is to equalize employment opportunity for men and women. This

regulation explains how the law applies to employment practices that disadvantage women because of pregnancy or childbirth.

(2) **Findings and definitions.** Pregnancy is an expectable incident in the life of a woman. Discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.

(a) "Pregnancy" includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions.

(b) "Pregnancy related conditions" include, but are not limited to, related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy.

(3) **Unfair practices.**

(a) 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.

(b) The sole exception to (a) of this subsection is if an employer can demonstrate business necessity for the employment action. For example, an employer hiring workers into a training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during those first two months.

(c) It is an unfair practice to base employment decisions or actions on negative assumptions about pregnant women, such as:

(i) Pregnant women do not return to the job after childbirth;

(ii) The time away from work required for childbearing will increase the employer's costs;

(iii) The disability period for childbirth will be unreasonably long;

(iv) Pregnant women are frequently absent from work due to illness;

(v) Clients, co-workers, or customers object to pregnant women on the job;

(vi) The terms or conditions of the job may expose an unborn fetus to risk of harm.

The regulation by its terms was promulgated to "equalize employment opportunity for men and women." As the record in this case makes very clear, Ms. Hegwine was treated the same as any applicant—male or female—whose temporary disability condition prevented her proper performance of the job. See RP (3/15) 212:6-12. The regulation itself, in recognizing a "business necessity" exception, WAC 162-30-020(3)(b), acknowledges that there are circumstances where a woman's pregnancy *interferes with* her ability to meet an employer's reasonable job requirements. The example provided is the situation where the anticipated date of childbirth would cause a pregnant woman to be absent during an initial period of employment when absences could not be tolerated, i.e., when reliable attendance was an *essential element* of the job. The

regulation does not suggest that in those circumstances the employer must hire the woman anyway, only to excuse her from the attendance requirements or to place her on leave. To the contrary, the exception means that the employer need not hire the woman *at all* at that point in her pregnancy.⁹

Ms. Hegwine argues that Fibre cannot come within the exception because it did not prove a "business necessity." Brief of Appellant at 22. That argument is nothing but semantics. Fibre presented substantial evidence of the essential elements of the Order Checker Clerk position, including the 60-pound lifting requirement. It also presented substantial evidence that the job could not be modified to eliminate the requirement. Whatever the label, Fibre proved to the trial court by a preponderance of the evidence that its business needs required the candidate for the position to be able to perform that task, as reflected in the trial court's Findings of

⁹ This regulation is consistent with guidance from the Equal Employment Opportunity Commission on pregnancy discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Commission makes the following statement about hiring of a pregnant woman: "An employer cannot refuse to hire a woman because of her pregnancy-related condition *so long as she is able to perform the major functions necessary to the job.*" 29 C.F.R. pt. 1604, app., Answer to Question 12 (emphasis supplied).

Fact and Conclusions of Law. Its proof clearly brings it within the exception set out in WAC 162-30-020(3)(b).

Ms. Hegwine contends that her pregnancy entitled her to special treatment not available to other workers with temporary disabilities, namely, being hired and placed in some other position or on leave. That is not the import of WAC 162-30-020, and she presents no authority in support of her novel theory.¹⁰

3. Disability Accommodation Analysis Not Applicable

Although she asserted no claim for disability discrimination, Ms. Hegwine nonetheless devotes a substantial portion of her opening brief to her contention that the trial court "treated the case as a 'failure to accommodate' action," and that she proved disability discrimination as a matter of law. Brief of Appellant at 22. This contention is flatly incorrect.

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*. E.g., Hill, 144 Wn.2d at 193;

¹⁰ If WAC 162-30-020 purported to require an employer to hire a pregnant worker whose "particular disability prevents the proper performance of the particular worker involved," RCW 49.60.180(1), it would go beyond the authority granted to the WSHRC under the statute. Gugin v. Sonico, Inc., 68 Wn. App. 826, 831, 846 P.2d 571 (1993) ("The administrative agency's power to promulgate rules did not include the power to legislate." WSHRC regulation stricken as invalid).

Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 643, 9 P.3d 787 (2000).

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).

Even assuming that the physical limitations of a pregnancy were deemed to be a "disability," accommodation would be required by the WLAD only if the claimant also shows that he or she is qualified to perform the essential functions of the job in question. Kees v. Wallenstein, 973 F. Supp. 1191, 1193 (W.D. Wash., 1997), aff'd, 161 F.3d 1196 (9th Cir. 1998); Davis v. Microsoft Corp., 149 Wn.2d 521, 532, 70 P.3d 126 (2003); Hill, 144 Wn.2d at 193. In the case at hand, the trial court has determined, based on substantial evidence, that Ms. Hegwine was not able to perform an essential element of the Order Checker Clerk position and that the job requirements could not be modified in a way to permit her to do so. Based on this finding, Fibre had no obligation to accommodate her condition.

Ms. Hegwine contends that Fibre had a variety of alternatives that would have permitted her to be hired notwithstanding her lifting limitations. She tried unsuccessfully at trial to adduce testimony that the lifting requirement could have been modified so as to be within the limits

imposed by her physician. The trial judge, after weighing all the evidence, rejected this theory and found that the task could not be so modified. Ms. Hegwine then urges that the lifting requirement could have been eliminated from the Order Checker Clerk position and assigned to another Fibre employee. Fibre was not required to reassign the task in order to accommodate Ms. Hegwine. Davis, 149 Wn.2d at 534; MacSuga v. County of Spokane, 97 Wn. App. 435, 442-43, 983 P.2d 1167 (1999) (RCW 49.60.180 does not require employer to accommodate by eliminating or reassigning essential job functions: "If the only successful accommodation is to eliminate essential functions, then the employee cannot perform the essential functions of the job with reasonable accommodation.").

Ms. Hegwine further urges that she could have been assigned to another position at Fibre or placed on leave. Yet she did not assign error to the trial court's Findings of Fact that "there was no other light-duty position available as a temporary assignment until [her] restriction had been lifted" and that "maternity leave . . . was available [only] to company employees, as opposed to new hires." CP 16. In any case, an employer is not required to accommodate a disability by reassigning a claimant to a position that is already occupied or by creating a new position. Pulcino, 141 Wn.2d at 644; MacSuga, 97 Wn. App. at 442.

Thus, even if Ms. Hegwine could by analogy apply the requirements for accommodation of a disability to her claim of sex/pregnancy discrimination, the claim still must fail. She could not perform an essential element of the Order Checker Clerk position, the lifting requirement could not be modified, and authority under the WLAD establishes that the other forms of accommodation she proposes are not required.

D. NO MERIT IN MS. HEGWINE'S OTHER ARGUMENTS

1. Ms. Hegwine Was an Applicant, Not an Employee

Ms. Hegwine contends that she was actually an employee of Fibre and was discharged from employment because of her sex and pregnancy. See Brief of Appellant at 21. She does so in order to seek the protection of WAC 162-30-020(4)(a), which requires an employer to provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth. Her contention contradicts Findings of Fact to which she assigned no error.

The trial court found that (a) Fibre offered Ms. Hegwine the position of Order Checker Clerk on February 21, 2001, and that the "offer was and at all times remained contingent on her passing a physical examination administered by Fibre" (Finding of Fact No. 1, CP 14); (b) she was asked by Fibre's physician to obtain releases from her own

doctors for her pregnancy and for a gall bladder condition (Finding of Fact No. 2, CP 14-15); (c) her physician forwarded to Fibre a release stating lifting restrictions on March 1, 2001, while Ms. Hegwine was going through orientation at Fibre, and that the "lifting restrictions meant that Ms. Hegwine had not yet completed and passed her physical exam" (Finding of Fact No. 4, CP 15); (d) Mr. Arkell determined, based on a job analysis, that Ms. Hegwine did not meet the essential job requirements (Finding of Fact No. 12, CP 16); and (e) Fibre subsequently advised her that it was withdrawing its offer of employment because she was unable to perform the job that had been offered (Finding of Fact No. 13, CP 17).

In light of these unchallenged findings, Fibre had no obligation to offer Ms. Hegwine a maternity leave because she had never become a Fibre employee.

2. Fibre Properly Relied on Dr. Herron's Stated Limitations on Ms. Hegwine's Lifting Ability

Ms. Hegwine contends that, notwithstanding the written notices from Dr. Herron, her personal physician, restricting her from lifting more than 40 pounds, she might have been able to get clearance to lift 60 pounds, as required by the Order Checker Clerk position. She adduced testimony from Dr. Herron at trial that

if someone said I occasionally need to lift this weight [60 pounds] from here to there, you know,

periodically throughout the day, I think I would have said – I probably would have instructed her in some body mechanics in how to do it, and be careful, and – you know, but I think I would have said that would be fine.

RP (3/14) 194:8-14. Even this speculative testimony from Dr. Herron does not indicate Ms. Hegwine could perform the lifting that the trial court found to be required by the job, i.e., picking up as many as 15 boxes of reports weighing up to 60 pounds, and carrying them 15 to 30 feet and down steps. Finding of Fact No. 7, CP 16. More importantly, that is not what Dr. Herron told Fibre when he provided a Pre-Employment Medical Classification for Ms. Hegwine in 2001.

On March 1, 2001, Fibre received Dr. Herron's written opinion that Ms. Hegwine should not lift more than 30 pounds to waist height and not more than 20 pounds to shoulder height or higher for more than two hours a day and that she could not perform the work described without accommodation to comport with this temporary lifting restriction. Finding of Fact No. 4, CP 15. At Ms. Hegwine's request, Dr. Herron amended the lifting restriction to 40 pounds. Finding of Fact No. 5, CP 15. Because of his inconsistent statements, Fibre's physician Dr. Ostrander contacted him to clarify Ms. Hegwine's restrictions. At that time, Dr. Herron indicated that she could lift no more than 20 pounds frequently and 40 pounds occasionally to infrequently. Finding of Fact No. 6, CP 15.

In his trial testimony, Dr. Herron acknowledged that he had provided these numbers to Fibre, explaining:

I'm filling this form out for the same reason that Longview Fibre is having me fill it out. They want to limit their liability; I want to limit my liability; so I'm gonna give conservative numbers, and minimize my risk of someone saying "you said too much and she had a problem."

RP (3/14) 190:2-7. Whatever his excuse for failing to give an accurate opinion based on his evaluation of his patient, the law did not require Fibre to second-guess him.

Ms. Hegwine urges that Fibre should have explained to Dr. Herron the actual requirements of the Order Checker Clerk position and pushed him to consider a more permissive lifting restriction. That is not required by Chapter 49.60 RCW. "Neither federal nor Washington law requires an employer to contact the employee's doctor or consult federal agencies to determine the availability of reasonable accommodations." MacSuga, 97 Wn. App. at 442. Just as the trial court in MacSuga properly withheld a jury instruction suggesting such an obligation, so did the trial court in the instant case not deem it to be Fibre's duty to do so. As the trial court correctly observed:

Fibre didn't have to guess that Dr. Herron was . . . more interested in making sure he was okay than providing accurate information. They didn't have to go back to him and say, well, you know, it's sixty

pounds, can you give us some more? They had no obligation to do that.

RP (3/15) 291:2-7. The trial court's comment is consistent with the principle that "[n]either federal nor Washington law requires an employer to contact the employee's doctor . . . to determine the availability of reasonable accommodations." MacSuga, 97 Wn. App. at 442.

3. "Changing" Weight Requirement a Red Herring

Ms. Hegwine claims that, at different times, she received different information about the weight lifting requirements of the job, suggesting that the 60-pound lifting requirement was manufactured as an excuse to avoid hiring her due to her pregnancy. In fact, when she gave her deposition, Ms. Hegwine testified that she had been told nothing about lifting requirements during her job interview. RP (3/14) 64:16-18. Suddenly at trial she recalled that a 25-pound lifting restriction had been mentioned. RP (3/14) 64:19-21. She then contended that she requested Dr. Herron to raise her lifting capacity to 40 pounds based on information received from Fibre. RP (3/14) 36:10-13. However, there is no evidence in the record as to what information Ms. Hegwine supposedly received from Fibre that led her to make that request.

In fact, however, the lifting requirement of the job was established through a careful analysis of the actual duties performed by the Order Checker Clerk. Ex. 1, pp. 7-12. The trial court summed it up:

The sixty-pound weight limit was a legitimate, essential function of the job. The people who actually performed the work, and this probably fairly common, had a better idea just what the job entailed than the people who supervised the people who did it. And the fact that perhaps Mr. Samples initially said twenty-five pounds and it's made its way up to sixty, I don't find particularly surprising or disconcerting. This is what's been going along, and this was his kind of understanding of the job.

When an issue comes up that actually causes Fibre to do a detailed job evaluation, they find out that the job has, as most jobs do, probably altered over time, and now they know just what the job is and they know what the requirements are. The sixty-pound limit is a legitimate, essential function of the job, because the un rebutted testimony is that there were IBM reports that came through that filled a whole bin, and that full bin weighed in the neighborhood of sixty pounds. The process that Fibre went through, and the point in time when they went through, was legitimate, reasonable to get us to that point.

RP (3/15) 290:5-291:1. There is simply no basis in the record to support Ms. Hegwine's contention that the weight requirement was a pretext for discrimination.

V. CONCLUSION

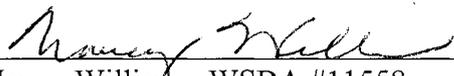
According to Ms. Hegwine's physician, who provided Fibre with information on her physical limitations at the time she applied for the position of Order Checker Clerk, she was not capable of performing an essential element of the job. In that circumstance, neither RCW 49.60.180 nor WAC 162-30-020 required that she be given the job regardless, simply

because she was pregnant at the time. Nor can she demonstrate that her pregnancy was a "disability" protected by the statute, or, even if it were, that she would be entitled to the accommodations she contends should have been offered.

In short, the trial court—where testimony and evidence were considered and determinations of credibility made—correctly entered its judgment in Fibre's favor. The judgment should be upheld.

DATED: September 30, 2005.

PERKINS COIE LLP

By 
Nancy Williams, WSBA #11558

and

William L. Dowell, WSBA #3311
Attorneys for Respondent
Longview Fibre Company

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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

STACY L. HEGWINE,

Appellant,

vs.

LONGVIEW FIBRE COMPANY,
a Washington corporation,

Respondent.

CERTIFICATE OF SERVICE

Nancy Williams, WSBA #11558
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000

William L. Dowell, WSBA #3311
1000 Twelfth Avenue, Suite 2
Longview, WA 98632
(360) 423-5220

I certify that on the 3rd day of October, 2005, I served the Brief of Respondent on the Appellant, by delivering a true and correct copy of the same to Appellant's attorney at his last known business address, as indicated below:

Mark S. Brumbaugh
Walstead Mertsching
Attorneys at Law
1000 Twelfth Avenue, Suite 2
Longview, WA 98632

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

DATED this 3rd day of October, 2005.



Donna L. Walt
Legal Secretary