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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**LONGVIEW FIBRE COMPANY,**

*Petitioner*

v.

**STACY L. HEGWINE,**

*Respondent*

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**PETITIONER'S RESPONSE TO AMICI CURIAE**

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## I. INTRODUCTION

Petitioner Longview Fibre Co. ("Fibre") appreciates the history provided by Amici Curiae Washington Employment Lawyers Association ("WELA"), American Civil Liberties Union of Washington ("ACLU"), and Northwest Women's Law Center ("NWLC") (collectively referred to herein as "Amici"). Fibre does not refute the basis for federal or Washington gender antidiscrimination legislation and policy—it is deeply important. Rather, Fibre seeks to have the Court concurrently apply the accepted statutory and common sense principle that employers do not have an obligation to hire an applicant who cannot perform essential aspects of the position applied for.

## II. ARGUMENT

### A. **The Court Must Consider the Issues of this Case Within the Confines of the Findings of Fact and Conclusions of Law Established by the Trial Court.**

Fibre first reminds the parties, Amici, and the Court that this case does not involve an appeal from a summary judgment decision involving purely legal issues, nor does it represent a hypothetical inquiry into the application of WAC 162-30-020. Instead, Hegwine appealed from the trial judge's ruling after a full trial in which the judge considered and weighed all of the evidence and entered findings of fact and conclusions of law. Therefore, while public policy is certainly important and relevant to some extent, the issues on appeal must be considered in relation to the specific facts of this case in light of the deference afforded the trial court's factual findings.

**B. Fibre Has Not Engaged in Stereotyping Regarding Pregnant Women's Abilities or Qualifications as Amici Assert.**

Amici attempt to frame this case as an example of employer stereotyping pregnant women or a generalized employer bias against hiring pregnant women. *See* WELA Br. at 6; Br. of ACLU & NWLC at 12-18. But this case did not involve a policy against employing pregnant women. Nor did stereotyping regarding pregnant women's abilities play any role.

Following Hegwine's conditional offer of employment, she submitted to a mandatory physical exam that Fibre requires of all its offerees. *See* Clerk's Papers ("CP") at 2 (Finding of Fact ("FF") 1). As part of that exam, she disclosed that she was pregnant and that she had a gall bladder dysfunction. *See id.* at 21-22 (FF 2). Fibre therefore asked her to obtain from her personal care provider a statement of whether there were any limitations on her ability to perform the highly physical requirements of the position. *Id.* Hegwine's physician indicated that Hegwine did in fact have a lifting restriction that precluded her from performing all requirements of the position. CP at 22 (FF 4-6).

Far from weeding out women due to their ability to become pregnant or employing a policy against hiring pregnant women, Fibre simply applied a specific job requirement that the Order Check Clerk be able to lift and deliver reports weighing up to 60 pounds—an essential function of the position. Contrary to Amici's assertions that this requirement targeted Hegwine as a pregnant woman, Fibre would have

required any applicant, male or female, to be able to perform the delivery of the reports. There was no element of stereotyping or discrimination.

**C. Fibre Has Established that the Ability of the Order Checker Clerk Position to Lift 60 Pounds Was a Business Necessity.**

Despite the facts that the trial court did not expressly address the "business necessity" terminology of WAC 162-30-020 and that Hegwine did not assert at trial that Fibre had an obligation to establish business necessity, the Court of Appeals held that Fibre had waived the business necessity "affirmative defense." *Hegwine v. Longview Fibre*, No. 33174-8-II, at 19-20 (Wash. Ct. App. April 25, 2006) (referred to herein as "*Hegwine*, slip op."). The court further held that, even if considered, Fibre did not establish business necessity. *Id.* The Court of Appeals was wrong on both fronts. Despite Amici's arguments here, Washington law does not support the conclusion that business necessity is an affirmative defense. Even if it were an affirmative defense, Fibre demonstrated business necessity by producing substantial evidence—found persuasive by the trial court—that Fibre's business required the Order Checker Clerk position to perform the essential function of lifting, carrying and delivering up-to-60-pound reports.

**1. Business Necessity Was Not an Affirmative Defense that Fibre Waived by Not Expressly Pleading It.**

The Court has held that business necessity is not an affirmative defense, assigning the ultimate burden of proof to the defendant where it negates an element of the case ultimately required to be proven by the plaintiff. *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483,

493, 859 P.2d 26, 865 P.2d 507 (1993); *see also Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 176, 930 P.2d 307 (1997). On claims of employment discrimination, the Court has held, consistent with U.S. Supreme Court precedent under the *McDonnell Douglas* burden-shifting framework, that the plaintiff bears the ultimate burden to prove intentional discrimination. *Id.* at 490 (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). Because business necessity under WAC 162-30-020 is a justification for acts that might otherwise be deemed discrimination, and because a pregnancy discrimination plaintiff maintains the ultimate burden to prove discrimination, business necessity under WAC 162-30-020 is *not* an affirmative defense.

Amici correctly note that in *Kastanis* the Court relied in part on the U.S. Supreme Court's opinion in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989), which was expressly overruled by Congress in 1991. But Amici incorrectly represent the import of that fact. For the reasons set forth below, the Court is in no way bound by federal law regarding business necessity and the *Kastanis* opinion is still binding as Washington precedent.

First, the *Kastanis* opinion did not primarily rely on *Wards Cove*. The *Kastanis* Court relied primarily on its own opinion in *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983), and reasoned only that its conclusion regarding affirmative defenses was consistent with the U.S.

Supreme Court's reasoning in *Wards Cove*, see 122 Wn.2d at 492-93.

Second, the *Wards Cove* opinion had already been overruled by Congress at the time the Court considered it in *Kastanis* in 1993. See, e.g., *Cota v. Tucson Police Dep't*, 783 F. Supp. 458, 472 n.14 (D. Ariz. 1992) (recognizing that the Civil Rights Act of 1991 effectively overruled *Wards Cove* by expressly establishing that the employer has the burden of production and persuasion on the issue of business necessity). Therefore, the Court was implicitly aware of the legislative change in federal law, but relied on the *Wards Cove* opinion for its reasoning regardless of that change. Third, neither the Court nor the Washington Legislature has similarly overruled *Kastanis*; indeed, the Court relied on it again in 1997. See *Magula*, 131 Wn.2d at 176. Hegwine's suit is not brought under Title VII of the Civil Rights Act and therefore is governed by the Court's interpretation of business necessity rather than Congress's interpretation or that of federal courts. Finally, the Civil Rights Act of 1991 *did not change* the general principle that an employment discrimination plaintiff has the *ultimate burden* to prove intentional discrimination—the proposition for which the Court relied on *Wards Cove*. See *Kastanis*, 122 Wn.2d at 492-93. For those reasons, the reasoning in *Kastanis* is the law and applies here to negate Amici's blanket conclusion that business necessity was an affirmative defense that Fibre waived by not expressly asserting it at trial. Fibre bore the burden of *production* on business necessity, a burden that it clearly met—but it was Hegwine who bore the ultimate burden of persuasion regarding discrimination.

Moreover, even if the Court were now to adopt the federal approach to business necessity and hold that it is in fact an affirmative defense, the Court should not bar Fibre from asserting it here. Where failure to plead a defense does not cause surprise to the opposing party or affect the substantial rights of the parties, it may be deemed harmless. *Mahoney v. Tingley*, 85 Wn.2d 95, 100-01, 529 P.2d 1068 (1975); *Hogan v. Sacred Heart Med. Ctr.*, 101 Wn. App. 43, 54, 2 P.3d 968 (2000) (concluding that failure to plead an explicit release from liability did not waive the defense because the argument was raised in the party's trial brief and the opposing party therefore could not claim it was surprised that the party planned to make the argument). Here, Fibre consistently asserted at trial that it had no duty to hire Hegwine because she could not perform the essential functions of the Order Checker Clerk position due to her pregnancy-related lifting restriction. No surprise or harm was caused Hegwine when Fibre clarified in response to Hegwine's appeal that its substantial evidence regarding the ability to perform the essential functions of the position established a business necessity.

Further, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." CR 15(b). Fibre presented evidence—found persuasive by the trial court—that based on Hegwine's pregnancy-related lifting restrictions, she could not perform essential functions of the Order Checker Clerk position, and that no accommodation could be made. By analogy to the example given in

WAC 162-30-020, Fibre demonstrated that business necessity justified its decision to rescind Hegwine's offer of employment because she could not perform important aspects of the position applied for. Fibre presented extensive evidence on this issue. At no time did Hegwine object to the presentation of that evidence or to the trial court's failure to articulate the evidence in terms of "business necessity," nor did she contend to the trial court that Fibre had failed to show a business necessity.

**2. Fibre Presented Sufficient Evidence to Establish That the Ability of the Order Checker Clerk to Lift 60 Pounds Was a Business Necessity.**

Washington courts have not articulated a standard for business necessity under WAC 162-30-020. But, as asserted in Fibre's Petition for Review, the regulation sets forth an example in which business necessity justifies not hiring a pregnant woman into a training program that *cannot accommodate* absences for the first two months, if the woman would be absent to give birth during the first two months. WAC 162-30-020. Fibre put forth substantial evidence at trial, and the trial court found, that lifting reports weighing up to 60 pounds was an essential function of the Order Checker Clerk position. CP at 23 (FF 8). Just as refusing to hire a woman whose pregnancy-related absence would interfere with the necessary training for a position constitutes business necessity, so would refusing to hire a woman who, because of her pregnancy, was wholly unable to perform an essential function of the position. It is hard to imagine a more basic business necessity than to require the applicant be able to perform the job.

Fibre's evidence likewise satisfies the business necessity standard set forth by the U.S. District Court for the Eastern District of Washington in *Johnson v. Goodyear Tire & Rubber Co.*, 790 F. Supp. 1516, 1523 (E.D. Wash. 1992), interpreting WAC 162-30-020(5)(c). Business necessity exists if the employer's action "was intended to achieve legitimate business goals" and "those goals were served in some significant sense" by the action taken. *Id.* Fibre had the legitimate business goal of ensuring that successful applicants could perform the essential functions of the position applied for. Rescission of its conditional offer of employment to Hegwine served that goal. Fibre was informed by her physician that she could not perform the lifting required by the position.

**D. WELA's Argument Regarding the BFOQ Standard Is a Red Herring that Should Be Disregarded.**

WAC 162-30-020 expressly provides an exception to its provisions where there is a business necessity for the employer's action. WELA asserts that because the regulation applies to both disparate treatment and disparate impact, the business necessity requirement should be interpreted consistently with the bona fide occupational qualification ("BFOQ") standard associated with disparate treatment. WELA Br. at 10. In support of that argument, WELA cites a single federal case interpreting the Americans with Disabilities Act ("ADA"). *Id.* (citing *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1263 (9th Cir. 2001)). But that analysis is in conflict with the regulation on which Hegwine asks the Court to rely,

and is specific to the ADA and therefore nonbinding on the Court. More important, the BFOQ standard is conceptually inapplicable to this situation because Fibre has no policy or practice that excludes pregnant applicants generally.

The BFOQ is an "exception to the rule that an employer . . . may not discriminate on the basis of protected status." WAC 162-16-240. Employers asserting it as a justification for discrimination *admit* that they have a broad policy or make an employment decision based on a protected characteristic, such as gender, rather than making individual assessments based on job requirements. Indeed, the Court has held that one of the primary purposes of the BFOQ is that it "relieves the employer of the burden of testing the capabilities of every applicant individually by allowing it to summarily reject those applicants who clearly do not meet the minimum criteria." *Rose v. Hanna Mining Co.*, 94 Wn.2d 307, 311-12, 616 P.2d 1229 (1980) (distinguishing between the proviso in RCW 49.60.180 that the prohibition on discrimination is not applicable where a disability prevents the proper performance of the job by an individual and a BFOQ that justifies rejection of all persons with a particular condition).

Fibre had no policy against hiring pregnant women for the Order Checker Clerk position, and the trial court made no such finding. Fibre did not contend that it was entitled to reject pregnant applicants based on a BFOQ. Instead, Fibre requires applicants to be able to perform the essential functions of the job applied for and, after making a contingent

job offer, seeks individualized information about the applicant's ability to do so. Here, as the trial court concluded based on its evaluation of the evidence, the position required the ability to lift and carry loaded bins weighing up to 60 pounds. This is a key duty of the job. Neither state nor federal law requires a BFOQ analysis to justify an employer's requirement that an individual applicant, regardless of protected status, be able to perform the essential functions of the position applied for.

**E. Fibre Was Not Required to Hire Hegwine Only to Put Her on Leave.<sup>1</sup>**

Contrary to WELA's assertions, WAC 162-30-020 does *not* expressly contemplate leave for applicants. *See* WELA Br. at 11-12. WAC 162-30-020(4)(a) requires an "employer" to provide leave for the period of time a woman is temporarily disabled due to pregnancy. But the trial court found (and Hegwine did not appeal) that Hegwine had received only a *conditional* offer of employment. Fibre was not yet her employer. *See* CP at 21-24 (FF 1, 4, 12, 13). Therefore, under the regulation, Fibre had no duty to provide her a leave of absence based on a pregnancy-related disability.

The business necessity example provided in WAC 162-30-020(3)(b) does not require a different conclusion. The example permits an

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<sup>1</sup> The ACLU and NWLC repeatedly assert, without citing supporting authority, that Washington law requires accommodation of pregnancy-related disabilities regardless of what accommodations are available for other disabled employees. *See, e.g.,* Br. of ACLU & NWLC at 9. Fibre is unaware of any provision requiring absolute accommodation, and assumes that Amici refer to the leave provided by WAC 162-30-020(4). Nothing in the regulation suggests that leave must be offered to an applicant who has not even started the job in question.

employer not to hire a pregnant woman who would give birth during the first two months of employment if there was a training program for the first two months for which absences could not be excused. The regulation does not suggest that such an applicant be hired regardless of her condition and the real impact it would have on her ability to meet job requirements. Far less does it suggest that an employer must hire an applicant who on the first day of work is unable to perform the requirements of the position and would need to be placed on leave.

Further, there are not two separate business necessity requirements—one for refusal to hire and one for refusal to place an applicant on leave—as WELA suggests. WELA Br. at 11-12. WAC 162-30-020 provides a justification for refusal to hire or promote or to terminate employment or to demote an employee based on business necessity. The provision does not suggest that an employer must show business necessity for not placing on leave an applicant, not yet hired, whose condition prevents her from doing the job.

**F. The Interpretation of WAC 162-30-020 Pressed by Amici Exceeds the Human Rights Commission's Authority.**

As asserted in Fibre's Petition for Review, if WAC 162-30-020 requires employers to hire applicants who cannot perform essential job functions due to pregnancy-related disability, the regulation would ignore an express proviso of the Washington Law Against Discrimination. See RCW 49.60.180(1) (stating that "the prohibition against discrimination because of . . . disability shall not apply if the particular disability prevents

the proper performance of the particular worker involved"); *see also* Pet. for Rev. at 11-13. An administrative agency cannot amend a statute; a regulation that conflicts with a statute is beyond the agency's authority and the regulation should be invalidated. *H&H P'ship v. State*, 115 Wn. App. 164, 170, 62 P.3d 510 (2003).

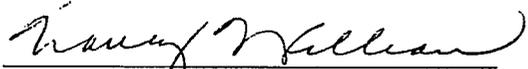
Pregnancy-related disabilities cannot be viewed in isolation or to ignore the Washington Legislature's overriding intent to allow employers to require applicants to perform the job. Contrary to Amici's assertion, an ever broader range of disabilities under Washington law—pregnancy-related or not—will be covered by the Legislature's new definition of disability, which purports to be retroactive. *See* S.S.B. 5340, 60th Leg., Reg. Sess. (Wash. 2007). Under that definition, a disability will exist "whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job." *Id.* Therefore, employers will increasingly face this issue under the new definition.

### III. CONCLUSION

In summary, Fibre respectfully asserts that the arguments put forth by Amici have no bearing on this fact-specific appeal. Because Fibre did not discriminate against Hegwine due to her gender or pregnancy, but rather required only that she be able to perform essential functions of the

position for which she applied, Fibre asks the Court to reverse the Court of Appeals' conclusion to the contrary and reinstate the trial court's judgment.

DATED: May 1, 2007

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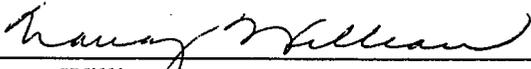
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