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NO. 87933-8

SUPREME COURT OF THE STATE OF WASHINGTON

GARRETT HARRELL, an individual,

Appellant,

v.

WASHINGTON STATE, acting through the Department of Social and
Health Services,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In this petition, Mr. Harrell complains that the trial court erred in dismissing his federal failure to accommodate claim under 42 U.S.C. § 12112, the Americans with Disability Act (ADA). The Court of Appeals correctly applied well-settled case law in concluding that the trial court's dismissal of Garrett Harrell's ADA claim was appropriate. As this Court has held, "there is no express legislative indication that the State had consented to suit in state court for federal civil rights actions. . . . if [consenting to suit in state court for federal civil rights actions] had been the intention of the Legislature it would have been stated by 'express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' It has not done so." *Rains v. State*, 100 Wn.2d 660, 667-68, 672 P.2d 165 (1983). This Court's determination that it is the function of the state legislature, and not Congress, to statutorily impose liability on the State, is consistent with the holdings of the United States Supreme Court and other states.

Mr. Harrell's ADA claim was redundant to the accommodation claim he lost under the Washington Law Against Discrimination (WLAD), RCW 49.60.180. Mr. Harrell has not challenged the jury's determination, on his state law failure to accommodate and retaliation claims that the State reasonably accommodated him and did not retaliate against him. In

addition, he has not appealed the dismissal of his § 1983 first amendment claim under § 1983 or the denial of his motion for summary judgment. The only claim raised in this petition is a federal failure to accommodate claim that is precluded by a jury's determination rejection of his state law failure to accommodate claim.

II. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, Department of Social and Health Services, McNeil Island Special Commitment Center (Center).

III. DECISION OF THE COURT OF APPEALS

The Court of Appeals, Division II, in an opinion dated August 28, 2012, upheld a jury verdict in favor of the Department on Mr. Harrell's state law claim under RCW 49.60.180, affirmed the trial court's dismissal of Mr. Harrell's federal law claims under 42 U.S.C. § 1983 and 42 U.S.C. § 12112, and affirmed the trial court's denial of Mr. Harrell's motion for summary judgment. The Court of Appeals properly held that substantial evidence supported the jury's verdict, sovereign immunity barred Mr. Harrell's federal law claims, and material issues of fact precluded summary judgment.

IV. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals properly apply this Court's holding in *Rains v. State* that Washington has not "consented to suit in

state court for federal civil rights actions”?

2. Did the Court of Appeals properly uphold the jury’s verdict that the Department reasonably accommodated Mr. Harrell when that verdict was supported by substantial evidence?

3. Did the Court of Appeals properly affirm the dismissal of Mr. Harrell’s claim under 42 U.S.C. § 12112 when that claim was redundant of Mr. Harrell’s failure to accommodate claim under RCW 49.60.180 and the jury’s conclusion that the Center reasonably accommodated Mr. Harrell was supported by substantial evidence?

V. COUNTERSTATEMENT OF THE CASE

A. Factual History

The lawsuit arises out of Mr. Harrell’s employment as an on-call Residential Rehabilitation Counselor at the Center, a specialized mental health treatment institution for civilly committed sex offenders located on McNeil Island, in Pierce County, Washington. To ensure security, the Center employs Residential Rehabilitation Counselors. CP at 45, Ex. 101; RP at 1278. Residential Rehabilitation Counselors are scheduled in large numbers, every day, around the clock. CP at 46; RP at 299-300, 304, 1278-80. When Mr. Harrell was interviewed, he indicated that he suffered from night blindness but that he could work any of the three shifts. RP at 357. He began work on October 1, 2007. RP at 978.

On October 31, Mr. Harrell spoke to his supervisor, Mr. Gibson, by phone and told him that he had come to the realization that he could only work day shifts. RP at 368-69. He requested a reasonable accommodation—that he be assigned to the day shift or a kitchen position. RP at 356. Mr. Harrell could not be assigned to a kitchen position because counselors and kitchen personnel were in different job classifications. RP at 548-49. Mr. Gibson could not preschedule Mr. Harrell exclusively to the day shift because that would violate the terms of the collective bargaining agreement.¹ RP at 1287-88. The Center did not have a vacant pre-scheduled day shift position in which to place Mr. Harrell, as those positions had already been scheduled for the month of November. RP at 376-77.

Mr. Harrell had already been scheduled to work swing shifts during November. RP at 383. Accordingly, Mr. Gibson suggested that Mr. Harrell switch from prescheduled to call-in status so that he could call in to the on-site administrator daily and ask if the Center had any day shift

¹ The collective bargaining agreement is quoted in appointment letters received by on-call hires. It states, “[t]he Employer may fill a position with an on-call appointment where the work is intermittent in nature, is sporadic and it does not fit a particular pattern. The Employer may end on-call employment at any time by giving notice to the employee.” CP at 147, Ex. 143; RP at 665. Mr. Harrell received this appointment letter and knew the terms of employment associated with on-call work as a Residential Rehabilitation Counselor. RP at 658-59, 1053-56; CP at Ex. 105, 143; RP at 343, 659-60, 1055. The legal effect of the bargaining agreement on the Center’s duty to accommodate was set forth in Jury Instructions 8 and 11 which are the law of the case. (CP at 853-57). The plaintiff’s failure to object to any of the jury instructions was recognized by the Court of Appeals. *Harrell v. State*, 285 P.3d 159, n.8 (2012).

openings. RP at 383.

Mr. Gibson also directed Mr. Harrell to submit a letter to him explaining his medical needs and desired accommodation, as well as medical documentation of his disability. RP at 369-70. Based upon his experience scheduling Residential Rehabilitation Counselors, Mr. Gibson believed that if Mr. Harrell was on call-in status it would allow him greater flexibility to work only day shifts and to achieve a temporary, reasonable accommodation pending a submission of paperwork that would initiate a formal DSHS determination of whether Mr. Harrell required a more permanent reasonable accommodation. RP at 372. Mr. Gibson did not receive the medical documentation he requested from Mr. Harrell; so, on November 9, Mr. Gibson left Mr. Harrell a voice mail again requesting the documentation. RP at 563-64.

On November 20, Lester Dickson, the Center's personnel administrator, received a letter dated November 19 from Mr. Harrell's attorney, asking what legal basis the Center had for declining to accommodate Mr. Harrell's disability. RP at 705. Mr. Dickson attempted to contact Mr. Harrell the following day and left him a message. RP at 771-72. Mr. Gibson notified the on-site administrators to make every effort to make any day shift on-call assignments available to Mr. Harrell. RP 559-60. Mr. Dickson spoke with Mr. Harrell on December 5th and

again requested that he fax in his medical documentation. RP at 782. Mr. Harrell restated his desire to work day shifts only. RP at 782-83. Later that day Mr. Harrell faxed to Mr. Dickson his medical documentation. RP at 1005.

The evidence contained in the Center's records showed that on multiple occasions, on-site administrators called Mr. Harrell to offer him day shift work and either left a message or otherwise could not reach him. RP at 1126-29, 1253. On-site administrator Mario Martinez telephoned Mr. Harrell on at least 15 separate days to offer him day shift work, but he never reached Mr. Harrell and just left messages. RP at 1248. On December 18, Mr. Harrell returned a message left by on-site administrator Randy Pecheos advising that he had a new telephone number. RP 901-2. Mr. Pecheos advised Mr. Harrell that he should call the Center "a couple hours before" the scheduled start of the day shift because that would be when permanent staff would be calling in sick. RP at 903. In November, Mr. Harrell called McNeil Island during the morning hours on just two days, both days well after the day shift already began. RP at 1116-17. The evidence at trial also showed that Mr. Harrell phoned the Center in the early morning hours on just three December mornings.² RP at 1126-27.

² Since the jury returned a verdict in the Department's favor, all facts should be considered in the light most favorable to the Department. *Read v. Sch. Dist. No. 211 of Lewis County*, 7 Wn.2d 502, 110 P.2d 179, 504 (1941) ("It is the rule that upon appeal in

In early 2009, due to budget cuts, the Center laid off roughly 60 employees who were permanent and on-call staff, including Mr. Harrell. RP at 1291-92. At the point he was laid off, Mr. Harrell had not called the Center, for any reason, for over a year. RP at 375, 1115, 1122-23, 1129-30, 1252-53, 1255; CP Ex. 124.

B. Procedural History

Mr. Harrell sued DSHS, which operates the Center, Superintendent Dr. Henry Richards, and his direct supervisor, Mr. Gibson, individually and in their official capacities. He claimed the Defendants discriminated against him based on his disability in violation of the Washington Law Against Discrimination, RCW 49.60.180, and the Americans with Disability Act 42 U.S.C. § 12112. He also claimed that he was wrongfully terminated in violation of the Washington Law Against Discrimination and that his constitutional rights were violated under 42 U.S.C. § 1983.

Following nearly two weeks of trial before a jury in Pierce County, the trial court granted the Center's CR 50 motion for judgment as a matter of law and dismissed Mr. Harrell's ADA and § 1983 claims. The remaining claims went to the jury, which concluded that the Center properly accommodated Mr. Harrell's disability and committed no acts of retaliation against him. The court denied a CR 59 motion for new trial

a case where the jury has returned the verdict, this court must consider the facts in the light most favorable to respondents[.]").

filed by Mr. Harrell following the jury's decision. The Court of Appeals affirmed the decisions of the trial court and the jury on April 1, 2011.

VI. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court Of Appeals Decision Is Consistent With Well Settled Case Law That Sovereign Immunity Bars Private Actions Against The State Under Title I Of The ADA

Mr. Harrell contends that the Court of Appeals erred by holding that sovereign immunity bars private actions against the State under Title I of the Americans with Disabilities Act, 42 U.S.C. § 12112 ("Title I of the ADA"). In reality, this holding is wholly consistent with this Court's opinion in *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983). It is undisputed that sovereign immunity prohibits Congress from enacting laws that expose unconsenting states to private actions in state court where Congress lacks the authority under section 5 of the Fourteenth Amendment to abrogate that immunity. *Alden v. Maine*, 527 U.S. 706, 712-13, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).³ It is also undisputed that Congress lacked the authority to abrogate that immunity with respect to Title I of the ADA. *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). Thus, a state's susceptibility to private actions under Title I of the ADA in state court

³ A related, but conceptually distinct type of immunity is Eleventh Amendment immunity, which prohibits suits against unconsenting states in *federal* court. *Alden*, 527 U.S. at 712-13.

turns on whether that state is an unconsenting state.

This Court recognized in *Rains*, 100 Wn.2d 660, that Washington is an unconsenting state with respect to federal civil rights actions, such as those under Title I of the ADA. In fact, in *Rains*, this Court rejected the very argument advanced by Mr. Harrell in his Petition for Review—that Washington is a “consenting state” for the purposes of federal civil rights claims under RCW 4.92.090, which states: “The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.” In *Rains*, this Court held that “there is no express legislative indication that the State here has consented to suit in state court for federal civil rights actions. . . . We believe, however, if [consenting to suit in state court for federal civil rights actions] had been the intention of the Legislature it would have been stated by ‘express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’ It has not done so.” *Rains*, 100 Wn.2d at 667-68 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)).

Mr. Harrell seeks to distinguish *Rains* from his case in two ways. First, he argues that 42 U.S.C. § 1983 “lacks the requisite specificity to trigger the waiver.” Petition for Review at 13. He cites no authority for

this proposition. The Court did not rely upon this proposition in holding that the state is immune to claims under 42 U.S.C. § 1983, nor could it have, as the relevant inquiry is whether the Washington State Legislature, not Congress, spoke with requisite clarity regarding an alleged waiver of sovereign immunity.

Mr. Harrell's second argument distinguishing *Rains* posits that an ADA claim is a claim for "tortious conduct," for which sovereign immunity has been waived. Petition for Review at 6-7. Relying upon *Blair v. Washington State Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987), Mr. Harrell argues that because discrimination has been recognized by the Washington State Supreme Court as "tortious conduct," any claim arising out of an act of discrimination is not subject to sovereign immunity. *Id.* at 576.

Blair's holding is limited to Washington Law Against Discrimination cases, however and is inapplicable to ADA claims. *Blair's* general reference to "discrimination" could only apply to the Washington Law Against Discrimination because the ADA was not enacted by Congress until 1990.⁴ Moreover, Mr. Harrell's interpretation of *Blair* is contrary to federal law. State tort claim requirements are preempted by

⁴ Mr. Harrell also cites to *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 225 P.3d 339 (2010) in support of this contention. While *Valdez-Zontek*, unlike *Blair*, was decided after the passage of the ADA, it explicitly limits its holding to Washington Law Against Discrimination cases. *Id.* at 175.

federal law when a federal claim is raised in state court. *Felder v. Casey*, 487 U.S. 131, 134, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). *Rains* clearly applies to this case.

Mr. Harrell further criticizes the Court of Appeals for relying upon *Federal Aviation Admin. v. Cooper*, ___ U.S. ___, 132 S. Ct. 1441, 1448, 182 L. Ed. 497 (2012), for the proposition that “a waiver of sovereign immunity must be ‘unequivocally expressed’ in statutory text,” because *Cooper* concerns the federal government’s waiver of sovereign immunity. Yet, as indicated in the language quoted above from *Rains*, this same standard applies to all purported waivers of sovereign immunity.

The Legislature has been clear and specific when it has chosen to waive the state’s sovereign immunity to suit in state court with respect to actions arising from federal statutes. For example, with respect to federal maritime actions brought under the Jones Act, RCW 47.60.210 states:

The state consents to suits against the department by seamen for injuries occurring upon vessels of the department in accordance with the provisions of section 688, title 46, of the United States code.⁵

⁵ Even the Legislature’s express waiver of sovereign immunity to Jones Act suits in state courts has not been construed to constitute waiver of Eleventh Amendment immunity to be sued in federal court. *Micomonaco v. State of Wash.*, 45 F.3d 316 (9th Cir. 1995) (In order to waive Eleventh Amendment immunity a statute must clearly so indicate.)

Unlike at least one other state, there is no such statute waiving sovereign immunity as to the ADA.⁶ Further, any interpretation of RCW 4.92.090 that would render it a general waiver as to all causes of action would impermissibly render RCW 47.60.210 superfluous. *G-P Gypsum Corp. v. State*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portions rendered meaningless or superfluous.” (quotation marks omitted)). Finally, when the Washington State Legislature has intended to incorporate federal remedies in Washington law, it has done so expressly,⁷ and it has not done so for claims under 42 U.S.C. § 12112, the ADA. Thus, the Court of Appeals correctly concluded that Washington has not consented to suit under the ADA in state court.

Despite this clear state of the law, Mr. Harrell contends that the Court of Appeals’ opinion presents “a significant question of law under the Constitution of the State of Washington or of the United States”

⁶ Minnesota has passed a statute that has expressly consented to suit under the ADA. *See, e.g.*, MINN. STAT. § 1.05 (“An employee, former employee, or prospective employee of the state who is aggrieved by the state’s violation of the Americans with Disabilities Act of 1990, United States Code, title 42, section 12101, as amended, may bring a civil action against the state in federal court or in any other court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act.”).

⁷ RCW 49.60.030(2) (“Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys’ fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601 et seq.).”).

warranting review under RAP 13.4(b)(3). Yet, as indicated above, there is no question regarding the state of the law in this area. This Court resolved the issue in *Rains* and the Legislature has acted in accordance with respect to other statutes.

B. Court of Appeals Holding Does Not Create Any Conflict With Previous Decisions Interpreting Either the Washington Law Against Discrimination or the Americans with Disabilities Act

Mr. Harrell also contends that the Court of Appeals' opinion is in conflict with either a decision of this Court or with another decision of the Court of Appeals, warranting review under RAP 13.4(b)(1) or (2). Yet *none* of the allegedly conflicting cases even mention, much less decide, any issues regarding whether Washington has waived its sovereign immunity as to federal causes of action. Instead, they address the appropriate post judgment interest rate for a discrimination claim under RCW 49.60, whether a plaintiff was required to file a tort claim before initiating a claim under RCW 49.60 against the state, and the federal *Age Discrimination* in Employment Act. *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 173-76, 225 P.3d 339 (2010); *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 575-77, 740 P.2d 1379 (1987); *Becker v. Wash. State Univ.*, 165 Wn. App. 235, 266 P.3d 893 (2011).

The cases that address Title II of the ADA are inapposite because they deal with accommodating disabled individuals' use of public

services, an area where Congress has validly abrogated state sovereign immunity. *United States v. Georgia*, 546 U.S. 151, 159, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006) (“Title II validly abrogates state sovereign immunity.”); *contra*, *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (holding that Title I of the ADA did not validly abrogate state sovereign immunity). These cases should be distinguished from those addressing Title I of the ADA, which concerns accommodating disabled individuals in employment, the issue at bar. *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 911 P.2d 1319 (1996); *Lynn v. Wash. State Dep’t of Soc. & Health Serv.*, ___ Wn. App. ___, 285 P.3d 178 (2012).

Mr. Harrell also contends that the Court of Appeals’ decision conflicts with Executive Order 96-04, which directs state agencies to “implement[] the ADA.” But Executive Order 96-04 makes no reference to authorizing private suits against the state for violations of the ADA. Nor could it, as Washington’s Constitution vests the authority for waiving sovereign immunity *solely* with the Legislature. Const. art. II, § 26 (“The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.”). Mr. Harrell has failed to set forth a valid basis warranting review under RAP 13.4(b)(1)-(3).

C. Mr. Harrell's Misstatement Of This Court's Holding In Davis v. Microsoft Does Not Warrant Review

Mr. Harrell claims that the Court of Appeals erred by failing to expressly address this Court's holding in *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003), presumably because he believes *Davis* entitled him to judgment as a matter of law. Yet this argument relies upon what can only be described as a misstatement of *Davis's* holding. Mr. Harrell contends that this Court held in *Davis* that an employer fails to accommodate an employee when it does "nothing to reassign" an employee other than "[t]elling] him to look for another position on his own on the internet." Petition for Review at 15. Yet this Court expressly disavowed such a holding:

"We believe that Davis's concerns about the reasonableness of Clement's approach are at least sound enough to resist Microsoft's motion for judgment as a matter of law. Similarly, we decline to conclude, as the Court of Appeals appears to have done, that Clement's strategy amounted to a failure to accommodate Davis in the reassignment process. To take either position as a matter of law—i.e., to say that access to all company job listings was enough or to say that Microsoft was obligated to find an exact match before Davis had any duty to follow up—would be unwise. The reasonableness of any employer's approach will depend on a number of factors, such as the size of the employer and its database of open jobs, the nature of the job descriptions themselves (whether highly detailed or sketchy), the level of involvement of the company's job counselor, and the advisability of disclosing the disability to the hiring supervisors prior to (or after) an initial

interview. In sum, the fact-finder must determine whether Microsoft's efforts were reasonably calculated to assist Davis in finding an alternative position within the company. We affirm the conclusion of the Court of Appeals that Microsoft's motion for judgment as a matter of law on Davis's second theory was properly denied."

Davis at 538.

Thus, Mr. Harrell's argument relies solely on a misstatement of the law and is without merit as a result.

Further, even if the Court of Appeals erred, which it did not, review would not be appropriate under RAP 13.4(b). Mr. Harrell himself states that the Court of Appeals did not discuss *Davis*, and thus the Court of Appeals did not create a conflict regarding *Davis*. Further, no constitutional questions, much less any "significant" constitutional questions, are raised by this issue. Finally, this is not an issue of substantial public interest—Mr. Harrell simply disagrees with the Court of Appeals, but that is a private, not public, interest.

D. The Jury's Verdict On Mr. Harrell's Claim Under RCW 49.60.180 Demonstrates The Futility Of Mr. Harrell's Duplicative Claim Under 42 U.S.C. § 12112

Mr. Harrell's final argument in support of his Petition for Review is that the Court of Appeals' decision leaves Mr. Harrell "with no remedy" and deprives disabled individuals "any avenue of relief" when they have been discriminated against. Petition for Review at 7, 14. This assertion is

patently false. Mr. Harrell had his day (two weeks) in court and a jury found that the Center had reasonably accommodated his disability and had committed no acts of retaliation against him. Since Mr. Harrell's ADA claim was duplicative of his RCW 49.60.180 claim, the jury's verdict on the latter collaterally estops Mr. Harrell from pursuing the former.

In *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, in which the Supreme Court held that Congress lacked the authority to force states to submit themselves to claims under Title I of the ADA, the Court expressly recognized that the holding in *Garrett* did not mean that disabled individuals lacked any recourse for discrimination. Rather, such individuals could still have their rights vitiated through the United States (e.g., suits initiated through the Equal Employment Opportunity Commission ("EEOC") on the plaintiff's behalf after the filing of a charge with the EEOC), or through the use of state laws prohibiting discrimination. *Id.* at 374 n.9.

The same is true here. Mr. Harrell could have requested that the EEOC file suit on his behalf under Title I of the ADA. Further, the dismissal of his ADA claim did not preclude him from fully litigating of *the exact same claim* under RCW 49.60.180. Mr. Harrell has not identified any significant difference between the standards that apply to accommodation claims under Title I of the ADA and RCW 49.60.180.

Washington courts have repeatedly looked to cases interpreting Title I of the ADA as persuasive authority for interpreting RCW 49.60.180. *See, e.g., McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Davis* 149 at 521.

Mr. Harrell cites *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 911 P.2d 1319 (1996), for the proposition that, “An employer’s duties described in the ADA are much more clearly articulated than in WLAD.” Petition for Review at 12. Yet *Fell* has nothing to do with an employer’s duties *whatsoever*. Instead, *Fell* concerns a “plan for paratransit service for the disabled and elderly.” 128 Wn.2d at 621. As a result, this Court in *Fell* addressed the differences between Title II of the ADA and RCW 49.60.215, both of which concern public services, not employment.

To the extent there is any substantive difference between Title I of the ADA and RCW 49.60.180, it would involve *greater*, not lesser, protections for employees due to RCW 49.60’s mandate that it be liberally construed. *Allison v. Housing Auth. of City of Seattle*, 118 Wn.2d 79, 88, 821 P.2d 34 (1991) (Title VII differs from R.C.W. 49.60 in that Title VII does not contain a provision which requires liberal construction for the accomplishment of its purposes.). As a result, any effort by Mr. Harrell to pursue his ADA claim at this juncture would be barred by collateral estoppel. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299,

307, 96 P.3d 957 (2004).

Finally, Mr. Harrell contends that the Court of Appeals' decision results in state statutory and common law claims, including those he presented to the jury in this case, being barred by sovereign immunity. Yet the Court of Appeals did not make such a holding, and instead limited its holding regarding sovereign immunity to "federal claims."

Disability discrimination and failure to accommodate claims are fully cognizable against the State as the jury's verdict indicates. Therefore, petitioner has failed to establish a basis for review under RAP 13.4(b)(4).

VII. CONCLUSION

The Court of Appeals correctly concluded that the jury's verdict rejecting Mr. Harrell's reasonable accommodation and retaliation claims was supported by substantial evidence and that the dismissal of his ADA claim was appropriate under existing law. The petitioner has failed to satisfy any of the criteria warranting review under RAP 13.4. Accordingly, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 28 day of November, 2012.

ROBERT M. MCKENNA
Attorney General

/s/ Matthew T. Kuehn
MATTHEW T. KUEHN, WSBA #30419
Assistant Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their
counsel of record on the date below as follows:

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

DATED this 28 day of November, 2012, at Tacoma, Washington.

Jodi Elliott
JODI ELLIOTT

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Harrell v. Washington State

Case No. 87933-8

Matthew T. Kuehn, WSB#30419

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