

No. 73355-9-I

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

JAMES OSBORNE

Appellant,

v.

RECREATIONAL EQUIPMENT, INC.,

Respondent.

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

BRIEF OF RESPONDENT RECREATIONAL EQUIPMENT, INC.

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I. INTRODUCTION

Former REI employee James Osborne was one of more than 100 REI headquarters employees laid off during a reduction in force in early 2013. In this lawsuit, Osborne claimed that REI laid him off because of his age, his disability, and in retaliation for him filing a previous lawsuit against REI. Osborne also claimed that REI failed to reasonably accommodate his disability. Osborne's disability and age discrimination claims, and his wrongful termination claim, were dismissed on summary judgment due to lack of evidence and Osborne has now abandoned the age claim. Osborne's failure to accommodate claim was tried to a King County jury over three weeks in February 2015. The jury of 12 returned a unanimous verdict for REI after approximately two hours of deliberations.

Osborne's claims were correctly rejected by the jury and the trial court. At the time of his layoff, Osborne was working part-time in REI's Information Technology department as an IT Consultant. Osborne (along with more than 100 of his REI co-workers) was laid off because REI, like virtually all retailers, was facing increasing business pressure and it made the budgetary decision to reduce overhead expenses in administrative functions like the IT department where Osborne worked. Layoffs, unfortunately, were part of those expense reductions.

While Osborne contributed in his role as a part-time IT Consultant, employees with more critical jobs than his were also laid off. The trial court correctly determined that REI's legitimate business reasons and the corresponding absence of evidence of any unlawful motive mandated summary judgment on Osborne's layoff claims.

At trial, the jury correctly determined that REI *had never* failed to accommodate Osborne's disability. The evidence was overwhelming that REI had repeatedly and continually accommodated Osborne's disability in ways that far exceed what the law requires. Osborne's argument at trial and on this appeal is that employees who are successfully and fully accommodated in their jobs must be given preferential treatment when employers are undergoing layoffs. This is not the law. When layoff decisions are made, employees who are successfully accommodated in their jobs, like Osborne was, are treated equally, not better. But even if Osborne's position were the law, the jury's verdict was still correct because the evidence was that REI did exactly what Osborne complained it should have done. After Osborne's position was selected for layoff, REI checked with him to update his limitations, REI reviewed available positions with him, and REI ensured that he knew how to apply for any positions he was interested in. Osborne never applied for any open positions, because he had already moved his primary residence to Arizona

and because he was unable to work full time. The jury correctly returned a verdict for REI.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court's jury instructions allowed each party to argue its theory of the case, were not misleading and, read as a whole, accurately informed the jury of the applicable law.

2. Whether an employee who is successfully accommodated in his or her current position is entitled to equal or favored treatment in the context of group layoffs.

3. Whether there were any open positions at REI that Osborne was qualified for and able to perform with or without reasonable accommodation.

4. Whether Osborne presented sufficient evidence at summary judgment to establish a material dispute of fact over whether REI's decision to lay him off was a pretext for disability discrimination.

5. Whether Osborne presented sufficient evidence at summary judgment to establish a material dispute of fact over whether REI's motivation in selecting him for layoff was substantially motivated by a desire to retaliate against Osborne for filing his consumer lawsuit.

III. STATEMENT OF THE CASE

A. Osborne's Employment with REI

Osborne began working for REI on May 4, 1994, as a Systems Development Supervisor. CP 322 ¶ 5. He was promoted to Director of Systems Development on December 1, 1999, and held various director level positions at REI until his 2007 bicycle crash. *Id.* Osborne was good at his job and was a solid contributor to REI and its IT department, within the limits of his education and training. CP 107; 139-40; 142; 159.

Although employed in REI's IT department, Osborne did not have technical training or a technical background; his primary skills were managerial and organizational. CP 220-21; Trial Transcript ("TT") 21:23-23:14; 25:8-26:5; 27:16-30:12 (Feb. 4, 2015).

B. The 2007 Bicycle Crash

In June 2007, while on a strenuous lunchtime bike ride, a piece of a branch from a cottonwood tree lodged in the front wheel of Osborne's bicycle. CP 285 at 123:23-25. He was riding approximately 25 miles per hour in a group of riders when this occurred. The branch jammed between the front wheel's spokes and the bike's front fork. *Id.* The impact broke the bike's aluminum frame, simultaneously sending Osborne hard to the pavement and spraining his spine. CP 286 at 137:12-23. Osborne's injury left him with residual mobility and pain management challenges that

impact his day to day functions, including work. CP 216. Through aggressive physical therapy, including four-hour, after-work gym sessions, Osborne gradually regained his strength to the point where he can now bike, ski, and exercise for up to four hours per day. CP 180-86 TT 63:7-22; 75:19-76:11; 90:2-91:12 (Feb. 4, 2015).

C. REI Helps Osborne Slowly Return to Work

Osborne missed more than a year of work after his bike crash. While he was recovering REI paid him his full salary for six months, at which point Osborne's long-term disability benefits started. CP 741; Ex. 339; TT 60:7-9 (Feb. 11, 2015). During Osborne's year-long absence, REI worked with him and his doctors to develop a plan to return to work. CP 50 ¶¶ 2-3; 217; Tr. Exs. 12-21. One REI employee described the plan in these words: "how can we best partner with Jim to help meet his needs and know we care and want him to be successful in his transition back?" Tr. Ex. 16.

In July 2008, Osborne came back to work part-time as an IT Consultant working a maximum of 8 hours per week, mostly from home in a work station REI built for him. CP 53, 217; Tr. Exs. 4, 339; TT 82:1-8 (Feb. 11, 2015). At first, Osborne worked on special projects with no set timelines so that he could work at his own pace without the stress of deadlines. CP 218; TT 83:8-19 (Feb. 11, 2015). He started out working

two hours per day, four days per week, at times most convenient to him and he picked the assignments he wanted to work on. TT 78:21-79:2 (Feb. 11, 2015); CP 50 ¶3. REI offered to pay for a taxi to drive Osborne to and from work, but he declined. CP 53; CP 2908.

By April 2010, Osborne had transitioned to working on regular projects with a team that depended on him. Ex. 116; TT 83:17-21 (Feb. 11, 2015). Osborne expressed concern to his manager in a September 1, 2010 meeting once he realized this “sea change” had occurred and that he would be expected to contribute value like other employees. Tr. Ex. 116 at 2 (“I reminded Marianne that up until I started reporting to her I had complete control over the work I was doing. . . . I further explained that my initial focus coming back to work was to support my recovery.”) Around this time, Osborne asked REI to guarantee him continued employment until age 65. REI explained that it could not do that. Ex. 338.

Over the first two years back at work, Osborne slowly increased his working hours from eight to 28 hours per week, where he plateaued in 2010. CP 188; Tr. Exs. 175-178, 181. REI regularly checked in with Osborne to assess whether his accommodations were sufficient, and adjusted his accommodations accordingly. CP 265-67; TT 74:13-19 (Feb. 11, 2015). His last two years at REI, Osborne’s health care providers

never approved him to work more than 28 hours a week. Tr. Exs. 175-178, 181; TT 67:1-4 (Feb. 10, 2015).

At his last accommodation check-in on December 12, 2012, the day before Osborne was laid off, Osborne reported that he was still unable to work more than 28 hours per week. Tr. Ex. 181; CP 268-60. Although his doctors never released him to work more than 28 hours per week during his REI employment, at trial Osborne claimed he is now able to work full-time without any restrictions. TT 169:2-19 (Feb. 11, 2015); CP 180.

D. Osborne's Work as an IT Consultant

In his part-time IT Consultant role, Osborne was assigned project-based tasks according to the needs of the IT group. For example, he prepared a study of REI's use of vendors in the IT department. CP 191. He also worked on disaster recovery planning, network assessments, and he helped develop a process for managing SAP¹ change requests. TT 181:1-10 (Feb. 4, 2015); CP 108; 194; 237.

One of Osborne's primary tasks in his last two years with REI was to assist with REI's annual Payment Card Industry ("PCI") audit. TT 180:3-181:4 (Feb. 4, 2015); CP 136. A PCI audit is an annual exercise whereby a third-party firm assesses REI's compliance with 12 PCI

¹ SAP is enterprise software used by REI. CP 240-41.

compliance standards for the protection of customer payment card data, such as credit cards and bank debit cards. *Id.*; CP 300 ¶3.

Osborne assisted with REI's 2011 PCI audit and in 2012 he assumed the role of project manager for the PCI audit as his primary task. TT 24:25-25:21 (Feb. 9, 2015); CP 190; 300 ¶4. While envisioned as a part-time project, the PCI audit challenged Osborne's work capacity. Tr. Exs. 105, 305; CP 128; 147; 148-50. One reason was because Osborne lacked the technical skills to complete the audit without regular help from his co-workers. TT 185:10-23 (Feb. 17, 2015); Tr. Ex. 305; CP 116; 144-46. In September 2012, Osborne told his functional supervisor Carlos Melvin that "[t]he current cadence and volume [of the PCI audit] is exceeding my part time work capacity." Tr. Ex. 105; CP 310-13; 158. Despite the challenges, Osborne completed his work on the 2012 PCI audit on November 30, 2012. Tr. Ex. 90; CP 190; 301; 308. After completing his 2012 PCI audit duties, Osborne did not have a primary assignment because the 2013 PCI audit would not begin again until late spring of the next year. TT 235:5-15 (Feb. 17, 2015); CP 158.

E. REI Realizes It Needs a Full-Time Compliance Program Manager

Carlos Melvin supervised Osborne's work on the PCI audit. Melvin had been supervising the PCI audit for several years and had been growing frustrated with not having a designated specialist to oversee the

audit. Ex. 305; CP 160-61; 152-54. In late 2011 and early 2012, Melvin began advocating for the creation of a full-time security and compliance manager who would manage all of REI's information security compliance activities, including the PCI audit. *Id.* The job was simply too important to be addressed on an ad hoc basis. To this end, in late fall of 2012, REI decided to create a Compliance Program Manager ("CPM") position to consolidate all of REI's information security compliance issues under one position. CP 141-42; CP 301 ¶6; 310-13. The intent in creating the CPM position was not to eliminate Osborne's IT Consultant role. TT 187:1-8 (Feb. 17, 2015).

Osborne was not a candidate for the CPM position because he did not have the technical skills or computer security experience the position needed. Tr. Ex. 305; CP 148; 161-63; 114. The position required advanced training in security and compliance programs, and technical skills sufficient to manage a broad compliance program, including security architecture, encryption, HIPAA, data security standards, and state and federal laws. CP 160-61; 163. Osborne did not have any of these skills or experiences. The person REI selected, Kelly Matt, is a full-time employee with an advanced degree in security engineering and significant experience as a security architect engineer. Tr. Ex. 306; TT 231:1-23 (Feb. 17, 2015); CP 166; 301; 317-19.

F. Osborne Purchases a Home in Arizona

In October 2012, Osborne and his wife purchased a home in Paradise Valley, Arizona. TT 42:2-43:2 (Feb. 11, 2015). That home remained the Osborne's primary residence through the trial, although in 2013, they also purchased a condominium on Mercer Island. CP 499-500 at 23:9-25:10. During the fall of 2012, Osborne asked Carlos Melvin if he could work remotely if he moved to Arizona. CP 516 at 92:10-14.

G. REI Eliminates More than 100 Support Operations Positions

In late 2011 and early 2012, REI, like many retailers, was facing mounting business pressure. CP 240. In the fall of 2012, REI's Chief Financial Officer, Eric Artz, asked all divisional leaders to identify areas in their budgets for reductions. CP 246-47; 323. On the personnel front, he asked leaders to consider whether some open positions could be eliminated. CP 240; 243; 247. He asked that everyone consider reducing or eliminating new hires. CP 247. Lastly, he asked all managers to consider whether current positions could be eliminated without impacting REI's ability to meet its business needs. *Id.* One of the criteria used to identify positions for elimination was whether the position was doing work that would be completed before the end of the year. CP 247-48. IT was among the support divisions scrutinized for reduction. CP 247.

REI first laid off employees whose work would be completed in 2012. CP 248. In this initial round, REI eliminated seven headquarters positions, including three in the IT division. CP 242. Over the next three months, all non-essential activities were put on hold and REI laid off approximately 100 additional support operations employees. *Id.*; TT 240:4-19. In the IT division alone, REI eliminated approximately 20 positions, including Ed Telders, Osborne's immediate supervisor. TT 106:18-20 (Feb. 18, 2015); CP 245.

Osborne's position was chosen for layoff because he had completed his work on the 2012 PCI audit at the end of November 2012 and because REI had decided to hire a Compliance Program Manager who would take over the PCI audit duties in 2013. CP 248-49; 141-42. REI considered whether there were other tasks it might assign Osborne but, given the pending layoffs and his limited technical skills, there were none. CP 111; 274; 276; 278; TT 20:14-22:4 (Feb. 10, 2015).

H. Osborne Is Notified of His Layoff

REI notified Osborne that his position was going to be eliminated in a meeting on December 13, 2012. CP 215; 272. Prior to the meeting, Kristin Bradley reviewed all the open positions in the IT Department to see whether Osborne might qualify for a different job, but all the open positions required at least 40 hours per week and many required technical

skills that Osborne did not have. TT 128:11-20 (Feb. 12, 2015). During the meeting, Kristin Bradley reminded Osborne that he was eligible for rehire and could apply for any open positions. TT 132:5-9 (Feb. 12, 2015). The next day, on December 14, 2012, Osborne ran his own search of available positions, which confirmed that all the open positions required the ability to work full time. Tr. Ex. 144; TT 113:4-114:13 (Feb. 11, 2015). Osborne, who by this time had already bought his new home in Arizona, never applied for any open jobs at REI after his layoff. TT. 180:10-12 (Feb. 12, 2015).

Osborne complains about how REI handled his termination, but these accusations are both wrong and unfair. Layoffs are never easy, but REI handled Osborne's layoff with thoughtful consideration. For example, REI invited Osborne to come back the next week for a goodbye lunch. He declined. TT 155:2-156:7 (Feb. 12, 2015). And even though Osborne had no work to do, REI purposefully delayed Osborne's termination another 20 days to January 2, 2013. CP 442. REI picked that date for two reasons. First, delaying the termination date into the next year meant that Osborne would still earn his 2012 year-end bonus and would receive his retirement contribution. CP 443. TT 154:6-155:1 (Feb. 12, 2015). Second, Osborne's birthday is January 1, and REI did not want

his termination date to fall on his birthday. TT. 44:14-45:1. (Feb. 11, 2015); TT 124:9-14 (Feb. 12, 2015).

I. Osborne’s Consumer Lawsuit Against REI

In June 2010, approximately two years after Osborne returned to work, he filed a lawsuit against REI claiming that his REI bicycle was the cause of his 2007 crash. CP 179. While REI disagreed with Osborne’s choice to try to blame his crash on the REI bicycle, REI acknowledged his right to bring the claim and took steps to separate his consumer lawsuit from his role as an REI employee. CP 224-25; 344 ¶3; 254. To that end, REI shielded the IT business leaders and HR employees who had decision-making authority over Osborne from the details of his lawsuit. 344 ¶3. Osborne settled his consumer lawsuit with REI on August 1, 2012, more than four months before REI made the decision to eliminate his position. CP 3; CP 24; CP 383.

IV. ARGUMENT

A. There Was Overwhelming Evidence Supporting the Jury’s Finding That REI Had Always Accommodated Osborne’s Disability

At trial, Osborne accused REI of failing to engage in reasonable efforts to accommodate his disabilities. To prove a case for failure to accommodate, a plaintiff must show that (1) the employee had a disability that “substantially limited . . . his ability to perform the job”; (2) he was

qualified to perform the “essential functions” of the job; (3) he gave the employer notice of the disability and its substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to it and medically necessary to accommodate the disability.

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145 (2004).

Only the fourth element was disputed at trial. On this issue, the evidence was that REI had provided continued accommodations as part of an ongoing interactive process with Osborne that started after his bicycle accident and continued through his January 2, 2013 layoff. REI’s efforts repeatedly exceeded its legal obligations and the jury correctly determined that Osborne had been reasonably accommodated at all times.

The Washington Law Against Discrimination (“WLAD”) requires only “reasonable” accommodations. *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 373 (2005). The WLAD does not require an employer to “revamp the essential functions of a job to fit the employee,” *Fey v. State*, 174 Wn. App. 435, 452-53 (2013). Similarly, the WLAD does not obligate an employer to create a new position for a disabled employee. *E.g. Dean v. Mun. of Metro. Seattle-Metro*, 104 Wn.2d 627, 634 (1985) (“Metro had no duty to create a job for [the plaintiff].”); *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 644 (2000) (same). More specifically, the law does not require an employer to create a part-time job

for an employee as an accommodation. *Whitbeck v. Vital Signs, Inc.*, 934 F. Supp. 9, 16 (D.D.C. 1996), *rev'd on other grounds*, 116 F.3d 588 (D.C. Cir. 1997) (“providing an entirely new part-time position for a disabled employee...is not required by the ADA”). Nor is an employer required to eliminate all stress from the job. *See Fey*, 174 Wn. App. at 452-53.

As described more fully above, REI did all these things and more. For the first twenty months after Osborne returned to work, REI essentially provided him with a therapy job. EX 116 at 2 (“my initial focus coming back to work was to support my recovery”). Nothing in the law required REI to do that.

In his last two years at REI, Osborne transitioned to a stable position where he contributed real value. His only limitation was that he could not work more than 28 hours per week, a limitation that REI was able and willing to accommodate. Osborne repeatedly describes the layoff as REI “eliminating” his accommodation. *E.g.*, App. Br. at 17. But this is just twisting language. REI didn’t eliminate Osborne’s accommodation—i.e., the 28-hour cap on his hours. REI eliminated Osborne’s *job*. It did that because REI was facing economic pressures and there was no available work for Osborne to do. That would have happened whether Osborne was working 28 hours, 40 hours, or 50 hours.

TT 146:22-147:12 (Feb. 12, 2015). His accommodation had nothing to do with the layoff decision.

The fallacy underlying Osborne’s argument is easily revealed by the following hypothetical. Suppose an employee has a lower back condition that requires the employee to stand for part of the day. The employer provides the employee with a stand-up desk, which successfully accommodates the employee’s disability. Now, suppose that two years later the employer undergoes a round of layoffs and the employee with the stand-up desk is one of the employees whose job is eliminated. Would it be accurate to describe what just happened as the employer “eliminating” the employee’s accommodation? It would not. But that is exactly what Osborne is arguing here. The jury correctly determined that REI never failed to reasonably accommodate Osborne.

B. The Jury Was Properly Instructed on Osborne’s Failure to Accommodate Claim

1. The Trial Court’s Instructions Were Correct and Allowed Osborne to Argue His Theory to the Jury

The jury was properly instructed on the law. Jury instructions are reviewed in their entirety. Instructions are proper if (1) they permit both parties to argue their respective theory of the case; (2) they are not misleading; and (3) when read as a whole, they properly inform the trier of fact of the applicable law. *E.g., Keller v. City of Spokane*, 146 Wn. 2d

237, 250 (2002). An erroneous jury instruction is not a basis for reversal unless it substantially affects the outcome of the case. *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington*, 162 Wn. App. 495, 505 (2011). Trial courts are provided considerable discretion in tailoring jury instructions. See *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 278, 135 P.3d 955, 962 (2006). In general, instructions that are not misleading and that allow a party to argue their theory of the case will not provide a basis for vacating a jury verdict. *Id.*²

The trial court's Jury Instructions 5-9 addressed the substantive law underlying Osborne's reasonable accommodation claim. Instructions 5, 6 and 8 were slightly modified versions of the Washington Pattern Jury Instructions ("WPIs") 330.33, 330.34 and 330.37. Instruction 9 set forth black letter law that employers are not required to eliminate essential functions or create new positions as a form of accommodation. *Fey*, 174 Wn. App. at 452-53; *Dean*, 104 Wn.2d at 634.

Instruction 7 was the only instruction that was not a model instruction or black letter law and Instruction 7 favored Osborne rather than prejudiced him. Throughout the trial, Osborne argued that layoffs trigger the transfer accommodation process set forth in *Dean*, 104 Wn. 2d 626. Instruction 7 was the trial court's effort to allow Osborne to argue

² Osborne fails to comply with RAP 10.3(g) and 10.4(c) in identifying the supposed errors in the trial court's instructions.

this theory to the jury. REI objected to Instruction 7 because it instructed the jury that REI had a duty to pursue additional accommodations for Osborne as part of the layoff process if the jury found that Osborne's position existed for the purpose of providing a reasonable accommodation. REI disagrees that this is an accurate statement of Washington law, but even if incorrect, any error advantaged Osborne, rather than prejudicing him. In any event, there was ample evidence presented at trial to support a jury finding that Osborne was working a real job during his last two years at REI, not a job that existed for the purpose of providing him with an accommodation. *E.g.*, Ex. 116.

2. The Trial Court Correctly Rejected Osborne's Proposed Instructions Nos. 13-17

a) Instruction Nos. 13-16

Osborne assigns error to the trial court's refusal to add four additional instructions on the interactive process. The trial court's Instruction No. 6 addressed the interactive process. The instruction is a slightly modified of WPI 330.334 and it addresses the interactive process with the following language:

Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The employee has a duty to cooperate with his employer to explain the nature and extent of the employee's

impairment and resulting limitations as well as his qualifications.

Osborne's proposed instruction No. 13 would have instructed the jury, among other things, that an employer has an affirmative obligation to give advance notice to employees with disabilities (but not to other employees) when layoffs or other business changes are anticipated.

Osborne's proposed Instruction No. 14 would have instructed the jury that it was required to find for Osborne if it found that REI had not taken steps to accommodate him *after* he was selected for layoff, if there were "plausible accommodations available."

Osborne's proposed instruction No. 15 would have instructed the jury that an employer has a continuing duty to consider reassignment to positions that might reasonably exist in the "reasonable future." Proposed Instruction No. 16 would have instructed the jury that REI's duty to accommodate was continuing and would have been triggered by the decision to lay Osborne off.

b) Instruction No. 17

Osborne also assigns error to the trial court's refusal to read Osborne's proposed Instruction No. 17, which read in its entirety as follows:

Whereas equal treatment is expected for most employees, the law requires an employer to treat employees unequally in order to eliminate barriers

to the disabled. An employer is liable for disability discrimination where it treats the disabled employee without regard to his disability.

CP Supp., Ex. 1 at 35.

3. Successfully Accommodated Employees Are Treated Equally in a Layoff

All of Osborne's rejected instructions relied on the faulty premise that employees who are successfully accommodated in their current jobs must receive special treatment during layoffs. The law does not require this. An employee with a disability who is fully and successfully accommodated in his or her present job is treated equally not better than other employees in a layoff situation.

The goal of the reasonable accommodation requirement is to give disabled employees equal footing with their able-bodied peers. EEOC Enforcement Guidance: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, *available at* <http://www.eeoc.gov/policy/docs/accommodation.html> (last viewed January 24, 2015) ("The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the 'benefits and privileges of employment' equal to those enjoyed by

similarly-situated employees without disabilities.”).³ Disability law “does not command affirmative action in hiring or firing.” *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997). Thus, employers need not give “disabled persons [] priority in hiring or reassignment over those who are not disabled.” *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

This principle applies equally in the layoff and reduction-in-force context. A layoff does not trigger the obligation to find a transfer position for a disabled employee selected for layoff. Employers “need not reassign a disabled employee...for reasons such as lay off, better job opportunity, or convenience.” *Ransom v. State of Arizona Bd. of Regents*, 983 F. Supp. 895, 901 (D. Ariz. 1997); *see also See Staub v. Boeing Co.*, 919 F. Supp. 366, 370-71 (1996) (dismissal proper where the employer “suffered from a lack of job openings at the time [the plaintiff] was released to work, and had a surplus of laid-off employees with more seniority”); *Chasse v. Computer Sciences Corp.*, 453 F. Supp. 2d 503, 520-21 (D. Conn. 2006) (lay off did not amount to a failure to accommodate disabled employee); *Ware v. Mut. Materials Co.*, 93 Wn. App. 639, 648 (1999) (dismissal proper where there was “uncontroverted evidence that [the plaintiff]

³ The Washington Supreme Court has recognized that federal employment law is instructive when interpreting the WLAD. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 228 (2006).

would have been terminated anyway during the reduction in force); *Cluff v. CMX Corp. Inc.*, 84 Wn. App. 634, 640 (1997); see also *Wong v. Pape Mach., Inc.*, 370 F. App'x 871, 873 (9th Cir. 2010) ([The plaintiff's] interactive process claim fails because [disability law] does not require an employer to reasonably accommodate an employee after termination for a non-discriminatory reason.”).

Ransom, also relied on by Osborne, explains the fallacy of Osborne's argument. “[R]eassignment of disabled employees as a reasonable accommodation is not automatic. It applies under the following limited circumstance: 1) the employee becomes unable to perform the essential function of the job even with reasonable accommodations and 2) there exists, or soon will be, a vacant position which the employee is qualified to perform. An employer need not reassign a disabled employee under any other circumstances, such as requests by disabled employees who want transfers or reassignments to other jobs for reasons such as lay off, better job opportunity, or convenience.” *Ransom*, 983 F. Supp. at 901.

Osborne repeatedly argues that REI had a duty to transfer him because his “accommodation [was] failing.” *E.g.*, App. Br. at 23, 24, 26. But this is just wrong on the facts. Osborne's accommodation was working just fine. REI simply did not have a continuing business need for

his position, especially in a situation where more than 100 of his peers were losing their jobs, too.

Aponte Diaz v. Navieras Puerto Rico, Inc., 130 F. Supp. 2d 246, 254 (D.P.R. 2001), is on point with the facts in this case. In *Aponte Diaz*, the employee argued that after his position was eliminated for economic reasons he should have been offered another position as a reasonable accommodation. *Id.* Applying the ADA, the court held that a job transfer for an employee with a disability is a form of accommodation that should be pursued if an employee with a disability cannot be reasonably accommodated in his or her current position. *Id.* Just like Osborne, Aponte Diaz was able to perform the essential functions of his position. His “termination was caused by the elimination of his position, nothing more.” *Id.* Under these circumstances, the ADA did not require the employer to take affirmative steps to help find another position for Aponte Diaz: “the ADA does not require an employer to transfer or reassign a disabled employee when his position is eliminated for non-discriminatory reasons. Such a requirement would reach beyond the objective of discrimination jurisprudence by immunizing disabled employees from legitimate dismissals.” *Id.*

Daughtery v. City of El Paso, 56 F.3d 695 (5th Cir. 1995) *holding modified by Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002),

is also instructive. In *Daugherty*, the plaintiff, whose position was eliminated, sued alleging that the employer “should have made a reasonable accommodation by reassigning him to another position on the city payroll.” 56 F.3d at 698. The court rejected the plaintiff’s argument and confirmed that in a layoff situation, employees with disabilities are entitled to equal, not better, treatment. *Id.* at 700.

Osborne argues that he was entitled to special treatment. He claims that REI was obligated to provide him, and presumably other employees who were accommodated in their positions, advance notice that layoffs were on the horizon. He claims that REI was obliged to locate another job for him when it was laying off more than 100 of his colleagues. This is not the law. An employer’s obligation to seek out a different job for a disabled employee is triggered when an employee’s disability renders him or her unable to perform his or her *current job* with or without an accommodation. *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002); *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 536–37 (2003); *Clarke v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 120 (1986); *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 636 (1985). Here, there is no evidence that Osborne had become unable to perform his IT Consultant duties; thus the law did not

trigger any obligation by REI to find or create another new position for him.

Osborne argues that *Curtis v. Security Bank of Washington*, 69 Wn. App. 12 (1993) supports his position. But *Curtis* is inapposite. *Curtis* was a bank employee who could not work standing up for significant periods of time. *Id.* at 14-15. During a reorganization, the decision was made to place *Curtis* in a position that would require her to work while standing. *Id.* After that decision was made, but before the reorganization was implemented, several desk job positions became available that *Curtis* was qualified for. *Id.* at 18. Unaware that the bank had decided to move her back to a position that required standing, *Curtis* did not apply for these open positions. *Id.* at 20. Under these facts, Division III held that the bank had an affirmative obligation to make *Curtis* aware of the two openings and to encourage her to apply. *Id.* at 19. *Curtis* thus stands for the basic principle that if an employer is planning to reassign a disabled employee to a new position that the employer knows the employee cannot perform due to a disability, the employer must engage in the interactive process as part of implementing the reassignment.

Curtis does not hold, as Osborne suggests, that an employer must engage in the interactive process whenever an employee with a disability

is one of many slated for a group layoff. To so hold would unfairly preference employees with disabilities in layoff scenarios and would violate the general rule that “an employer undertaking a RIF is not required to offer an employee a transfer to another job position.” *Webber v. Int’l Paper Co.*, 417 F.3d 229, 240 (1st Cir. 2005) (affirming dismissal of employee’s disability discrimination claim).

4. The Trial Court Correctly Declined to Give an Undue Burden Instruction

The trial court properly rejected Osborne’s proposed undue burden instruction because there was no evidence that REI had ever rejected a request for reasonable accommodation by Osborne.

If an employee proposes a reasonable accommodation that an employer refuses to provide, the burden shifts to the employer to prove that providing the accommodation would pose an undue burden on the employer’s operations. *Easley v. Sea-Land Services, Inc.* 99 Wn. App. 459 (2000); *Erwin v. Roundup Corp.*, 110 Wn. App. 308 (2002).

In *Easley*, a mechanic working in a shipyard suffered a herniated disc in his neck while performing heavy duty work involving the use of air tools. 99 Wn. App. 459. Easley’s health care providers recommended he avoid air tools and certain heavy duty work but indicated he could perform medium and light duty assignments. The employer had more than 115 mechanics doing a variety of tasks, some of which were medium or light

duty. Easley specifically requested medium duty jobs that he could perform, but the employer refused to consider him for any other assignments and Easley was let go. At trial, the manager who made the decision not to accommodate Easley testified that it would have been “difficult, if not impossible, to find” another assignment for Easley. Documents written by the employer and introduced at trial also contended that it would have been an undue hardship for the employer to have given Easley a different assignment. On these facts, the court held that it was reversible error for the trial court to not provide the undue hardship instruction to the jury. *Id.* at 472.

In *Erwin v. Roundup Corp.*, 110 Wn. App. 308, Erwin was the Nutrition Center Manager at a Fred Meyer grocery store. After injuring herself in a fall, she was no longer able to meet the job’s requirement that she be able to lift up to 50 pounds. Erwin argued that it would have been a reasonable accommodation for Fred Meyer to relieve her of the lifting requirement. At trial, Erwin pointed to the fact that she had successfully performed the job for 90 days without needing to do any heavy lifting. Fred Meyer countered with evidence that the job could not be performed without being able to lift 50 pounds. Based on this evidence, the court found that it was error for the trial court to not instruct the jury on undue hardship. *Id.* at 317.

Osborne's case is not like *Easley* or *Erwin*. There was no evidence that REI ever said no to any proposed accommodations. Nor did REI argue that any proposed accommodations would be a burden or too expensive.

Osborne tries to get around this by repeatedly describing his layoff in ways that contort reality. In Osborne's phrasing, his layoff is not a business decision that applies to more than 100 employees. Rather it is REI "summarily withdrawing [his] accommodation." App. Br. at 31. This is semantics. What happened was this: REI laid Osborne off, along with more than 100 of his co-workers, because REI needed to reduce costs and because Osborne was one of more than 100 employees whose positions were determined to be less critical than the positions REI retained. Reasonable accommodation and undue hardship had nothing to do with this decision. The trial court correctly rejected the undue hardship instruction.

C. There Were No Open Positions for Which Osborne Was Qualified

As discussed above, Osborne was not entitled to advance notice of his layoff or preference in reassignments. But even if REI were required to give Osborne preferential treatment in its layoffs, the jury's verdict was correct because the evidence at trial was that there were no open positions for which Osborne was qualified.

When the duty to transfer is triggered, an employer's obligation is limited to open jobs for which the employee is qualified. *See Curtis*, 69 Wn. App. at 19 (transfer is not required unless the "handicapped employee is qualified for a job within an employer's business, and an opening exists."); *Davis v. Microsoft Corp.*, 109 Wn. App. 884, 892 (2002) *aff'd*, 149 Wn. 2d 521 (2003) ("One of the methods by which an employer may reasonably accommodate a disabled employee is by reassigning that employee to a vacant position for which he is qualified."). Federal law is in accord:

The ADA may only require an employer to reassign a disabled employee to a position for which the employee is otherwise qualified. *An employer may be obligated to reassign a disabled employee, but only to vacant positions; an employer is not required to "bump" other employees to create a vacancy so as to be able to reassign the disabled employee. Nor is an employer obligated to create a "new" position for the disabled employee.*

Malabarba v. Chicago Tribune Co., 149 F.3d 690, 699 (7th Cir. 1998) (emphasis added) (quoting *Gile v. United Airlines, Inc.*, 95 F.3d 492, 498 (7th Cir. 1996)); *see also, U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 396 (2002); *Reza v. Int'l Game Tech.*, 351 F. App'x 188, 190 (9th Cir. 2009) (reassignment must be to an open position); *Burns v. Coca-Cola*

Enterprises, Inc., 222 F.3d 247, 257 (6th Cir. 2000) (“an employer need only reassign a disabled employee to a vacant position.”).

Although it had no legal obligation to do so, REI did in fact, consider whether Osborne could be transferred to another vacant position. But all vacant positions were full-time, professional positions requiring *at least* 40 hours and the evidence at trial was that Osborne could not work more than 28 hours per week.

D. The Trial Court Properly Entered Summary Judgment on Osborne’s Disparate Treatment and Public Policy Claims

1. Standard and Scope of Review for Summary Judgment

A grant of summary judgment is reviewed *de novo*, with the court engaging in the same inquiry as the trial court. *TracFone Wireless, Inc. v. Dep’t of Revenue*, 170 Wn.2d 273, 280–81, 242 P.3d 810 (2010); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

It is the appellate court’s task to review a ruling on a motion for summary judgment based solely on the record before the trial court at the time of ruling. RAP 9.12; *see also Wash. Fed’n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163 (1993); *Gaupholm v. Aurora Office Bldgs., Inc.*, 2 Wn. App. 256, 257 (1970). The purpose of RAP 9.12 “is to effectuate the rule that the appellate court

engages in the same inquiry as the trial court.” *Green v. Normandy Park*, 137 Wn. App. 665, 678 (2007), *rev. denied*, 163 Wn.2d 103 (2008) (quoting *Wash. Fed’n of State Employees*, 121 Wash.2d at 157).

Specifically, RAP 9.12 provides that:

“On review of an order granting or denying a motion for summary judgment *the appellate court will consider only evidence and issues called to the attention of the trial court*. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.”

RAP 9.12 (emphasis added).

In support of his arguments for summary judgment, Osborne improperly relies on the trial record.⁴ In fact, Osborne’s brief includes over 90 citations to the trial transcript or trial exhibits, including a question asked by a juror at trial.⁵ The trial record may not be considered by the Court in reviewing the summary judgment orders because the trial evidence was not available to the trial court when it ruled on REI’s motion for summary judgment on July 21, 2014.⁶ The Court should limit its

⁴ Brief of Appellant at 39-48.

⁵ *E.g.*, *Id.* at 42, n. 117 (citing to over 80 quotes from the trial transcript); *id.* at 48 (quoting a question asked by a juror during trial).

⁶ Order Granting REI’s Motion for Summary Judgment at CP 2180- 2184 (listing all evidence the trial court considered in deciding REI’s motion for summary judgment).

consideration to only the record that was before the trial court on summary judgment.

2. There Is No Evidence That the Decision to Lay Off Osborne Was Motivated by His Disability

Osborne claims that REI selected him for layoff because of his disability. There is no evidence of this.

To withstand summary judgment on a disparate treatment claim, a Washington Law Against Discrimination (“WLAD”) plaintiff may (i) provide direct evidence of discrimination or (ii) proceed under the “indirect” method of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Kastanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 490 (1993), *amended*, 122 Wn.2d 483 (1994). Direct evidence, “if believed, proves the fact [of discriminatory animus] without inference or presumption.” *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998). Because there is no direct evidence of disability animus, Osborne must proceed under the indirect *McDonnell Douglas* method.

Under the *McDonnell Douglas* framework, Osborne must first establish a *prima facie* case of discrimination. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172 (2001), *overruled on other grounds*, *McClarty v. Totem Elec.*, 157 Wn.2d 214 (2006). Specifically, he must offer evidence to support four elements: (1) the employee is a member of a protected class, (2) the employee is qualified for the employment position or performing

substantially equal work, (3) the employee suffered an adverse employment action, and (4) similarly situated employees not in plaintiff's protected class received more favorable treatment or there is some other indicia of discrimination. *Kastanis*, 122 Wn.2d at 490; *Ware v. Mut. Materials Co.*, 93 Wn. App. 639, 646-47 (1999). A plaintiff must support each element of her prima facie case with specific and material facts. *Roerber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 135 (2003) (citing *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (Wash. 1996)).

If Osborne establishes his *prima facie* case, the burden shifts to REI to identify a lawful, nondiscriminatory motive for its decision. *Kastanis*, 122 Wn.2d at 490. Once REI does so, Osborne must then produce evidence that REI's stated reason is a pretext for unlawful discrimination. *Id.* at 491. To establish pretext, Osborne must offer evidence indicating that the articulated nondiscriminatory reasons are "unworthy of belief." *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 372 (2005). "Speculation and belief are insufficient to create a fact issue as to pretext. Nor can pretext be established by merely conclusory statements of a plaintiff who feels that he has been discriminated against." *Hines*, 127 Wn. App. at 372.

a) Osborne failed to establish his *prima facie* case

Osborne failed to establish his *prima facie* case because there was no evidence that *any* similarly situated non-disabled employee was treated better than he was. *See, e.g., Raines v. Seattle Sch. Dist. No. 1*, C09-203 TSZ, 2013 WL 496059, at *7 (W.D. Wash. Feb. 7, 2013) (granting summary judgment on WLAD disability disparate treatment claim where plaintiff did not identify “even a single comparator, *i.e.*, a similarly situated non-protected employee who was treated more favorably”). Instead, the evidence before the trial court was undisputed that more than 100 full-time employees were laid off around the same time as Osborne. There was no evidence that Osborne, a part-time employee with limited technical skills working on individual projects, was more valuable than his 100 full-time co-workers who also lost their jobs.

On appeal, Osborne argues that REI treated him differently by walking him to his car after he was informed he was going to be laid off. But this is a post-hoc argument directly inconsistent with what Osborne said in a 2013 email he wrote (using an alias) to a Seattle Times reporter: “Taxi’s lined up one day to take people home after termed.” CP 291. Thus, according to Osborne’s own characterization, other employees were treated similarly to him—by leaving immediately after they were laid off.

As evidence of disparate treatment, Osborne points to the fact that his position was eliminated, a different position was created, and that a non-disabled person was hired.⁷ But this does not constitute evidence of disparate treatment. *See Coon v. Cent. Washington Hosp.*, CV-10-194-RMP, 2011 WL 5025269, at *6 (E.D. Wash. Oct. 21, 2011). In *Coon*, a hospital laid off the plaintiff, who was one of two administrative assistants, because it was experiencing financial difficulties. The plaintiff, who was disabled, sued for discrimination. The court, in granting judgment as a matter of law for the hospital, found that the plaintiff “fail[ed] to satisfy the only disputed prima facie element, disparate treatment” because “[she] was not replaced by anyone after her termination; her position was eliminated.” *Id.* The court did not find it relevant that that the administrative assistant who kept her job was not disabled. *Id.* Similar to the circumstances in *Coon*, where the plaintiff’s position was eliminated and another employee took on her former duties, Osborne’s position was eliminated and his PCI Audit duties were rolled into a higher level, full-time position. It was undisputed below that Osborne was both unable and unqualified to perform the duties of that position. *See* CP 114; 148; 161-63.

⁷ Brief of Appellant at 39-40 (“REI created a new position and staffed it with an employee who did not require accommodation.”).

Without more, Osborne cannot demonstrate a *prima facie* case. See *LaGrant v. Gulf & W. Mfg. Co., Inc.*, 748 F.2d 1087, 1090 (6th Cir. 1984) (“The mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a *prima facie* case.”).

b) REI had a legitimate business reason for Osborne’s layoff

Even if Osborne could establish a *prima facie* case, REI presented strong evidence of its lawful, nondiscriminatory reason for his layoff: In response to marketplace pressures, REI made a strategic business decision to lay off more than 100 employees in support divisions, which included the IT group. More specific to him, Osborne had completed his work on the 2012 PCI audit and was without an assigned role at the time the need for layoffs arose. In a layoff scenario, his position was an obvious choice for elimination.

“[J]ob layoffs and reductions in the work force triggered by poor economic conditions or a bad business climate constitute a legitimate nondiscriminatory reason for a termination.” *Bedow v. Valley Nat. Bank of Arizona*, 755 F. Supp. 276, 278 (D. Ariz. 1989); e.g., *O’Sullivan v. Minnesota*, 191 F.3d 965, 969 (8th Cir. 1999) (“Budgetary and labor management considerations are legitimate, nondiscriminatory reasons for layoff decisions.”). Moreover, a reduction in force is a business decision

and “the wisdom of [it] is not for a court or a jury to decide.” *Doan v. Seagate Tech., Inc.*, 82 F.3d 974, 977 (10th Cir.1996). Even for an employee with a disability, a reduction in force is a legitimate reason for discharge. *See, e.g., Ware*, 93 Wn. App. at 647 (affirming summary judgment for employer who discharged disabled employee as a part of a group layoff of 12 employees).

The Court in *Cluff v. CMX Corp. Inc.*, 84 Wn. App. 634, 639 (1997), affirmed summary judgment for the employer on an employee’s disability discrimination claim after he was discharged as part of a larger reduction in force. Similarly, in *Coon v. Cent. Washington Hosp.*, the district court found a hospital’s rationale for laying off an administrative assistant to be legitimate and nondiscriminatory, where the hospital’s stated reason was that it “fac[ed] extreme financial pressures, and the administrative assistant position was the least necessary for the QCM department.” 2011 WL 5025269 at *6.

Here, the evidence demonstrates that REI’s non-discriminatory reason was almost identical to that of the employers in *Cluff* and *Coon*: staff reductions in non-revenue generating divisions of the Co-op in the face of financial pressures. It is undisputed that more than 100 REI employees were laid off in the latter half of 2012 and early 2013. CP 226; 240; 243; 246-47. Osborne admits as much in an email he sent to a local

reporter. CP 291 (“REI eliminated over 100 positions. Done over several months.”); *see also* CP 226. Witness testimony also confirmed that REI’s business judgment was what motivated the decision to lay off Osborne.⁸ In a lay off situation, REI simply had no business need for a part-time IT employee. CP 228; 192-94.

c) Osborne presented no evidence of pretext

Because REI presented a legitimate reason for Osborne’s layoff, in order to avoid summary judgment Osborne was required to present probative evidence that REI’s stated reason was a pretext for disability. But the record contains no such evidence.

Osborne testified that he had no personal knowledge that REI’s decision to eliminate his position was motivated by discriminatory animus because of his disability. Of the three decision makers Osborne identified (Bill Baumann, Ed Telders, and Carlos Melvin), he could not think of anything suggesting that any of the three was biased against disabled workers. Osborne testified that he had “no way of knowing.” CP 199:2-19. It was equally undisputed that Osborne was disabled when REI

⁸ *See* CP 125 (“ . . . we needed to evaluate the budget, funding for all positions, all contractors, all consultants. We were looking at our financial posture.” (Telders Decl.)); 240 (“So the competitive environment changed dramatically in terms of how consumers were shopping . . . which had a number of implications in terms of the IT division.” (Clements Decl.)); 246-47 (“ . . . we needed to reduce the overall expenses for support divisions by the end of quarter 3.” (Clements Decl.)); 273 (“So these meetings weren’t just about Jim’s termination. We had a grander plan that we were maneuvering through in IT for a larger layoff.” (Bradley Decl.)); *see also* 226; 243.

brought him back to work in 2008 and then accommodated him for more than four-and-one-half years. CP 195.

Because Osborne cannot refute that REI laid off employees due to financial struggles, he instead makes bare assertions that REI had inconsistent justifications for his termination, and failed to follow its own policies in his layoff. Brief of Appellant at 41-43. Yet this is a mischaracterization of the facts in this case.

As an initial matter, Osborne cannot show that REI's explanation for his layoff has changed substantially over time. *See Dumont v. City of Seattle*, 148 Wn. App. 850 (2009) (to support a finding of pretext, plaintiff must demonstrate "*substantial changes* over time in the employer's proffered reason for its employment decision") (emphasis added). REI has offered consistent testimony regarding Osborne's layoff. REI has presented unrefuted testimony that it began its layoff process in 2012 by first identifying positions with sun-setting tasks. CP 323 at ¶ 8. Osborne admits as much. CP 988 at ¶ 91 ("As November and December 2012 progressed Mr. Melvin stopped encouraging me to participate in the project. It was at this time that REI began the process of examining expense reduction opportunities through layoffs."); CP 291 ("REI eliminated over 100 positions. Done over several months."); "Terminations due to cost cutting. Sales 2%+ under plan.").

With respect to who made the decision, Michelle Clements, REI's Senior Vice President of Human Resources, did testify that she thought Joe Dell'Orfano and Janet Hanson had made the decision to lay off Osborne, but she later explained that she was basing this on her belief that Bill Baumann and Ed Telders left REI before Osborne, which was mistaken. CP 590. Ed Telders, who unlike Clements had first-hand knowledge of the decision, confirmed that Baumann, not Dell'Orfano or Hanson, was the senior leader involved in the decision. CP 633.

Second, Osborne argues that REI departed from its policies in firing him. This is not supported by the evidence. In particular, Osborne's claim that there was no interactive dialogue prior to his termination is not true. Brief of Appellant at 43. For four-and-one-half years REI accommodated Osborne's disability, including providing him with a home office and allowing him to work in a part-time role. This involved regular check-ins and changes to Osborne's accommodation plan when he requested them. It is true that there were not many changes after June 2010, but that is because Osborne's condition was stable and because he no longer sought to increase his work hours above 28 hours per week.

Thus, Osborne presented nothing more than unsupported assertions to dispute REI's evidence that he was laid off for a legitimate reason. Mere allegations without supporting evidence are insufficient for the

Plaintiff to prove pretext. *See Cluff v. CMX Corp. Inc.*, 84 Wn. App. 634, 639-40 (1997) (plaintiff failed to create any inference that company's decision to restructure was a pretext to terminate him by asserting, without substantiation, that the company was financially stable). Accordingly, Osborne did not show pretext and summary judgment was appropriate. *Ware*, 93 Wn. App. at 646-47; *Cluff*, 84 Wn. App. at 639; *O'Sullivan*, 191 F.3d at 970.

3. Osborne's Wrongful Discharge Claim Was Properly Dismissed on Summary Judgment

Osborne's wrongful discharge claim was similarly lacking in supporting evidence. Employment in Washington is at will. An exception to this rule allows an employee to bring a tort action if his or her termination contravenes public policy. But this exception is "applied cautiously to avoid allowing the exception to swallow the general rule." *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 495 (2004); *see also Barnett v. Sequim Valley Ranch, LLC*, 174 Wn. App. 475, 491 (2013) *review denied*, 178 Wn.2d 1014 (2013) (citing *Sedlacek v. Hillis*, 145 Wn.2d 379, 390 (2001)).

To prove a claim for a wrongful discharge in violation of public policy, Osborne was required to establish: (1) the existence of a clear public policy; (2) that discouraging the conduct in which he engaged would jeopardize the public policy; (3) that the public policy-linked

conduct caused dismissal; and (4) that REI cannot offer an overriding justification for the dismissal. See *Hollenback v. Shriners Hosp. for Children*, 149 Wn. App. 810, 825-26 (2009).

Osborne's claim fails for the independent reasons that he cannot satisfy the third and fourth elements because his consumer lawsuit had nothing to do with his layoff. To show causation, there must be sufficient evidence of a nexus between the lay off and the policy-linked conduct. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 179 (1994). Osborne cannot show causation because (1) no temporal link exists between the filing of his lawsuit and his layoff, (2) REI treated Osborne well during that four-and-one-half-year period, and (3) his managers were kept separate from Osborne's lawsuit.

First, in the absence of direct evidence of causation, "[c]lose temporal proximity between protected activity and the alleged retaliatory action can establish a causal link between the two events," *Wilton v. Master Solutions, Inc.*, No. C12-66RSL, 2013 WL 1561927, at *6 (W.D. Wash. Apr. 12, 2013), but "a court may not infer causation unless the time between the employer's knowledge of the protected activity and the termination is very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that a lapse of even three or four months is too long to infer causation); *Macon v. United Parcel Serv., Inc.*, No. C12-260

RAJ, 2012 WL 5410289, at *9 (W.D. Wash. Nov. 5, 2012) (dismissing plaintiff's wrongful discharge claim because gaps of 20 and 16 months between the policy-protected conduct and termination, without any other allegations, did not provide a sufficient causal link).

Osborne cannot rely on a temporal nexus to establish causation because the time frame is well beyond 20 months. Osborne inaccurately states that this time frame was "just four weeks" from the settlement of his lawsuit to termination. Brief of Appellant at 41, n. 114. First of all, the layoff did not occur until *more than two and one half years later* after Osborne filed his lawsuit (in June 2010), and it was not "four weeks" from settlement to termination, it was more than four months. Under no timeline does Osborne meet the "close temporal proximity" requirement to show causation. See *Wilton*, 2013 WL 1561927, at *6; *Macon*, 2012 WL 5410289, at *9.

Osborne tries to get around this by lumping the filing and settlement of his lawsuit together. But even that significantly distorts the facts and overstates the temporal proximity. Osborne's consumer lawsuit was settled in early August 2012, CP 3, and the decision to lay him off was not made until December 2012. CP 323. Osborne himself described his layoff as occurring four months after the settlement, not four weeks. CP 1026.

Even a close temporal nexus is insufficient to show causation where the plaintiff was terminated for a legitimate reason. *See Plemmons v. U.S. Bancorp*, No. 04-5860, 2006 WL 290557, at *6 (W.D. Wash. Feb. 7, 2006) (“[Plaintiff] makes only a temporal nexus to her discharge; she was terminated eight days after her conduct of refusing to pre-date the loan documents. But coincidence is not proof of causation.”)

Second, an employee’s attempt to show causation fails when the employer has taken positive actions between the time an employee took a protected action and was fired. *Manatt v. Bank of Am.*, NA, 339 F.3d 792, 802 (9th Cir. 2003) (“We find no evidence, direct or circumstantial, from which a jury might infer causation. . . . In the period of time between Manatt’s complaint and the Bank’s decisions not to transfer her, the Bank gave Manatt a pay raise and selected her for a prestigious assignment with the United Way.”). In the period of time between Osborne filing a lawsuit against REI and his termination, REI continued to satisfactorily employ Osborne for two-and-a-half years.

Third, there was no evidence that any decision-maker acted upon or even knew any of the details of Osborne’s lawsuit. CP 200-01. In fact, REI consciously kept Osborne’s consumer lawsuit separate from his status as an employee. CP 741 at ¶ 3. His lawsuit was handled by REI Legal

and outside counsel, without the involvement of Osborne's management or human resources. *Id.*

As explained above, REI's business justification is unassailable. Osborne admits that his layoff came in the midst of a larger layoff at REI. CP 988; CP 291 (email from Osborne to a Seattle Times reporter) ("REI eliminated over 100 positions. Done over several months."); "Terminations due to cost cutting. Sales 2%+ under plan."). REI no longer had a need for the IT Consultant position as it was downsizing and consolidating, and Osborne was, without dispute, not qualified for the CPM position. CP 160-61; 163; 166-67; 278. Finally, there was no evidence that any decision makers were motivated by Osborne's consumer lawsuit. CP 200-201.

Finally, Osborne presents no admissible evidence to support his public policy claim. Osborne again tries to rely on Karen Halverson's declaration, but this declaration is wholly devoid of specific evidence and relies primarily on hearsay. *Cofer v. Pierce Cnty.*, 8 Wn. App. 258, 262 (1973) (a party cannot use an affidavit or declaration based on hearsay to create a question of fact); *Dunlap v. Wayne*, 105 Wn.2d 529, 535 (1986) ("A court cannot consider inadmissible evidence when ruling on a motion for summary judgment."). The trial court correctly determined that it did

not create a material dispute of fact sufficient to defeat summary judgment.

E. The Trial Court Correctly Denied Osborne's Motion to Compel

In September 2014, REI produced in discovery approximately 245 emails it had forensically recovered from the hard drive of former REI IT supervisor Ed Telders. Telders was Osborne's supervisor in 2012 when Osborne was laid off. Telders was laid off in March 2013, a few months after Osborne. Osborne requested Telder's Outlook Calendar in his RFP 55. CP 1513. Because it had been more than a year since Telders' layoff, his Outlook Calendar was not available on REI's network. CP 1692. However, REI was able to locate the hard-drive from the work station Telders had used. Telders, who was an information security specialist, had secured the drive with a double layer of encryption. As a result, REI was forced to engage a vendor to try and see if anything could be recovered from the drive. *Id.* This process took several months and the calendar was not saved to the drive. *Id.* The drive did contain a folder with approximately 245 emails Telders had saved that related to Osborne. *Id.*; CP 1709-10. REI promptly reviewed and produced these documents, most of which were duplicates of documents that had already been produced from other sources, and none of which proved material to the litigation. *Id.*

On November 26, 2014, in response to the Telders production, Osborne filed a motion to compel, asking the trial court to appoint a special master to conduct a comprehensive audit of all the steps REI undertook to respond to all of Osborne's discovery requests in the litigation. CP 1396. Osborne did not point to any discovery violations by REI. Nor could he identify any particular documents material to the litigation that had not already been produced. REI opposed the motion, arguing that Osborne was attempting to manufacture a phony dispute for tactical advantage. CP 1673-1686. The trial court properly exercised its discretion and denied the motion.

V. CONCLUSION

Employees with disabilities are entitled to reasonable accommodations to help them perform their jobs. But employees with disabilities are not immune from the economic forces that sometimes result in employee layoffs. In layoff situations, employees with disabilities are entitled to equal, not better, treatment under the law. When market forces required cutbacks at REI's headquarters in late 2012 and early 2013, Osborne's position was correctly and fairly identified as one of the more than 100 positions appropriate for reduction. This was not discrimination or retaliation and it was not a failure to accommodate. The

jury's verdict and the trial court's summary judgment orders dismissing
Osborne's claims should be affirmed.

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

JAMES OSBORNE,

Appellant,

v.

RECREATIONAL EQUIPMENT, INC.,

Respondent.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, the following:

- **BRIEF OF RESPONDENT RECREATIONAL EQUIPMENT, INC.; and**
- **This CERTIFICATE OF SERVICE**

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Dated this 18th day of December, 2015 at Seattle, Washington



 Mary Klemz, Legal Assistant