SUPREME COURT OF THE STATE OF WASHINGTON

No. 1043066

Kimberly Bogardus, Appellant

v.

City of Yakima, Appellee

City of Yakima's Answer to Petition for Review

Bundy Law Group, PLLC
5429 E 111th Pl
Tulsa, OK 74137
Attorneys for Appellee

/s Elena C. Bundy
ELENA C. BUNDY
WSBA No. 38836
(206) 518-3021
elena@bundylawgroup.com

/s Kristofer J. Bundy
KRISTOFER J. BUNDY
WSBA No. 19840
(206) 372-3627
kris@bundylawgroup.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

I. INTRODUCTION

After losing at the trial court and the Court of Appeals, Ms. Bogardus seeks review here. The core of this employment case is that Ms. Bogardus represented to the Social Security Administration that she was fully and permanently disabled and that she had quit working forever, leading them to grant her full and permanent disability benefits. Yet her legal theory in this case is that she could work and that the City should have given her a different job, without any explanation for this contradiction. The United Stated Supreme Court has held that a claim with these core facts is barred by judicial estoppel:

> *we hold that* an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.

Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 806 (1999) (emphasis added).

The Court of Appeals followed the precise holding of *Cleveland*, stating as follows:

> Here, Ms. Bogardus offered no explanation for why or how her assertion in her SSDI application that she was too disabled to work could be reconciled with her later position that she could, in fact, work had the City offered her a reasonable accommodation. Her SSDI application negates element (2) of her WLAD failure to accommodate claim—that she was qualified to perform the essential functions of the job. *Because she provides no explanation for her contrary positions, her accommodation claim cannot survive the City's summary judgment motion.*

Bogardus v. City of Yakima, No. 40060-3-III (Wash. Ct. App. April 13, 2025) (unpublished) at p. 11 (emphasis added).

Ms. Bogardus seeks review on three, or possibly four, grounds. First, that "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." RAP 13.4(b)(1). This ground fails because the Court of Appeals fully followed *Cleveland.* To make her case that *Cleveland* and the Court of Appeals decision are

in conflict, Ms. Bogardus misapplies the straightforward holding of *Cleveland* (that a claimant's ADA claim is barred by judicial estoppel where the claimant fails to explain the "apparent contradiction" in their positions in two different forums). Just like the Court of Appeals held here.

Second, Ms. Bogardus claims that this case presents "a significant question of law under the Constitution of the State of Washington or of the United States is involved." RAP 13.4(b)(3). Yet she offers no argument for that standard.

Third, Ms. Bogardus argues that "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The foundations of her argument are (1) the demonstrably false assertion that the City never tried to accommodate her in the six years before 2020; and (2) the false and unsupported assertion that, for six years, the City knew

her job aggravated her condition, and had medical opinions as to that causation. As shown below, all of these statements in Ms. Bogardus' Petition are made without citation to evidence, rendering them meaningless.

Finally, Ms. Bogardus makes an argument starting on page 24 of her Petition that the Court of Appeals decision conflicts with Court of Appeals precedent. While she does not cite to RAP 13.4(2), the City will address her argument as if she had. That standard of review fails because there is no conflict. Ms. Bogardus' argument that she was terminated for taking protected leave is directly contradicted by the record, as correctly found by the Court of Appeals:

> The letter expressed that Ms. Bogardus was not terminated for using protected leave, but instead for being in an "unauthorized leave without pay status" for which she had been disciplined prior.

See Court of Appeals decision at p. 14.

For these reasons, and for the reasons set forth below, the Petition for review should be denied.

II. STATEMENT OF THE CASE

The Court of Appeals' decision accurately sets forth the relevant facts of the case on pages 1-7. The City incorporates those facts here be reference.

III. ARGUMENT

A. RAP 13.4(b)(1) does not apply because the Court of Appeals fully followed *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

Ms. Bogardus' primary argument for why this court should accept review is that the Court of Appeals decision conflicts with *Cleveland.* This argument is belied by the facts and law of this case, and the Court of Appeals perfectly applied *Cleveland* to those facts.

The holding in *Cleveland* was that, because the plaintiff there failed to explain her contradictory positions, her case was dismissed under judicial estoppel:

> *we hold that* an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.

Cleveland at 806.

The Court of Appeals held the same here:

> Here, Ms. Bogardus offered no explanation for why of how her assertion in her SSDI application that she was too disabled to work could be reconciled with her later position that she could, in fact, work had the City offered her a reasonable accommodation. . . . *Because she provides no explanation for her contrary positions, her accommodation claim cannot survive the City's summary judgment motion.*

See Bogardus v. City of Yakima, No. 40060-3-III (Wash. Ct. App. April 13, 2025) (unpublished) at p. 11 (emphasis added).

Ms. Bogardus incorrectly characterizes the holding of *Cleveland* so that she can argue that it conflicts with the Court of Appeals' decision below. It does not. The Court of Appeals properly applied *Cleveland's* holding by

focusing on whether Ms. Bogardus offered a sufficient explanation for her contradictory positions *at the summary judgment stage.* She offered nothing.

Therefore, the argument that the Court of Appeals decision contradicts *Cleveland* is incorrect. Review should not be accepted under RAP 13.4(b)(1).

B. Review should not be accepted under RAP 13.4(b)(4) because the factual foundations of Ms. Bogardus' arguments are false and unsupported.

Ms. Bogardus' second argument for why review should be accepted is that the Court needs to give guidance as to "the standard for a failure to engage in the interactive process claim, as the lower court overlooked respondent's six-year failure to act." This argument fails for two reasons. First, it fails because there is more than sufficient caselaw on employers' duties to "engage in the interactive process" and to accommodate disabilities. *See e.g. Goodman v. Boeing Co.,* 127 Wn.2d 401, 408–409,

899 P.2d 1265 (1995); *Frisino v. Seattle Sch. Dist. No. 1,* 160 Wn. App. 765, 783, 249 P.3d 1044 (2011).

Second, this argument is based on two false premises. The first false premise is that the City took no action for six years. Ms. Bogardus made the same argument at the trial court. The City responded with the following undisputed facts at the trial court and Court of Appeals:

> Ms. Bogardus' Opening Brief contains statements that do not comply with RAP 10.3(a)(5) and (6),[1] and should not be considered. For example, "Statement 5" states, "Respondent did not conduct any sort of interactive process or inquiry to even attempt to determine what type of accommodations could be provided to Ms. Bogardus until July 20, 2020," citing CP 604-605. *See* Opening Brief at p. 4. The Clerk's Papers cited by

[1] Ms. Bogardus' briefing at the trial court contained statements similarly unsupported (partially or fully) by citation or contradicted by evidence – so many unsupported and contradicted statements that the chart detailing them is 20-pages long. CP 712 (5:4-10), CP 726-745.

Ms. Bogardus consist of eight pages of Ms. Tresca's deposition testimony in which she references her personal involvement in the July 20, 2020 interactive meeting. CP 604-604. But Ms. Tresca's deposition testimony contained in CP 604-605 makes clear that there were other interactive discussions with Ms. Bogardus (*e.g.,* "there was a discussion with her about part-time, I would consider that an effort on part of the transit to accommodate her with some other type of alternative position."). CP 604 (45:9-20).

In addition, Ms. Tresca's testimony outside of CP 604-605 refers to other interactive discussions with Ms. Bogardus, for example:

We didn't have any specific formal requests from her in the beginning. We engaged in a discussion with her based on her requests for leave related to a medical condition. So I would consider that a request, even though she didn't specifically say she needed an accommodation… it would have been several years before the interactive discussion that we had when she returned from – and along the way there were discussions, and my understanding was there were also discussions at the department level with [Ms. Bogardus] about possible accommodations. CP 609

(39:2-11), CP 604 (45:9-20), CP 607-608 (55:3-58:5), CP 661 (72:6-25).

The declaration of Transit Manager, Alvie Maxey, also belies Ms. Bogardus' "Statement 5." Mr. Maxey declared that an alternative position was suggested to Ms. Bogardus prior to the July 20, 2020 meeting "as a possibility for allowing her time off as needed, improving her attendance, and building up her leave banks." CP 222.

And Ms. Bogardus' deposition testimony refutes "Statement 5." Ms. Bogardus testified that the City raised the possibility of the Extra Board position "quite a bit"; "That was – that was every time they – they were asked about trying to help me get another position. Extra board came up all the time. So I honestly don't know how many times, but it was quite a bit." CP 80 (191:25-192:11).

Also, the evidence shows that the City's focus on a position offering more flexible attendance made sense given that Ms. Bogardus admittedly did not tell anyone at the City that she couldn't physically do her job. CP 551 (144:8-25) (When asked who at the City she told that she wasn't able to physically do her job, Bogardus testified, 'I didn't because I was trying to do what I could do to keep my job.'). Nor did she tell anyone at the City that driving was causing her any sort of health problems:

> Q. My question is did you tell anyone at the City that the bouncing around was causing you health problems? The bouncing around on the bus was causing you health problems?
>
> A. No.
>
> CP 550-551 (140:18-141:7). It was Ms. Bogardus who refused to try the Extra Board position because, as she explained during her deposition, she didn't want to reduce her hours for financial reasons. CP 552 (147:13-25).

Therefore, the claim that the City failed to act for six years is demonstrably false.

The second false premise is Ms. Bogardus' multiple statements in her Petition to the effect that, prior to the accommodation meeting on July 20, 2020, the City "receiv[ed] consistent medical documentation explaining that the employee's medical condition . . . was being aggravated by her job duties." *See* Petition for Review at p. 2. She makes the same claim twice on page 5 of the

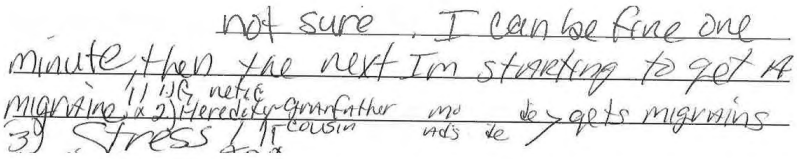
Petition ("Respondent had written notice of . . . the aggravation of her disability caused by her job of driving a bus . . . ."); ("Appellant's disability was being aggravated be her regular job . . . ."); then again on page 21 of the Petition ("Respondent had clear, written notice from Ms. Bogardus' physicians for six years that the physical demands of driving a bus aggravated her medical conditions. . . ."); and finally on p. 23 of the Petition ("here, Ms. Bogardus job was aggravating her disability.") Not one of these statements is supported by a citation to the record, rendering them meaningless.

In fact, Ms. Bogardus admitted during her deposition that neither she nor her doctors knew if the "bouncing around" on the bus triggered her migraines:

> Q. So when your primary health care provider says that triggers to migraines were unknown, that would not be an accurate statement; is that right?
>
> A. The unknown -- I don't know when I'm going to get them, and I can't say -

> - I can't say for sure that that didn't help the situation, you know, being on the bus. Being bounced around all day. It didn't help the situation. I can't say that's a trigger, and they can't say. They don't know, and I don't know. But that, I'm sure, didn't help anything with the situation because it's physically putting my body through stress.

CP 550 (139:23-140:8). When asked by SSA, "What causes your headaches," Ms. Bogardus responded as follows:



CP 128 (Question 3). And she never told the City that driving was causing her any sort of health problem, or that she couldn't physically do her job. CP 550-551 (140:18-141:7), 551 (144:8-25) (When asked who at the City she told that she wasn't able to physically do her job, Ms. Bogardus testified, "I didn't because I was trying to do what I could do to keep my job.").

For these reasons, Ms. Bogardus' argument that review should be accepted under RAP 13.4(b)(4) also fails.

C. Ms. Bogardus' argument that the Court of Appeals decision conflicts with Court of Appeals precedent is based on the inaccurate claim that she was terminated for taking protected leave – a fact clearly contradicted by the record.

Finally, Ms. Bogardus makes an argument starting on page 24 of her Petition that the Court of Appeals decision conflicts with Court of Appeals precedent. While she does not cite to RAP 13.4(2), the City will address her argument as if she had. That standard for accepting review fails because there is no conflict with precedent. Ms. Bogardus' argument is premised on the claim that she was terminated for taking legally protected leave. Petition for Review at p. 24. Yet, after a substantial review of the record, the Court of Appeals found that claim to be unsupported by the facts – she was terminated for repeatedly improperly taking leave:

> The letter expressed that Ms. Bogardus was not terminated for using protected leave, but instead for being in an "unauthorized leave without pay status" for which she had been disciplined prior.

Bogardus v. City of Yakima, No. 40060-3-III (Wash. Ct. App. April 13, 2025) (unpublished) at p. 14.

Therefore, there is no conflict with Court of Appeals precedent and if Ms. Bogardus is seeking review under RAP 13.4(4), it should be denied.

IV. CONCLUSION

The Court of Appeals correctly affirmed the trial court's dismissal of Ms. Bogardus' accommodation claim for multiple reasons, primarily because Ms. Bogardus applied for and received a finding of full and permanent disability by the Social Security Administration, meaning that she could not work, that it was not possible to accommodate her, and that her claim was barred by judicial estoppel after she failed to explain her contradictory positions. This is fully consistent with the

holding in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

And Ms. Bogardus' other arguments for why review should be accepted are based on demonstrably false and unsupported factual claims. The Petition for review should be denied.

Certificate of Compliance

We hereby certify that that this brief contains 2470 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits).

DATED this 16th day of July, 2025.

Bundy Law Group, PLLC
5429 E 111th Place
Tulsa, OK 74137
Attorneys for Appellee

/s Elena C. Bundy
ELENA C. BUNDY
WSBA No. 38836
(206) 518-3021
elena@bundylawgroup.com

/s Kristofer J. Bundy
KRISTOFER J. BUNDY
WSBA No. 19840
(206) 372-3627
kris@bundylawgroup.com

Proof of Service

On July 16, 2025, I caused the CITY OF YAKIMA'S ANSWER TO PETITION FOR REVIEW BRIEF to be e-filed with the Washington State Supreme Court and served on Appellant's attorney via e-mail to Favian Valencia at favian@sunlightlaw.com and alejandra@sunlightlaw.com.

DATED this 16th day of July, 2025.

/s Elena C. Bundy
Elena C. Bundy, WSBA No. 38836

BUNDY LAW GROUP

July 16, 2025 - 1:07 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	104,306-6
Appellate Court Case Title:	Kimberly Bogardus v. City of Yakima
Superior Court Case Number:	21-2-00063-6

The following documents have been uploaded:

- 1043066_Answer_Reply_20250716130313SC053591_6654.pdf
  This File Contains:
  Answer/Reply - Answer to Motion for Discretionary Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- ALEJANDRA@SUNLIGHTLAW.COM
- elena@bundylawgroup.com
- favian@sunlightlaw.com
- sunlightlawpllc@gmail.com

Comments:

Sender Name: Kristofer Bundy - Email: kris@bundylawgroup.com
Address:
5429 E 111TH PL
TULSA, OK, 74137-7609
Phone: 206-372-3627

Note: The Filing Id is 20250716130313SC053591