NO. 40060-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

Kimberly Bogardus,

Appellant/Plaintiff

v.

The City of Yakima, et al,

Respondent/Defendant

PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals decision conflicts with longstanding precedent and the rights of Washington disabled employees that are willing and able to work with reasonable accommodations. The decision creates a vague presumption that employees who request or receive Social Security Disability Insurance (SSDI) benefits are presumed to be unable to perform the essential functions of their job, which is in direct conflict with established precedent in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). Besides conflicting with the *Cleveland* precedent, this is also an issue of first impression for Washington State Courts.

This case also provides the perfect opportunity to establish clear guidance as to what makes up a claim of failure to engage in the interactive process. Currently, failure by an employer to engage in the interactive process is an actionable violation of the Washington Law Against Discrimination, 49.60 RCW ("WLAD"), but we do not have a clear legal standard of how an

employee can establish this claim. *Dean v. Municipality of Metropolitan Seattle-Metro,* 104 Wn.2d 627, 632, 708 P.2d 393 (Wash. 1985). The question posed by the facts in this case is: Does an employer violate WLAD by delaying the interactive process for six years, despite receiving consistent medical documentation explaining that the employee's medical condition affected her ability to perform her job and was being aggravated by her job duties? The Court of Appeals decision fails to find a failure to engage in the interactive process despite the fact that Appellant and her physicians requested accommodations over a period of six years, and on the sixth year that Respondent engaged in an interactive conversation, it refused available accommodations in the form of time off and transfer to vacant positions.

The Court of Appeals decision also heightens the burden for employees to demonstrate pretext, even with direct written evidence that the employer's termination letter cited the use of Family Medical Leave Act ("FMLA"), Washington State Paid

Family and Medical Leave ("PFML"), and reasonable accommodation time off as part of the reason for Appellant's written reprimand, suspension and termination.

The conflicts created by the Court of Appeals decision sow confusion for employees, employers, and the lower courts, necessitating this Court's intervention. Clear guidance is urgently needed to ensure that disabled workers in Washington are not forced to choose between seeking essential federal benefits and contributing to our workforce. Allowing disabled individuals who are capable of working with accommodation to remain in the workforce is not only a matter of individual dignity and right but also a significant benefit to the overall economy of Washington State. This Court should grant review to resolve these critical legal conflicts, reaffirm the robust protections of the WLAD, and provide clear guidelines for all.

II. ISSUES PRESENTED FOR REVIEW

1. The *Cleveland* precedent acknowledges that the Social Security Disability Insurance (SSDI) eligibility standard is

different from the employment disability accommodation standard, and that "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side." 526 U.S. 795, 802-03, 119 S.Ct. 1597 (1999). Did the lower court err in holding that Appellant's application for and receipt of SSDI benefits created a presumption that she was unable to perform the essential functions of her job with reasonable accommodation and that Appellant needed to expressly "explain" her SSDI claim even when SSDI administrative judge's written decision is consistent with Appellant's claims, thereby creating an additional element and burden of proof for employees on SSDI to prove a claim of failure to accommodate under WLAD.

2. Failure of an employer to engage in the interactive process is an actionable violation of WLAD and the cause of action accrues when the employer has knowledge that the employee needs an accommodation. *Dean,* 104 Wn.2d 627, 632; *Barnett v. U.S. Air, Inc.,* 228 F.3d 1105, 1114-15 (9th Cir.

2000), *vacated and remanded on other grounds, U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S.Ct. 1516 (2002). Did the lower court err in failing to find that there was an issue of fact that precluded summary judgment when Respondent had written notice of Appellant's disability and the aggravation of her disability caused by her job of driving a bus, and delayed engaging in the interactive process for six (6) years.

3. If an employee becomes disabled and cannot be accommodated in his or her position, the employer must take affirmative steps to help the employee identify and apply for any vacant position for which the employee is qualified. *Davis v. Microsoft Corp.,* 149 Wn.2d 521, 536–37, 70 P.3d 126 (2003). Did the lower err in affirming summary judgment for Respondent when Appellant's disability was being aggravated by her regular job of driving a bus and Respondent refused to consider transferring her to a vacant office position that she was qualified for, thereby, abrogating *Davis.*

4. Whether an employer has made a sufficient effort to provide a reasonable accommodation is generally a question of fact for the jury. *Johnson v. Chevron U.S.., Inc.,* 244 P.3d 438, 159 Wash.App. 18, 29-32 (Wash. App. 2010); *Davis,* 149 Wn.2d 521, 536–37. Did the lower court err in affirming summary judgment for Respondent when there was evidence that Respondent denied Appellant's request to be re-assigned to a vacant office position and/or be allowed time off as an accommodation and determined these facts to be insufficient to prove a claim of reasonable accommodation?

5. To survive summary judgment on the element of pretext in WDVPP claims, "the employee needs only to present evidence sufficient to create a genuine issue of material fact whether 'discrimination was a substantial factor in an adverse employment action, not the only motivating factor.'" *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty.,* 189 Wash.2d 516, 404 P.3d 464 (2017). Did the Court of Appeals err by failing to find an issue of fact with regards to pretext when Respondent's

termination letter expressly cited the Appellant's use of legally protected medical leave and accommodations as a reason for her discharge, thereby creating a new standard for employees to prove pretext at the summary judgment stage?

6. An employee can establish her claim of WDVPP with direct evidence and preclude summary judgment without having to undergo through the *McDonnell Douglas* burden-shifting analysis. *Mackey v. Home Depot USA, Inc.,* 12 Wn. App. 2d 557, 571, 459 P.3d 371, 381 (2020); *Bittner v. Symetra Nat'l Life Ins. Co.,* 558 P.3d 177, 187 (Wash. App. 2024). Did the Court of Appeals decision err in requiring Appellant to prove pretext under the *McDonnell Douglas* burden-shifting analysis despite Respondent's termination letter explicitly stating that her reprimands, suspension and termination were partly due to taking time off that was designated as "FMLA," "PFML" and taken as an accommodation?

7. WLAD holds that it is to be construed liberally to accomplish its purpose of protecting employees from unfair

treatment and discrimination. RCW 49.60.010-.020. Did the Court of Appeals decision err by failing to construe Appellant's WLAD claims liberally?

III. STATEMENT OF THE CASE

Petitioner Kimberly Bogardus began her employment with Respondent, the City of Yakima, as a bus driver in 2001. CP 791. Around 2014, Ms. Bogardus began experiencing debilitating migraines and related back and neck conditions that were progressively aggravated by the physical demands of her job. CP 262. On September 11, 2014, Appellant's physician provided Respondent written notice in the form of an FMLA form requesting intermittent time off that explained:

> "On occasion when flaring up, difficult to turn head to drive. [...] When this flares up, it is difficult for patient to drive bus. Difficult to turn head from side to side. When neck pain flares up it triggers her migraine headaches." CP 273-276.

Appellant cannot predict when the migraines are coming on, but she can tell when they are about to happen because she feels "off." CP 414. Appellant's physicians recertified her

request for FMLA time off for medical treatment and intermittently for her migraines each year on October 16, 2016, November 30, 2016, January 24, 2017, March 30, 2017, March 30, 2018, September 26, 2018, and March 30, 2019. CP 133. From 2016 until her termination in 2020, Appellant took time off and used her FMLA, PFML, vacation time, sick time and leave without pay—as categorized by Respondent's time off tracker—to avoid driving with migraines, to get medical treatment and take time off to try to heal. CP 148-154, 262, 273-284.

On September 11, 2019, Appellant's physician submitted to Respondent another FMLA form requesting time off for medical treatment and intermittent time off for her migraines, which, for the first time, categorized the migraines as a permanent condition. CP 281-284. The document also informed Respondent that:

> "Patient [suffers from] headache pain [and] migraines. These can induce vision changes,

> numbness, paresthesia of upper extremities, nausea and emesis." CP 283.

Despite receiving these written notices from Appellant's physicians since 2014 and Appellant having to consistently take time off, Respondent failed to initiate any interactive process to discuss accommodations with Ms. Bogardus until July 20, 2020. CP 604-05.

From 2014-2020, Respondent had vacant positions that did not require driving a bus that Appellant was qualified to perform: Respondent had the Transit Office position and filled with other employees on 11/7/14 and 7/15/19; and the Transit Dispatcher position on 6/2/16, 10/1/16, 11/2/16, and 2/17/20. CP 267, 587.

At the July 20, 2020 meeting, Appellant provided Respondent with a chart note from her physician stating, in part, "job of driving aggravating pain." CP 266, 623-626. As documented in Respondent's representative's hand written notes memorializing this meeting, Ms. Bogardus explained that she suffered from bulging disks and pinched nerves causing

migraine headaches since 2014 (increasing due to menopause), and also suffered severe carpal tunnel on both hands, and that she had been getting treatment from a new doctor who recommended surgery, exercises and a wrist brace. CP 610-11. Appellant specifically requested a transfer to the dispatcher and information window positions. CP 611. The dispatcher and information window positions had been granted to her coworker bus drivers as a general transfer and as a light duty position for bus drivers that needed light duty due to surgeries. CP 550. Respondent simply responded to this request for the dispatcher position transfer with: "No. That's not going to happen." CP 550, 610-11. Respondent's only justification of its refusal to offer these position transfers is that the dispatcher position required regular and reliable attendance that Appellant was not able to fulfill. CP 267. The only accommodations that Respondent offered at this meeting was an "Extra Board" and part time bus driver job, which would still require driving. CP 136, 548-549. The only difference of the Extra Board bus driver

position was that it would have required Appellant to confirm whether she could work her shift by 2 PM the prior day, which did not help Appellant because she could not predict her migraines a day in advance. CP 548-549. This would have left her in the same position because if she confirmed a shift, and then had a migraine come on, she would still need to call in to request time off. *Id.* Appellant explained this to Respondent and the only response she got was: "Oh, yeah. I guess that wouldn't work." CP 548-549.

On July 20, 2020, Appellant had exhausted her FMLA time off for 2020. CP 137. Appellant made an effort to continue working in her bus driver position and was able to successfully perform her duties intermittently until August 17, 2020. During that time, however, on July 28, 2020, Appellant filed a Labor and Industries claim for carpel tunnel syndrome related to driving the bus. CP 175. Thereafter, Appellant had to call in sick on August 4th and 5th—Respondent still failed to grant

Appellant time off as an accommodation for this time off. CP 602, 685. On August 11, 2020, Appellant, for the first time, directly requested in writing unpaid leave as an accommodation. CP 137-138. Respondent denied this accommodation request citing a policy of only granting time off as an accommodation for "temporary medical condition when an employee has provided an anticipated date of return"—this policy was never produced by Respondent. CP 138.

On August 17, 2020, Respondent assigned Appellant to drive a bus with a broken down suspension and broken down seats. CP 78. While driving this bus, Appellant drove over a bump that jarred her neck and exacerbated her back, neck and migraines. *Id.* Appellant took time off to see her physician. *Id.* Respondent admits that it received a:

> "[D]octor's note dated August 20, 2020 that retroactively excused Ms. Bogardus from work in connection with 'migraines and back pain' and stated, 'Return to normal duties 8/24/2020.'" CP 266.

Respondent ignored this request for time off and simply categorized the time off as "leave without pay." CP 138.

Respondent Disciplined and Terminated Appellant For Taking Protected Time Off

On August 27, 2020, Respondent terminated Ms. Bogardus. CP 299-302. The termination letter indicates that the termination was due to taking time off that was categorized as unauthorized leave without pay—it cited August 4-5, 2020 as a violation and violations that were documented in reprimand letters dated February 14, 2017 and September 10, 2018. CP 299. Each of these reprimand letters and the termination letter faults Appellant for using up her PFML and FMLA leave—which is the reason that Respondent categorized her additional time off as "unauthorized leave without pay." CP 136, 292, 295. Respondent initially approved and categorized, in its time off tracker, Appellant's time off as "FMLA" and "PFML"—the same time off that is partly used against Appellant in the termination and reprimand letters. CP 152-154.

Appellant's Applications For And Receipt of SSDI Benefits

On May 12, 2020, Appellant applied for Social security disability indicating that her illness, injuries or conditions limited her ability to work due how driving, having to turn her head, being bounced up and down was causing her consistent pain. CP 95. On October 18, 2021, the first SSDI application was denied. CP 613-614.

On January 13, 2021, Appellant's attorneys submitted a second SSDI application. CP 116-126. Appellant's attorney's—through an interviewer identified as "A. Sanchez"—documented in a "Disability Report" questionnaire that "Claimant's alleged onset date" was April 17, 2020—this questionnaire was not signed by Appellant. CP 78, 124. The Court of Appeals decision misinterpreted this fact by framing it as a statement made by Appellant on her "application that that she had stopped working on April 17, 2020" instead of a legal allegation made by Appellant's legal representatives. Ct. App. Decision at 5-6.

Appellant's second SSDI application was initially approved finding her disabled as of March 17, 2022. CP 615-18. After Appellant's legal representatives appealed, a second ruling was made that changed the effective date of disability. CP 195-200; App. 2-7. On April 20, 2023, SSDI administrative law judge, Jennifer Smiley, held a hearing and made the following relevant finding:

> "2. The claimant has not engaged in substantial gainful activity since April 17, 2020, the alleged onset date (20 CFR 404.1520(b) and 404.1571 et seq.).
> The earnings record indicates that the claimant worked at levels consistent with substantial gainful activity into 2020. [Ex 11D; 4D]. The evidence as a whole, including the claimants hearing testimony and statements to providers and to staff involved in her workers compensation claim, indicate that she had only been working intermittently from April 2020 into August 2020, when she was ultimately terminated due to her impairments and resulting absences. [Ex 4E; 2F]. There is no indication that the claimant worked at levels consistent with substantial gainful activity after the alleged onset date. I therefore find that the claimant was not engaged in substantial gainful activity since the alleged onset date." CP 195; App. 2.

In her decision, SSDI judge Smiley granted Appellant's SSDI application for her impairments of bilateral carpal tunnel syndrome, degenerative joint disease and degenerative disc disease of the lumbar and cervical spine, fibromyalgia, obesity, depressive disorder, anxiety disorder, and ADHD effective April 17, 2020. CP 195-196; App. 2-3.

Procedural History

On January 19, 2021, Appellant filed suit against Respondent for failure to accommodate, disability discrimination and wrongful discharge in violation of public policy (Appellant made other claims, but those are not included in this petition). The trial court granted summary judgment to Respondent, and the Court of Appeals affirmed on April 3, 2025. Appellant filed a motion for reconsideration, which was also denied by the Court of Appeals on May 21, 2025. This petition timely follows.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review pursuant to RAP 13.4(b)(1), (3) and/or (4) because the Court of Appeals' decision conflicts with established precedent from the U.S. Supreme Court and this Court, and it raises issues of substantial public interest that require this Court's intervention to provide clarity.

A. The Court of Appeals' Decision Conflicts with U.S. Supreme Court Precedent and Creates an Issue of First Impression Regarding an Employee's Receipt of SSDI Benefits.

The Court of Appeals decision effectively creates a new, heightened burden for disabled Washington employees who have applied for or received SSDI benefits. This holding directly conflicts with the U.S. Supreme Court's decision in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999); *See also Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 957 (9th Cir. 2013) (Finding that the employee's SSDI benefit applications did not inherently conflict with her ADA claim because SSDI

application did not consider the possibility of reasonable accommodation). In *Cleveland*, the Court held that the pursuit and receipt of SSDI benefits does not automatically estop a recipient from pursuing an ADA claim. *Id*. at 802-03. The Court reasoned that the two statutory schemes are not inherently in conflict because the Social Security Administration (SSA) does not consider the availability of "reasonable accommodation" when determining disability. An individual can be "unable to engage in any substantial gainful activity" for SSDI purposes and simultaneously be a "qualified individual" who can perform the essential functions of her job *with* reasonable accommodation for ADA/WLAD purposes. *Id*.

The Court of Appeals erred by creating a presumption that Ms. Bogardus was unable to perform the essential functions of her job simply because she received SSDI benefits. It further erred by requiring her to "explain" an apparent contradiction when no true contradiction exists. The SSDI

administrative judge's decision explicitly noted that Ms. Bogardus worked intermittently until she was terminated in August of 2020 "due to her impairments and resulting absences." (CP 195; App. 2). This finding is perfectly consistent with Ms. Bogardus's WLAD claim: she could have continued to work had Respondent reasonably accommodated her need for intermittent leave or transferred her to a vacant position that did not aggravate her conditions. The lower court decision seems to hinge on its misinterpretation that appellant claimed that she had not worked at all after April 2020, but that is not what the record reflects. The SSDI ruling explicitly outlines the fact that it considered appellant testimony and her work records and specifically acknowledges that the record established that appellant did continue to work intermittently through August 2020, but found that it was not sufficient to constitute "substantial gainful activity" under its definition. *Id.* There are no inconsistencies between appellant claim of failure to accommodate, and her claim for SSDI benefits.

The lower court's decision forces disabled employees into an impossible choice: forgo essential disability benefits or forfeit their civil rights under WLAD. This is an issue of first impression for this Court and one of substantial public importance that requires clarification.

B. This Court Should Grant Review to Clarify the Standard for a Failure to Engage in the Interactive Process Claim, as the Lower Court Overlooked Respondent's Six-Year Failure to Act.

The WLAD requires employers to take affirmative steps to accommodate disabled employees. A core component of this duty is the interactive process. *Dean v. Mun. of Metro. Seattle*, 104 Wn.2d 627, 639 (1985). An employer's duty to engage in this process is triggered once it has notice that an employee has a disability requiring accommodation. *Id*.

In this case, Respondent had clear, written notice from Ms. Bogardus's physicians for six years that the physical demands of driving a bus aggravated her medical conditions. Yet, for six years, Respondent did nothing. It made no inquiry

into the extent of her limitations or what accommodations might be possible. It was not until July 2020, at Ms. Bogardus's insistence, that any discussion occurred. This prolonged and willful inaction is a clear breach of the duty to engage in the interactive process. The Court of Appeals' failure to recognize this breach as a triable issue of fact effectively renders the employer's duty meaningless. This Court should grant review to establish a clear and workable standard for what constitutes a failure to engage in the interactive process, particularly in cases of unreasonable delay.

C. This Court Should Establish a Clear Standard for Claims of Failure to Engage in the Interactive Process.

This Court has held that when a disabled employee cannot be accommodated in their current position, reassignment to a vacant position for which the employee is qualified is a required form of reasonable accommodation. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 536-37 (2003). The employer must "take affirmative steps to help the employee identify and

apply for any vacant position for which the employee is qualified." *Id*.

Here, Ms. Bogardus's job was aggravating her disability. Respondent had vacant positions—Transit Dispatcher and Transit Office Assistant—that did not involve driving and for which Ms. Bogardus was qualified. When Ms. Bogardus specifically requested a transfer to the dispatcher position during the July 2020 meeting, Respondent summarily refused, stating, "No. That's not going to happen." (CP 550, 610-11). Respondent's only justification was an unsubstantiated claim that she could not maintain "regular and reliable attendance," the very issue an accommodation is meant to address. This outright refusal to consider a viable and available accommodation is a direct violation of its duties under WLAD and this Court's holding in *Davis*. Furthermore, whether an accommodation is reasonable is a question of fact for a jury.

Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 29 (2010). Summary judgment was therefore inappropriate.

D. The Court of Appeals' Decision Conflicts with this Court's Precedent Regarding an Employer's Duty to Reassign a Disabled Employee.

To survive summary judgment on a discrimination or retaliation claim, a plaintiff need only create a "genuine issue of material fact whether 'discrimination was a substantial factor in an adverse employment action...'" *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty.*, 189 Wn.2d 516, 526 (2017).

In this case, Ms. Bogardus presented direct, "smoking gun" evidence of Respondent's unlawful motive. The written reprimands, suspension notice, and termination letter explicitly state that the adverse actions were taken because Ms. Bogardus took time off. (CP 292, 295, 299). Respondent's own records show this time off was categorized as FMLA and PFML leave. (CP 152-154). An employer cannot lawfully discipline or terminate an employee for using legally protected leave.

The Court of Appeals erred by requiring Ms. Bogardus to proceed through the *McDonnell Douglas* burden-shifting framework. When a plaintiff presents direct evidence of a discriminatory motive, the framework is inapplicable. *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 571 (2020). The letters themselves create a genuine issue of material fact as to whether Ms. Bogardus's use of protected leave was a substantial factor in her termination. The lower court's decision sets a dangerous precedent, allowing employers to escape liability even when they document their own illegal motives.

E. The Court of Appeals Erred by Heightening the Burden for Employees to Demonstrate Pretext, Even with Direct Written Evidence of a Discriminatory Motive.

This Court has clearly held that to survive summary judgment, an employee need only produce evidence sufficient to create a "genuine issue of material fact whether 'discrimination was a substantial factor... not the only motivating factor,'" and that summary judgment is "seldom

appropriate" in such cases. *Mikkelsen v. Pub. Util. Dist. No. 1*, 189 Wn.2d 516 (2017).

The lower court's decision creates an irreconcilable conflict with this standard. Ms. Bogardus produced direct evidence of pretext: a termination letter and prior disciplinary letters that explicitly cited her use of legally protected medical leave as the reason for her reprimand, suspension, and ultimately, her discharge. Using protected activity as a basis for adverse action is the very definition of pretext.

Furthermore, where such direct evidence exists, an employee is not required to proceed through the *McDonnell Douglas* burden-shifting framework. *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 571 (2020); *Bittner v. Symetra Nat'l Life Ins. Co.*, 558 P.3d 177, 187 (Wash. App. 2024). The lower court erred by forcing Ms. Bogardus through this framework despite her direct evidence of an unlawful motive and then compounded the error by finding the direct evidence

itself was insufficient. If a written admission of an unlawful motive cannot get a plaintiff to a jury, the pretext standard has become illusory. This Court must grant review to resolve this conflict and restore the standard articulated in *Mikkelsen*.

F. The Lower Court's Decision Undermines the Liberal Construction of WLAD and Creates Confusion Regarding the Rights of Disabled Workers.

The legislature has mandated that the provisions of WLAD "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020. The purpose is to eliminate and prevent discrimination in Washington. The Court of Appeals' decision does the opposite. It narrows the protections for disabled workers, creates barriers to justice, and misapplies this Court's precedent in a manner that favors employers over the rights of employees. This Court should grant review to correct these errors and reaffirm the broad, remedial purpose of the WLAD.

V. CONCLUSION

For the foregoing reasons, Petitioner Kimberly Bogardus respectfully requests that this Honorable Court grant her Petition for Review to resolve these critical issues and reverse the decision of the Court of Appeals.

CERTIFICATE OF COMPLIANCE WORD COUNT

This document contains 4328 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLLY SUBMITTED this __20th_ day of June, 2025.

/s/ Favian Valencia

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the PETITION FOR REVIEW with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

Elena C. Bundy
Kris Bundy
Bundy Law Group, PLLC
Address: PO Box 2543
Bellingham, WA 98227

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

EXECUTED this _20th_ day of June, 2025.

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APPENDIX

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SOCIAL SECURITY ADMINISTRATION
Office of Hearings Operations

DECISION

IN THE CASE OF	CLAIM FOR
Kimberly Sue Bogardus (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner)	21RF412A50112 (Beneficiary Notice Control Number) *Social Security Number removed for your protection*

JURISDICTION AND PROCEDURAL HISTORY

This case is before me on a request for hearing dated April 25, 2022 (20 CFR 404.929 *et seq.*). On April 20, 2023, I held a telephone hearing. The claimant agreed to appear by telephone before the hearing, and confirmed such agreement at the start of the hearing (Ex 15B). The claimant is represented by Thomas Andrew Bothwell, an attorney. Jeff Cockrum, an impartial vocational expert, also appeared and testified at the hearing via telephone.

The claimant is alleging disability since April 17, 2020.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, I make the following findings:

1. The claimant's date last insured is December 31, 2025.

2. The claimant has not engaged in substantial gainful activity since April 17, 2020, the alleged onset date (20 CFR 404.1520(b) and 404.1571 *et seq.*).

The earnings record indicates that the claimant worked at levels consistent with substantial gainful activity into 2020 (Ex 11D; 4D). The evidence as a whole, including the claimant's hearing testimony and statements to providers and to staff involved in her worker's compensation claim, indicate that she had only been working intermittently from April 2020 into August 2020, when she was ultimately terminated due to her impairments and resulting absences (Ex 4E; 2F). There is no indication that the claimant worked at levels consistent with substantial gainful activity after the alleged onset date. I therefore find that the claimant has not engaged in substantial gainful activity since the alleged onset date.

3. The claimant has the following severe impairments: bilateral carpal tunnel syndrome; degenerative joint disease and degenerative disc disease of the lumbar and cervical spine;

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fibromyalgia; obesity; depressive disorder; anxiety disorder; and attention deficit hyperactivity disorder ("ADHD") (20 CFR 404.1520(c)).

The above medically determinable impairments significantly limit the ability to perform basic work activities as required by SSR 85-28.

Any other impairment mentioned in the evidence of record has been considered and found to be non-severe as the evidence does not establish that such impairments have resulted in more than minimal limitations in the ability to perform work-related activities for a period of at least 12 consecutive months as required by the regulations to be found severe.

4. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and 404.1526).

The claimant's impairments, considered singly and in combination, do not meet the requirements of any listed impairment. In regards to her mental impairments, the claimant has the following degree of limitation in the four broad areas of mental functioning set out in the disability regulations for evaluating mental disorders and in the mental disorders listings in 20 CFR, Part 404, Subpart P, Appendix 1: a moderate limitation in understanding, remembering, or applying information; a moderate limitation in interacting with others; a moderate limitation in concentrating, persisting, or maintaining pace; and a moderate limitation in adapting or managing oneself. Since the claimant does not have an extreme limitation of one or marked limitation of two of the four areas of mental functioning, she does not meet the "paragraph B" criteria of any applicable listing. In addition, the evidence in this case fails to establish the presence of the "paragraph C" criteria.

In addition to the above, I note that no medical source qualified to opine as to medical equivalence has found that the claimant's impairments medically equal any listing. Accordingly, I find that the claimant's impairments do not meet or medically equal any listed impairment.

5. The claimant has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) except she can never climb ladders, ropes, or scaffolds, but can occasionally climb ramps and stairs; she can frequently balance and occasionally stoop, kneel, crouch, and crawl; she can frequently reach overhead bilaterally, but is limited to occasional use of the bilateral upper extremities to perform handling and fingering manipulations; she should avoid concentrated exposure to workplace hazards such as unprotected heights, moving mechanical parts, and operating motor vehicles; she can understand, remember, and carry out simple instructions, make simple work-related decisions, and tolerate occasional changes in a routine work setting; and she should have no more than brief, superficial interaction with the public.

In making this finding, I have considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and SSR 16-3p. I also considered the medical

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opinions and prior administrative medical findings in accordance with the requirements of 20 CFR 404.1520c.

Diagnostic imaging indicates multilevel degenerative changes in the cervical and lumbar spine, the latter of which have been noted to be generally stable (Ex 1F/16; 7F/3; 9F; 10F). Given the claimant's symptom reports, nerve conduction studies and EMGs have been performed, which have revealed severe bilateral carpal tunnel syndrome, left greater than right, as well as acute on chronic radiculopathy in the bilateral upper extremities at C5-C6 (Ex 7F/3). There is somewhat limited treatment from the claimant's physicians for her spine impairments; however, the notes from the claimant's chiropractor indicate she has consistently reported pain at between 5 and 7 out of 10 (Ex 18F/1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33). Treatment notes indicate that the claimant has also exhibited positive findings on trigger point testing consistent with her fibromyalgia diagnosis (Ex 5F/11, 16-21; 14F/12). Notes indicate that she has reported waxing and waning of symptoms, but even when improved, she expresses desire for better pain management (Ex 5F/11, 16-21). Notably, an examination in October 2020 revealed signs of pain in the range of motion of all joints, which the examiner observed were not intrinsically related to her spine impairments, but which I note are consistent with her fibromyalgia, which was not under consideration at that examination (Ex 2F). The claimant's impairment-related symptoms, particularly her low back pain but also pain in other joints that are engaged in weight-bearing activity, are exacerbated by her weight. Treatment records regularly indicate that the claimant presents with height and weight measurements that result in BMI calculations above 30, which classifies the claimant as obese from a clinical standpoint (Ex 1F; 5F; 7F). Pursuant to the requirements of SSR 19-2p, I have accounted for the effects of the claimant's habitus in arriving at the above-defined residual functional capacity.

Despite the claimant's reports of pain-limited functioning, she has regularly presented to her physicians with largely normal physical signs on examination, including strength, gait, range of motion, sensation, and reflexes (Ex 1F/2, 5, 8, 15, 19, 23; 5F/5, 6, 9, 11, 13, 15, 17; 7F/2; 14F/8, 10, 12, 13, 15). However, I note that these observations are not inconsistent with the claimant's testimony or function reports, where she has reported that her increased pain and difficulty with activity is brought on by repetitive movement as well as jarring, such as when the bus she used to drive would go over bumps.

I find that the above evidence is consistent with and supports the physical limitations identified in the above-defined residual functional capacity. These limitations account for the claimant's subjective symptom reports, to the extent they are supported by the longitudinal record as a whole as required by SSR 16-3p. The claimant's low back pain, exacerbated by her habitus, as well as the effects of her carpal tunnel syndrome with grasping and manipulating objects with resistance (including lifting and carrying) would preclude work at more than light exertion, and would also preclude work that requires climbing ladders, ropes, or scaffolds. In addition, the claimant's acute on chronic upper extremity radiculopathy, combined with the effects of her fibromyalgia pain and her carpal tunnel syndrome, would preclude climbing ladders, ropes, or scaffolds, and would limit her to no more than frequent overhead reaching and occasional use of the bilateral upper extremities for find handling and fingering. In addition, the claimant's joint pain, including from her fibromyalgia and her spine impairments, combined with the effects of her habitus, would limit her to work with no more than occasional climbing of ramps and stairs,

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frequent balancing, and occasional stooping, kneeling, crouching, and crawling. Finally, the claimant's pain and weight would limit her to work in which she could avoid concentrated exposure to workplace hazards such as unprotected heights, moving mechanical parts, and operating motor vehicles.

In regards to the claimant's mental impairments, treatment records indicate that she has been assessed with depressive disorder secondary to poor management of her pain symptoms, anxiety disorder, and ADHD based on diagnostic findings from her providers and the consultative examinations (Ex 5F; 6F; 13F). Notes from the claimant's mental health provider are handwritten and difficult to read, but regularly indicate she reports difficulty with concentration and inattention as well as irritability and anxiety, with observations of the same (Ex 6F). A consultative examination performed in August 2021 revealed substantially similar findings, including difficulty with attention resulting in impaired short-term recall, inability to perform serial 7s but adequate ability for serial 3s, and that she was largely socially withdrawn, consistent with the reports from both the claimant and her husband, resulting in overall poor social and occupational adaptation (Ex 13F). She was noted to not be in any treatment, and thus, her prognosis was poor (*id.*). I find the above supports and is consistent with moderate limitations in each of the four areas of mental functioning. In turn, these moderate limitations support and are consistent with the mental restrictions found in the above-defined residual functional capacity. The claimant's poor attention resulting in impaired memory as well as poor social and occupational adaptation would limit her to work involving simple instructions, simple work-related decisions, and no more than occasional changes in a routine work setting. Further, while the treatment records and consultative examinations indicate she is able to appropriately interact with her providers and there is no indication that she has difficulty with friends or family, she should avoid more than brief, superficial interactions with the public in light of her social withdrawal and regularly reported and observed irritability.

In arriving at this decision, I considered the medical opinions in the evidence of record. The state agency consultants at the initial level opined that the claimant would be limited to work at light exertion in which she occasionally climbs ladders, ropes, and scaffolds, frequently balances, occasionally stoops, kneels, crouches, and crawls, frequently reaches overhead bilaterally, occasionally handles bilaterally, avoids concentrated exposure to hazards, performs simple, routine tasks with superficial interaction with the public and works in a routine environment with expected changes (Ex 1A). At the reconsideration level, the consultants opined that the claimant would be limited to work at light exertion in which she never climbs ladders, ropes, or scaffolds, occasionally climbs ramps and stairs, frequently balances, occasionally stoops, kneels, crouches, and crawls, frequently reaches overhead bilaterally and occasionally handles objects bilaterally, avoids concentrated exposure to hazards, performs simple, routine tasks with only occasional, superficial interactions with the public, adapts to normal, routine changes, and does not need to set independent goals (Ex 3A). I find these opinions generally persuasive, but that the opinion at the reconsideration is more persuasive than the initial level opinion. Specifically, I find that the opinion at the initial level does not appear to take the effects of the claimant's habitus into consideration in performing activities such as climbing, which is more accurately reflected in the reconsideration level opinion. However, I find that neither opinion accounts for the effects of the claimant's carpal tunnel syndrome on her ability to perform fine manipulations, despite the

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regularity with which her symptoms are found in the treatment record. As such, additional limitations have been included in the above-defined residual functional capacity.

I considered the opinions from the orthopedic consultant as well as the consultative examiner from April 2021 and July 2021, respectively (Ex 3F/8; 8F). However, I find these opinions generally unpersuasive. It is unclear if either consultant took the claimant's subjective symptoms, including her pain, into consideration as required by SSR 16-3p. Further, there is no indication that either examiner accounted for the effects of the claimant's habitus in considering the claimant's ability to persist in the context of a full-time competitive job. In addition, I find that the minimal limitation identified by the orthopedic consultative examiner in regards to the claimant's carpal tunnel syndrome is inconsistent with the severity of the objective findings, and does not appear to account for the increased symptomology experienced by the claimant with repetitive activities. Finally, I note that the opinion from the consultative examiner in July 2021 appears to be based on the one-off examination, rather than the longitudinal record as a whole. For the above reasons, I find these opinions unpersuasive.

In sum, I find that the claimant has the above-defined residual functional capacity, which is consistent with and supported by the longitudinal treatment record, the claimant's subjective symptom reports, and the opinions from the state agency consultants.

6. The claimant is unable to perform any past relevant work (20 CFR 404.1565).

The claimant has past relevant work as a Bus Driver (DOT #913.463-010), a semi-skilled, SVP-4 job, generally and actually performed at the medium exertion level. Since the claimant is limited to work at the light level, the demands of the claimant's past relevant work exceed her residual functional capacity.

7. The claimant was an individual closely approaching advanced age on the established disability onset date, and has since changed age categories to an individual of advanced age (20 CFR 404.1563).

8. The claimant has at least a high school education (20 CFR 404.1564).

9. The claimant's acquired job skills do not transfer to other occupations within the residual functional capacity defined above (20 CFR 404.1568).

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1560(c) and 404.1566).

If the claimant had the residual functional capacity to perform the full range of light work, considering the claimant's age, education, and work experience, a finding of "not disabled" would be directed by Medical-Vocational Rule 202.14 prior to her 55th birthday, but a finding of "disabled" would be directed by Rule 202.06 as of her 55th birthday. To determine the extent to which the claimant's additional limitations erode the unskilled light occupational base, I asked the vocational expert whether jobs exist in the national economy for an individual with the

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claimant's age, education, work experience, and residual functional capacity, even prior to the claimant's change in age category. The vocational expert testified that given all of these factors there are no jobs in the national economy that the individual could perform.

Based on the testimony of the vocational expert, I conclude that, considering the claimant's age, education, work experience, and residual functional capacity, a finding of "disabled" is appropriate under the framework of the above-cited rules.

11. The claimant has been under a disability as defined in the Social Security Act since April 17, 2020, the alleged onset date of disability (20 CFR 404.1520(g)).

DECISION

Based on the application for a period of disability and disability insurance benefits protectively filed on September 1, 2020, the claimant has been disabled under sections 216(i) and 223(d) of the Social Security Act since April 17, 2020.

/s/ *Jennifer Smiley*
Jennifer Smiley
Administrative Law Judge

April 27, 2023
Date

SUNLIGHT LAW, PLLC

June 20, 2025 - 10:19 AM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

KIMBERLY BOGARDUS, Appellant, v. CITY OF YAKIMA, a Washington Municipal Corporation, Respondent.	)	No. 40060-3-III UNPUBLISHED OPINION

COONEY, J. — In an amended complaint, Kimberly Bogardus sued the City of Yakima (City) under the Washington Law Against Discrimination (WLAD) and for Wrongful Discharge in Violation of Public Policy (WDVPP). Her claims stem from the City's termination of her employment. The trial court dismissed Ms. Bogardus' amended complaint on the City's motion for summary judgment.

Ms. Bogardus appeals the trial court's order on summary judgment. We affirm.

BACKGROUND

In 2003, Ms. Bogardus was hired as a transit operator[1] for the City. During her time as a transit operator, Ms. Bogardus experienced "migraine headaches for which she sought leave." Clerk's Papers (CP) at 133. Due to her migraines, Ms. Bogardus worked with the City on her Family Medical Leave Act (FMLA) certification.

In October 2016, Ms. Bogardus was re-certified for FMLA leave for her migraines that occurred "1-3 times per week/1 day per episode." CP at 133. Because Ms. Bogardus had previously exceeded her allowed FMLA leave, the City required re-certification every 30 days. Ms. Bogardus was re-certified for FMLA leave in November 2016, January 2017, March 2017, March 2018, September 2018, and March 2019. Between 2016 and her termination on August 27, 2020, Ms. Bogardus had exhausted her annual allotment of 480 hours of FMLA leave. Ms. Bogardus used a total of 3,437.25 hours of leave during that period.

On some occasions, Ms. Bogardus had exhausted her allotted leave hours, did not request additional unpaid leave, and did not report to work. These deficiencies resulted in Ms. Bogardus being in an "unauthorized leave without pay status." CP at 134. Ms. Bogardus admitted at her deposition that she did not have "regular and reliable

[1] The position of transit operator required Ms. Bogardus to "operate[ ] a City bus" to "transport passengers over local routes according to prescribed time schedules." CP at 277.

attendance," an essential function of the transit operator position. CP at 567, 133. She also admitted to not informing the City that she believed "being bounced around" while driving a bus all day triggered her migraines. CP at 550. Ms. Bogardus confessed that neither she nor her doctors knew why and when she would experience a migraine.

Due to Ms. Bogardus' apparent need for a more flexible schedule, the City offered her an "extra board" position. CP at 222, 430, 563. The "extra board" position is "for bus drivers, and so they are not put specifically on the schedule. They are—they're requested to work certain shifts whether there's an opening or there's a need" and allows the driver to "either accept the shift or decline the shift." CP at 605. Ms. Bogardus declined this position because "I have bills to pay. So I needed to take what I could because I needed the income to pay for my bills and insurance." CP at 552.

Ms. Bogardus was eventually disciplined because she had exhausted her leave hours and, though remaining absent from work, failed to request additional unpaid leave "in accordance with City policy." CP at 134. Ms. Bogardus received an oral reprimand in November 2016 and a written reprimand in February 2017 for "us[ing] more leave time than allowable per her approved FMLA allocation" and failing to "request additional unpaid leave in accordance with City policy—placing her in an unauthorized leave without pay status." CP at 134. Ms. Bogardus again entered an unauthorized "leave without pay status" in 2018 and was issued a suspension for 40-hours without pay for the policy violation. CP at 135.

In 2020, Washington's State Paid Family and Medical Leave Act (PFMLA) took effect. Ms. Bogardus applied for and was approved for PFMLA benefits for the 2020 calendar year. Between April 20 and July 13, 2020, Ms. Bogardus called in daily to inform the City that she would not be coming to work but would instead be using PFMLA leave.

On July 6, 2020 when her PFMLA leave was nearly exhausted, the City sent a letter to Ms. Bogardus stating it was scheduling a meeting for July 20, 2020, to discuss her medical condition, limitations, and ways in which the City could help her improve her attendance. Ms. Bogardus, her union representative, and representatives from the City attended the meeting. The City and Ms. Bogardus again discussed the extra board position, but Ms. Bogardus was not interested. The City encouraged Ms. Bogardus to "come up with alternative accommodations that she believed would work for her." CP at 136, 221. She was also reminded of the City's leave without pay policy that she had previously violated.

By the end of July, Ms. Bogardus depleted her PFMLA leave. On August 4 and 5, 2020, she did not report to work despite having exhausted all of her leave, putting her in an unauthorized leave without pay status once again. A pre-disciplinary hearing was held in late August to address the issue. Ms. Bogardus claimed at that hearing that she had checked her computer on August 3 and believed she had accrued leave, but the leave she thought she had accrued had disappeared when she looked again on August 4.

On August 27, 2020, Ms. Bogardus was terminated by the Interim City Manager, Alex Meyerhoff. The four-page termination letter explained that Ms. Bogardus was being terminated because she called out of work on August 4 and 5, despite not having "sufficient leave accruals to cover these two days of absence" therefore leaving her in an "unauthorized leave without pay" status. CP at 186. The letter noted that she had been disciplined numerous times for this same violation. Mr. Meyerhoff stated in the letter that he found her proffered excuses at the disciplinary hearing "not credible." CP at 187.

Ms. Bogardus was alleged to have violated City of Yakima Transit Operations Policy and Procedures Manual Section 2.6(3), which states:

> Each employee shall be held responsible for tracking and knowing the amount of accrued leave to which they are entitled to assure coverage of all requested leave time. Taking leave without sufficient accrued leave to cover the time taken off is considered an unauthorized absence and subject to disciplinary action.

CP at 187. The termination letter also noted Ms. Bogardus violated City of Yakima General Civil Service Rules and Regulations, Chapter IX, Section (A)(1) for which discipline is appropriate for "dereliction of duty." CP at 187. Finally, the letter stated Ms. Bogardus had violated City of Yakima Administrative Policy Nos. 1-100 by taking "[u]nauthorized absence from the job" and "[u]nauthorized or improper use of any type of leave." CP at 187.

Following her termination, the City learned Ms. Bogardus had applied for full and permanent disability benefits with the Social Security Administration (SSA), stating on

the application that she had stopped working on April 17, 2020. Her application was granted effective April 17, 2020, approximately four months prior to her termination.

In January 2021, Ms. Bogardus filed suit against the City and individual defendants. In her original complaint, Ms. Bogardus asserted claims for (1) "Violation of Washington State Law Against Discrimination," including disparate treatment, retaliation, and failure to engage in the interactive process; (2) "Willful Violation of the Washington State Family Leave Act (WFLA);" (3) "Hostile Work Environment in Violation of WLAD;" (4) "Wrongful Termination in Violation of Public Policy;" and (5) "Intentional infliction of physical injury and aggravation." CP at 6-7.

In 2023, the City moved for summary judgment dismissal of all of Ms. Bogardus' claims. In response to the City's motion, Ms. Bogardus indicated that she intended to dismiss her claims for WFLA, hostile work environment, and intentional infliction of physical injury. Ms. Bogardus also noted an intention to dismiss her claims against "Each Individual Defendant" and asserted that her WDVPP claim was not addressed in the City's motion and was therefore not subject to summary judgment.[2] CP at 456.

Ms. Bogardus moved to continue the City's motion for summary judgment. Following a hearing on her motion, the court issued an order stating, "Plaintiff indicates

[2] Despite this assertion, the City *did* move for summary judgment dismissal of Ms. Bogardus' WDVPP claim, dedicating a page and a half of argument to it in its opening brief.

intent to dismiss all but 3 theories of complaint and will dismiss against all defendants but City of Yakima." CP at 248. Thereafter, Ms. Bogardus filed an amended complaint naming only the City as a defendant and asserting claims for violating the WLAD and for WDVPP.

Following a hearing on September 28, 2023, the court granted the City's motion for summary judgment and dismissed Ms. Bogardus' claims with prejudice.

Ms. Bogardus timely appeals.

ANALYSIS

We review orders on summary judgment de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is only appropriate if there are no genuine issues of material fact, and "the moving party is entitled to judgment as a matter of law." *Id.*; CR 56(c). The moving party bears the initial burden of establishing that there are no disputed issues of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

When considering a motion for summary judgment, evidence is considered in a light most favorable to the nonmoving party, here, Ms. Bogardus. *Keck*, 184 Wn.2d at 370. If the moving party satisfies its burden, then the burden shifts to the nonmoving party to establish there is a genuine issue for the trier of fact. *Young*, 112 Wn.2d at 225-

26. While questions of fact are typically left to the trial process, they may be treated as a matter of law if "reasonable minds could reach but one conclusion." *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

A nonmoving party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, a nonmoving party must put "forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Id.*

WLAD—FAILURE TO ACCOMMODATE

Ms. Bogardus argues summary judgment in favor of the City was erroneous because the City failed to accommodate her in violation of the WLAD. The City contends that judicial estoppel bars Ms. Bogardus' claims under the WLAD. We agree with the City.

The WLAD prohibits an employer from discharging an employee "because of . . . the presence of any sensory, mental, or physical disability." RCW 49.60.180(2). To prevail on a failure to accommodate claim, a plaintiff must prove: (1) "the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform their job[;]" (2) "*the employee was qualified to perform the essential functions of the job*[;]" (3) the employee gave the employer notice of the abnormality and its resulting substantial limitations; and (4) upon receiving notice, the employer failed to adopt

measures that were available to the employer and that were medically necessary to accommodate the employee's abnormality. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003) (emphasis in original).

The term "essential functions" as used in element (2) is "derived from WLAD's federal counterpart, the Americans with Disabilities Act (ADA)."[3] *Id.* at 533. "While the question of whether an employer adequately accommodated an employee normally presents a factual question for a jury to decide, summary judgment is appropriate on a WLAD accommodation claim when reasonable minds could reach but one conclusion." *Slack v. Luke*, 192 Wn. App. 909, 919, 370 P.3d 49 (2016).

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App 95, 98, 138 P.3d 1103 (2006)). Three factors guide a court's determination of whether to apply the doctrine of judicial estoppel: (1) whether the party's later position is "clearly inconsistent with its earlier position[;]" (2) whether acceptance of the "inconsistent position in a later

[3] "'The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'" *Davis*, 149 Wn.2d at 533 n.5 (quoting 42 U.S.C. § 12111(8)).

proceeding would create the 'perception that the first or second court was misled[;]'" and (3) whether the party asserting the inconsistent position would receive an unfair advantage or impose an unfair disadvantage on the opposing party if not estopped. *Id.* at 538.

In *Cleveland v. Policy Management Systems, Corporation*, the United States Supreme Court held:

> [P]ursuit, and receipt, of [Social Security Disability Insurance (SSDI)] benefits does not *automatically* estop a recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with "reasonable accommodation."

526 U.S. 795, 797-98, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999) (emphasis added). The Supreme Court explained "a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation." *Id.* at 806. This is because an ADA plaintiff "bears the burden of proving that she is a 'qualified individual with a disability'—that is, a person 'who, with or without reasonable accommodation, can perform the essential functions' of her job." *Id.* at 806.

In essence, the Court held a plaintiff's assertion that they cannot work in an SSDI application does not inevitably result in them being estopped from asserting an ADA

claim, but it can if the plaintiff does not provide an explanation for why both of their positions are consistent with one another.

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.

WLAD—RETALIATION

Ms. Bogardus argues that her WLAD retaliation claim was improperly dismissed on summary judgment. However, aside from reciting the legal standard for such a claim, she provides no argument or analysis explaining why her claim was improperly dismissed. For this reason, we decline to address this issue. *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) ("Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review."), *rev'd on other grounds by* 170 Wn.2d 117, 240 P.3d 143 (2010).

WDVPP CLAIM

Ms. Bogardus argues her WDVPP claim was erroneously dismissed on summary judgment.[4] We disagree.

To establish a prima facie case under the WDVPP, an employee must demonstrate: (1) her discharge may have been motivated by reasons that contravene a clear public policy, and (2) the employee's public-policy linked conduct was a significant factor in the decision to terminate the employee. *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 577-78, 459 P.3d 371 (2020).

A WDVPP claim is typically limited to four scenarios: (1) when the discharge was a result of the employee refusing to commit an illegal act (e.g. refusing to engage in price fixing); (2) when the discharge was a result of the employee performing a public duty or obligation (e.g., jury duty); (3) when the termination resulted due to an employee exercising a legal right or privilege (e.g., filing a worker's compensation claim); and

[4] The City contends that though it moved for summary judgment dismissal of Ms. Bogardus' WDVPP claim, Ms. Bogardus did not substantively respond to its argument below. In moving for summary judgment, the City bore the initial burden of proving the absence of a genuine issue of material fact related to Ms. Bogardus' WDVPP claim. After making this showing, the burden shifted to Ms. Bogardus to present evidence demonstrating the presence of a genuine issue of material fact. In not responding to the City's argument, Ms. Bogardus failed to meet her burden. Notwithstanding Ms. Bogardus' deficiency, because we review the trial court's order de novo, we exercise our discretion and review her claimed error.

(4) where the discharge is premised on an employee "whistleblowing." *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989).

Upon the employee making a prima facie case of WDVPP, the burden shifts to the employer to "'articulate a legitimate, nondiscriminatory reason'" for the employee's termination. *Mackey*, 12 Wn. App. 2d at 571 (quoting *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County*, 180 Wn.2d 516, 527, 404 P.3d 464 (2017)). If the employer meets its burden, the employee "must produce sufficient evidence showing that the employer's alleged nondiscriminatory reason for the discharge was a 'pretext.'" *Id.* at 572 (quoting *Mikkelsen*, 180 Wn.2d at 527). "'An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer.'" *Mikkelsen*, 180 Wn.2d at 527 (quoting *Scrivener v. Clark College*, 181 Wn.2d 439, 446-47, 334 P.3d 541 (2014)).

In order to defeat summary judgment, the employee must show only that a reasonable trier of fact could find that discrimination was a substantial factor in the employer's decision to discharge the employee. *Id*. at 528.

Here, Ms. Bogardus' WDVPP claim is premised on two legal rights she exercised: requesting a reasonable accommodation and taking protected leave. However, there is no evidence that this conduct was a significant factor in her termination. Indeed, Ms.

Bogardus' termination letter articulated multiple reasons for her discharge, including: violations of the City of Yakima Transit Operations Policy and Procedures Manual's rules for how to take time off; violation of City of Yakima General Civil Service Rules and Regulations, namely "dereliction of duty;" and violations of City of Yakima Administrative Policies for "[u]nauthorized absence from job" and "[u]nauthorized or improper use of any type of leave." CP at 186-87. The letter clearly expressed that Ms. Bogardus was not being terminated for using protected leave, but instead for being in an "unauthorized leave without pay status" for which she had been disciplined prior. CP at 186.

Ms. Bogardus is unable to direct this court to any evidence in the record that indicates discrimination was a factor in her termination. Rather, her argument is limited to the City "openly admit[ing] in their discipline and termination letters that their reason for reprimanding and terminating [Ms. Bogardus] was due to time off that she took as an accommodation and protected time off for her disability." Appellant's Am. Open. Br. at 16. She provides no citation to the record supporting her argument, and the letter itself clearly contradicts her unsupported statement. Consequently, there is an absence of any genuine issue of material fact related to her WDVPP claim, and it was properly dismissed on summary judgment.

WFLA CLAIM

Ms. Bogardus argues the trial court improperly dismissed her WFLA claim. The City responds that it was Ms. Bogardus, not the trial court, who voluntarily dismissed her WFLA claim. We agree with the City.

In Ms. Bogardus' response to the City's motion for summary judgment, she wrote "Plaintiff Intends to Dismiss her Claim for Willful Violation of Washington State Family Leave Act." CP at 455. On September 26, 2023, Ms. Bogardus filed a first amended complaint that did not include a claim for a violation of the WFLA. If an amended complaint "abandons a former theory or cause of action, it does not relate back to the original complaint, but, instead, rests the action upon the pleadings as amended." *Ennis v. Ring*, 49 Wn.2d 284, 288, 300 P.2d 773 (1956). Because Ms. Bogardus voluntarily dismissed her claim for violation of the WFLA, we decline review.

ATTORNEY FEES

Ms. Bogardus requests her attorney fees pursuant to RAP 18.1 and RCW 49.48.030. RCW 49.48.030 provides: "In any action in which any person *is successful in recovering judgment for wages or salary owed to him or her*, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer." (emphasis added). Because Ms. Bogardus has not been successful in recovering judgment for wages or salary owed to her, she is not entitled to her attorney fees on appeal.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Johnson, J.P.T.[†]

[†] Brandon L. Johnson, an active judge of a court of general jurisdiction, is serving as a judge pro tempore of this court pursuant to RCW 2.06.150(1).

Tristen L. Worthen
Clerk/Administrator

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The Court of Appeals of the State of Washington Division III

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April 3, 2025

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CASE # 400603
Kimberly Bogardus v. City of Yakima
YAKIMA COUNTY SUPERIOR COURT No. 2120006339

Counsel:

Enclosed please find a copy of the opinion filed by the court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received by this court on or before the dates each is due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW: hcm
c: **E-mail** Honorable Judge Jeffrey Swan