Washington Law Against Discrimination: Disability Claims  
by Darren Feider

An employer commits an unfair practice if it refuses to hire, terminates, or otherwise discriminates based on "the presences of any sensory, mental or physical disability." RCW 49.60.010, .180(1)-(3). Under the Washington Law against Discrimination ("WLAD"), "[a]n employer who discharges, reassigns, or harasses for a discriminatory reason faces a disparate treatment claim; an employer who fails to accommodate the employee’s disability, faces an accommodation claim." Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 640, 9 P.3d 787 (2000); Jane Doe v. The Boeing Co., 121 Wn.2d 8, 17, 846 P.2d 531 (1993). Even if the plaintiff cannot establish the elements of disparate treatment or failure to accommodate, he or she may still have a claim for retaliation against the employer. Each claim is discussed below.

A. Disparate Treatment.

An employer cannot refuse to hire a person or otherwise discriminate (e.g., terminate, fail to promote, or demote) because of a disability if the person is qualified to do the job. RCW 49.60.180. The plaintiff’s ultimate burden in employment discrimination cases is to produce enough evidence for a trier of fact to reasonably conclude that discrimination was a “substantial factor” in the adverse employment action. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 186-87, 23 P.3d 440 (2001). Where the plaintiff lacks direct evidence of disability discrimination – i.e., evidence that the decision maker admitted that he fired the plaintiff because she was disabled – the plaintiff may survive summary judgment if she creates a presumption of discrimination by presenting a prima facie case. Id. at 179-81.


Washington has adopted the McDonnell Douglas/Burdine three-part burden allocation framework for disparate treatment cases. McDonnell Douglas Corp. v. Percy Green, 411 U.S. 792 (1973); Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 753 P.2d 517 (1988). Under McDonnell Douglas/Burdine, the plaintiff has the initial burden to prove a prima facie case. If the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises and the burden shifts to the employer to produce evidence of a legitimate non-discriminatory reason for its actions. Becker v. Cashman, 128 Wn. App. 79, 85, 114 P.3d 1210 (2005). If the employer meets this burden, it has successfully rebutted the presumption of unlawful discrimination. Id. at 86. The burden then shifts back to the plaintiff to produce evidence that the asserted reason

At all times, the plaintiff carries the ultimate burden at trial to prove discrimination was a substantial factor in the employer’s actions. However, to survive summary judgment, the plaintiff need only show a reasonable judge or jury could find her disability was a substantial motivating factor for the employer’s adverse actions.  Hill, 144 Wn.2d at 185-87.

2.  A Prima Facie Case of Disability Discrimination.

As stated above, the plaintiff has the initial burden of setting forth a prima facie case of disability discrimination.  Hill, 144 Wn.2d at 181.  The elements of a prima facie case of disparate treatment disability discrimination are that the plaintiff was (a) disabled; (b) subject to an adverse employment action; (c) doing satisfactory work; and (d) discharged or suffered other adverse employment actions under circumstances that raise a reasonable inference of unlawful discrimination.  Anica, 120 Wn. App. at 489-91.  The plaintiff must present specific and material facts to support each element of this prima facie case.  Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).  If he or she fails to set forth a prima facie case of discrimination, the employer is entitled to prompt judgment as a matter of law.  Hill, 144 Wn.2d at 181.

a.  Plaintiff must Establish the Disability.

WLAD prohibits employment discrimination based on real or perceived disability.  RCW 49.60.010; Hill, 144 Wn.2d at 191.  Employers may not discriminate against or discharge any employee on the basis of the presence of any sensory, mental, or physical disability.  RCW 49.60.180.  The first thing the plaintiff must establish is that he or she is disabled.  Roeber, 116 Wn. App. at 136.

(1)  Definition of Disability.

The Washington Administrative Code (“WAC”) defines a “disability” as “the presence of any sensory, mental, or physical disability.”  WAC 162-22-020(1).  The WAC further provides that a condition is a “sensory, mental, or physical disability” if it is “an abnormality and is a reason why the person having the condition did not get or keep the job in question . . .”  WAC 162-22-020(2)(c).  Courts hold that a “disability” is a medically cognizable or diagnosable condition that exists as a record or history and that substantially limits the ability to do the job.  Roeber v. Dowty Aerospace Yakima, 116 Wn. App. 127, 136, 64 P.3d 691, review denied, 150 Wn. 2d 1016, 79 P.3d 446 (2003) (holding migraines and depressive disorders can be abnormalities if they substantially limit the plaintiff’s ability to work).

Courts utilize this definition of “disability” in disparate treatment cases.  See Phillips v. City of Seattle, 111 Wn.2d 903, 907, 766 P.2d 1099 (1989) (holding the WAC required “the ‘presence’ of a handicap and that this condition be the reason for the discharge.”); Hume v. Am. Disposal Co., 124 Wn.2d 656, 670, 880 P.2d 988 (1994) (applying the WAC definition to a constructive discharge claim under the WLAD).  WAC 162-22-020(2) provides:

The “presence of a sensory, mental, or physical disability” includes, but is not limited to, circumstances where a sensory, mental, or physical condition:

(a)  Is medically cognizable or diagnosable;

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(b) Exists as a record or history;

(c) Is perceived to exist whether or not it exists in fact.

A significant cautionary point is that proving a disability requires expert medical testimony, medical documentation, or at least, credible and admissible evidence of the employer’s state of mind as to whether the employer perceives the existence of a disability. Phillips, 111 Wn. 2d at 909. Failure of such proof will result in dismissal of a disability claim.

(a) **Definition of Medical Condition.**

A disability can be a physical or mental condition. See Kirby v. City of Tacoma, 124 Wn. App. 454, 498 P.3d 827 (2004) (stress disorder constituted a mental disability); Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 148, 94 P.3d 930 (2004) (plaintiff's depression and PTSD were legally cognizable disabilities); Roeber, 116 Wn. App. at 136 (holding migraines and depressive disorders can be abnormalities). WLAD prohibits discrimination against real or perceived disabilities. See Callahan v. Walla Walla Housing Authority, 129 Wn. App. 812, 110 P.3d 782 (2005) (citing RCW 49.60.010). A condition need only be cognizable or diagnosable even if it has not yet been recognized or diagnosed. Id. at 820-21 (holding undiagnosed multiple sclerosis is a cognizable and diagnosable condition).

(b) **Whether the Disability Substantially Limits Employee’s Ability to do the Job.**

A plaintiff must show her condition substantially limited her ability to do her job. Callahan, 129 Wn. App. at 820; Roeber, 116 Wn. App. at 136. If she can do the job notwithstanding the medical condition, there is no viable claim. For instance, in Callahan, the plaintiff made a prima facie case of discrimination when she presented evidence that her disease caused her excessive absenteeism. She needed extensive testing to diagnose her multiple sclerosis, which led to missing work and substantially impaired her performance. Id.

b. **Adverse Employment Action.**

Assuming the plaintiff has established that she is disabled, she must next show that she suffered an adverse employment action. To establish an adverse employment action, the plaintiff must show “an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.” Robel v. Roundup Corp., 148 Wn.2d 35, 74 n.14, 59 P.3d 611 (2002). “An actionable adverse employment action must involve a change in employment conditions that is more than an ‘inconvenience or alteration of job responsibilities’. . . ., such as reducing an employee’s workload and pay. . . . In contrast, yelling at an employee or threatening to fire an employee is not an adverse employment action.” Kirby, 124 Wn. App. at 498 (holding an employer’s failure to promote the plaintiff was an adverse employment action, but disciplinary or investigations do not constitute adverse employment actions; they were mere inconveniences that did not have a tangible impact on plaintiff’s workload or pay).

c. **Satisfactory Work.**

Once disability and adverse employment action is established, the plaintiff must show his work was satisfactory in order for his disparate treatment claim to stand. Becker, 128 Wn.
App. at 86. This is a normally factual analysis. Id. For instance, in Becker, the court held the plaintiff must have been doing satisfactory work because he had been replaced by a healthy man who he had spent two months training before he was fired – i.e., how could he be not doing satisfactory work if he was training new hires? Conversely, in MacDonald v. Korum Ford, 80 Wn. App. 877, 912 P.2d 1052 (1996), an employee failed to provide competent evidence of satisfactory work where she had low sales figures for the majority of her tenure as a sales person. Id. at 889.

d. Reasonable Inference of Disability Discrimination.

In addition, the plaintiff must present sufficient evidence to establish that the adverse employment action occurred under circumstances that raise a reasonable inference of unlawful discrimination. This is the causation element. A mere coincidence of timing is not proof, by itself, of causation. Anica, 120 Wn. App. at 489 (affirming dismissal where plaintiff’s only proof was that she terminated 2 months after returning from a workplace injury; her employer was aware of her surgeries and social security disability payments when it restored her to her position thereby disproving inference of discrimination). Often the inference of discrimination can be established where the plaintiff makes a showing that he or she was replaced by someone outside the protected class or that the disability was a reason for the adverse employment action. Roeber, 116 Wn. App. at 136 (holding plaintiff failed to show that person who replaced him was not disabled).

A decision-maker’s notice of the disability can give rise to evidence that the condition played a role in the adverse employment action. Callahan, 129 Wn. App. at 820-21 (holding supervisor’s notice from her secretary that the plaintiff may have been diagnosed with multiple sclerosis created an issue of fact as to whether the condition played a role in the termination decision). Evidence that the medical condition was discussed in any performance reviews or in the investigation that led to his termination likewise may support a reasonable inference of disability discrimination. Roeber, 116 Wn. App. at 136.

3. Legitimate, Non-Discriminatory Reasons for Adverse Action.

Once the plaintiff has established a prima facie case of disability discrimination, the evidentiary burden shifted to the employer to produce a legitimate nondiscriminatory reason or explanation for its adverse employment action. Hill, 144 Wn.2d at 181. This is a burden of production only, not a burden of persuasion. Id. A court will dismiss a plaintiff’s claims if he or she fails to rebut the employer’s articulated reasons. Kirby, 124 Wn. App. at 498 (affirming dismissal because the plaintiff did not dispute that he lacked in teamwork and ability to build consensus or partnerships necessary to move the organization forward).

Although a plaintiff who suffers from alcoholism or drug addiction may have a qualifying “disability,” employers do have legitimate, non-discriminatory reasons for requiring employees to attend and complete rehabilitation programs. See Hines v. Todd Pacific Shipyards Corp., 127 Wn. App. 356, 112 P.3d 522 (2005); Rhodes v. RUM Stores, Inc., 95 Wn. App. 794, 800, 977 P.2d 651 (1999) (employee was not discharged because he was chemically dependent, but rather because of his failure to comply with the terms of a re-entry agreement). Further, failure to comply with the terms and conditions of a last chance agreement is a legitimate, nondiscriminatory reason to terminate employment. Hines, 127 Wn. App. at 371. In Hines, the court found no evidence the employee’s termination resulted from his drug and alcohol disability. Id. The employer did not fire the employee after testing positive for drug usage,
assisted the employee in entering a treatment program, and allowed the employee to return work after being diagnosed with chemical dependency. Id. Thus, when the employee failed to comply with his last chance agreement, the employer had legitimate, non-discriminatory reasons to terminate notwithstanding his disability. Also, threats of violence or harassment constitute legitimate, non-discriminatory reasons even if the employee claims some related disability. Roeber, 116 Wn. App. at 137-38.


If the employer has articulated legitimate, non-discriminatory reasons for the adverse employment action, the plaintiff must show that those reasons were a mere pretext for disability discrimination. Hill, 144 Wn.2d at 181. To prove that articulated reasons were pretext, the plaintiff must produce evidence that the reason is unworthy of belief. Keeper v. State, 79 Wn. App. 732, 738, 904 P.2d 793 (1995). The plaintiff must offer specific instances of conduct or discipline constituting discrimination based on his or her disability. Id. at 739. Where “the plaintiff has produced no evidence from which a reasonable jury could infer that an employer’s decision was motivated by an intent to discriminate, summary judgment is entirely proper.” “Speculation and belief are insufficient to create a fact issue as to pretext. Nor can pretext be established by mere conclusory statements of a plaintiff who feels that he has been discriminated against.” Hines, 127 Wn. App. at 372 (quoting McKey v. Occidental Chem. Corp., 956 F. Supp. 1313, 1319 (S.D. Tex. 1997)). If the plaintiff does not establish pretext, the employer is entitled to dismissal. Hill, 144 Wn.2d at 182.

An employer’s reasons may be considered pretextual if they are factually debatable. See Riehl, 152 Wn.2d at 151-52 (holding employer’s reason that it had to downsize as potentially pretextual because plaintiff was terminated in a profitable year). If the employer’s reasons are not supported by documentary evidence, they may be found to be pretextual. Id. (holding employer’s reason that it had retained another employee because of his superior performance to be potentially pretextual because there was no documentation that said employee had performed better). Further, stray comments that could be construed to be discriminatory can create issues of pretext. Id.

If there is evidence of a temporal proximity between learning of disability or receiving an accommodation request and the adverse employment action, the plaintiff may establish pretext with such timing evidence. Roeber, 116 Wn. App. at 138 (holding one year between nurse practitioner’s letter for accommodation and termination did not raise pretext). Conversely, when a person is “both hired and fired by the same decision makers within a relatively short period of time, there is a strong inference that he or she was not discharged because of any attribute the decision makers were aware of at the time of hiring.” Becker, 128 Wn. App. at 86 (citing Hill, 144 Wn.2d at 189). This is known as the “same actor” defense, which is often asserted in defense of a claim of discrimination.

B. Failure to Accommodate.

Even if an employer does not discriminate in hiring, promoting or firing a disabled employee, it may still have a duty to accommodate a disabled employee and failure to do so constitutes disability discrimination. WLAD requires employers to reasonably accommodate a disabled employee unless the accommodation would be an undue hardship. Pulcino v. Federal Express Corp., 141 Wn.2d 629, 639, 9 P.3d 787 (1998). To establish a prima facie case of failure to accommodate, the plaintiff must establish: (1) he had a sensory, mental, or physical
abnormality 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 abnormality and its substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt available measures that were medically necessary to accommodate the abnormality. Hines, 127 Wn. App. at 371; Davis v. Microsoft Corp., 149 Wn.2d 521, 532, 70 P.3d 126 (2003); Hill, 144 Wn.2d at 192-93.

1. Two-Part Test for Disability in Accommodation Cases.

In a failure to accommodate case, the above-discussed WAC definition of “disability” applies, i.e., “the presence of any sensory, mental, or physical disability.” Doe, 121 Wn.2d at 15. The Washington Supreme Court set forth two disability elements: “an accommodation claimant satisfies the “handicap” element of his or her claim by proving that (1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual’s ability to perform his or her job.” Pulcino, 141 Wn.2d at 641; Hill, 144 Wn.2d at 192.

The second element of the test is dispositive. Even if a plaintiff has recognized sensory, mental or physical abnormality, he must show it prevented him from performing his job duties. See McClarty v. Totem Elec., 119 Wn. App. 453, 470, 81 P.3d 901 (2003) (affirming dismissal of a failure to accommodate claim: even though plaintiff had a recognized handicap, bilateral carpal tunnel syndrome, he could still perform most of his job duties). Requiring the plaintiff to demonstrate substantial interference with job performance is logical: without the limitation, there would be no need for any accommodation. Id.; Roeber, 116 Wn. App. at 139 (holding no failure to accommodate claim because plaintiff’s migraines were successfully treated with medication and his performance reviews indicate that he met or exceeded expectations).

2. Qualified to Perform Essential Functions of Job.

A plaintiff must show he or she is qualified to perform essential job functions in order to successfully bring an accommodation claim. Essential job functions are “the fundamental job duties of the employment position the individual with a disability holds or desires.” Davis, 149 Wn.2d at 533 (quoting 29 C.F.R. § 1630.2(n)(1) (2002)). The term does not include “the marginal functions of the position.” Id. In Davis, for example, the court held job presence or attendance at work could be (and should be) an essential job function, and plaintiff failed to establish this second element due to his inability to work long unpredictable hours. Id., at 536. Washington law does not require employers to change a job or eliminate indispensable tasks or duties in order to accommodate a disability because that would “effectively nullify the second element of the plaintiff’s prima facie case. . .” Davis, 149 Wn. 2d at 532.

3. Employer Notice of Abnormality.

The duty of an employer to reasonably accommodate the plaintiff’s disability arises when the employer becomes aware of the employee’s disability and physical limitations. Goodman v. Boeing Co., 127 Wn. 2d 401, 408, 899 P.2d 1265 (1995). Without notice, there can be no duty to accommodate. “The employee bears the burden of giving the employer notice of [her] disability.” Id. at 408. In Hume v. American Disposal Company, the Washington Supreme Court held that because the plaintiff had not missed any work due to pain in his hands and because he was successfully completing his work in a timely fashion, the employer did not have notice, and therefore, did not fail to accommodate the plaintiff’s disability. Id. at 672; see
Roeber, 116 Wn. App. at 140 (holding plaintiff’s nurse practitioner and counselor’s letters indicating plaintiff suffered from depression and was taking anti-depressants did not create notice because the letters also stated that the condition was successfully medicated and did not restrict her job duties).

Even with notice if the employer instructs the plaintiff to not exceed his or her medical limitations, it has no further responsibility to accommodate the plaintiff until he or she gives sufficient notice of her need for further accommodation. There is no continuing duty to re-evaluate the employee’s accommodation. Anica, 120 Wn. App. at 489 (dismissal of the failure to accommodate claim because plaintiff had failed to give employer sufficient notice of her worsening condition).

4. Measures to Accommodate.

Assuming the existence of a disability that substantially impaired job performance and employer notice thereof, the plaintiff must next show that an employer failed to adopt available, medically necessary measures to accommodate her abnormality. Riehl, 152 Wn.2d at 145. This duty is limited to “those steps reasonably necessary to enable the employee to perform his or her job.” Id. (quoting Jane Doe, 121 Wn.2d at 18). The term “reasonable” is linked to necessity and limits the duty to “removing sensory, mental or physical impediments to the employee’s ability to perform his or her job.” Id. at 21. Reasonable accommodation turns on the job specifications and impact of the plaintiff’s condition on work tasks. Id. at 20. Where trauma or physical deterioration has caused the disability, the accommodation may be apparent. If so, the main question will be whether the accommodation is reasonable. Id. at 20-21.

a. Medically Necessary.

Washington law only requires an employer to provide a disabled employee with “medically necessary” accommodations. Riehl, 152 Wn. 2d at 147; Hill, 144 Wn.2d at 193. Thus, the plaintiff is not entitled to any accommodation he or she demands. Where the need to accommodate the plaintiff is not medically confirmed, it is not reasonable to require the employer to provide accommodation. Doe, 121 Wn.2d at 18-19 (explaining that the plaintiff’s determination that she needed to dress as a woman based on gender dysphoria was not medically supported). “[T]he employee must prove that accommodation is medically necessary.” Hill v. BCTI Income Fund-I, 97 Wn. App. 657, 668, 986 P.2d 137 (1999), aff’d in part, vacated in part, Hill II, 144 Wn.2d 172, 194, 23 P.3d 440 (2001) (denial of failure to accommodate claim because the plaintiff failed to show that transfer to a new office was medically necessary to accommodate her asthmatic condition); Pulcino, 141 Wn. 2d at 643; Davis, 149 Wn. 2d at 532; Riehl, 152 Wn.2d at 148 (denial of failure to accommodate claim because lack of nexus between plaintiff’s depression and the medical condition of post traumatic stress disorder).

b. Requested Accommodation Available.

In addition to establishing medical necessity, the plaintiff must show that a specific reasonable accommodation was, in fact, available to the employer when the disability became known. Hill, 144 Wn.2d at 192; Pulcino, 141 Wn.2d at 643; Roeber, 116 Wn. App. at 140 (holding plaintiff failed to show the positions he requested were available).

If a vacant position is available, the plaintiff must then show that he or she was qualified for that vacant position and that the employer failed to notify him or her of job opportunities that

5. **Employer’s Reason for Not Granting Accommodation Request.**

Courts do not require an employer to necessarily grant an employee’s specific request for accommodation. Rather, “an employer need only ‘reasonably’ accommodate the disability.” Pulcino, 141 Wn. 2d at 643 (citing Snyder v. Medical Serv. Corp., 98 Wn. App. 315, 326, 988 P.2d 1023 (1999)). If the plaintiff establishes that a specific reasonable accommodation was available and that accommodation was medically necessary, the burden of production shifts to the employer to show that the proposed solution was not feasible. Pulcino, 141 Wn. 2d at 643.

C. **Hostile Work Environment Discrimination.**

In addition to disparate treatment and failure to accommodate claims, WLAD permits a disability-based hostile work environment claim. Robel, 148 Wn.2d at 43 (“Whether the antidiscrimination statute supports a disability based hostile work environment claim is an issue of first impression in this state”). Most federal courts have recognized a hostile work environment claim under the Americans with Disabilities Act of 1990 (“ADA”, 42 U.S.C. § 12101) and apply Title VII standards. Id. at 44 (citing Brian L. Porto, Annotation, Actions Under Americans with Disabilities Act (42 U.S.C.A. §§ 12101 et seq.) to Remedy Alleged Harassment or Hostile Work Environment, 162 A.L.R. Fed. 602, 612-24 (2000)). The Robel court extended the reasoning in Washington’s landmark hostile work environment sexual harassment case, Glasgow v. Georgia-Pac. Corp., 103 Wn. 2d 401, 693 P.2d 708 (1985), to disability claims under the anti-discrimination statute. Robel, 148 Wn.2d at 44-45 (citing Glasgow, 103 Wn. 2d at 406 n. 2). As a result, the plaintiff in a disability-based hostile work environment case must prove (1) that he or she was disabled within the meaning of the antidiscrimination statute; (2) that the harassment was unwelcome; (3) that it was because of the disability; (4) that it affected the terms or conditions of employment; and (5) that it was imputable to the employer. Id. at 45.

1. **Disabled.**

The definition of disability in RCW 49.60.180(3) controls in a hostile work environment case. Robel, 148 Wn. 2d at 44 (holding plaintiff’s disabilities qualified for purpose of the hostile work environment claim); see supra Part A.2.a.

2. **Unwelcome Harassment.**

To prove that the conduct was “unwelcome,” the plaintiff must show that he or she “did not solicit or incite it” and viewed it as “undesirable or offensive.” Robel, 148 Wn.2d at 45 (quoting Glasgow, 103 Wn.2d at 406; cf. 6A WPI 330.23, at 240 (requiring jury to find that plaintiff proved “[t]hat this language or conduct was unwelcome in the sense that the plaintiff regarded the conduct as undesirable and offensive, and did not solicit or incite it.”)). Generally, if the plaintiff reports or complains about the alleged conduct, courts will consider the conduct unwelcome. Id.

3. **Because of Disability.**

To establish that the harassment occurred “because of” the disability, the plaintiff must show that the disability was the motivating factor for the unlawful discrimination. Robel, 148 Wn.
2d at 45 (quoting Glasgow, 103 Wn. 2d at 406. There must be a nexus between the specific harassing conduct and the particular injury or disability. Id. (holding that teasing of plaintiff by co-workers about her workplace injury was related to her disability or the employer’s perception of her as disabled).

4. **Affected Terms and Conditions.**

To prove that the conduct affected the terms and conditions of employment, the plaintiff must show “[t]he harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.” Robel, 148 Wn. 2d at 47 (quoting Glasgow, 103 Wn.2d at 406. A satisfactory finding on this element should indicate “[t]hat the conduct or language complained of was so offensive or pervasive that it could reasonably be expected to alter the conditions of plaintiff’s employment.” Id. (citing 6A WPI 330.23, at 240).

5. **Imputable to Employer.**

Employers are not responsible for all unlawful harassment; it must be imputed to them before liability arises. To prove that conduct must be imputed, the plaintiff must show:

Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof. To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.

Robel, 148 Wn.2d at 47 (quoting Glasgow, 103 Wn.2d at 407. The jury must find either that (1) “an owner, manager, partner or corporate officer personally participate[d] in the harassment” or that (2) “the employer . . . authorized, knew, or should have known of the harassment and . . . failed to take reasonably prompt and adequate corrective action.” Id. (holding that deli manager and assistant deli manager were management personnel for purposes of employer liability); see also 6A WPI 330.23, at 240-41. The remedial action must be of such a nature to have been reasonably calculated to end the harassment. Robel, 148 Wn.2d at 48 (holding an employer’s investigations and termination of one co-worker without further management corrections were inadequate).

D. **Retaliatory Discharge.**

WLAD holds “[i]t is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter. RCW 49.60.210. To date, there are no reported Washington cases that address retaliatory discharges for protected actions taken related to a disability. In general, a prima facie case for retaliation requires a plaintiff to show: “(1) he or she engaged in statutorily protected activity; 2) an adverse employment action was taken; and 3) there was a causal link between the employee’s activity and the employer’s adverse action.” See Estevez v. Faculty Club of Univ. of Wash., ___ Wn. App. ___, 120 P.3d 579, 589 (2005) (citing Delahunty v. Calhoon, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992) Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987)); Milligan v. Thompson, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). The McDonnell burden-shifting

E. Retaliation for Filing Workers’ Compensation Claim.

In addition to claims for disability discrimination, a plaintiff may sue the employer for unlawful retaliation for filing a workers’ compensation claim. Washington’s Industrial Insurance Act provides: “No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title.” RCW 51.48.025(1).

1. Prima Facie Case of Retaliation.

Under the Washington Workers’ Compensation statute at RCW 51.48.025(3), the plaintiff employee may institute an action against an employer who has retaliated against him in some way for pursuing workers’ compensation benefits by showing that he or she (a) exercised the statutory right to pursue workers’ benefits under Title 51 RCW or communicated to the employer an intent to do so or exercised any other right under RCW Title 51; (b) was discharged; and (c) there is a causal connection between the exercise of the legal right and the discharge. Wilmot, 118 Wn.2d at 68-69; Robel, 148 Wn.2d at 48-49.

   a. Exercising a Statutory Right.

In establishing a prima facie case, the plaintiff need not attempt to prove retaliation was the employer’s sole motivation. The plaintiff need only produce evidence that pursuit of a workers’ compensation claim was a cause of the firing. Id. at 70. Further, the Washington Supreme Court determined in Robel that a retaliatory act short of discharge will still comprise a cause of action. 148 Wn. 2d at 50 (citing trial court fact finding: “[the employer’s] actions and/or inactions in regard to the verbal and non-verbal harassment of Robel in the work setting . . . was an unlawful act of retaliation in response to her filing and/or pursuing an industrial insurance claim under RCW 51, et seq., a statutorily protected activity . . . ”).

   b. Adverse Employment Action.

An employer’s harassment in response to filing a worker’s compensation claim is an adverse action. Robel, 148 Wn.2d at 49.

   c. Causal Connection.

The plaintiff may establish the causation element of the prima facie case by merely showing that she filed a workers’ compensation claim, that the employer had knowledge of the claim, and that the plaintiff was discharged. Wilmot, 118 Wn.2d at 69.

2. Legitimate Non-Discriminatory Reasons.

The burden of production shifts to the employer after the plaintiff successfully establishes a prima facie case. Wilmot, 118 Wn.2d at 70. To satisfy the burden of production, the employer must articulate a legitimate reason for the discharge that is neither pretext nor
retaliatory. Id.; Anica, 120 Wn. App. at 492 (employer had articulated legitimate, non-discriminatory reason to fire plaintiff because she did not have a valid social security number).


The burden shifts back to the plaintiff when the employer produces evidence of a legitimate basis for the discharge. Wilmot, 118 Wn.2d at 70. The plaintiff may respond to the employer’s legitimate reason by showing that the reason is pretext or by showing that although the employer’s stated reason is legitimate, the plaintiff’s pursuit of workers’ compensation benefits was a substantial factor motivating the employer to fire the plaintiff. Wilmot, 118 Wn.2d at 73. A Washington court held that, where a plaintiff was terminated three months after filing for workers’ compensation benefits which she received and one week after returning to work to her former position, these circumstances do not establish pretext of discriminatory motive. Anica, 120 Wn. App. at 494.