IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy

between

WASHINGTON FEDERATION OF STATE EMPLOYEES,

and

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES.

RE: Rosalba Mayorga - Disability Separation; AAA Case No. 01-17-0004-9768

RULING ON MOTION
FOR SUMMARY JUDGMENT
AND DISMISSAL

LUELLA E. NELSON,
Arbitrator

May 6, 2019
Portland, OR

Pursuant to Agreement between WASHINGTON FEDERATION OF STATE EMPLOYEES ("Federation" or "WFSE"), and STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES ("Employer" or "DSHS"), LUELLA E. NELSON was selected to serve as Arbitrator in the above proceeding. The parties agreed to submit the Employer's dispositive motion on stipulations and exhibits.

On January 29, 2019, the Employer submitted a Motion for Summary Judgment and Dismissal of the grievance in this matter. The Federation submitted a Response to the Motion on February 20, 2019. The Employer submitted a Reply Brief on March 1, 2019, and the matter was deemed submitted for ruling on the Motion.

APPEARANCES

On behalf of the Federation:

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On behalf of the Employer:

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RELEVANT SECTIONS OF THE AGREEMENT

Step 5 – Arbitration:

...

B. Authority of the Arbitrator

1. The arbitrator will:

a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;

...

ARTICLE 32
REASONABLE ACCOMMODATION AND DISABILITY SEPARATION

32.1 Reasonable Accommodation

A. The Employer and the Union will comply with all relevant federal and state laws, regulations and executive orders providing reasonable accommodations to qualified individuals with disabilities.

B. An employee who believes that he or she suffers a disability and requires a reasonable accommodation to perform the essential functions of his or her position may request such an accommodation by submitting a request to the Employer. The Employer will acknowledge receipt of the request for reasonable accommodation or disability separation. The Employer will begin processing a reasonable accommodation request within thirty (30) calendar days.

C. Employees requesting accommodation must cooperate with the Employer in discussing the need for and possible form of any accommodation. The Employer may require supporting medical documentation and may require the employee to obtain a second medical opinion from a physician or licensed mental health professional of the agency's choice and at Employer expense. Evidence may be requested from the physician or licensed mental health professional regarding the employee's limitations. The Employer will conduct a diligent review and search for possible accommodations within the agency. Medical information disclosed to the Employer will be kept confidential. Upon request, an employee will be provided a copy of his or her reasonable accommodation information that is maintained by the Employer.

D. The Employer will determine whether an employee is eligible for a reasonable accommodation and the final form of any accommodation to be provided. The Employer will attempt to accommodate the employee in his or her current position prior to looking at accommodations in alternative vacant positions.

32.2 Disability Separation

A. An employee with permanent status may be separated from service when the agency determines that the employee is unable to perform the essential functions of the employee's position due to a mental, sensory or physical disability, which cannot be reasonably accommodated. Determinations of disability may be made by the agency based on an employee's written request for disability separation or after obtaining a written statement from a physician or licensed mental health professional.

B. The agency may separate an employee after providing at least fourteen (14) calendar days' written notice when the agency has medical documentation of the employee's disability and has determined that the employee cannot be reasonably accommodated in any available position. The agency may immediately separate an employee that requests separation due to disability.

...

D. Disability separation is not a disciplinary action. An employee who has been separated because of a disability may grieve his or her disability separation in accordance with Article 29, Grievance Procedure, unless the separation was at the employee's request.

FACTS

The following factual recitation combines the undisputed factual statements in the pleadings, sworn declarations, deposition testimony from related court proceedings, and other documentary evidence submitted as attachments to the pleadings.

Grievant, Rosalba Mayorga ("Grievant) is 58 years old. She began working for the DSHS in March 1990 as a Social Worker. The Employer disability separated her effective May 10, 2016. At the time of her separation, she was classified as a Social Services Specialist 3 ("SSS3").

During most of her career, Grievant did intake, screening calls coming into Child Protective Services ("CPS") for appropriate response. From 2009 until her separation in May 2016, Grievant worked for Children and Family Welfare Services ("CFWS"). CFWS Social Workers become involved after a court has found a child to be dependent. All of Grievant's clients were in the dependency process. Grievant described her job as "one of the most stressful jobs in the department" and "very hard." She worked at least eight hours daily, and typically was away from home for work for 12 or more hours per day, during her time with CFWS.

A. GRIEVANT SUSTAINED SERIOUS INJURIES IN A CAR ACCIDENT THAT OCCURRED IN THE COURSE AND SCOPE OF HER EMPLOYMENT.

On September 9, 2013, Grievant suffered severe injuries, including a traumatic brain injury, in an accident that totaled the state car she was driving in the course of her work. The Washington State Department of Labor and Industries ("L&I") accepted her injuries. Because of injuries sustained in the accident, Grievant was unable to work for a period of time. Between the time of her accident in September 2013 and her disability separation in May 2016, she took approximately 3,500 hours of leave, mostly covered by L&I benefits.

B. BECAUSE OF THE AFTER-EFFECTS OF HER INJURIES, GRIEVANT COULD NOT PERFORM THE ESSENTIAL FUNCTIONS OF HER JOB AS A SOCIAL WORKER.

Upon her return to work, Grievant was unable to work in the same way she had before the accident. Despite her efforts, she could not keep up, even with the support DSHS offered. This support included allowing reduced hours and a gradual return to work, reduced caseload, reducing or eliminating driving, and supervisory support with prioritizing work and making decisions.

C. GRIEVANT'S DOCTOR RECOMMENDED THAT SHE NOT CARRY A CASELOAD.

In a November 25, 2015, meeting with Area Administrator Sylvia Johnson, Grievant and her husband requested further reasonable accommodation. Johnson confirmed this information in a December 8 letter and provided a medical inquiry for Grievant to submit to her doctor, with a request that the doctor provide the information by December 21. On December 10, Grievant requested that DSHS extend the deadline because she would be out of the country; the deadline was extended to January 8, 2016. Meanwhile, the DSHS confirmed opening of her reasonable accommodation case on December 15, 2015.

Grievant had difficulty finding a physician to conduct an examination, resulting in further postponement of the deadline for the medical inquiry. Neuropsychologist Dr. Tedd Judd, Ph.D., examined Grievant on January 29, 2016, and issued two reports, dated January 29 and February 17, 2016. Dr. Judd recommended several accommodations for Grievant, including assignment to a position that did not carry a caseload.[1] Grievant agreed with Dr. Judd that she needed DSHS to reassign her to a position that did not carry a caseload. She provided Dr. Judd's reports to DSHS on February 19, 2016.

On March 3, 2016, Grievant and DSHS participated in a reasonable accommodation meeting. As documented in a meeting memo with which Grievant agrees, the attendees discussed the results of Dr. Judd's examination and agreed to initiate the disability reassignment process. Christian Afful, a DSHS Reasonable Accommodation Specialist at the time, explained the disability reassignment process to Grievant during the meeting. Afful told Grievant that she could voluntarily limit the search for a vacant, funded position by completing a "Request to Limit Vacancy Search" form, but that this would limit the scope of the search and limit her opportunity to be offered a vacant, funded position. The disability process, as summarized in the March 3 meeting notes, was described, in pertinent part, as follows:

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[1] Other recommended accommodations were to reduce her workload to a level that she could consistently complete within her work hours; reduce the complexity of her workload to reduce the need to multitask and prioritize tasks; reduce interruptions and distractions; provide assistance from her supervisor in prioritizing her work, including what to work on, when to work on it, and how to allocate and prioritize her time; and possibly the use of calendars, timers, and alarms to help her stick with planned priorities. It was also suggested that she be encouraged to "check her judgment with others when a situation may call for adjusting her plan in midstream."

> ... the Department will make a good faith effort to locate a vacant/funded position (only within DSHS) for which the employee is qualified. During the search process, the agency will first consider lateral positions, meaning same pay, status, location. However, if there aren't any lateral positions available we will consider positions below the current pay range.
> During the search process management is not required to create a new position or bump someone else from their position to accommodate another. If a position is located and offered to an Employee, and they have not held permanent status in that job class before, they will need to serve whatever trial service period is required – either six or 12 months.
> ...
> The Department will make a good faith effort to assign you to a vacant funded position considering your healthcare provider's recommendations. While an attempt will be made to assign you to an alternative position that is lateral to your current position, if unable to locate such a position, positions at lower salary ranges will be considered. If no alternative positions can be identified, or if you decline a position that is offered, we will initiate your disability separation from state service.

D. BOTH THE EMPLOYER AND GRIEVANT SEARCHED FOR POSITIONS MEETING THE RESTRICTIONS IMPOSED BY GRIEVANT AND HER TREATING PHYSICIAN.

On March 9, 2016, Grievant submitted a Request to Limit Vacancy Search form that sought to limit the vacancy search to a single position, Relative Search Specialist ("RSS"), which is an SSS3 position; a single office, the Mt. Vernon office; and a single administration within DSHS, Children's Administration. In her deposition taken on May 10, 2018, Grievant testified that she knew there was an RSS vacancy at Mt. Vernon because a co-worker, John Barr, who had previously been assigned the RSS position as a reasonable accommodation and would soon retire, suggested she apply for his position.

On March 10, 2016, Grievant exchanged emails with Afful regarding her Request to Limit Vacancy Search. In that exchange, Afful informed her that she could limit the search to a geographic area, but could not limit it to a single position, and that by limiting the scope of the search she might limit the opportunities to find a vacant, funded position. On March 15, 2016, Grievant signed a second Request to Limit Vacancy Search specifying a single city, Mt. Vernon, and a single administration, Children's Administration.

Afful initiated the reasonable accommodation vacancy search process on March 16, 2016. At his behest, two vacancy searches were conducted; the first was between March 22 and March 25, 2016, and the second was between April 19 and April 25, 2016.

1. THE FIRST VACANCY SEARCH

The first vacancy search looked at four identified positions by reaching out to the position supervisors to determine whether the positions were still funded and whether they were vacant or would soon become vacant. Of those four positions, one had been moved to headquarters in Olympia, two had been filled, and the remaining position carried a caseload. Afful told Grievant on March 31, 2016, that the first vacancy search had not yielded any positions. Grievant testified in her May 10, 2018, deposition that, after one of the vacancy searches, she asked Afful specifically about the RSS position in Mt. Vernon, and "he said he didn't know."

2. GRIEVANT'S DIRECT APPLICATION

On March 28, 2016, three days after the first vacancy search ended, Kelly Lutes, the supervisor of the Native American Inquiry and Relative Search Unit in Mt. Vernon, sent out an email seeking candidates for an internal transfer into her unit as an RSS. The position description stated, inter alia, that

> This position receives little supervision and the incumbent exercises independent judgement in devising own work methods to devise an advanced level of specialized, culturally competent and solution focused case management.

According to Lutes' declaration dated September 6, 2018, RSS's in her unit have to be "very computer savvy" to work with eight different search engines, move between programs, and document their activities on the computer; they must also prioritize and multi-task constantly.

On March 30, 2016, Grievant emailed Lutes that she was interested in being considered for the RSS position.[2] Grievant was interviewed on April 11, 2016. The application process consisted of an interview with a panel of four, including Lutes, and completion of a short computer exercise to determine whether a candidate knew how and where to search for very basic information with the DSHS computer system. Grievant testified that, when she previously transferred internally to Mt. Vernon from another office, she had not been required to go through a selection process.

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[2] Grievant testified in her May 10, 2018, deposition that she applied twice for an RSS position, once "before disability" in December and once "after disability." Another candidate was selected for the vacancy for which Grievant applied in December. Because she knew Lutes from commuting on the same bus, she turned to her for information on the reason she was not selected for that RSS position, but got no answer.

Grievant initially had trouble logging on for the computer exercise because her password was no longer valid. Lutes' declaration states that she assisted Grievant with logging on and allowed her an extra 10 minutes; however, Grievant was one of only two candidates who did not complete the computer exercise. Lutes knew Grievant, and knew she had worked for years in intake and CFWS, where she would have used the DSHS computer system all the time. She was surprised that Grievant did not complete the computer exercise.

According to an offer of proof from her attorney, Grievant was taken off-guard by the administration of a computer exercise and had trouble accessing the computer platforms because her password protocols had been revoked. She also was out of practice working with the DSHS computers. She believes she performed poorly on the computer exercise because of a combination of her recent lack of practice, the stress of the password situation, being caught off-guard by the computer exercise, and the general stress of the interview. She believes she could have demonstrated her competence in a less stressful setting. In her deposition taken on May 10, 2018, she testified, inter alia, "I'm not the best with the computer, but I think that if I had the training and – someone who's patient can help me." She acknowledged that it was not reasonable to expect that level of assistance in her previous job because of that supervisor's varied duties, but suggested, "maybe in another job, because there are many that they have that is more desk job, I think that I could do that."

According to Lutes' declaration, Grievant's answers in the interview were "not poor in content," but were "unnecessarily brief," at times short and "almost aggressive;" she talked about having many conflicts over the years; and she appeared "defeatist." The panel discussed that she was "negative and somewhat aggressive and came across as disgruntled." The panel unanimously agreed Grievant would not be a good fit for the position or the unit, and gave her an average score of 2.8 out of 5. Lutes sent Grievant an email on April 15, 2016, informing her that another candidate had been selected for the position. Lutes' declaration states that she did not know at the time that Grievant was seeking reasonable accommodation or disability reassignment.

Grievant believes she was qualified for, and could have performed the essential functions of, the RSS position. She acknowledges that she may have initially required more supervisory attention than provided in the position description, but asserts that this would not have been an undue hardship for the Employer.

3. THE SECOND VACANCY SEARCH

On April 19, 2016, four days after Lutes informed Grievant that she had not been chosen for the RSS position, the second DSHS vacancy search began. This search looked at three positions, including a Social Services Specialist 2 position – a position to which Grievant could have demoted if it met her needs. Of the three positions, two were found to carry caseloads, and the third was not vacant. On April 25, 2016, Afful received an email informing him that the vacancy search had again failed to identify a position for Grievant. By letter on April 26, 2016, DSHS notified Grievant that she was being disability separated effective May 10, 2016.

E. THE FEDERATION FILED THE GRIEVANCE AT HAND

On May 17, 2016, the Federation filed a grievance on Grievant's behalf. The grievance cited Article 32 of the Agreement and described the dispute as follows:

> On April 26, 2016, the Agency disability separated the grievant without giving preferential treatment in reassignment, nor providing an accommodation so the employee can do the essential functions of the job.

The remedy sought was:

> The employer return the grievant to employment with the same hours, wages, benefits, location and schedule and give her the position in Relative search and/or any other mutually agreed upon remedy and make the grievant whole to all wages and benefits to which the grievant is entitled.

In later grievance responses, the Employer noted the following fleshing-out of the allegations during grievance step meetings, to assert that the Employer had

* violated Article 32.1.A of the Agreement by failing to "comply with Executive Order 13.02" and not following "the applicable state and federal laws in this situation;"
* violated Article 32.1.B of the Agreement by holding a Reasonable Accommodation meeting in March, more than 30 days after filing of the request for reasonable accommodation request;
* violated Article 32.1.C of the Agreement by failing to conduct a "diligent" search, noting that the search did not include the RSS position, which differed from Grievant's prior position in that it "is non-case carrying, does not require driving and has very little or no overtime required." The Union further argued that it would not be an undue hardship to afford Grievant temporary accommodation in this

position "to provide assistance and training in the use of alarms, timers, calendars, etc., and to assist the Grievant in processing changes that arose."

* violated Article 32.2 of the Agreement by disability separating Grievant, which it described as 'the accommodation of last resort."

* failed to conduct a "diligent" search for a vacant position for which Grievant may have been qualified.

* "The grievant should not have had to apply for a transfer and be asked to interview for the vacant "relative search" position but should have been offered the position as an accommodation."

On August 21, 2017, the Union filed a Demand for Arbitration with the American Arbitration Association ("AAA") describing the claim as follows:

> Disability separation without exhausting reasonable accommodation by giving preferential treatment in reassignment, not providing an adequate accommodation to ensure ability to perform essential job functions. The claimant desires to return to employment with the same hours, wages, benefits, location and schedule, preferably the relative search position denied to the claimant. Any other remedy to make the claimant whole.

F. GRIEVANT FILED AN EEOC CHARGE AND A LAWSUIT

While this grievance was pending, on May 25, 2016, Grievant filed a charge with the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a right to sue letter on March 23, 2017.

On August 26, 2016, Grievant and her husband filed suit in Skagit County Superior Court against DSHS, the Washington State Department of Enterprise Services, certain named state employees, and the car manufacturer. Grievant filed a second amended complaint on April 30, 2018. The action was removed to the U.S. District Court for the Western District of Washington at Seattle. There, Grievant's claims against individual defendants were dismissed for lack of service. The remaining claims alleged:

* Violations of Title VII of the Civil Rights Act of 1964 ("Title VII") in the form of discrimination based on race and national origin, as well as retaliation and intentional infliction of emotional distress;

* Violations of Titles I and II of the Americans with Disabilities Act ("ADA");

* Violations of Section 504 of the Rehabilitation Act of 1974 ("Section 504);

* Violations of the Age Discrimination in Employment Act ("ADEA"); and

* Violations of the Age Discrimination Act of 1975.

On September 6, 2018, the Employer moved for Summary Judgment. After further pleadings, on December 17, 2018, the district court judge granted the Employer's Motion. The court dismissed without prejudice the claims against individual defendants who had not been served. It found that, absent any defendants sued in their official capacity, the Title I ADA and ADEA claims were barred by the Eleventh Amendment. It noted that Grievant had previously conceded that Title II of the ADA did not apply to employment discrimination cases, and found that the Title II claims, which were previously dismissed on that basis, could not be reasserted. It further noted that Grievant had conceded that she had not exhausted her remedies under the ADEA, and therefore dismissed those claims without prejudice.

The court found that Grievant had failed to offer evidence from which a reasonable jury could return a verdict in her favor on the Title VII and Rehabilitation Act claims. It noted that "Disability is not a protected class under Title VII," so it analyzed her disability discrimination claims under the Rehabilitation Act. It found:

> The only reasonable inference from evidence is that, after 2013, [Grievant] was no longer qualified for the Social Services Specialist 3 position she had held since 2009, regardless of any reasonable accommodation the employer could provide. She was simply unable to perform the job and needed an entirely new position, one that did not involve a caseload and/or court-related paperwork.

It therefore dismissed her disability claims under §504 of the Rehabilitation Act.

The court further found that the evidence did not support Grievant's assertion that the Employer discriminated against her by its failure to find a new position for her and/or failure to hire her for the position she found. It noted that Grievant had reduced her chances of finding a vacant acceptable position through geographic and job limitations, and had offered "no evidence of vacant positions meeting her search criteria and satisfying the limitations identified by Dr. Judd that DSHS hid from her." It found that the failure to identify appropriate vacancies "was not causally connected to her disability." The court found

> The law does not require an employer to (a) continue to pay an employee who cannot, with or without reasonable accommodation, perform the essential functions of the job, (b) create a new position for her, or (c) terminate or reassign an existing employee so that [Grievant] could have his or her job.

The court found that the RSS position for which Grievant applied "required much the same skills and capabilities as her [SSS3] position, which she admittedly could not do." It noted that she did not complete the computer exercise or interview well. It found no evidence that her application was rejected for her disability, "except to the extent that her disability made her unable to show proficiency on the DSHS computer system and/or convince the panel that she could successfully perform the job." It found that §504 of the Rehabilitation Act "does not require an employer to hire someone who cannot perform the essential functions of the job."

As to Grievant's Title VII claims, the court found that "[Grievant] has not shown that she was performing satisfactorily as a [SSS3]." It further found no evidence that her race, national origin, or color was "a motivating factor in her disability separation or her unsuccessful bid for the [RSS] position."

As to Grievant's Title VII retaliation claims, the court found:

> No reasonable person could believe that a complaint about child welfare policies and how they impact the citizens of Washington is a complaint of employment discrimination or any other activity protected by the statute.

The court dismissed with prejudice Grievant's claims under Title II of the ADA, Title VII, and §504 of the Rehabilitation Act, as well as her declaratory judgment claims. It dismissed without prejudice her claims against individual defendants, her claims for prospective relief under Title I of the ADA and the ADEA, and her claims under the Age Discrimination Act of 1975. It stated that her claims under Title I of the ADA and the ADEA could only be asserted in state court and could not be reasserted in federal court.

POSITION OF THE EMPLOYER

Summary judgment is appropriate where there are no disputed material facts, and the moving party is entitled to judgment as a matter of law. The Arbitrator should view the evidence in the light most favorable to Grievant and draw all reasonable inferences in her favor. Grievant may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having affidavits considered at face value. A mere scintilla of evidence in support of her position is insufficient to avoid judgment. Summary judgment should be granted where Grievant fails to offer evidence from which a reasonable jury could return a verdict in her favor. Grievant cannot present any evidence to support an inference that DSHS discriminated against her.

The discovery conducted in Grievant's federal case, on the same issues, rendered any further proceedings unnecessary because there is no dispute over any material fact. Viewing the evidence in the light most favorable to Grievant, no reasonable fact finder could find that DSHS violated the Agreement. This grievance alleged the failure to reasonably accommodate Grievant and not giving preferential treatment in the reassignment process. If DSHS can establish that it did not discriminate against Grievant in either respect, there can be no adverse finding against it.

Grievant's Title VII and ADA claims were dismissed in federal court on summary judgment. Her Title VII claims were for discriminatory hiring practices, segregated hiring practices, and retaliation. Grievant cannot establish those claims. She has the initial burden of establishing her prima facie case. If she meets that burden, DSHS must offer a non-discriminatory reason for its actions. If it does, Grievant must produce evidence suggesting that those reasons are a pretext for discrimination.

Grievant is a member of a protected class, and the disability separation and decision not to hire her into the RSS position were adverse actions. However, she cannot prove the second or fourth elements of a prima facie case, nor establish membership in a protected class as the sole or motivating factor in the adverse employment action. It is undisputed that she was not qualified for her pre-injury SSS3 position in CFWS. She could not work the hours; carry a full caseload; prioritize; multi-task; or drive. She could not perform the essential functions of her job. She admits she could not do the job and needed to be reassigned. Her voluntary limitations on the vacancy search resulted in no positions being identified that matched her skill set and in which she could be reasonably accommodated.

Grievant's only evidence regarding her claim of not being hired is that she was not hired.

To establish her prima facie case under either the ADA or § 504, Grievant must show that: (1) she is disabled; (2) she was "otherwise qualified," meaning she could perform the essential functions of the job with or without accommodations; (3) she suffered an adverse employment action because of her disability; and (4) DSHS received federal financial assistance (for § 504) or is a public entity (for the ADA). Zukle v. Regents of Univ. of California, 166 F.3d 1041, 1045 (9th Cir. 1999). In cases where the plaintiff alleges a failure to

accommodate, as Grievant does in this case, the plaintiff's initial burden also includes showing the existence of a reasonable accommodation that would allow her to perform the essential functions of the job. Zukle, 166 F.3d at 1046-47.

The undisputed evidence is that Grievant could not perform the essential functions of her pre-injury job, with or without accommodation. DSHS worked with Grievant for more than two years in an effort to get her back to successfully performing her pre-injury job. The medical reports received by DSHS, and Grievant's own concessions, established the only reasonable accommodation that was available was reassignment.

DSHS carried out two vacancy searches that corresponded with Grievant's qualifications as an experienced social worker, allowed for the accommodations recommended by the IME (non-case carrying and reduced multi-tasking) and honored the limitations Grievant voluntarily imposed on the vacancy search. Grievant limited the search for a vacant, funded position to a single administration within a single office. During searches carried out in March and April 2016, no vacant, funded, non-case carrying, limited multi-tasking SSS3 positions were located in Children's Administration in Mt. Vernon. Grievant's claims under Title I of the ADA and § 504 of the Rehabilitation Act of 1973 both fail because Grievant was not "otherwise qualified" for her pre-injury position, she was not "otherwise qualified" for the RSS position she sought, and her self-imposed limitations on the vacancy search process resulted in no positions being identified for which she was "otherwise qualified" and could perform with or without reasonable accommodation.

Because Grievant's federal claims fail, her claims that the Agreement was also violated must fail, as Article 32 does not require DSHS to do more than what is required under federal law. The grievance should be summarily dismissed.

Although the Federation asserts that DSHS did not comply with Article 32.1(B)'s 30-day requirement, it failed to proffer any evidence that DSHS did not begin processing the accommodation request within 30 days of notice that Grievant was requesting new accommodations. The Agreement does not require a reasonable accommodation meeting within 30 days; the Federation put forth no evidence that it has ever been interpreted to require such a meeting at all, let alone within 30 days. Interpreting the Agreement in this fashion would be

nonsensical. Some accommodation requests can be granted without needing to go through the reasonable accommodation process. DSHS began the reasonable accommodation process within 30 days. Its obligation to provide accommodation was ongoing, and it continued to work with Grievant, including a meeting with her two days after her husband notified it of her need for new accommodations.

The Federation misapplies and misunderstands the holding in Davis v. Microsoft. DSHS's reasonable accommodation and job search processes complied with the requirements outlined in Davis. Nothing in Davis requires DSHS to do anything more than assess whether Grievant was qualified for any open, funded position within the parameters she and her doctor established. The undisputed facts demonstrate that DSHS did exactly that. DSHS was not required to put her through "testing." Grievant's medically documented limitations made it clear that she could not perform the essential functions of the RSS positions. Grievant has no evidence that any position for which she was qualified and able to perform the essential functions existed. Accordingly, DSHS invoked the disability separation procedures.

If the Arbitrator does not grant summary judgment on the merits for the reasons set forth above, the grievance should, nevertheless be dismissed under the doctrines of res judicata or collateral estoppel.

Res judicata or claim preclusion is an affirmative defense that prevents a party from "litigating a second lawsuit on the same claim, or any other arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit." The threshold requirement for the application of res judicata is a valid and final judgment on the merits in a prior suit. Grievant received a final judgment on the merits of her discrimination claim and the court's decision is entitled to deference in this arbitration. Courts have held summary judgment can be a final judgment on the merits with the same preclusive effect as a full trial, and is therefore a valid basis for application of res judicata.

The Washington State Supreme Court has approved the application of res judicata when there is a concurrence of identity in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made.

The identity of subject matter requirement is easily met because Grievant's allegations were the same as those she made in her federal lawsuit. Washington courts employ a four-factor test to determine whether or not there is an identity in the causes of action: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." These four factors are present in the current arbitration. First, the rights of DSHS would be impaired if this arbitration were to proceed forward because the judgment in the federal case, which limited DSHS's liability by dismissing the claims with prejudice, would not be honored. Forcing DSHS to continue to litigate Grievant's allegations would be unjust in light of the court order granting summary judgment on the exact same facts and legal theories. The second factor is met because the same evidence is presented in both actions. The third factor is met because Grievant's federal claim and grievance both allege that her right to a reasonable accommodation and to preferential reassignment were violated. In this case, the right being infringed in both matters is the same. The Agreement specifically cites to the federal statute that was used to make the Summary Judgment determination in federal court. The fourth factor is met because Grievant's federal claim and grievance both allege the same nucleus of operative facts to substantiate her claims.

The third and fourth elements of res judicata are typically considered together. "Under the principles of res judicata, a judgment is binding upon parties to the litigation and persons in privity with those parties." Privity is established "where a person is in actual control of the litigation, or substantially participates in it." "[I]n general, the employer/employee relationship is sufficient to establish privity." Grievant was the complaining party in the federal lawsuit and she is the complaining party in her grievance. In both cases, she has alleged that DSHS discriminated against her. In the federal court case, DSHS defended the action and prevailed.

Collateral estoppel and res judicata are very similar concepts. Collateral estoppel's preclusive effect, however, focuses on an individual issue that may no longer be pursued in litigation. Res judicata is intended to prevent re-litigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one

or more of the crucial issues or determinative facts determined in previous litigation. Collateral estoppel may be applied to preclude only those issues that have actually been litigated, and necessarily and finally determined in the earlier proceeding. Further, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented' in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. As argued above, the rights under the Agreement are identical to those rights asserted in Grievant's federal lawsuit. The issues to be determined in this arbitration involve the same bundle of legal principles as the federal lawsuit. It is inarguable that summary judgment is considered a judgment on the merits. The third element is easily satisfied, as Grievant is the only party against whom the doctrine is asserted. Finally, the application of collateral estoppel does not work an injustice, which is generally considered to mean a procedural irregularity. Grievant had a full and fair opportunity to litigate her claims in federal court. The federal court ruled that DSHS did not discriminate against her. Because the rights under the Agreement are the same those litigated in the federal case, dismissing the case on res judicata/collateral estoppel grounds is proper.

Contrary to the Federation's assertions, the court did not make factual determinations on Grievant's Title I ADA claims. The court made clear that the claims addressed in its order and dismissed with prejudice were those under Title II of the ADA, Title VII and §504 of the Rehabilitation Act. The factual findings on those claims should be given preclusive effect. There is authority for the principle that factual determinations of an administrative agency should be given preclusive effect in arbitration under a collective bargaining agreement. Factual findings made by a federal district court are certainly entitled to at least the same degree of deference. The factual determinations made by the court lead to only one conclusion: DSHS did not violate Article 32 of the Agreement when it disability separated Grievant.

Lastly, if the Arbitrator does not dismiss on the basis of res judicata or collateral estoppel, DSHS requests an order stating that the factual determinations made by the court are preclusive in the arbitration.

POSITION OF THE FEDERATION

Summary Judgment is appropriate only where "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law" CR 46(c). Evidence must be considered in favor of the nonmoving party.

Summary Judgment is not appropriate here because issues of fact exist regarding each of the alleged violations of the collective bargaining agreement.

A very specific violation of state law is at issue. Under Washington law, "[i]f a handicapped employee is qualified for a job within an employer's business and an opening exists, the employer must take affirmative steps to help the handicapped employee fill the position." Curtis v. Security Bank of Washington, 69 Wn. App. 12, 19, 847 P.2d 507 (1993). An employer is required to "(a) perform capabilities testing on open positions, (b) encourage the employee to apply for vacant positions she can perform and (c) affirmatively assist her in applying for those positions." Davis v Microsoft Corp. 109 Wn. App. 884, 893, 37 P.3d 33 (2002).

Grievant was qualified to perform the RSS position. Unlike a case-carrying position, the RSS position required a repetitive, uniform set of tasks. Contrary to the Employer, the position was compatible with the accommodations Grievant sought. The multi-tasking required of the position was encompassed within a finite set of responsibilities that are repeated. Admittedly, the RSS position description called for "little supervision." Although Grievant may have initially needed additional supervision to perform this job, this accommodation would not have been an undue hardship. The Employer bears the burden of demonstrating that an accommodation would be unreasonable, but cannot carry this burden on summary judgment.

Whether Grievant could perform the essential functions of the RSS position is a question of fact. The interview panel did not conduct "capabilities testing" as required. It denied Grievant's candidacy based, in large part, on her demeanor during the interview, but admitted that her answers "were not poor in content." The panel was not aware that she was engaged in the accommodation process. The Employer violated the law by

catching Grievant off-guard with the computer exercise instead of affirmatively assisting her in applying for the position, including providing accommodations for that test. Grievant was forced to apply for this position without any encouragement or assistance from the Employer as required by state law. There is a question of fact as to whether the Employer violated Article 32 of the Agreement, and dismissal of the grievance is unwarranted.

A question of fact also exists as to whether the Employer complied with Article 32.1(B) of the Agreement. While the February 19, 2016, response indicates receipt of the request for accommodation and initiation of the process within 30 days, there is a question of fact whether finally holding the reasonable accommodation meeting in March 2016 complied with this Article.

A question of fact also exists as to whether the Employer complied with Article 32.1(C) of the Agreement, which provides that it will conduct a diligent review and search for possible accommodations. Grievant, not the Employer, identified the RSS position and applied for it on her own. Had the Employer conducted a diligent search, it would have identified this position. The Employer was required to perform capabilities testing, encourage Grievant to apply for the position and accommodate her in the application process for this position. The Employer did none of this.

Because a question of fact exists on the issue of whether Grievant was qualified for and could have been accommodated in the RSS position, the Employer violated Article 32.2 of the Agreement by invoking disability separation.

Res judicata does not bar the grievance. Prior to granting summary judgment, the court had dismissed the reasonable accommodation claims under the ADA on jurisdictional grounds – the Eleventh Amendment barred a lawsuit against the state (DSHS) in federal court. The court dismissed the accommodation claims without prejudice in both its Order Granting Motion for Partial Dismissal and its Order Granting Summary Judgment. A dismissal without prejudice is not a judgment on the merits for purposes of invoking res judicata.

Res judicata is inapplicable to claims arising out of Article 32 of the Agreement. A portion of the claims arises out of the Agreement's inclusion of state and federal law. Res judicata dismissal of these claims is inappropriate because the federal court dismissed the overlapping claims without prejudice and, initially, did

so solely on Eleventh Amendment sovereign immunity grounds. The specifically asserted causes of action in this matter differ from those in the federal lawsuit.

Collateral estoppel (issue preclusion) does not apply because the issues here are distinct from the issues partially examined in the federal lawsuit and because the federal court dismissed the claims on jurisdictional grounds without reference to the specific factual underpinnings.

Collateral estoppel does not bar the grievance because the grievance asserts very specific violations of Washington law regarding the reasonable accommodation obligation of an employer. The record in the federal case contains no indication that the court addressed the state law issues. Although the Order Granting Summary Judgment does briefly address the question of whether Grievant could perform the essential functions of the RSS position with accommodation, nothing in the record indicates the court fully considered or analyzed the issues. More important, these issues should not have even been before the court because the reasonable accommodation claims had been dismissed without prejudice. It is unclear why Grievant's counsel reintroduced some of these issues in a Second Amended Complaint, or why the judge entertained factual argument on an already dismissed claim rather than referring to the original order and reiterating that the court lacked jurisdiction under the 11th Amendment. Because this is a jurisdictional issue – sovereign immunity – the court's decision is properly subject to a collateral attack by a party whose rights or interests are adversely affected.

To the extent DSHS argues that a party in the original matter cannot collaterally attack the final judgment in that matter, the Federation asserts that it is the real party in interest in the grievance as it has the most interest in remedying violations of the Agreement. The Federation was not a party in the federal court lawsuit. Given the ineffectiveness of Grievant's private counsel as demonstrated by the haphazard presentation made on her behalf in federal court, application of collateral estoppel here would create an injustice.

DISCUSSION

Motions for summary judgment are disfavored in arbitration, which is an extension of the collective bargaining process. In considering a motion for summary judgment, evidence must be viewed in the light most favorable to the non-moving party. A ruling on such a motion is not a ruling on the merits. Allegations

sufficient to survive a motion for summary judgment do not necessarily equate to evidence sufficient to carry the day in the hearing that follows. However, summary judgment may be appropriate if undisputed facts are sufficient to decide the matter on the merits.

A. ARTICLE 32.1(A)

Article 32.1(A) of the Agreement requires compliance with applicable legal provisions regarding reasonable accommodation for disabled employees. The Federation argues that a disability reassignment into the RSS position would have been such a reasonable accommodation.

Reasonable accommodation does not require removing an incumbent employee to make room for a disabled employee. It does require assisting an employee who can perform the essential functions of a vacant position, with or without accommodations, in moving into that position. The Employer did not identify the RSS position in its vacancy search. The stipulated facts do not indicate whether that was because the Employer was unaware of Barr's impending retirement, or because the Employer concluded the RSS position was not within Grievant's medical restrictions and/or her qualifications.

The issue the Federation seeks to present in arbitration under this provision is not whether Grievant could perform the essential functions of the SSS3 position that she held before her automobile accident; it is undisputed that she could not, even with reasonable accommodations. The issue also is not the question that was addressed by the interview panel in April 2016 – i.e., Grievant's relative qualifications vis-a-vis non-disabled applicants without consideration of possible reasonable accommodations. Rather, the issue is whether she could perform the essential functions of the RSS position, with or without reasonable accommodations. The undisputed facts are sparse regarding the process that would have been used to determine whether she could perform the essential function of the RSS position if that position had been identified in a vacancy search.

The computer exercise for the RSS position tested ability to use the DSHS computer systems that were regularly used in that position. The Federation disputes whether that exercise fairly measured Grievant's abilities given the circumstances. Grievant acknowledged in her deposition that her computer skills were "not the best." Nonetheless, she had used the computer systems for years. Viewed in the light most favorable to

Grievant, a question of fact exists regarding whether her poor performance on the computer exercise reflected a lack of basic computer competence, or simply the factors raised in her attorney's offer of proof.

A legitimate concern with a possible disability reassignment to the RSS position is the stated requirement to work with little supervision. Dr. Judd had recommended more than minimal supervisory assistance and oversight. The Federation asserts that providing close supervision for a break-in period would have been a reasonable accommodation, and correctly notes that the Employer bears the burden of showing that a requested accommodation would be an undue hardship. As far as can be determined on the limited record presented, the Employer did not consider whether such a temporary enhancement in the level of supervision in the RSS position would be an undue hardship, because it did not identify this position for disability reassignment. Viewed in the light most favorable to Grievant, a question of fact exists on the reasonableness of the suggested accommodation.

For all the above reasons, the Employer's Motion to Dismiss as to Article 32.1(A) is denied.

B. ARTICLE 32.1(B)

The question of whether holding a meeting more than 30 days after receipt of the reasonable accommodation request complies with 32.1(B) is a contractual interpretation issue, not a question of fact. Resolution of this allegation is possible given the undisputed facts.

Article 32.1(B) requires the Employer to "begin processing" the reasonable accommodation request within 30 calendar days. On its face, this provision does not require a meeting within 30 days. The Employer began processing the reasonable accommodation request with its request for medical documentation on December 8, 2015, roughly two weeks after the November 25, 2015, meeting at which Grievant and her husband requested further reasonable accommodation. These undisputed facts prove that the Employer began processing the request for reasonable accommodation within 30 days of the initial notice of the need for additional accommodation. Viewing the facts in the light most favorable to Grievant, the Employer's Motion for Summary Judgment is granted as to Article 32.1(B).

C. ARTICLE 32.1(C)

The Federation asserts that a question of fact exists regarding whether the Employer's search for a suitable position was "diligent" within the meaning of this provision. This assertion revolves around the undisputed fact that the Employer did not identify the RSS position as a possible accommodation. It is closely tied to the requirements of Article 32.1(A), discussed above.

Both of the Employer's searches identified, inter alia, positions that, upon further inquiry, were found not to be vacant. Taking Grievant's testimony regarding the encouragement from her co-worker at face value, that co-worker's imminent retirement from an RSS position was no secret. As noted above, the undisputed evidence does not reflect whether the Employer was nonetheless unaware of that impending retirement, or whether it was aware of it but considered the RSS position inappropriate for disability reassignment.

Grievant applied for the RSS position directly. The interview panel and Lutes were unaware that she was seeking reasonable accommodation. As noted, their task was not to determine whether Grievant had the minimum qualifications to perform the RSS position, with or without accommodation; it was to compare her qualifications with those of the other applicants. The undisputed facts do not address whether the Employer ever considered the more limited question of minimum qualifications for the RSS position, with or without accommodations, during the vacancy search. Viewing the facts in the light most favorable to Grievant, a question of fact exists regarding the diligence of the vacancy search.

For all the above reasons, the Employer's Motion for Summary Judgment as to Article 32.1(C) is denied.

D. ARTICLE 32.2

The dispute regarding Article 32.2 is derivative of the alleged violations of Article 32.1. If the Employer did not exhaust the available reasonable accommodations, then, the Federation argues, its move to disability separation under Article 322 was premature. In view of the questions of fact discussed above as to Articles 32.1(A) and (C), the Employer's Motion for Summary Judgment as to Article 32.2 is denied.

E. SUMMARY OF THE MERITS OF THE MOTION FOR SUMMARY JUDGMENT

Viewing the evidence in the light most favorable to Grievant, questions of fact exist regarding the Employer's compliance with relevant federal and state law, regulations, and executive orders, as required by Article 32.1(A), its compliance with its obligation to conduct a "diligent search" for possible accommodations, as required by Article 32.1(C), and its compliance with the prerequisites to disability separation under Article 32.2. No question of fact exists regarding the Employer's compliance with the obligation under Article 32.1(B) to "begin processing" Grievant's accommodation request within 30 days.

F. RES JUDICATA AND COLLATERAL ESTOPPEL

The Employer cites the doctrines of res judicata and collateral estoppel as alternative bases for dismissal of this grievance. Grievant's reasonable accommodation claims were dismissed without prejudice on 11th Amendment jurisdictional grounds. The court barred re-filing of those claims in federal court, but specifically noted that they could be re-filed in state court. There was no final judgment as to those claims. Res judicata therefore does not apply to those claims.

In any event, res judicata is inapposite because there is incomplete identity in the parties. As noted, arbitration under a collective bargaining agreement is an extension of the collective bargaining process. A collective bargaining agreement is an agreement between an employer and a union; individual employees are third party beneficiaries of that agreement. Even where, as here, the collective bargaining agreement incorporates statutory protections that were pursued in court by an individual employee, the parties in interest differ. The difference in the parties in interest, and the lack of any involvement by the Federation in the federal court litigation, also precludes application of collateral estoppel as to the court's factual findings.

RULING

The Employer's Motion for Summary Judgment is granted as to alleged violation of Article 32.1(B) and denied as to alleged violation of Articles 32.1(A), 32.1(C), and 32.2.

LUELLA E. NELSON - Arbitrator