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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KERRY and MICHAEL WASHBURN,
Plaintiffs,
v.
GYMBOREE RETAIL STORES, INC., *et al.*,
Defendants.

Case No. C11-822RSL

MEMORANDUM OF
DECISION

This matter was heard by the Court in a bench trial commencing September 17, 2012, and concluding on September 20, 2012. Plaintiff Kerry Washburn alleges that defendant Gymboree Retail Stores, Inc. ("Gymboree"), defendant Fran Anyan, store manager at Gymboree, and defendant Lana Rackley, Gymboree district manager, interfered with her rights under the Family and Medical Leave Act ("FMLA"), failed to accommodate her disability, discriminated against her on the basis of disability and wilfully failed to pay her wages. Plaintiffs also seek to recover damages for loss of consortium.

In the best of all worlds, Kerry Washburn would be in the middle of her fifth year at Gymboree, enjoying her work as an assistant manager or sales lead and being proud to be part of one of Gymboree's top teams, led by her manager, Ms. Anyan, at the Tacoma Mall Store in Tacoma, Washington. Her health and family issues would necessitate some adjustments to her work schedule, but in a job where flexibility in schedules is the norm, the team would easily adjust to these periods of time off.

1 But the best of all worlds was not the situation presented to the Court. Instead,
2 based on a number of mis-communications, mis-understandings and missed
3 opportunities, Ms. Washburn and Ms. Anyan found themselves on opposite sides of a
4 contentious lawsuit, both enduring several days of difficult testimony that often reduced
5 them each to tears.

6 The Court has considered the evidence presented at trial, the exhibits admitted
7 into evidence, the arguments of counsel and, being fully advised, now makes the
8 following Findings of Fact and Conclusions of Law.

9 **FINDINGS OF FACT**

10 Kerry Washburn was hired by Gymboree in April 2008 to work as a part-time
11 sales associate at Gymboree's retail store at South Hill Mall in Puyallup, Washington.
12 She was quickly promoted to part-time assistant manager and then to full-time assistant
13 manager. By all accounts, she performed her job well and she was highly valued as a
14 colleague and friend by her manager and co-workers.

15 In 2009, Ms. Washburn experienced several life changing events. In March, she
16 was diagnosed with Multiple Sclerosis ("M.S."). To reduce the symptoms of M.S.
17 attacks, Ms. Washburn began undergoing rounds of infusions. Each round of infusions
18 required that Ms. Washburn receive treatment in the hospital for a few hours each day,
19 two or three days in a row. Dr. James Bowen, the Medical Director of Swedish
20 Hospital's renown M.S. Center and Ms. Washburn's treating physician, testified that this
21 treatment consisted of large doses of steroids that often make patients feel wired and
22 anxious. Consistent with this testimony, Ms. Washburn testified that she felt sick and
23 had difficulty sleeping for several days after receiving steroid infusions. The majority of
24 M.S. patients are depressed and, although the research on the issue is not decisive, Dr.
25 Bowen believes stress exacerbates the symptoms of M.S.
26

1 Shortly after Ms. Washburn was diagnosed with M.S., her family life became
2 emotional and challenging. The Washburns have three biological children, two foster
3 children and an adopted daughter ("P"), the daughter of a friend who died of a seizure
4 disorder several years ago. The Washburns opened their home to P and eventually
5 adopted her. P was a troubled child since birth, but in 2009, her psychological
6 challenges significantly disrupted the Washburns' family life. Between June and late
7 September, P was admitted to Seattle Children's hospital's psychiatric unit twice for one
8 week each time. P was admitted once because she expressed suicidal thoughts and once
9 because she refused to bathe for an extended period of time. Additionally, Ms.
10 Washburn's 18 year-old son was diagnosed with ulcerative colitis in May 2009, just two
11 months after Ms. Washburn was diagnosed with M.S.

12 Fall 2009 brought still more challenges. In October 2009, Ms. Washburn
13 underwent two separate rounds of steroid infusions. The first round of infusions did not
14 work, which required Ms. Washburn to undergo a second round shortly after the first.
15 During this time period, Ms. Washburn was also suffering from exhaustion due to
16 anemia and stomach problems related to the steroid injections. In November, P ran
17 away from home and was missing overnight. At the end of November, four police
18 officers were shot and killed in nearby Lakewood, Washington, causing additional
19 concern for Ms. Washburn, whose husband is a Seattle Police Captain.

20 The number and magnitude of stressful events that occurred within such a short
21 time period would bring any person to the breaking point. It is a tribute to Kerry
22 Washburn's strength, her faith and her strong and abiding marriage to Mike Washburn
23 that she was able to continue as well as she did. However, while Ms. Washburn's look
24 back at that time leads her to downplay the cumulative impact of these events, the Court
25 finds that in reality, this overwhelming series of stressors left her in a constant state of
26 depression, anxiety, and internal conflict. Due to this constant emotional and energy

1 drain, the Court finds that Ms. Washburn over-reacted to natural and non-harassing
2 behavior from Ms. Anyan and her co-worker, Angie Cochenour.

3 In December 2009, Ms. Washburn's anxiety, guilt, and exhaustion culminated in
4 a confrontation with Ms. Anyan that ultimately led to the breakdown in the relationship
5 between Ms. Washburn and Gymboree. The confrontation occurred on December 17,
6 the day after Ms. Washburn underwent a colonoscopy that required her to be under
7 anesthesia. During trial, Ms. Washburn testified that she does not react well to
8 anesthesia and in the past, has had small seizures following procedures involving
9 anesthesia. Ms. Washburn's appointment was the final appointment of the day on
10 December 16. Even though Ms. Washburn had asked for the day off after her
11 colonoscopy, and Ms. Anyan had granted her request, Ms. Washburn went to the store
12 on December 17 to return a key and talk to Ms. Anyan.

13 Ms. Anyan and her salespeople were dealing with the rush of customers to be
14 expected one week before Christmas when Ms. Washburn arrived. It is likely Ms.
15 Anyan did not give immediate attention to Ms. Washburn when she announced she
16 needed to talk with her. However, the Court finds that it was Ms. Washburn who lost
17 control and said things that were both inappropriate and out of character for her. The
18 Court finds that Ms. Washburn's emotional and physical exhaustion, combined with the
19 negative effects of anesthesia, led to Ms. Washburn's breakdown that day. Ms. Anyan's
20 description of Ms. Washburn as looking "edgy, pale, upset, angry and not herself" that
21 day is consistent with the fact she was still groggy and affected by the anesthesia.

22 The Court finds Ms. Anyan's conduct after this conversation telling. Ms. Anyan
23 immediately reported the incident to her supervisors, but she did not seek to discipline
24 Ms. Washburn. Instead, Ms. Anyan expressed her concern that Ms. Washburn was
25 simply not herself that day. Ms. Cochenour's testimony also supports Ms. Anyan's
26 version of events.

1 The Court finds that throughout 2009 Ms. Washburn was attempting to cope with
2 a double bind situation that tied her in emotional knots. When she was at home taking
3 care of herself and her family, she felt guilty that she was not at work. She also missed
4 the relief from medical and family pressures that work provided, as well as the pride she
5 felt making money and playing an important role in a company in which she strongly
6 believed. When she was at work, she felt guilty for not being home to manage the
7 family life and care for herself.

8 Based on her doctors' recommendations, Ms. Washburn approached Ms. Anyan
9 in October 2009 to discuss the possibility of stepping back to a less demanding role at
10 work. The Court finds that Ms. Anyan did not pressure Ms. Washburn to take a
11 demotion or a cut in pay. Rather, Ms. Anyan merely responded to Ms. Washburn's
12 questions about alternative positions that would decrease her responsibilities and hours.

13 Ms. Washburn's internal struggle also led her to make odd decisions during this
14 time period. For example, Ms. Washburn insisted that she attend the opening of
15 Gymboree's store in Redmond, Washington, even though she was on approved medical
16 leave at the time and she still had the infusion IV line in her arm. Similarly, in late
17 October 2009, Ms. Washburn insisted on attending a staff meeting even though she was
18 again on approved medical leave at the time and Ms. Anyan had strongly and
19 consistently urged her not to attend. These actions indicate that Ms. Washburn was not
20 exercising good judgment.

21 The Court finds that, as plaintiffs' counsel averred in his closing argument, "the
22 medical records...are important, because these are records written when no one is
23 watching, when no one is thinking about litigation...[they] are the real insight as to what
24 was happening at the time." In this key period of time of October and November of
25 2009 the records show the following entries:
26

1 “Kerry is very distraught and tearful today. She recently learned her
2 18-year old son has ulcerative colitis and her 16-year old adopted daughter
3 has been hospitalized on the psychiatric unit at Children's Hospital twice
4 since last June...Kerry is concerned about continuing to work and still
5 successfully meet[ing] the demands of raising a family and also managing
6 her own health issues.” Ex. 35: Progress Note, Barbara Severson, ARNP,
7 Oct. 14, 2009.

8 “Clt...presents today quite distressed and feeling overwhelmed by health
9 and family situation. She relates feelings of depression going back at least
10 6 months. There is very high stress in the family due to clts adopted
11 daughter [P] who...is very disruptive, aggressive towards Clt and siblings
12 and refusing school....She feels very hopeless about the situation and
13 generally overwhelmed. Clt has crying spells at home and feels she just
14 has to get away. Though her job is stressful, she feels it does allow her
15 some time away from all the problems at home....Clts depression and
16 overall stress levels make it difficult for her to cope at work and stay
17 focused.” Ex. 34: Intake Assessment, Dr. Judith Defelice, Oct. 27, 2009.

18 “Kerry describes being a positive and energetic person by nature.
19 Whatever she attempts in life, she gives it more than 100% of her effort.
20 This is true of her jobs, her parenting, or her volunteer activities. Since
21 being diagnosed with MS, she is coming to the realization that she cannot
22 do it all...[Kerry] and I discussed the importance of balance in her life. We
23 also discussed the role that stress could potentially play in MS. Given all
24 of her demands on her time, we discussed possibly giving up some
25 activities so that she can have time to rest, relax and recalibrate....We
26 discussed her possibly quitting work so that she can have more time for
herself to 'escape' from home responsibilities, but without adding stress to
her life....Kerry has multiple demands on her time....It will be important
for Kerry to establish some firm boundaries on her time so that she does
not over-extend herself and place unnecessary stress on herself.” Ex. 35:
Progress Note, Dr. Michelle Toshima, Oct. 27, 2009.

“Today, less distressed than at last clinic visit. First time visit with
rehabilitation psychologist, Michelle Toshima, Ph.D, earlier today with
plans to terminate employment and spend more time focusing on herself
and her family. Kerry feels positive about this decision and wants to stop
working as soon as possible.” Ex. 35: Progress Note, ARNP Severson,
Oct. 27, 2009.

“Mood--depressed, tearful. Emotionally drained at this point related to
disable[d] daughter running away from home last week....The entire family
is exhausted at this point....Clts work is giving her a difficult time because
of time off but Clt is standing her ground and setting good boundaries.”
Ex. 34: Progress Note, Dr. Defelice, Nov. 17, 2009.

“Kerry plans to terminate employment by the end of this year. The job was
never intended for financial gain but rather an opportunity to get out of the
house. Kerry now realizes that her priority is her family.” Ex. 35: Progress
Note, ARNP Severson, Nov. 19, 2009.

1 These records reflect that Ms. Washburn was under tremendous stress and
2 conflicted about whether she should continue to work. Ultimately, Ms. Washburn
3 continued to try to work, but she did not return to Gymboree after December 2009.

4 The Court finds that Ms. Anyan did advise her that she could seek FMLA leave
5 by contacting the benefits department. Whether or not she was given the actual phone
6 number of April MacDonald, Gymboree Benefits Manager at the time, or shown exactly
7 where FMLA leave was covered in the employee handbook is not pertinent to the Court's
8 ultimate decision. Ms. Washburn is an intelligent woman whose husband testified that
9 he had significant experience with FMLA leave. He urged her on multiple occasions to
10 obtain FMLA leave and her failure to follow through was not the fault of the defendants,
11 but an example of Ms. Washburn's inability to make a final decision about what she
12 wanted to do.¹

13 Ms. Washburn testified that Ms. Anyan gave her leave to care for her medical
14 needs each time she requested it. However, Ms. Washburn claims that she stopped
15 asking for leave she was entitled to take because she sensed resentment and anger in Ms.
16 Anyan's tone of voice when she approved Ms. Washburn's requests. She also alleges that
17 Ms. Anyan once questioned whether Ms. Washburn's husband could take care of P when
18 P was hospitalized. While the Court believes that Ms. Anyan did not react as pleasantly
19 to all of Ms. Washburn's requests for time off as she now recalls, the law does not require
20 her to smile and cordially grant all leave requests, even under the FMLA. The law
21 requires that Ms. Anyan grant them and the evidence shows that she gave Ms. Washburn
22 all of the time off she requested.

23
24 ¹ Plaintiffs' counsel's suggestion that Ms. Anyan, as Ms. Washburn's manager, should
25 have helped Ms. Washburn obtain and complete the FMLA forms is flawed. Individual
26 managers should not be responsible for such personnel actions. The better approach is to
require all employees to work with the Benefits Department to ensure consistent treatment by
trained Human Resources employees.

1 Based on the Court's findings that Ms. Anyan did not threaten to demote Ms.
2 Washburn and Ms. Washburn was not denied leave in 2009, the events that transpired
3 from January 2010 forward must be viewed through a different lens. Ms. Washburn
4 received FMLA leave in January 2010.² Based on Dr. Defelice's January 6, 2010 note,
5 Ms. MacDonald approved FMLA leave for Ms. Washburn. Ex. 10. Ms. MacDonald
6 informed Ms. Washburn that her FMLA leave could continue until March 10, 2010, but
7 only if Ms. Washburn submitted an additional doctor's note indicating that she still
8 needed leave. Ms. Washburn followed Ms. MacDonald's instructions and submitted two
9 additional doctor's notes, extending her leave until February 12, 2010. Ex. 1.

10 Even though Ms. MacDonald told Ms. Washburn several times, both by letter and
11 by phone, that she had to provide an updated doctor's note to remain on leave beyond
12 February 12, 2010, Ms. Washburn did not provide any additional medical documentation
13 to Gymboree. In late March, Ms. Washburn asked to transfer to another store, but she
14 never suggested that she wanted to transfer because of her medical condition. Ms.
15 Washburn was able to work at that time, and therefore, the Court finds that she was not
16 entitled to demand a transfer. Furthermore, Ms. Washburn was never denied the right to
17 return to work after her FMLA leave began in January 2010. Ms. Washburn's failure to
18 produce required documentation, which she had done in the past, or return to work
19 entitled Gymboree to process her resignation.

20 In February, while Ms. Washburn was on FMLA leave, she sent a letter to Ms.
21 Rackley outlining concerns about what she saw as harassing conduct by Ms. Anyan and
22 Ms. Cochenour. Ex. 11. Although Ms. Washburn's letter referenced Ms. Rackley, the
23 Court finds that Ms. Rackley was the appropriate person to respond to Ms. Washburn's

24 ² Dr. Defelice's testimony that she, as Ms. Washburn's doctor, did not know that Ms.
25 Washburn actually received FMLA leave is further evidence of Ms. Washburn's internal
26 conflict between her desire to work and her desire and need to be at home.

1 concerns. Whether Ms. Rackley and Gymboree handled Ms. Washburn's complaint
2 properly is not pertinent to the Court's ultimate decision.

3 Gymboree and its managers did not violate any federal or state laws based on their
4 communications with Ms. Washburn in 2010. However, Gymboree's investigation of
5 and response to Ms. Washburn's Washington State Human Rights Commission
6 ("WSHRC") complaint, as well as Gymboree's subsequent conduct related to its position
7 in the WSHRC response must be addressed.

8 After Gymboree received Ms. Washburn's WSHRC complaint, Ms. Rackley
9 informed Gymboree that, contrary to Ms. Washburn's version of events, she had offered
10 Ms. Washburn two open positions at different stores, but Ms. Washburn never responded
11 to her. However, neither Ms. Rackley's email communications with Ms. MacDonald
12 during the time leading up to Ms. Washburn's termination nor Ms. MacDonald's
13 contemporaneous record of communications with Ms. Washburn suggests that Ms.
14 Rackley offered Ms. Washburn two positions at different stores. Exs. 14, 16.

15 Faced with this conflicting evidence, Gymboree did nothing to investigate Ms.
16 Rackley's version. Instead, Gymboree and Gymboree's San Francisco, California
17 counsel, Nixon Peabody LLP ("Nixon Peabody"), trusted Ms. Rackley "because they had
18 no reason to doubt her," and included her version in their response to the WSHRC.
19 Gymboree maintained this position for almost a year of this litigation. It was not until
20 plaintiffs provided defendants with a copy of Ms. Rackley's voicemail, which did not
21 include an offer to transfer to another store, that defendants revised their position.

22 Even after Gymboree was presented with the actual voicemail left by Ms.
23 Rackley, both the Rule 30(b)(6) deposition witness and Nixon Peabody behaved poorly
24 during the deposition. Gymboree's chosen representative, refused to deviate from the
25 party line response: "We had no reason to doubt what Lana told us" and "[w]e had no
26 reason to think we needed to verify the information." Throughout the deposition, Nixon
27 Peabody made numerous inappropriate objections as to the form of plaintiffs' counsel's

1 legitimate questions. These objections often caused the witness to ask for the question to
2 be repeated, which was followed by a cycle of professed lack of understanding by the
3 witness and additional objections by Nixon Peabody. In the end, Nixon Peabody's
4 behavior and the witness's refusal to provide what should have been a brief,
5 straight-forward "we were wrong" answer complicated the process and increased both
6 the emotional and financial toll of the litigation.

7 Gymboree demonstrated a lack of due diligence to discover the truth about
8 whether or not Lana Rackley offered Ms. Washburn two positions at other stores in her
9 April 14, 2010 voicemail to Ms. Washburn. Gymboree's conduct may well have resulted
10 in Ms. Washburn's justifiable outrage that her former employer was lying about an
11 important fact and therefore, was covering up a conspiracy to get rid of her for seeking
12 legitimate time off to deal with family medical leave issues. Gymboree's failure to
13 perform even a minimal inquiry as to the truth of Ms. Rackley's version of events
14 increased the motions and the costs, both emotional and financial, of the litigation.

15 The Court appreciates defendants' local counsel's acknowledgment of this conduct
16 in his final closing argument. Local counsel and his firm have conducted themselves
17 honorably throughout the litigation. The same cannot be said for Gymboree and Nixon
18 Peabody. Nixon Peabody's failure to make reasonable efforts to check the veracity of
19 Ms. Rackley's claim by consulting the stores she claimed had openings that were offered
20 to Ms. Washburn, or by analyzing the emails sent by Ms. Rackley around that time -
21 none of which mentions any offers to transfer Ms. Washburn to other stores -
22 demonstrates bad faith. The Court finds that Gymboree and Nixon Peabody acted in bad
23 faith by failing to make even a minimal inquiry to verify a critical fact and in their
24 conduct at the Rule 30(b)(6) deposition discussed above.

25 **CONCLUSIONS OF LAW**

26 Based on the findings set forth above, the Court concludes that Ms. Washburn has
not sustained her burden of proof in establishing by a preponderance of the evidence that

1 any of the defendants violated any of the federal and state laws under which plaintiffs
2 brought this lawsuit.

3 **A. FMLA**

4 The FMLA entitles eligible employees to take reasonable leave due to their own
5 medical reasons or to care for a family member with a serious health condition. 29
6 U.S.C. § 2601(b). The FMLA makes it unlawful for an employer to interfere with,
7 restrain, or deny an employee's exercise of FMLA rights. *Id.* at § 2615(a)(1). Once an
8 employer has sufficient information to determine whether the employee's reason for
9 leave is FMLA-qualifying, the employer is responsible for designating leave as FMLA
10 leave and informing the employee about the designation. 29 C.F.R. § 825.300(d)(1).

11 Where an employer lacks sufficient information to determine whether the employee's
12 reason for leave qualifies the employee for FMLA leave, the employer "should inquire
13 further of the employee or the spokesperson to ascertain whether leave is potentially
14 FMLA-qualifying." *Id.* at § 825.301(a).

15 Ms. Washburn claims that defendants interfered with her rights under the FMLA
16 by failing to provide notice of her rights under the FMLA, failing to investigate or enter
17 the collaborative process to determine whether the reason for her leave qualified her for
18 FMLA leave and if so, the amount of time she needed for FMLA leave. She also alleged
19 that defendants interfered with her FMLA rights by repeatedly requesting that she step
20 down from her position after she took leave.

21 Based on the findings set forth above, the Court concludes that defendants did not
22 interfere with Ms. Washburn's rights under the FMLA. First, while Ms. Anyan may not
23 have shown Ms. Washburn exactly where the FMLA section in the employee handbook
24 is or thoroughly discussed the extent of leave she may need, the Court finds that
25 defendants did not commit the technical regulatory violations alleged by Ms. Washburn.
26 Second, even if there were technical regulatory violations, Ms. Washburn did not suffer
any harm as a result. She testified that she received all of the time off she requested and

1 she has not shown that either alleged technical violation resulted in any other form of
2 compensable harm. As a result, the Court concludes that Ms. Washburn is not entitled to
3 relief under the FMLA for defendants' handling of her need for leave. See Ragsdale v.
4 Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002) (the FMLA "provides no relief
5 unless the employee has been prejudiced by the violation.").

6 The Court also concludes that defendants did not interfere with Ms. Washburn's
7 rights under the FMLA by repeatedly asking her to step down. On the contrary, the
8 Court finds that it was Ms. Washburn who yelled at Ms. Anyan during the pivotal
9 December 17 conversation. Additionally, Ms. Anyan's responses to Ms. Washburn's
10 inquiries about other positions do not constitute conduct that would "tend[] to chill" an
11 employee's willingness to exercise her FMLA rights. Bachelder v. America West
Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001).

12 **B. WASHINGTON'S FAMILY LEAVE ACT ("WFLA")**

13 Ms. Washburn's claims under the WFLA are virtually identical to her FMLA
14 claims. The WFLA mirrors its federal counterpart and provides that courts are to
15 construe its provisions in a manner consistent with similar provisions of the FMLA.
16 RCW 49.78.4110. Therefore, the Court's discussion of Ms. Washburn's FMLA claims
17 applies to her WFLA claims. Based on the findings identified above, the Court
18 concludes that defendants did not interfere with Ms. Washburn's rights under the WFLA.

19 **C. AMERICANS WITH DISABILITIES ACT ("ADA")**

20 The ADA prohibits discrimination "against a qualified individual on the basis of
21 disability in regard to...the hiring, advancement, or discharge of employees, employee
22 compensation, job training, and other terms, conditions, and privileges of employment."
23 42 U.S.C. § 12112(a). Discrimination includes "not making reasonable accommodations
24 to the known physical or mental limitations of an otherwise qualified individual." *Id.* at
25 § 12112(b)(5)(A). To protect employees, the ADA "prohibits a supervisor from
26 threatening an individual with transfer, demotion, or forced retirement unless the

1 individual foregoes a statutorily protected accommodation." Brown v. City of Tucson,
2 336 F.3d 1181, 1193 (9th Cir. 2003); accord 42 U.S.C. § 12203(b). Ms. Washburn
3 claims that defendants failed to accommodate her by failing to provide leave without
4 harassment and failing to transfer her to an open position in spring 2010. Ms. Washburn
5 also asserts claims of interference based on defendants' harassing conduct and her
6 retaliatory and/or constructive termination.

7 Based on the findings set forth above, the Court concludes that defendants did not
8 fail to accommodate Ms. Washburn. First, Ms. Washburn received all of the leave she
9 requested and defendants did not threaten to demote her. Second, Ms. Washburn was not
10 entitled to transfer to another store. Ms. Washburn did not inform Gymboree that she
11 needed a change due to a medical condition. Furthermore, Dr. Bowen and Dr. DeFelice
12 testified that they did not think Ms. Washburn was limited in her ability to work. See
13 Connolly v. Entex Info. Servs., Inc., 27 Fed.Appx. 876, 878 (9th Cir. 2000) ("The goal is
14 to identify an accommodation that allows the employee to perform the job effectively,
15 not to provide the job of the employee's choice.").

16 The Court also concludes that defendants did not interfere with Ms. Washburn's
17 rights under the ADA. Ms. Washburn received all of the leave she requested. Only after
18 Ms. Washburn raised the possibility of stepping down did Ms. Anyan discuss the
19 potential change in position with her. The Court concludes that Ms. Washburn has not
20 established an interference claim based on retaliatory termination and/or constructive
21 termination.

22 **D. WASHINGTON LAW AGAINST DISCRIMINATION ("WLAD")**

23 Ms. Washburn's WLAD claims mirror her ADA claims. As a result, the Court's
24 analysis of her claims of interference and failure to accommodate under the ADA apply
25 equally to her claims under the WLAD.

26 For the reasons set forth in the Court's discussion of Ms. Washburn's ADA claims,
the Court concludes that Ms. Washburn has not established that defendants failed to

1 accommodate her, subjected her to harassment on the basis of her disability, or retaliated
2 against her for exercising her rights under the WLAD.

3 **E. WITHHOLDING OF WAGES**

4 RCW 49.48.030 provides reasonable attorney's fees in any action to a person who
5 is successful in recovering judgment for wages or salary owed to her. RCW 49.52.070
6 allows an aggrieved employee to recover twice the amount of wages unlawfully and
7 wilfully withheld by an employer, together with a reasonable sum for attorney's fees and
8 costs of suit. The Court concludes that defendants do not owe plaintiffs any unpaid
9 wages. Therefore, plaintiffs are not entitled to attorney's fees under RCW 49.48.030 or
10 double damages and attorney's fees under RCW 49.52.070.

11 **F. LOSS OF CONSORTIUM**

12 "Damages for loss of consortium are proper when a spouse suffers loss of love,
13 society, care, services, and assistance due to a tort committed against the impaired
14 spouse." Burchfiel v. Boeing Corp., 149 Wn. App. 468, 494 (2009). However, if no
15 legal wrong as been committed against the impaired spouse, there can be no claim of loss
16 of consortium. Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 870 (2000).
17 Based on the findings set forth above, the Court concludes that plaintiffs are not entitled
18 to damages for loss of consortium.

19 **G. SANCTIONS**


20 "[T]he district court has the inherent authority to impose sanctions for bad faith,
21 which includes a broad range of willful improper conduct." Fink v. Gomez, 239 F.3d
22 989, 992 (9th Cir. 2001). The court's inherent power reaches conduct before the court
23 and beyond, regardless of whether the disobedient conduct interfered with the trial.
24 Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). However, before a court may invoke
25 its inherent power to impose sanctions, it must make a specific finding that a party or
26 counsel has acted in bad faith. Id. at 50.

1 Additionally, Local General Rule 3(d) provides that "[a]ny attorney or party
2 who...so multiplies or obstructs the proceedings in a case as to increase the cost thereof
3 unreasonably and vexatiously, may, in addition to, or in lieu of the sanctions and
4 penalties provided elsewhere in these rules, be required by the court to satisfy personally
5 such excess costs, and may be subject to such other sanctions as the court may deem
6 appropriate." GR 3(d).

7 Based on the findings set forth above, the Court concludes that Gymboree and
8 Nixon Peabody acted in bad faith and obstructed the proceedings in this case by failing
9 to investigate or verify whether Ms. Rackley offered Ms. Washburn two positions at
10 different stores in April 2010. Gymboree's and counsel's failure to conduct a reasonable
11 inquiry, particularly in the absence of any evidence supporting Ms. Rackley's version of
12 events, obstructed the WSHRC's investigation and vexatiously multiplied the
13 proceedings before this Court. They also compounded this problem by their behavior at
14 the Rule 30(b)(6) deposition of Bridget Schickedanz, Gymboree's Human Resources
15 Director.

16 For all of the foregoing reasons, Gymboree shall, within thirty days of the date of
17 this Decision, pay plaintiffs \$50,000 through their attorney. The Clerk of Court is
18 directed to enter judgment in favor of defendants.

19 DATED this 30th day of October, 2012.

20
21
22 
23 Robert S. Lasnik
24 United States District Judge
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26