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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NORMA MAXWELL,

Plaintiff,

v.

VIRTUAL EDUCATION
SOFTWARE, INC., a Nevada
Corporation,

Defendant.

NO: CV-09-173-RMP

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER PURSUANT TO FED. R. CIV.
P. 52

A bench trial was held in this case. Closing arguments were heard on September 22, 2010. Plaintiff was represented by Kammi Mencke Smith of Winston & Cashatt in Spokane, Washington, and Janet Chung and Katherine DeWeese Bennett of Legal Voice in Seattle, Washington. Defendant was represented by David Silke and Sarah Turner of Gordon & Reese, LLP, in Seattle.

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1332 and, thus applies Washington state substantive law to resolve Ms. Maxwell's claims. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817 (1938). Plaintiff

1 Norma Maxwell asserts Washington state law claims of gender and pregnancy
2 discrimination under chapter 49.60 RCW and negligent and intentional infliction of
3 emotional distress against her former employer, Defendant Virtual Education
4 Software, Inc. (“VESi”).
5

6 Having heard testimony and fully reviewed all of the materials submitted by
7 the parties and the record in this matter, the Court enters the following Findings of
8 Fact, Conclusions of Law, and Order pursuant to Fed. R. Civ. P. 52.
9

10 **FINDINGS OF FACT**

11 *Background on VESi*

12 Defendant VESi is a small educational software business that was
13 incorporated in 1998 and began as a home based operation. In 2002, VESi moved
14 its location to an office building so that most of the employees could interact more
15 easily while working. VESi was founded by President and CEO Michael “Mick”
16 Jackson and is run by three executives: Mr. Jackson; Ms. Roberta “Robbie”
17 Jackson, who is Mick Jackson’s spouse; and Mr. Patrick Chung. Ms. Jackson is
18 Vice President of Operations, and Mr. Chung is Vice President of Design &
19 Development.
20

21 In 2000, Mr. Chung started working part-time for VESi, helping Ms.
22 Jackson create database programs to track student registration. In 2005, Mr.
23 Jackson and Ms. Jackson asked Mr. Chung to work full-time. Mr. Chung has
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1 personally invested \$30,000.00 into the company and is the vice president of
2 design and development.

3
4 From the beginning of his work with VESi, Mr. Chung has performed the
5 majority of his work remotely from his home in Portland, Oregon. Mr. Chung
6 visits Spokane approximately once each month, when he stays with Mr. and Ms.
7 Jackson in their home and works in the VESi office for a few days at a time.
8

9
10 *Hiring of Ms. Maxwell*

11 On April 17, 2006, Ms. Maxwell responded to VESi's advertisement seeking
12 a part-time, in-house Web designer. Ms. Maxwell interviewed only with Mr.
13 Jackson. During or around the time of the first interview, Mr. Jackson informed
14 Ms. Maxwell that the position had been converted to a full-time position, and Mr.
15 Jackson inquired whether Ms. Maxwell was willing and able to work a full-time
16 schedule. Ms. Maxwell's response was affirmative, and she was then brought in
17 for a second meeting with Mr. Jackson during which he offered her the job.
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20
21 At the time that Ms. Maxwell interviewed for the position at VESi, she had
22 one child. At the offer meeting with Mr. Jackson, Ms. Maxwell indicated that
23 there were some issues with her husband's schedule and childcare, and that she
24 might want to work out a flexible schedule. Mr. Jackson responded that VESi was
25 a family friendly company, that family came first, and that VESi tried to be
26 flexible with its employees if possible.
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1 Ms. Maxwell testified that she understood that Mr. Jackson would even be
2 agreeable to having Ms. Maxwell work four hours each day at the office and four
3 hours each day from home (“4/4 schedule”). Both parties agree that Mr. Jackson
4 recalls that he informed Ms. Maxwell that she would have to work out her schedule
5 with Mr. Chung, who would be her supervisor. Mr. Jackson concluded the
6 meeting by informing Ms. Maxwell of her starting date and instructing her to be at
7 work at 8:00 a.m., at which time Mr. Chung would welcome her and set up her
8 schedule. The decision to hire Ms. Maxwell rested solely with Mr. Jackson.
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12 *Work Conditions and Nature of Job*

13 Ms. Maxwell was told that she was hired as an at-will employee of VESi and
14 that she would remain an at-will employee throughout her employment with VESi.
15 Ms. Maxwell’s duties as a web designer at VESi included designing marketing and
16 promotional materials, designing and updating web pages and websites, developing
17 courses, and providing technical support. Ms. Maxwell reported directly to Mr.
18 Chung.
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22 During Ms. Maxwell’s employment, VESi employed a total of sixteen
23 employees. From 2006 to 2008, the time period during which Ms. Maxwell was
24 employed at VESi, VESi employed approximately six to seven part-time
25 employees and seven to eight full-time employees. The majority of employees
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1 were female and were referred to as “the girls” by Mr. Jackson, Ms. Jackson, and
2 most of the other employees, including Ms. Maxwell.

3
4 With some variations, VESi’s full-time employees during the period of Ms.
5 Maxwell’s employment typically worked regular office hours from 8:00 a.m. to
6 5:00 p.m. However, Angela Koker, a full-time employee during part of Ms.
7 Maxwell’s time at VESi, worked a flexible schedule and was allowed on occasion
8 to come into the office late and leave early. Ms. Koker’s flexible schedule was
9 evidenced by Mr. Chung’s company-wide email in May 2006 that told Ms.
10 Maxwell to “please make any necessary arrangement with Angela for Wednesday
11 and Friday if and when Angela decides to come in late.” *See* Exhibit 204.

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15 On May 1, 2006, Ms. Maxwell started her employment with VESi as a full-
16 time employee, scheduled to work 40 hours per week. However, Ms. Maxwell was
17 under the impression that she would be allowed to work up to four hours each day
18 from home, even though Mr. Chung had not agreed to that arrangement, and Mr.
19 Jackson later denied that he had agreed to that arrangement.

20
21
22 On Ms. Maxwell’s first day of work in May 2006, Mr. Chung told her that
23 during her 90-day probationary period, she would have to work full-time from the
24 office. As a result, Ms. Maxwell called her husband to resolve child care issues
25 that arose when she learned that she would be expected to work a full day at the
26 office. However, during her 90-day probationary period, Ms. Maxwell actually
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1 was allowed to work a flexible schedule so that three days a week she was in the
2 office for 8.5 hours (8:00 a.m. - 4:30 p.m.), and for two days a week, she was in the
3 office for 6.5 hours (7:30 a.m. – 2:00 p.m.) and worked from home for 1.5 hours.
4

5 Ms. Maxwell maintained this flexible schedule beyond her 90-day
6 probationary period but did not transition to a 4/4 schedule. Since Ms. Maxwell's
7 son had adjusted to daycare, she concluded that it was not necessary to have as
8 flexible a schedule as she initially had envisioned. At some point after her
9 probationary period, Ms. Maxwell's schedule changed, and she added a third day
10 of working 6.5 hours in the office and 1.5 hours at home, which was the schedule
11 that she followed when she began maternity leave on April 30, 2008.
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15 During Ms. Maxwell's employment with VESi, Ms. Maxwell, Mr. Chung,
16 and Ms. Koker were the only full-time employees who had schedules with at least
17 some hours of work performed at home on an ongoing basis. However, VESi
18 regularly granted employees' requests to work occasionally from home or use
19 "paid time off" or "personal time off" ("PTO")¹ when they had temporary
20 childcare issues.
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24 ¹ Both defense and plaintiff witnesses testified that "PTO" was used for either
25 "paid time off" or "personal time off" because there was no difference in how
26 "PTO" was tracked.
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Pregnancy

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2 On September 20, 2007, Ms. Maxwell learned that she was pregnant with
3 her second child. Ms. Maxwell was surprised, joyful, but also apprehensive
4 because her first pregnancy had been difficult with severe nausea throughout the
5 pregnancy. Upon returning to work from the doctor's appointment during which
6 she learned that she was pregnant, Ms. Maxwell told several of her co-workers that
7 she was pregnant. The co-workers were surprised and pleased, but puzzled by Ms.
8 Maxwell's demeanor regarding the news.
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12 During her entire second pregnancy, Ms. Maxwell was severely nauseated
13 and subject to vomiting, once even in the office waste basket. Ms. Maxwell sought
14 to resolve the nausea through a variety of remedies. For example, during her
15 pregnancy, Ms. Maxwell reported to her acupuncturist that her health concerns
16 were "depression associated w[ith] hormones, pregnancy, and continued nausea
17 even w[ith] medication." Exhibit 214.
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21 Because of the nausea during her pregnancy, Ms. Maxwell asked Mr.
22 Jackson if she could have a flexible schedule and work more from home while she
23 was pregnant so that she could rest when she was nauseated and then work once
24 the nausea had passed. Mr. Jackson asked that she put her request in writing and
25 ultimately Mr. Jackson denied her request, stating that it would set a bad precedent.
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1 Mr. Jackson responded that if Ms. Maxwell was ill and could not work, she could
2 either leave work or stay home and use PTO.

3
4 During her pregnancy, VESi occasionally allowed Ms. Maxwell to work
5 from home when she had childcare issues, and Ms. Maxwell was able to leave
6 work for doctor appointments or childcare issues. In fact, several times Ms.
7
8 Maxwell notified Ms. Jackson and the staff that she was coming in late or was
9 working from home due to childcare issues, her husband's schedule, or doctor
10 appointments, and that she would take PTO. No one took any issue with these
11 notices or absences.
12

13
14 Ms. Maxwell contends that VESi's refusal to allow her to work more hours
15 from home was an adverse employment decision. However, the evidence supports
16 that VESi allowed Ms. Maxwell the same, or possibly more, flexibility with her
17 work schedule as they allowed other employees, except for Mr. Chung. The Court
18 also finds that Ms. Maxwell was not similarly situated to Mr. Chung, because Mr.
19 Chung had personally invested \$30,000 in VESi and was an officer of the
20 company. Therefore, the Court finds that VESi did not treat Ms. Maxwell in a less
21 favorable manner than before she was pregnant or in comparison to co-workers
22 when VESi refused to allow her to work more hours from home.
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26 Prior to becoming pregnant, Ms. Maxwell had a good relationship and
27 positive interactions with Mr. Jackson. Ms. Maxwell often would go into Mr.
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1 Jackson's office and talk with him about work and about her son Charlie. Ms.
2 Maxwell also had a good relationship with Ms. Jackson, who worked as office
3 manager in addition to her other duties. Ms. Maxwell believed that she had good
4 relationships with her other coworkers, including Kristen Todd and Jeanette Nash,
5 two defense witnesses who testified at trial. After learning of her pregnancy, Ms.
6 Maxwell's co-workers' perception of her changed, and they perceived her as
7 depressed, negative, pessimistic, and unpredictable.
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11 At some point shortly after learning that Ms. Maxwell was pregnant, Mr.
12 Jackson called Ms. Maxwell into his office and told her that there were concerns
13 from other employees that her attitude had changed for the worse and that she was
14 being negative.² Mr. Jackson told Ms. Maxwell that her negative attitude had
15 changed the atmosphere of the office, and that most of the pregnant women whom
16 he had known all seemed to be "glowing," whereas she seemed miserable.
17
18 Deposition of Mick (Michael) Jackson, Apr. 7, 2010, at 35. Mr. Jackson's report
19 of Ms. Maxwell's alleged negative attitude was obtained secondhand from Ms.
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23 _____
24 ² Ms. Maxwell recalls that the discussions with Mr. Jackson about the flexible
25 schedule, about her attire, and about her negative attitude all took place within a
26 single conversation. Mr. Jackson recalls that the topics may have been discussed
27 over multiple conversations.
28

1 Jackson, and Mr. Jackson told Ms. Maxwell that the comments had come from
2 “the girls,” meaning the other women who worked in the office.

3
4 Ms. Maxwell responded to Mr. Jackson that she was feeling physically ill
5 and that most people in the office did not know this, as she had kept it to herself.
6 Ms. Maxwell testified that she was completely caught off guard by Mr. Jackson’s
7 conversation with her and felt that the conversation was disciplinary in nature, and
8 told Mr. Jackson that she did not want to work in an environment where people
9 who have issues with a person do not communicate those issues directly to the
10 person. Later, Ms. Maxwell talked individually with each of her coworkers and
11 explained that if her attitude seemed at all different that it was because she was not
12 feeling well, and she hoped that her coworkers would understand her situation.

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16 At trial, VESi called Ms. Todd and Ms. Nash, two of the coworkers with
17 whom Ms. Maxwell spoke, to testify about their perceptions that Ms. Maxwell had
18 developed a negative attitude after becoming pregnant. Ms. Nash testified that Ms.
19 Maxwell had developed a negative attitude after becoming pregnant and cited an
20 incident involving Ms. Todd’s birthday celebration.

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22
23 Apparently, the custom at VESi was to celebrate a coworker’s birthday by
24 bringing that worker’s favorite dessert to the worker’s cubicle or carrel. All of the
25 other workers in the office would gather around the worker’s desk and sing
26 “Happy Birthday.” Ms. Nash testified that on the occasion of Ms. Todd’s birthday,
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1 after Ms. Maxwell had become pregnant, Ms. Maxwell's "negative attitude" was
2 demonstrated by not participating in the celebration as usual. Instead, Ms.
3 Maxwell only had rolled her chair back from her own work desk, remained seated,
4 and sang "Happy Birthday," rather than standing closer to Ms. Todd's desk. Ms.
5 Nash relied on this episode to support her conclusion that Ms. Maxwell had a
6 negative attitude and testified that she felt badly for Ms. Todd for being shunned
7 by Ms. Maxwell on her birthday.
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10 The Court finds that the coworkers' testimony regarding Ms. Maxwell's
11 "negative" behavior was unconvincing and more indicative of the fact that Ms.
12 Maxwell was suffering from severe nausea and may have avoided crowding
13 around a dessert on a coworker's desk as a courtesy to her coworkers to avoid
14 further nausea and possible vomiting.
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18 Similarly, the Court finds that the coworkers', and Ms. Jackson's, testimony
19 about Ms. Maxwell's unprofessional dress was unconvincing. VESi had a casual
20 dress code allowing its employees to wear jeans, shorts, t-shirts, and open-toe
21 shoes, so long as the employees were dressed appropriately, neat, and groomed.
22 Defendants contend that prior to her pregnancy Ms. Maxwell always arrived at
23 work looking professional, but at some point shortly after she announced her
24 pregnancy that Ms. Maxwell appeared at work in "sweat pants."
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1 Mr. Jackson called Ms. Maxwell into his office and stated that he knew that
2 she was pregnant and recognized that there would be adjustments, but that she
3 could not wear sweatpants in the office. Ms. Maxwell denied that she was wearing
4 sweatpants, but rather was wearing stretch pants. After this conversation, it is not
5 contested that Ms. Maxwell did not wear the pants at issue again to work and that
6 there were no further issues with Ms. Maxwell's appearance.
7

8
9 Ms. Maxwell was the only employee at VESi with whom Mr. Jackson
10 personally addressed regarding work attire, although he did speak with another
11 employee about coworkers' complaints about her body odor issues. The only other
12 reprimands involving employees' appearance were by Ms. Jackson who spoke to a
13 male employee about his inappropriate t-shirt that had a picture of a naked woman
14 on it, and when Ms. Jackson spoke with Mr. Chung when he wore sweat shorts to
15 the office.
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19 Prior to Ms. Maxwell's pregnancy, Mr. Jackson had no problems with Ms.
20 Maxwell or her appearance, and he was very pleased with her work performance.
21 However, Mr. Jackson stated in a deposition published at trial that he was
22 concerned that her pregnancy would affect her job in the sense that she had
23 "possibly heightened emotional issues, behavioral issues" due to her pregnancy.
24 Deposition of Mick (Michael) Jackson (Apr. 7, 2010) at 38. During his meeting
25 with Ms. Maxwell in his office, Mr. Jackson suggested that she talk to her doctor
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1 about “upping her medications.” Deposition of Mick (Michael) Jackson (Apr. 7,
2 2010) at 36. After the meeting, Ms. Maxwell reported to her physician that she
3 noted a “worsening of her moods” and requested an increase in her antidepressants.
4

5 Although Mr. Jackson had expressed concern about the impact that Ms.
6 Maxwell’s pregnancy would have on her job, VESi celebrated Ms. Maxwell’s
7 pregnancy in a traditional manner, by throwing a baby shower for her. Near the
8 end of her pregnancy, Ms. Maxwell wrote an email to Ms. Jackson stating, “It
9 really means a lot to have such a supportive work environment. I can’t imagine
10 how stressful a situation like this would be for women that don’t get this. And I’m
11 sure lots don’t. I’m a very lucky girl. Thanks a million” Exhibit 222. In
12 addition, after the baby shower, Ms. Maxwell sent Mr. Jackson and Ms. Jackson a
13 thank-you card stating how touched she was by their generosity and how much she
14 appreciated them.
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19 *Post-Pregnancy*

20 Ms. Maxwell gave birth to her second son, Joshua, in May 2008 via
21 caesarean section. Initially, Ms. Maxwell was going to take three weeks of PTO,
22 or maternity leave, and then return to work at VESi part-time for three weeks.
23 Instead, Ms. Maxwell decided to take four weeks of PTO, or maternity leave, and
24 then return to work part-time for two weeks, before returning to work full-time.
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1 Ms. Jackson encouraged her to take as much time as she needed. In fact, VESi
2 gave Ms. Maxwell five additional PTO days for her maternity leave.

3
4 Prior to her maternity leave, Ms. Maxwell had proposed the following
5 schedule when she would return to her full-time position: working at the VESi
6 office from 7:00 a.m. to 2:00 p.m., and working the remaining five hours per week
7 at home. VESi agreed to this arrangement. However, during her maternity leave,
8 Ms. Maxwell changed her proposed post-maternity schedule and requested that she
9 be allowed to work four hours in the office and four hours at home each workday,
10 the same 4/4 schedule that Ms. Maxwell had proposed when she was initially
11 hired. Specifically, Ms. Maxwell requested to work in the office from 10:00 a.m.
12 to 2:00 p.m. each day and from home for the remaining hours. The proposed 4/4
13 schedule would have allowed Ms. Maxwell and her husband to take turns caring
14 for the new baby and to avoid immediate childcare costs for him.
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19 Ms. Maxwell and Mr. Chung discussed the proposed 4/4 schedule, and Mr.
20 Chung was agreeable to the schedule. Recalling this time period during his
21 deposition, Mr. Chung opined that he thought that it was poor planning for Ms.
22 Maxwell to have another child at this time because of the demands on her time
23 with two children and adjusting to her husband's schedule. Deposition of Patrick
24 Chung, Apr. 7, 2010, at 36. Although Mr. Chung had the authority as Ms.
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1 Maxwell's immediate supervisor to approve the 4/4 schedule, Mr. Chung conferred
2 with Mr. Jackson and Ms. Jackson about Ms. Maxwell's proposal.

3
4 An email from Mr. Jackson to Mr. Chung stated that Mr. Jackson had
5 concerns about Ms. Maxwell's being able to accomplish anything at home "with an
6 infant and a toddler to care for . . . having seen Robbie with two small ones . . ."
7
8 and that it was "less a Norma issue and more a new mother issue." Exhibit 12.
9 The email further stated, "[I]f it comes to putting in the time or caring for the
10 children I'm guessing the children will come first." Exhibit 12.
11

12 At trial, Mr. Jackson stated that there is a hierarchy that occurs in a family.
13 He stated that within a family structure, such as Ms. Maxwell's family, that a new
14 infant would come first in demanding attention, then a toddler, then generally a
15 spouse, and, in Ms. Maxwell's case, Mr. Jackson stated, VESi would be the last to
16 receive Ms. Maxwell's attention.
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19 Ms. Jackson also expressed opposition to Ms. Maxwell's proposed 4/4
20 schedule because of a casual comment that Ms. Maxwell made once about the
21 difficulty of working at home with Charlie, her older son. Ms. Jackson did not
22 think that Ms. Maxwell's proposed schedule was a feasible schedule. She also
23 believed that it was poor planning on Ms. Maxwell's part to have a second child at
24 that time because of Ms. Maxwell's need for time off, her financial pressures, and
25 for various other reasons.
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1 Ultimately, Mr. Chung, Ms. Jackson, and Mr. Jackson rejected Ms.
2 Maxwell's proposed 4/4 schedule, but agreed that Ms. Maxwell could return to
3 work full-time at 40 hours per week by working in the office from 7:00 a.m. to
4 2:00 p.m. each day and working the remaining 5 hours per week at home.
5

6 Ms. Maxwell contends that VESi was unfair to her in refusing her proposed
7 4/4 schedule because Mr. Jackson had agreed to allow her to work a 4/4 schedule
8 during the offer meeting before she even began working at VESi. However, the
9 Court finds that the evidence supports that VESi never expressly, or by *de facto*,
10 agreed to a 4/4 schedule for Ms. Maxwell at any time during her employment.
11
12

13 Mr. and Ms. Jackson both testified that Mr. Chung avoids confrontation.
14 When Ms. Maxwell communicated to Mr. Chung that she did not understand the
15 reason for their decision and that it had been her understanding when she was hired
16 that she could have a 4/4 schedule consistent with her current request, Mr. Chung
17 told Ms. Maxwell to put her reasons for the 4/4 schedule in writing so that he could
18 plead her case again to Mr. Jackson and Ms. Jackson. After Ms. Maxwell wrote
19 out her reasons and emailed them to Mr. Chung, Mr. Chung sought and received
20 her permission to share her email with Mr. and Ms. Jackson directly rather than
21 refer to her email for talking points. Mr. Chung forwarded the email to Mr. and
22 Ms. Jackson, but they were not persuaded. In addition, both of the Jacksons
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1 testified that they concluded that Ms. Maxwell was refusing to move beyond the
2 refusal for her request of the 4/4 schedule.

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4 It had been Ms. Maxwell's and Mr. Chung's routine to check in with each
5 other upon Ms. Maxwell's arrival at work each day, usually talking by telephone
6 with each other at least once each day. After the Jacksons and Mr. Chung refused
7 to accept Ms. Maxwell's proposed 4/4 schedule, Mr. Chung related the following
8 messages to Ms. Maxwell:
9

10
11 June 2, 2008 – "Mick will not talk with you about your schedules but his
12 door is opens [sic] if you want to talk about it";

13
14 June 2, 2008 – "I think you don't need to speak with Mick if you don't want
15 to. In fact, you should wait and see how's timing [sic] and schedules shake out in
16 these 2 weeks."

17
18 Exhibit 18.

19
20 On June 2, 2008, Mr. Chung wrote Mr. Jackson that "Norma WILL not talk
21 with you about your decision..." Exhibit 22 (emphasis in original).

22
23 In response, there are several emails from Ms. Maxwell to Mr. Chung
24 indicating her availability and interest for further discussion about her proposed 4/4
25 schedule, such as the following:

26
27 June 2, 2008 – "Mick has not asked me to speak with him yet...";
28

1 May 29, 2008 – “I am available if anyone wants to speak with me
2 personally. . .”;

3 June 2, 2008 – “I thought you said that Mick wanted to speak with me in
4 person regarding this issue.”

5 Exhibits 18, 19, 21, 22.

6 VESi contends that Ms. Maxwell’s continuous arguing about the 4/4
7 schedule decision and her refusal to move beyond that disagreement was the
8 reason for her termination. However, the Court finds from the evidence that Mr.
9 Chung’s comments and emails misled Ms. Maxwell into believing that the
10 Jacksons and Mr. Chung were available to continue the discussion about the 4/4
11 proposal and that Mr. Chung was encouraging Ms. Maxwell to continue the
12 discussion as well.
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18 On June 2, 2008, after her maternity leave ended, Ms. Maxwell returned to
19 work for two weeks on a part-time schedule working from 10:00 a.m. to 2:00 p.m.
20 in the office each day. However, Mr. and Ms. Jackson testified that when Ms.
21 Maxwell returned to work after her request for the “4/4 schedule” had been denied,
22 Ms. Maxwell’s attitude had changed, and she ignored Mr. Jackson in the office.
23 They contend that this conduct contrasted with her conduct before the pregnancy
24 when she had been friendly with him.
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1 In addition, Mr. Jackson claimed that when Ms. Maxwell returned to work
2 after maternity leave she did not respond to his emails as promptly as previously.
3 Prior to her leave, Mr. Jackson alleged that Ms. Maxwell had been very responsive
4 to his emails, typically responding within three to five minutes after receiving the
5 email. A few days after her maternity leave ended, Mr. Jackson again called Ms.
6 Maxwell into his office to inquire about whether she was intentionally not
7 responding to his emails. Ms. Maxwell responded that she never received the
8 emails. Mr. Jackson then sent her a test email, and she responded simply saying
9 that she “got it.” VESi did not submit any tangible evidence of the unanswered
10 emails, relying on Mr. Jackson’s perception regarding the issue.
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15 The Court finds that there was insufficient evidence to support a finding that
16 Ms. Maxwell was purposefully ignoring Mr. Jackson or refusing to respond to his
17 emails.
18

19 Mr. Chung testified at the beginning of his testimony that he was nervous
20 testifying at the trial. In addition, Mr. Chung admitted that until right before the
21 trial began that he believed that Mr. Jackson had the power to terminate him. Mr.
22 Chung appeared deferential to Mr. Jackson. On cross examination Mr. Chung
23 recalled one time when Mr. Jackson had yelled at him. Mr. Chung also testified
24 that he previously had told Ms. Maxwell not to cross Mr. Jackson or else she
25 would be terminated. Mr. Chung testified at trial that he never had children, but he
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1 testified that “it is hard to predict what a young infant will do.” Mr. Chung’s
2 testimony indicated that he appeared to have adopted Mr. Jackson’s philosophy
3 about a family hierarchy and the impact of an infant on Ms. Maxwell’s work
4 ability.
5

6 On June 16, 2008, Ms. Maxwell returned to a full-time schedule, working in
7 the office from 7:00 a.m. to 2:00 p.m. each day and expecting to work the
8 remaining five hours per week at home. June is typically VESi’s busiest month,
9 and everyone is expected to assist with answering the telephones. In addition, Mr.
10 and Ms. Jackson opted to take a vacation in Alaska in June to celebrate Ms.
11 Jackson’s birthday. Therefore, both of the Jacksons were absent from the office as
12 Ms. Maxwell returned to work on a full-time schedule.
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16 On Ms. Maxwell’s first day back in the office full-time, Mr. Chung
17 instructed her to assist a coworker, Ms. McCarty, with work that required them to
18 wear headphones to listen to digital recordings, or “swish files.” Later that same
19 day, Ms. Maxwell’s two other coworkers, Ms. Todd and Ms. Nash, complained to
20 Mr. Chung that Ms. Maxwell and Ms. McCarty were not helping to answer the
21 telephones.
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25 No one else at VESi had ever complained about Ms. Maxwell to Mr. Chung
26 or to Mr. and Ms. Jackson about any of her work, either before or after the
27 pregnancy and maternity leave. In fact, both Mr. Chung and Mr. Jackson
28

1 confirmed that Ms. Maxwell was the best web designer who ever worked for VESi.
2 Mr. Jackson testified that he was dismayed to lose Ms. Maxwell as an employee.

3
4 Mr. Chung did not discipline either Ms. Maxwell or Ms. McCarty for not
5 answering the telephones on June 16 and testified that Ms. Maxwell's eventual
6 termination was not based on her not answering the telephones on that day. In fact,
7
8 Mr. Chung had suggested to Ms. Jackson that a part-time person should be hired to
9 help answer the telephones while Ms. Maxwell and Ms. McCarty were busy
10 working on the swish files and the Jacksons were on vacation.

11
12 The Court finds that Ms. Maxwell did not help to answer the telephone
13 through no fault of her own, but because she was instructed to work on another
14 project that required her to listen to swish files with headphones and limited her
15 ability to hear the telephones. The Court also finds that Ms. Maxwell was not
16 terminated for failing to answer the telephone on June 16, 2008.
17

18
19 On the day before Ms. Maxwell's termination, Mr. Chung sent Ms. Maxwell
20 an email reminding her "to be polite and pleasant to everyone in the office. These
21 two tangibles can go a long way" Exhibit 25. Ms. Maxwell responded by
22 saying that she was confused as to what precipitated Mr. Chung's message and that
23 she thought that she was always polite and pleasant to everyone, that she had not
24 been told any differently, and that she was more than willing to reassure anyone or
25 address any misunderstandings.
26
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1 Although Mr. Jackson and Ms. Jackson expressed concern about Ms.
2 Maxwell's ability after the birth of her baby to focus on her work and continue
3 with her high productivity, rather than focusing on her family and her schedule,
4 Ms. Maxwell was never reprimanded for failing to meet a deadline. Throughout
5 her entire employment at VESi, Ms. Maxwell's job performance met expectations,
6 was above average, or was excellent, and she never missed a deadline.
7

8
9 Despite her previously excellent work performance, Mr. Chung terminated
10 Ms. Maxwell's employment on June 18, 2008, stating that "when Mick makes a
11 decision, he doesn't change his mind," and that Mr. Chung did not see the situation
12 improving between Mr. Jackson and Ms. Maxwell.
13

14
15 VESi hired a male employee to replace Ms. Maxwell.

16 *Post-Termination*

17
18 After her termination, Ms. Maxwell asked Mr. Chung for a letter of
19 recommendation. Mr. Chung agreed to review and sign a letter of
20 recommendation because he believed that Ms. Maxwell produced good work and
21 was a talented web designer, the best that VESi had ever hired.
22

23 In July 2008, shortly after Ms. Maxwell's termination, Ms. Maxwell's
24 husband transferred to a job in Phoenix, Arizona. In August 2008, Ms. Maxwell
25 relocated herself and the two children to Phoenix and interviewed with a company
26 called Televerde for a full-time position. During her interview, Ms. Maxwell
27
28

1 disclosed the events of her termination from VESi. Televerde hired Ms. Maxwell
2 as a consultant, rather than for full-time employment. At the time of trial, Ms.
3 Maxwell still was providing consulting services to Televerde. After moving to
4 Phoenix, Ms. Maxwell also started her own business, Norma Maxwell Web
5 Design, which is her current employment. Ms. Maxwell contends that she has
6 trouble trusting another employer because of her experience with VESi. However,
7 the Court finds that there is insufficient evidence to find that Ms. Maxwell has
8 difficulty trusting another employer.
9
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11

12 Evidence was submitted that Ms. Maxwell received a raise every year and
13 received a bonus every year while employed at VESi. Ms. Maxwell currently
14 lacks job security and does not receive benefits.
15

16 *Expert Witness Testimony on Stereotyping*
17

18 According to Plaintiff's expert witness, Dr. Jane Halpert, once an individual
19 is associated with a group by virtue of pregnancy or being a new mother, other
20 characteristics often are ignored, and employers will make decisions to the
21 individual's detriment because the discrimination overpowers all other common
22 sense. Moreover, gender or pregnancy stereotyping often occurs without ill intent.
23
24

25 Dr. Halpert testified that stereotyping fulfills the primary purpose of
26 reducing cognitive load because the thinker does not have to engage in a full
27 cognitive assessment process. Rather than making an individualized assessment of
28

1 an employee's prior work performance or individual characteristics, for example,
2 stereotypes can reduce the cognitive load of a manager by allowing that decision-
3 maker to attribute characteristics based on group membership.
4

5 According to Dr. Halpert, stereotyping is most easily seen when an
6 employee is judged negatively not for what the employee has actually done but for
7 what the supervisor believes the employee is likely to do or not do based on
8 generalities. Supervisors who tend to be bombarded with information often
9 simplify matters by conveniently using stereotypes.
10
11

12 The Court finds that VESi's comments throughout Ms. Maxwell's
13 pregnancy and after the birth of her second son and the decision to terminate her
14 employment are consistent with stereotyping of pregnant women and new mothers.
15

16 *Damages*

17

18 There was evidence admitted that supports that Ms. Maxwell experienced
19 emotional distress during and after her pregnancy related to her interactions with
20 Mr. Jackson and uncertainty after her employment was terminated. Based at least
21 in part on the conversations with Mr. Jackson during Fall 2007, Ms. Maxwell
22 experienced sufficient stress and anxiety that she requested and received, an
23 increased dosage of Zoloft. However, there was no evidence submitted regarding
24 damages related to emotional distress.
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1 There was evidence submitted that Ms. Maxwell suffered economic
2 damages in the following amounts due to VESi's actions:

- | | | | |
|---|----|--|--------------------------|
| 3 | 1. | Past Wages (July1, 2008- September 1, 2010) ³ | \$85,800.00 |
| 4 | | | |
| 5 | 2. | Past Benefits (July 1, 2008--September 1, 2010) | \$17,400.00 ⁴ |
| 6 | | | |
| 7 | 3. | Earnings from Contract Work (August 2008-September 2009) | |
| 8 | | | \$19,809.00 ⁵ |
| 9 | 4. | Future Wages and Benefits over One Year | \$48,724.00 ⁶ |

10
11 ³ Trial commenced September 7, 2010. The Court relied on the data included on
12 the Plaintiff's Exhibit 40, which was prepared by Ms. Jackson and admitted at trial.

13 All calculations with regard to past wages and benefits are based on a calculation
14 of 26 months between termination and trial.

15
16
17 ⁴ In closing argument, Plaintiff's counsel specifically requested \$17,400.00 for past
18 benefits, although that amount is less than a prorated amount over the 26 months
19 based on the figures provided in Exhibit 40.

20
21
22 ⁵ This figure is the sum of Ms. Maxwell's itemized revenue from August 30, 2009,
23 until April 28, 2010, as included on Plaintiff's Exhibit 57.

24
25 ⁶ This figure is based on Ms. Maxwell's wages as represented in Exhibit 33 and in
26 Ms. Maxwell's and Ms. Jackson's trial testimony plus the Ms. Maxwell's benefits
27 as represented in Exhibit 40. The Court finds that one year of future wages and
28

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2
3 **CONCLUSIONS OF LAW**

4 *Discrimination Claim*

5 Ms. Maxwell alleges that she was discriminated against on the basis of her
6 pregnancy and her status as a new mother, which she asserts are both forms of
7 gender discrimination.
8

9 The Washington Law Against Discrimination (“WLAD”) prohibits
10 employers from terminating a person’s employment on the basis of his or her sex.
11 RCW 49.60.180(2). The WLAD also prohibits employers from discriminating
12 against a person “in compensation or in other terms or conditions of employment”
13 on the basis of his or her sex. RCW 49.60.180(3). The provisions of chapter 49.60
14 RCW “shall be construed liberally for the accomplishment of the purposes
15 thereof.” RCW 49.60.020.
16
17
18

19 Discrimination because of pregnancy is a form of prohibited sex
20 discrimination. *Hegwine v. Longview Febre Co., Inc.*, 162 Wn.2d 340, 349 (2007);
21 WAC 162-30-020(3)(a)(ii) (unfair practice to impose different terms and
22 conditions of employment because of pregnancy). “Pregnancy” includes
23
24

25
26 _____
27 benefits adequately compensates Ms. Maxwell for the damages she experienced as
28 a result of her termination from VESi.

1 “pregnancy, the potential to become pregnant, and pregnancy related conditions.”
2 WAC 162-30-020(2)(a). Further, “pregnancy related conditions” are in turn
3 defined to include “related medical conditions, miscarriage, pregnancy termination,
4 and the complications of pregnancy.” WAC 162-30-020(2)(a).
5

6 Although not binding authority, courts look to Title VII, § 703 of the Civil
7 Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), for instruction in construing
8 chapter 49.60 RCW of the WLAD. *See Glasgow v. Georgia-Pacific Corp.*, 103
9 Wn.2d 401, 406 n.2 (1985); *Valdez-Zontek v. Eastmont School Dist.*, 154 Wn.
10 App. 147, 175 (2010). However, Title VII differs from chapter 49.60 RCW of the
11 WLAD by not requiring liberal construction for the accomplishment of its
12 purposes as WLAD does. *Allison v. Housing Authority of City of Seattle*, 118
13 Wn.2d 79, 88 (1991).
14
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17

18 Courts addressing employment discrimination under WLAD at the summary
19 judgment stage use the burden-shifting analysis established in *McDonnell Douglas*
20 *Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817 (1973), to determine whether the
21 plaintiff’s claim should proceed to a factfinder. *Domingo v. Boeing Employees*
22 *Credit Union*, 124 Wn. App. 71 (2004). This Court conducted the *McDonnell*
23 *Douglas* analysis at the summary judgment stage of this case. The Court denied
24 the motions with regard to the WLAD claim and determined that Ms. Maxwell’s
25 WLAD claim should proceed to trial (Ct. Rec. 85).
26
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28

1 To prevail on an employment discrimination claim under WLAD, the
2 employee must show by a preponderance of the evidence that discrimination on the
3 basis of sex, a protected attribute under RCW 49.60.180(2), was a “substantial
4 factor” in the employer’s adverse employment decision. *Mackay v. Acorn Custom*
5 *Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995); *see also* 6A Wash.
6 *Prac.*, Wash. Pattern Jury Instr. Civ. WPI 330.01 (5th ed.). “Substantial factor”
7 means a significant motivating factor in bringing about the employer’s decision,
8 but not necessarily the only factor or the determining factor. *See Mackay*, 127
9 Wn.2d at 310; *see also* 6A Wash. *Prac.*, Wash. Pattern Jury Inst. Civ. WPI
10 330.01.01 (5th ed.).
11
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15 Adverse employment decisions include termination as well as any action
16 that materially alters the “terms and conditions” of a plaintiff’s employment. *See*
17 *Kang v. U. Lim. Am., Inc.*, 296 F.3d 810, 819 (9th Cir. 2002); RCW 49.60.180(2),
18 (3).
19

20 A comparator, or demonstration that individuals who were similarly situated
21 to the plaintiff but did not share the protected attribute, is only a component of the
22 prima facie case stage of the *McDonnell Douglas* burden-shifting framework. *See*,
23 *e.g.*, *Marquis v. City of Spokane*, 130 Wn.2d 97, 113-14 (1996); *Domingo v.*
24 *Boeing Employees’ Credit Union*, 124 Wn. App. 71, 80 (2004). That consideration
25
26
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28

1 is not relevant at the trial stage. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857
2 (9th Cir. 2002), *aff'd* by 539 U.S. 90, 123 S.Ct. 2148 (2003).

3
4 At the trial stage, the burden-shifting normally is no longer relevant and
5 “unnecessarily evade[s] the ultimate question of discrimination *vel non*.” *Costa v.*
6 *Desert Palace, Inc.*, 299 F.3d 838, 855-56 (9th Cir. 2002) (quoting *United States*
7 *Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478 (1983)), *aff'd* by 539
8 U.S. 90, 123 S.Ct. 2148 (2003). This case does not fit the situation in which
9
10 burden-shifting would still be relevant. *See Costa*, 299 F.3d at 855, note 6 (the
11 *McDonnell Douglas* burden-shifting framework retains vitality at trial only where
12 there is no rebuttal by the employer and the jury must determine whether the
13 plaintiff’s prima facie case is established).
14
15

16 Gender stereotyping can be evidence of sex discrimination. *Price*
17 *Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775 (1989) (addressing a
18 Title VII claim), *superseded in part on other grounds by statute*, Civil Rights Act
19 of 1991, Pub.L. No. 102-166, 105 Stat. 1074; *see also Chadwick v. WellPoint, Inc.*,
20 561 F.3d 38, 45 (1st Cir. 2009) (“[A]n employer is not free to assume that a
21 woman, because she is a woman, will necessarily be a poor worker because of
22 family responsibilities”); *Back v. Hastings on Hudson Union Free School Dist.*,
23 365 F.3d 107, 120 (2nd Cir. 2004) (finding discrimination where a woman
24 professor was told that she cannot “be a good mother and work long hours,” and
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1 that “a mother who receives tenure would not show the same level of commitment
2 she had shown because she had little ones at home”).

3
4 In the retaliatory discharge context, temporal proximity between a protected
5 action and an adverse employment action, as well as satisfactory work
6 performance and evaluations prior to the discharge, suggest that the employer
7 acted with retaliatory motivation. *Estevez v. Faculty Club of Univ. of Washington*,
8 129 Wn. App. 774, 801-02 (2005). Retaliatory discharge is a closely analogous
9 claim to discriminatory discharge because a former employee asserting a
10 retaliatory discharge claim must show that a retaliatory motive was a “substantial
11 factor” in the challenged decision.
12
13
14

15 The Court finds that VESi did not discriminate against Ms. Maxwell on the
16 basis of her gender and pregnancy by not allowing her more flexibility in her work
17 schedule while she was pregnant. However, the Court finds that VESi did commit
18 an adverse employment action when it terminated Ms. Maxwell from her
19 employment. A number of comments by VESi executives showed gender
20 stereotyping at work. Ms. Maxwell was criticized for having a negative attitude
21 for the first time when she became pregnant, although the Court finds that Ms.
22 Maxwell’s pregnancy-related nausea was misinterpreted as a negative attitude.
23
24 Mr. Jackson’s comment that all of the pregnant women whom he had known were
25 “glowing” is consistent with stereotyping based on pregnancy.
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1 After Ms. Maxwell gave birth and requested the 4/4 schedule change, Mr.
2 Jackson described his opposition to the schedule as “less a Norma issue and more a
3 new mother issue” in that he expected Ms. Maxwell would not be able to get work
4 done at home because “the children will come first.” Exhibit 12.

5
6 Although VESi claims that Mr. Chung terminated Ms. Maxwell’s
7
8 employment because of her ongoing bad attitude regarding denial of her 4/4
9
10 schedule, there is no evidence to support that Ms. Maxwell brought up the subject
11
12 of her schedule any time after June 2, 2008. Rather, it appears that Ms. Maxwell
13
14 expressed a willingness to move on and do her work, but that she was responding
15
16 to what she perceived to be Mr. Chung’s requests for additional discussion of her
17
18 request. Mr. Chung’s testimony at trial that “it is hard to predict what a young
19
20 infant will do” indicates that he adopted Mr. Jackson’s viewpoint of a family
21
22 hierarchy and thought that being a new mother would affect Ms. Maxwell’s work
23
24 performance.

25 The Court finds that VESi continued to “type-cast” Ms. Maxwell after the
26
27 birth of her child. VESi appears to have been convinced that as a new mother Ms.
28
Maxwell would not be as good of an employee as she had been prior to her second
pregnancy, regardless of any individualized evidence to the contrary.

VESi urges this Court to conclude that Ms. Maxwell’s termination was
based wholly on her negative attitude resulting from VESi’s denial of her 4/4

1 schedule request. Even if the Court had found that Ms. Maxwell had a continuing
2 negative attitude after VESi's refusal of the 4/4 schedule, which the Court did not
3 find, VESi's decision would still have been motivated by gender, similar to the
4 employer in *Estevez*, 129 Wn. App. at 803.

6 In *Estevez*, the defendant contended that they terminated the plaintiff
7 because she was "stressed out," emitted a "stressful vibe," and was not a "good fit"
8 with the company after the plaintiff had formally complained about a coworker's
9 stalking her. *Id.* at 802. The *Estevez* court noted that the plaintiff, like Ms.
10 Maxwell, only had received positive feedback previously and rejected the
11 defendant's proffered nondiscriminatory reason for the termination, stating that it
12 assumed that the plaintiff's "stressful vibe" was the result of being subjected to
13 discriminatory conduct. *Id.* at 801.

17 The *Estevez* court distinguished a previous decision, *Selberg v. United Pac.*
18 *Ins. Co.*, 45 Wash. App. 469 (1986), by finding that *Selberg* "held that *protest*
19 *conduct* directed toward unlawful activity may so interfere with an employee's
20 work performance and render the employee ineffectual in employment so as to
21 afford an independent non-discriminatory basis for termination," but "did not hold
22 that an employee's understandable stress in reacting to sexual harassment at work
23 would justify termination." The *Estevez* court explicitly declined to extend the
24 holding of *Selberg*. *Id.* at 801.

1 In this case, the discriminatory animus that began with Ms. Maxwell's
2 announcement of her pregnancy continued and evolved beyond the timeframe of
3 her pregnancy until VESi terminated Ms. Maxwell approximately six weeks after
4 she gave birth to her second child. The Court finds that Ms. Maxwell's pregnancy
5 and subsequent newborn baby was a substantial factor in VESi's termination of her
6 employment.
7
8

9 The preponderance of the evidence supports that VESi discriminated against
10 Ms. Maxwell on the basis of her gender and pregnancy when VESi terminated her
11 employment in violation of RCW 49.60, the Washington Law Against
12 Discrimination.
13

14 *Emotional Distress Claims*

15 A plaintiff may not maintain a separate claim for negligent infliction of
16 emotional distress based on the same facts that support her claim under the
17 WLAD, which also permits damages for emotional injuries. *Francom v. Costco*
18 *Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182, review denied 141 Wn.2d
19 1017 (2000); see also *Chea v. Men's Warehouse, Inc.*, 85 Wn. App. 405, 412, 932
20 P.2d 1261 (1997).
21
22
23
24

25 Ms. Maxwell stated that she was pleading the negligent infliction of
26 emotional distress claim in the alternative to the discrimination claims. The Court
27 has found that VESi discriminated against Ms. Maxwell in violation of RCW
28

1 49.60, and Ms. Maxwell did not differentiate between the discriminatory and non-
2 discriminatory aspects of the case or segregate the evidence supporting the
3 discrimination claim from any evidence supporting an emotional distress claim.
4 Therefore, Ms. Maxwell's claim of negligent infliction of emotional distress is
5 dismissed.
6

7
8 An intentional infliction of emotional distress claim requires a showing on
9 the following elements: "(1) extreme and outrageous conduct, (2) intentional or
10 reckless infliction of emotional distress, and (3) actual result to plaintiff of severe
11 emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 195 (2003). Ms. Maxwell did
12 not present evidence supporting a finding in her favor of any of the elements of
13 intentional infliction of emotional distress. Ms. Maxwell's claim of intentional
14 infliction of emotional distress is also, therefore, dismissed.
15
16
17
18

19 *Damages*

20
21 A former employee who has proved discrimination under RCW 49.60 is
22 entitled to recover damages for emotional distress if he or she offers proof of actual
23 mental anguish or emotional distress. *Dean v. Municipality of Metropolitan*
24 *Seattle-Metro*, 104 Wn.2d 627, 641-42, 708 P.2d 393 (1985). In this case, Ms.
25 Maxwell did not submit any evidence supporting actual mental anguish or
26 emotional distress. Therefore, the Court will not award any damages for emotional
27
28

1 distress. Upon a showing of discrimination under RCW 49.60, a former employee
2 is also entitled to the reasonable value of lost past earnings and fringe benefits
3 from the date of the wrongful conduct to the date of trial and the reasonable value
4 of lost future earnings. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI
5 330.81.
6

7
8 Although a plaintiff in an employment discrimination case has a duty to
9 mitigate damages, the defendant employer bears the burden of proving a failure to
10 mitigate damages. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828 (2000).
11
12 VESi has not proved that suitable positions were available to Ms. Maxwell
13 following her termination from VESi or that she failed to use reasonable care and
14 diligence in seeking them.
15

16 The Court finds that VESi is liable for \$17,400 in past benefits, \$65,991.00
17 in past wages which reflects the net amount of past wages reduced by the
18 mitigation as shown by Ms. Maxwell's subsequent earnings in Exhibit 57, and
19 \$48,724.00 for one year of future wages and benefits. The Court awards no
20 damages for emotional distress. Ms. Maxwell has also has requested reasonable
21 attorney fees and costs, to which she is entitled under RCW 49.60.020(2) and
22 which the Court grants. Accordingly,
23
24
25

26 **IT IS HEREBY ORDERED:**
27
28

