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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DONALD BROWNELL

Appellant,

v.

SNOHOMISH COUNTY PUBLIC UTILITY DISTRICT NO. 1

Respondent.

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

This is an appeal from order of the Superior Court of Snohomish County granting summary judgment on a claim by Don Brownell (hereinafter “Brownell”) for disparate treatment disability discrimination on his discharge from the Snohomish County PUD. Brownell does not seek reversal of the summary judgment on his claim under RCW 51.48.025.

## **II. BROWNELL’S ASSIGNMENT OF ERROR**

Brownell assigns error to the court’s finding that there is no genuine issue as to any material fact pertaining to Brownell’s claim for disparate treatment disability discrimination and that the PUD was entitled to judgment on that claim. CR 56(c).

## **III. STATEMENT OF THE CASE**

### **A. Statement of Facts**

1. Brownell was discharged from his position as a Hydroelectric Constructor at the defendant’s Jackson Powerhouse on October 5, 2010. (See Exhibit 1 to Lacy declaration)(CP 48-50).

2. Brownell’s discharge followed an incident at the Woods

Creek power plant which occurred on August 27, 2010. (See Exhibit 2 to Lacy declaration)(Pre-termination letter)(CP 51-54).

3. Brownell's pre-termination letter was signed by Kim Moore, the PUD's Assistant General Manager of Generation and Water Resources. (Exhibit 2 to Lacy declaration) (CP 51-54). His discharge letter was signed by Moore and approved by the PUD's General Manager, Steve Klein. (Exhibit 1 to Lacy declaration) (CP 48-50). That letter included a number of prior documented counselings for performance issues over the course of Brownell's long career at the PUD. <sup>1</sup> *Id.*

4. Kim Moore did not directly supervise anyone at the Jackson Project, and obtained any information about any significant personnel issues from Zeda Williams, the senior manager over that project, or from Barry Chrisman, the Hydroelectric Superintendent, who was Brownell's direct supervisor. (Deposition of Kim D. Moore, pp. 16-17)(CP 142-143).

5. Barry Chrisman, the Hydroelectric Superintendent at the Jackson Project, was hired by the PUD in February, 1991. He was a previous co-worker of Don Brownell for about five years before he became

<sup>1</sup> Many of those had expired, according to PUD policy. (See Fact No. 19 below) (Deposition of Barry Chrisman, pp. 6, 9-11) (CP 164-167).

Brownell's direct supervisor, presumably in the mid to late 1990's.

6. Brownell suffered from several disabilities during his employment by the PUD which were well documented in the PUD records. (See Exhibits 3 through 7 to Lacy Declaration) (CP 55-76). He had been diagnosed with Myasthenia Gravis in about 1990, a fact known to the PUD. (See Exhibit 4 to Lacy declaration) (CP 57-60). Myasthenia Gravis is a neurological disease which causes sporadic but progressive weakness and abnormal fatiguing of skeletal muscles, which are exacerbated by exercise or repeated movement, but which can be improved by certain drugs. (Declaration of Don Brownell) (CP 196-197). In addition, Brownell suffered from a diagnosed hearing loss, which was discovered through testing at the PUD and which contributed to issues of communication between Brownell and his supervisor, Barry Chrisman. (Exhibit 7 to Lacy declaration) (Internal Memorandum and hearing evaluation record) (CP 72-76) (Brownell declaration) (CP 197).

7. On January 24, 2002, Brownell had been injured while working with a chainsaw to clear a road for the PUD, suffering a chainsaw laceration to his right forearm together with an open fracture to his distal radius bone and lacerations of several nerves. (See Exhibits 1, 3 and 8 to

Lacy declaration)(Accident report and operative report)(CP 48-50, 55-56, 77-79).

8. Brownell had been released back to work on March, 2003. (See Exhibit 6 to Lacy declaration)(case manager notes) (CP 64-71).

9. After Brownell's return to work he was left with continued and increased weakness in his right hand and forearm, as well as generally due to his Myasthenia Gravis. His condition caused him to be slower in performing certain physical tasks. (Brownell declaration) (CP 197).

10. Despite that partial disability, and during convalescence from the chainsaw injury, in May, 2002, Brownell was being considered for a promotion to a newly created position with a new job description, that of Hydro Constructor. That promotion was opposed by Barry Chrisman and Zeda Williams, Chrisman's supervisor, both of whom expressed their concerns that Brownell might not be able to handle the physical requirements of his job due to his injury. They specifically raised the fact that he suffered from Myasthenia Gravis. (See Exhibit 6 to Lacy declaration)(L&I claim notes) (CP 64-71).

11. On April 10, 2003 Zeda Williams met again with the PUD's L&I claims personnel, expressing her opinion that Brownell couldn't handle

the electrical and mechanical aspects of his new job description. *Id.*

12. As a result of the concerns expressed by Chrisman and Williams, Brownell underwent a physical capacities evaluation. *Id.* (See also Exhibit 9 and 10 to Lacy declaration)(CP 80-97), passed it, and was granted the new position despite the opinions of Chrisman and Williams. However, it was decided by the PUD that he was to be restricted from the use of a chainsaw or a snowmobile, that he would not be required to climb the metal ladder to operate the gantry crane, and that he would be allowed to seek assistance from other employees when needed to access certain areas of the project presenting difficulty of access to obtain sample collections. (Brownell declaration)(CP 197) (Chrisman depo. p. 16)(CP 171) ( Exhibit 6 and 11 to Lacy declaration) (L&I notes and May 2, 2003 e-mail from Williams to Chrisman) (CP 64-71 and CP 98-99).

13. Zeda Williams specifically recalls discussions with Chrisman about limiting Brownell's use of the crane, which could only be accessed by a long ladder climb to the top of the powerhouse. (Williams depo. pp. 28-29)(CP 181-182).

14. The new job description of Hydroelectric Constructor differed from that of Brownell's previous job of Hydro Operator Constructor

primarily in the sense that it had an expanded list of responsibilities, including many physical tasks not part of the previous job description, as well as additional minimum qualifications including physical capacities which were not part of the previous job. (See Exhibits C and E to Declaration of Cindy M. Lin) (defense materials)(CP 322-324 and CP 328-331).

15. From the time that Brownell returned to work in the spring of 2003 until he was fired following the Woods Creek incident in 2010, Brownell was continually subjected by Barry Chrisman to sarcasm and criticism regarding his inability to perform the physical tasks associated with his job in a manner and at a speed sufficient to satisfy Mr. Chrisman. Chrisman did still require Brownell to climb the ladder to operate the crane. (Brownell declaration)(CP 197).

16. Chrisman acknowledges that through observation of Brownell in the work place, he had become concerned enough about Brownell's physical capacities that he brought his concern up to PUD management. He specifically claims he became concerned when watching Mr. Brownell climbing a crane one day without using one of his hands. (Chrisman depo. pp. 12-13)(CP 168-169). He says his observations told him that Brownell had decreased arm strength which he understood to be a problem for

Brownell on performing workplace duties. (Chrisman depo. p. 17)(CP 170). Zeda Williams, Chrisman's boss, reports that Chrisman told her of his concerns pertaining to Brownell's physical limitations in the context of why certain projects were not being completed on time. (Williams depo. pp. 19-20)(CP 179-180). In addition, Mr. Chrisman was unhappy with what he perceived to be Brownell's need to hear instructions several times in order to perform certain tasks. (Chrisman depo, p. 30)(CP 173) Mr. Chrisman had been copied on and knew of Brownell's hearing disability. (See Exhibit 7 to Lacy declaration) (showing that Chrisman was sent a copy of the Safety Specialist's notification of Brownell's diagnosis of hearing loss)(CP 72-76).

17. Sara Kurtz is the Employee Resource Consultant who worked with PUD management to process the discharge of Don Brownell and drafted the letter setting forth the reasons for Don Brownell's discharge. (Deposition of Sara Kurtz, pp. 10-12)(CP 185-187) (Moore depo., p. 36)(CP 154).

18. Kurtz claims to not know of any criteria or standard employed by the PUD to determine what discipline to administer to an employee in any specific circumstance, or when an employee's performance deficiencies will result in a discharge from employment. (Kurtz depo., pp. 23-27)(CP 189-193). She claims she participated in meetings to determine

whether Mr. Brownell should be discharged, but can't recall who participated in those meetings. (Kurtz depo. p. 30)(CP 195). But, according to Kurtz, the specific level of discipline chosen for a PUD employee due to a performance deficiency is determined as the result of discussions by the Employee Resources and in-house legal personnel with the direct supervisor or manager of the employee. (Kurtz depo. p. 14)(CP 188). That was Barry Chrisman. (Chrisman depo. pp. 9-11)(CP 165-167). Mr. Chrisman admits that he was disappointed in Mr. Brownell's lack of physical capacity to do his job, specifically with regard to the speed at which Mr. Brownell was accomplishing his tasks, that he discussed that concern with the people above him in his chain of command. (Chrisman depo., p. 27)(CP 172). Mr. Chrisman also says he was coached to keep notes on those types of concerns in a separate file he kept on Mr. Brownell, which he called his "Manager's File," and that he disposed of the notes he had on Mr. Brownell once Mr. Brownell had been fired. (Chrisman depo., p.31-32)(CP 174-175). Zeda Williams claims she was also part of the meeting(s) to discharge Brownell. (Deposition of Zeda Williams, p. 9)(CP 178).

19. Kurtz acknowledges that written warnings given to employees expire after two years at the Snohomish County PUD. (Kurtz depo. p. 27-

28)(CP 193-194). Accordingly, Brownell, who knew that rule, understood that all the written warnings issued to him at the PUD prior to August 27, 2008 had expired prior the Woods Creek incident which occurred on August 27, 2010. (Brownell declaration)(CP 199-200).

20. Of the four specific prior performance issues mentioned in the Brownell's pre-termination letter prepared by Sara Kurtz and signed by Kim Moore on September 30, 2010 three were current at the time of the Woods Creek incident. The March, 2008 ramp rate warning had expired in March, 2010. (See Exhibit 2 to Lacy declaration) (pre-termination letter)(CP 51-54).

21. Of the then current disciplinary entries in Brownell's file, the first was a November, 2009 ten-day suspension Brownell had been issued by Barry Chrisman for allegedly failing to notice and report that on October 5, 2009 the flow of the stream at the Jackson Powerhouse had increased to 429 cubic feet per second, which was 29 cubic feet per second above the maximum operating flow allowed by the projects FERC operation plan. (See Exhibit 12 to Lacy Declaration)(CP 100-104). Brownell had grieved that suspension and it had been reduced to a four day suspension. This was not a "ramp rate" violation of the nature that had the potential to affect the PUD's FERC license if the flows fell below the minimum threshold

determined to be necessary for fish habitat. Instead, it resulted in the PUD having to continue to maintain its flow at higher levels for a period of time to maintain the agreed upon differential between high and low flows during the following few weeks. This loss of “flexibility” was a situation which *could have* resulted in a loss of revenue to the PUD, depending on whether it might have actually used the extra water it was allowing to flow to keep the river at the higher level to generate electricity. (Brownell declaration)(CP 200)(Also see Exhibit 12 to Lacy declaration)(October 26 Notice and November 4, 2009 suspension letter signed by Barry Chrisman)(CP 100-104) . The event had occurred due to Brownell having been distracted by the appearance at the powerhouse of managerial employee who was conducting a disciplinary investigation. (Brownell declaration)(CP 200).

22. The next current disciplinary entry in Brownell’s file on the date of the Woods Creek incident was a warning letter issued by Barry Chrisman on December 2, 2009 for allegedly improperly issuing a clearance to a substation wireman to do work on powerhouse equipment without first placing the wireman’s own personal locks on that equipment. At the time the machine was already locked out/tagged out for work due to the placement on the machine of another worker’s locks. The wireman in question had refused

to remove the other worker's locks and replace them with his own locks before proceeding with the work. Don Brownell was not clear about what the WACs required in that unique situation, though he knew that PUD policy made compliance with the WACs mandatory. He issued the clearance at that time and at two other times that week under the same circumstances to allow the work to be done. Later, after checking the specific WAC, he himself had brought the issue to the attention of Barry Chrisman, who decided to issue the written warning. (Brownell declaration)(CP 200-201).

23. The last disciplinary entry in Brownell's file as of the Woods Creek incident was an April 15, 2010 written warning from Chrisman for inaccurately filling out a safety monitoring report to FERC which Don Brownell submitted to FERC every month as part of his duties. Brownell had improperly carried forward some information, failing to note on some later reports that a particular structural defect had been corrected. (Brownell declaration)(CP 201) (See also, Exhibit 13 to Lacy declaration) (April 15, 2010 warning letter)(CP 105-108).

24. During the same period of time that Mr. Chrisman was issuing these written warnings and the suspension to Mr. Brownell, other employees under Mr. Chrisman's supervision were committing the same or

more serious types of errors without being issued any discipline. (Brownell declaration)(CP 201). One of the co-workers, Bill Easterling, committed a river flow violation in June, 2010 very similar to the flow violations for which Mr. Brownell was written up and suspended in November, 2009. On that occasion, while Mr. Easterling was in control of powerhouse due to Mr. Brownell's being gone to do inspections, a flow violation occurred. Mr. Easterling had failed to control the powerhouse units to prevent the flow violation, the same behavior that had earlier led to Mr. Brownell's suspension by Mr. Chrisman. Mr. Brownell discovered the violation upon his return to the powerhouse and notified Mr. Chrisman. He also documented the issue in the powerhouse log book. (See Exhibit 20 to Lacy declaration)(CP 136-137) Mr. Chrisman did not discipline Mr. Easterling and the matter was not reported to FERC as required by the PUD's license. (Brownell declaration)(CP 201) ( Also see Lacy declaration, and Exhibit 14 to Lacy declaration) (PUD response to interrogatory requesting information on discipline to other employees)(CP 109-115). Mr. Chrisman never communicated any other potential FERC violations to the attention of Kim Moore. (Moore depo. p. 59)(CP 161).

25. On another occasion in 2010 Mr. Easterling lifted and

disabled the wrong CO-2 cylinder from a cylinder holder, causing the CO-2 contents of six CO-2 cylinders to expel their contents in the powerhouse. That resulted in an evacuation of the powerhouse. Brownell notified Chrisman of the action of Easterling and the evacuation, however Chrisman did not discipline Easterling for the safety violation. (Brownell declaration)(CP 202) (See Exhibit 21 to Lacy declaration)(CP 138-139)

26. On a third occasion in 2010, Easterling failed to follow Chrisman's instructions to put the station's batteries on "equalize" causing a delay in battery maintenance. Again, Chrisman failed to discipline Easterling. (Brownell declaration)(CP 202).

27. Mr. Easterling and Gaylin Larson, another Jackson Powerhouse employee, also committed a clearance violation which Chrisman chose to overlook. Despite the fact that safety clearances are required to be logged into the station logbook and then carried forward to the next workday, Brownell discovered upon coming to work on a day in 2010 that Mr. Easterling had failed to make the appropriate carry forward entries in the log book. He brought this information to Mr. Chrisman, who chose to issue no discipline to Mr. Easterling. (Brownell declaration)(CP 202)(Again, see PUD response to interrogatory requesting information on discipline to other

employees)(See Exhibit 14 to Lacy declaration)(CP 109-115)

28. On a different occasion Gaylin Larson was also the benefactor of Mr. Chrisman's propensity to only discipline Don Brownell. Mr. Brownell observed Mr. Larson, while working on a piece of machinery, release his clearance with the disconnects still closed, a clear clearance violation. Mr. Brownell confronted Mr. Larson and requested that Larson report the violation, which was done. Brownell then informed Chrisman and reported what had happened. No discipline was issued to Mr. Larson. (Brownell declaration)(CP 202)(See Exhibit 14 to Lacy declaration)(CP 109-115)

29. The incident that Mr. Chrisman chose in order to initiate termination proceedings against Mr. Brownell was not a serious ramp violation according to FERC. Also the statement made to Mr. Brownell in his pre-termination letter, that the incident had "definite adverse implications on the District's credibility with the resource agencies, and could lead to monetary fines with FERC" was not a true statement. After receiving a report of that incident, FERC reported back to the PUD on November 22, 2010 that the "relatively small geographic area" which the PUD claims Mr. Brownell allowed to go dry had been determined by a fishery biologist to be an area

“not considered suitable habitat for the resident fish occupying upper Woods Creek.” FERC concluded, “..we will not consider the temporary deviation from the minimum flow requirements at the Woods Creek Project a violation of Article 2” [of the licensing agreement]. (See Exhibit 15 to Lacy declaration)(CP 116-118).

30. Whether Brownell had allowed the small stream bed to go dry is a disputed fact in this case. The area in question was never allowed to go dry as the gate which Mr. Brownell attempted to close on that occasion does not fully seal and water kept flowing over the creek falls all during the period of only approximately two hours before the problem was discovered and corrected. (Brownell declaration)(CP 202-203). (Please note the incident date in the FERC report is incorrect. It is listed as September 27, 2010 and should be August 27, 2010.)

31. Moreover, the evidence is that the PUD had been aware on several occasions of much more serious FERC license agreement violations committed by its employees and taken no disciplinary action at all. The PUD admits that, other than Mr. Brownell, it had never disciplined any employee for a river flow violation constituting a possible or actual violation of FERC standards, regulations, protocols or rules between 1990 and 2010. (Exhibit 14 to Lacy declaration)(CP 109-115). However, during that period of time

the PUD had reported, and FERC has responded to, dozens of such incidents. (See Exhibit 16 to Lacy declaration)(spreadsheet kept by PUD on incidents at Jackson Project from 5-18-1988 to 12-23-2009)(CP 119-124). At least three of those incidents were found by FERC to have been caused by the improper actions of PUD employees. (See Exhibits 17, 18, and 19 to Lacy declaration)(CP 125-127, CP 128-132, and CP 133-135).

#### **IV. ARGUMENT**

##### **A. Review of order on summary judgment.**

A decision granting summary judgment is reviewed de novo. *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008). The appellate court engages in the same inquiry as the trial court. *Hontz v. State*, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986).

Summary judgment shall be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one upon which the outcome of the litigation depends." *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1287 (1993). The court is to consider the facts and all reasonable inferences in the light most favorable to the non-moving party.

*Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Only if from all the evidence, reasonable persons could reach only one conclusion, should summary judgment should be granted. *Clements*, 121 Wn.2d at 249; *Wilson*, 98 Wn.2d at 437.

**B. Brownell demonstrated clearly established disabilities.**

It is unlawful for an employer to “discharge . . . [or] to discriminate against any person in compensation or in other terms or conditions of employment because of . . . the presence of any sensory, mental, or physical disability . . . .” RCW 49.60.180 (2) and (3). RCW 49.60.040 (7) defines a "disability":

(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

- (i) Is medically cognizable or diagnosable; or
- (ii) Exists as a record or history; or
- (iii) Is perceived to exist, whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity

within the scope of this chapter.

(c) For purposes of this definition, “impairment” includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Whether a sensory, mental, or physical condition is a handicap under RCW 49.60 is a question of fact. *Phillips v. Seattle*, 111 Wn.2d 903, 910, 766 P.2d 1099 (1989).

The definition of disability by the Legislature is consistent with *Pulcino v. Federal Express*, 141 Wn.2d 629 (2000), wherein the Washington Supreme Court ruled that RCW 49.60 is not limited to only permanent disabilities, but also includes temporary conditions. In *Pulcino*,

the employee suffered from a lumbar strain and a broken foot. The employee was able to establish that she was handicapped or disabled under RCW 49.60. 141 Wn.2d 641-43.

The evidence below clearly established that Brownell had three diagnosed disabilities under Washington law. Specifically, Brownell had a disability due to the chainsaw accident of 2002. Brownell also had myasthenia gravis, and a significant hearing loss.

**C. Brownell's burden of establishing evidence of discrimination sufficient to survive summary judgment.**

A claim for discrimination can be supported with either direct or circumstantial that a discriminatory animus was a substantial factor for the adverse employment decision. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 359, 172 P.3d 688 (2007). If the plaintiff is able to prove that this was the case, the burden shifts to the employer to prove that it would have taken the same action despite the discriminatory animus. 162 Wn.2d at 359-60. Once the prima facie case is satisfied, the plaintiff then has the burden of persuading the trier of fact that unlawful discrimination did occur. *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 493, 859 P.2d 26 (1993).

"Conduct resulting from the disability (e.g., decrease in

performance) is part of the disability and not a separate basis for termination." *Riehl v. Goodmaker, Inc.*, 152 Wn.2d 138, 152, 94 P.3d 930 (2004). Terminating an employee because of behavior brought on by the employee's disability is a termination of the employee because of the disability, itself. See 152 Wn.2d at 152; *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1139-40 n.18 (9<sup>th</sup> Cir. 2001); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 875 (9<sup>th</sup> Cir.), *cert. denied*, 498 U.S. 814 (1990).

**D. The court below should have denied the PUD's motion for summary judgment because the PUD did not carry its burden of proving a lack of genuine issues of material fact on Brownell's claim of disparate treatment disability discrimination.**

**a. The trial court failed to accord Brownell the benefit of viewing the evidence according to the proper burdens on summary judgment.**

In moving for summary judgment, the PUD undertook a very burdensome task. Defendants' burden was simply stated. It had to demonstrate that there was **no** genuine dispute as to **any** material fact-- this is a well-grounded principle. *Morris v. McNichol*, 833 Wn.2d 491, 494, 519 P.2d 7 (1974). This burden was further increased by the general

principle that states the facts asserted by the non-moving party and supported by affidavits or any other evidentiary material must be taken as true. *State ex rel Bond v. State*, 62 W.2d 487, 491, 383 P. 2d 288 (1963) Defendants' burden became even more onerous by the general principle that summary judgment is normally inappropriate in an employment discrimination case, where the issue is one of establishing a defendant's intentionally unstated intent. *See Johnson v. DSHS*, 80 Wn. App. 212, 229, 907 P. 2d 1223 (1996). In ruling that the PUD had met its burden the trial court simply ignored the principle that the facts must be viewed in a light most favorable to the non-moving party.

**b. Brownell set forth a strong prima facie case of disparate treatment disability discrimination.**

As stated, Mr. Brownell could establish the following for a prima facie case of discharge in violation of RCW 49.60 for handicap discrimination:

(1) he was handicapped; (2) he was discharged; (3) prior to the discharge he did satisfactory work; and (4) he was replaced by a person who was not handicapped.

*Cluff v. CMX Corp.*, 84 Wn.App. 634, 638, 929 P.2d 1136 (1997). In this case the evidence is clear that Brownell evidence met the standard for

being handicapped (disabled), and proved that he was discharged. There was also no challenge to the fact that he was replaced by people at Woods Creek who were not disabled. The real issue for consideration of his prima facie case, therefore, was whether the evidence created a question of fact on the issue of whether Brownell was doing work that satisfied the standards of the PUD. On that issue, the evidence was disputed, but was sufficient to create competing inferences demanding resolution by a trier of fact.

First, since the PUD had conducted no performance evaluations for Mr. Brownell it could not prove that his work had been rated as substandard compared to other employees at the PUD. Second, there was evidence to establish that most of the written warnings relied upon by the PUD in its summary judgment motion had expired. Third, PUD decision-makers acknowledge that they had not established any standard for discharge of PUD employees. Fourth, there was evidence that the PUD had never severely disciplined or discharged any employee for the kind of alleged FERC violations which they claim to have relied upon to discharge Brownell. Notwithstanding the PUD's citation of every record of counseling or discipline ever given to Brownell, there remains a question of fact regarding whether Brownell's comparative employment record was

so bad that his work would have been judged so unsatisfactory as to warrant discharge in the absence of discriminatory animus against him displayed by Mr. Chrisman and Ms. Williams based on their perceptions of his physical inadequacies. In addition, the PUD attempted to justify its discharge action through the use of incidents used at the PUD routinely as a means of counseling, and then removed from the files of employees after improvement of performance. In addition, Brownell's supervisor was keeping a file on Brownell's alleged physical difficulties due to his disabilities, shared that information with management, then destroyed it after Brownell's discharge. All this suggests mendacity on the PUD's part in its justification of the discharge decision. A history of counseling for improvement in several different areas over a long period of time, where the specific conduct has not been repeated, is certainly not sufficient to carry the heavy burden of showing there is no genuine issue of material fact on whether Brownell's then current performance was so unsatisfactory as to warrant discharge. In this case the PUD provided old evidence of counseling on such unrelated matters as internet use, electrical clearances, logbook entries, and filling out FERC forms, then attempted to tie them all together by characterizing all the conduct generally as a pattern of misconduct under the category of failing to attend to details. That

argument was creative, but might not have been persuasive in the face of Mr. Brownell's failure, in almost all instances, to have re-engaged in the specific conduct. To the contrary, where there is evidence, as in this case, that an employee has been singled out for disparate treatment through selective enforcement of policy, that evidence can be considered by a trier of fact in deciding whether the alleged misconduct was truly of a nature that would lead to discharge absent the presence of a discriminatory animus. See *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547-48 (10<sup>th</sup> Cir. 1988); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1155 (10<sup>th</sup> Cir. 1990). That evidence should be found to be even more persuasive in the face of evidence that Brownell's supervisor, who did the selective enforcement, was actually concerned about Brownell's disability-related behavior, but went to great pains to not directly address it. That implies that he knew that to take that route would subject him to a claim of discrimination. On these facts Mr. Brownell establishes a strong prima facie case of disparate treatment disability discrimination.

**c. Brownell's evidence also strongly suggests pretext.**

To prevail on summary judgment, plaintiffs are simply required to produce evidence raising an issue of material fact as to whether the employer's reasons given for their discharge are unworthy of credence or

belief or that they are merely a pretext for a discriminatory purpose.

To do this, a plaintiff must show, for example, that the reason has no basis in fact, it was not really a motivating factor for the decision, or was not a motivating fact in employment decisions for other employees in the same circumstances. *Renz v. Spokane Eye Clinic*, 114 Wn.App. 611, 619 (Div. III, 2002).

In Hill v. BCTI, the Washington Supreme stated:

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. 144 Wn.2d at 184 (2000).

Thus, the ordinary standard set forth in Hill, is that if an employee proves a prima facie case, and puts on evidence that the employer's asserted justification is false, he is entitled to present his case to a

trier of fact. In this case, however, there are multiple indicia that the defendant is dissembling to hide the truth that Mr. Brownell's disabilities as manifested in the workplace were a substantial factor in the motivation of Barry Chrisman and Zeda Williams to seek his discharge. First, despite literally dozens and dozens of incidents at the Jackson Powerhouse over decades which were potential violations of the PUD's license agreement with FERC, no one until Mr. Brownell has ever been seriously disciplined or fired due to such an incident. Second, despite conduct by Bill Easterling and Gaylin Larson that clearly qualified as misconduct, Mr. Chrisman didn't even report them, much less attempt to impose discipline on either for it. Yet he used just such kinds of behavior by Brownell to support Brownell's discharge. Third, despite the PUD's insistence otherwise now in its briefing, Brownell's indiscretion at Woods Creek in August 27, 2010, the event that precipitated the discharge, was not a serious matter, as FERC itself pointed out to the PUD. Those facts alone strongly imply that the PUD's stated ultimate reasons for firing Mr. Brownell, river violations was not the only motivating factors for the decision, and was not a motivating fact in employment decisions for other

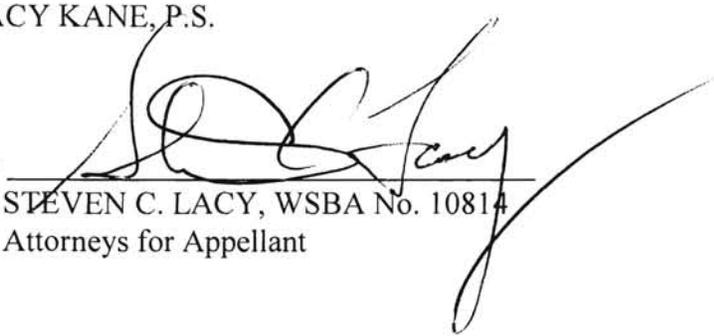
employees in the same circumstances. *Renz v. Spokane Eye Clinic*, 114 Wn.App. 611, 619 (Div. III, 2002). It follows that a jury could conclude that Brownell's physical disabilities were a substantial factor in the ultimate decision.

## V. CONCLUSION

The court below should have denied the PUD's motion for summary judgment as to Brownell's claim for disparate treatment disability discrimination. Because Mr. Brownell can show a prima facie case of discrimination and can establish sufficient evidence for jury consideration on the issue of pretext the court should reverse the ruling of summary judgment and remand this case for trial on merits of the disparate treatment discrimination claim.

Respectfully Submitted this 26th day of February, 2014.

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By 

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