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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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JOEL HAVLINA,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION;  
and PERSONNEL APPEALS BOARD OF THE STATE OF  
WASHINGTON,

Respondents

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APPELLANT'S APPEAL BRIEF

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## **I. ASSIGNMENT OF ERROR**

The Superior Court erred when entering an order of dismissal, which order affirmed the decision of the Personnel Appeals Board. CP 41-42.

## **II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Before an employer discharges a handicapped worker from employment, should the employer, as part of its obligation of reasonable accommodation, seek to find other employment for the employee throughout the employer's departments and divisions?

## **III. STATEMENT OF CASE**

Joel Havlina appeals the decision of the Thurston County Superior Court, which decision affirmed the decision of the Personnel Appeals Board. CP 41-2. The Personnel Appeals Board ratified the Washington State Department of Transportation's determination to terminate Havlina's employment, because of Havlina's work injuries. CP 12. Joel Havlina claims that his dismissal violates the handicap discrimination laws of the State of Washington and the United States.

Joel Havlina served as a Maintenance Technician II with the Washington State Department of Transportation, in the Connell

Maintenance Facility. Personnel Appeals Board Finding of Fact 2.2, CP 7. Havlina held this position from August 1993 to June 17, 2005. Personnel Appeals Board Findings of Fact 2.2 and 2.8, CP 7, 8. Joel Havlina previously served as a Maintenance Technician I and a temporary Maintenance Technician. Personnel Appeals Board Finding of Fact 2.2, CP 7.

On March 4, 2004, Joel Havlina aggravated a left knee injury, while performing job duties. Finding of Fact 2.3, CP 7. At the time of the injury, Havlina ascended a flight of steps. Transcript of Personnel Appeals Board Hearing, pages 70, 93, 159. In turn, Tom Lenberg, Joel Havlina's supervisor, accused Joel Havlina of "substandard conduct," as the mere result of Havlina walking up stairs. Transcript of Personnel Appeals Board Hearing, page 70, 161.

Orthopedist Christopher Kontogianis treated Joel Havlina for injuries to his knee. Transcript of Personnel Appeals Board Hearing, page 162. Kontogianis performed a meniscectomy on the knee. Personnel Appeals Board Finding of Fact 2.3, CP 7. On May 17, 2004, Joel Havlina returned to work. Personnel Appeals Board Finding of Fact 2.3, CP 7.

On April 18, 2005, Casey McGill, of the Washington State Department of Transportation, terminated Joel Havlina's employment based upon Havlina's knee disability. Personnel Appeals Board Finding of Fact 2.8, CP 9. Although Joel Havlina disagrees, the Personnel Appeals Board found that the Department of Transportation, before terminating Havlina's employment, searched for vacant positions, within the Transportation Department, to which to transfer Havlina. Finding of Fact 2.7, CP 9. The Department of Transportation also claims that it searched for a substitute position for Joel Havlina, with the State of Washington Department of Corrections and the Department of Social and Health Services. Transcript of Personnel Appeals Board Hearing, pages 129, 130. Nevertheless, the State of Washington did not search for other positions for Joel Havlina, outside the three departments, before discharging Havlina from employment. Transcript of Personnel Appeals Board Hearing, page 115. The Department of Transportation does not normally look outside the Department, and within other departments or divisions of the State of Washington, for open positions available for injured or disabled employees. Transcript of Personnel Appeals Board Hearing, page 116. Although Joel Havlina limited the geographic area, to where he

would move, Havlina was willing to work in other State of Washington agencies or departments outside the Department of Transportation. Transcript of Personnel Appeals Board Hearing, page 178.

#### **IV. ARGUMENT**

The Americans with Disabilities Act and the Washington Law Against Discrimination seek to integrate handicap citizens into the workforce to allow them a productive life. Both state and federal law require employers to find ways to bring the disabled into their ranks, even when doing so imposes some costs and burdens. **Cripe v. City of San Jose**, 261 F.3d 877, 881 (9th Cir. 2001). When enacting the ADA, Congress concluded that such is a small price to pay for the benefits of living in a society in which the disabled may realize “equality of opportunity, full participation, independent living, and economic self-sufficiency.” **Cripe v. City of San Jose**, 261 F.3d 877, 881 (9th Cir. 2001). Therefore, an employer holds certain duties to accommodate a disabled worker.

The State of Washington abrogated its duty to reasonably accommodate Joel Havlina’s handicap, because the State failed to search for jobs, to which to transfer Havlina, once Havlina could no longer

perform the functions of a maintenance technician. The record shows that Washington, when it learned of Havlina's disability, failed to place Havlina in another job, within other state agencies, other than the Department of Corrections or the Department of Social and Health Services. Nevertheless, Joel Havlina was willing to obtain employment within other agencies. Such agencies would include the State Patrol, Department of Agriculture, Attorney General's Office, Department of Ecology, Department of Fish and Wildlife, Department of Health, Department of Labor and Industries, Department of Licensing, Liquor Control Board, Department of Natural Resources, Department of Retirement Systems, or the Department of Revenue.

If accommodation cannot be made in the employee's current position, the employer must consider the feasibility of reassigning the disabled employee to a vacant position. **Jackson v. City of Chicago**, 414 F.3d 806, 812, 3 (7<sup>th</sup> Cir. 2005); **Office Of The Architect Of The Capitol v. Office Of Compliance**, 361 F.3d 633 (Fed.Cir. 2004); **Aka v. Washington Hospital Center**, 156 F.3d 1284, 1301 (D.C.Cir. 1998); **Carr v. Reno**, 23 F.3d 525, 530 (D.C.Cir 1994). Stated differently, an employer has a duty to consider reassignment to a different position when

the employee can no longer perform his existing job without reasonable accommodation. **Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.**, 180 F.3d 1154, 1175 (10<sup>th</sup> Cir. 1999). Where a comparable position is not vacant, an employer's obligation to reassign an employee may include an assignment to a position with a lower grade of pay if the employee meets the job's qualifications. **Hedrick v. Western Reserve Care System**, 355 F.3d 444, 457 (6<sup>th</sup> Cir. 2004); **Cassidy v. Detroit Edison Co.**, 138 F.3d 629, 634 (6<sup>th</sup> Cir. 1998). Under the ADA, an employer must *attempt* to reassign the disabled individual to any vacant position for which he or she is qualified, including those that represent a demotion. **Bond v. Sheahan**, 152 F.Supp.2d 1055, 1074 (N.D.Ill. 2001); **Hendricks-Robinson v. Excel Corp.**, 154 F.3d 685, 694 (7<sup>th</sup> Cir. 1998). The duty to transfer the employee to a vacant position extends not only to positions that are at the moment vacant, but also includes positions that the employer reasonably anticipates will become vacant in the immediate future. **Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.**, 180 F.3d 1154, 1175 (10<sup>th</sup> Cir. 1999).

Washington law follows the federal law. Under state law, reassignment is a reasonable accommodation. **Pulcino v. Federal**

**Express Corp.**, 141 Wn.2d 629, 9 P.3d 787 (2000). If the employee can no longer perform the duties of his job, the employer then has a duty to take affirmative measures to make known vacant job opportunities to the employee and to determine whether the employee is in fact qualified for those positions. **Dean v. Municipality of Metropolitan Seattle-Metro**, 104 Wn.2d 627, 639, 708 P.2d 393 (1985); **Davis v. Microsoft Corp.**, 109 Wn.App. 884, 892, 37 P.3d 333 (2002).

The State of Washington is one legal entity and one employer. Therefore, if one of its workers becomes disabled and cannot perform the functions of his current position, the State of Washington should look for vacant positions in agencies or departments, other than the department in which the employee works. The duty to seek accommodation for a disabled worker has never been limited to vacant positions within the department, in which the worker toils. In this age of information technology, the State of Washington could inexpensively determine if other employment openings exist for an injured worker, outside of the employee's own department.

## V. CONCLUSION

The State of Washington did not present proof that it attempted to transfer Joel Havlina to another job throughout state employment.

Therefore, the decision to terminate Joel Havlina's employment should be reversed. The State of Washington did not meet its obligation of reasonable accommodation.

DATED this 11<sup>th</sup> day of April, 2007.

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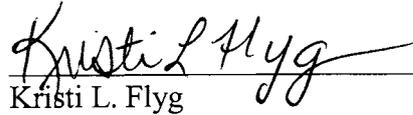
STATE OF WASHINGTON

BY \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, KRISTI L. FLYG, hereby certify that on the 11<sup>th</sup> day of April, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

- |                                     |                  |                             |
|-------------------------------------|------------------|-----------------------------|
| <input type="checkbox"/>            | Hand-delivered   | PATRICIA A. THOMPSON, #8035 |
| <input checked="" type="checkbox"/> | First-Class Mail | Attorney General's Office   |
| <input type="checkbox"/>            | Overnight Mail   | 1116 West Riverside Avenue  |
| <input type="checkbox"/>            | Facsimile        | Spokane, WA 99201-1194      |

  
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Kristi L. Flyg