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COURT OF APPEALS  
DIVISION II

No. 35941-3-II

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**COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON  
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LINDA J. EVANS

Appellant

v.

STATE OF WASHINGTON

Respondent

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**BRIEF OF APPELLANT**

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STEVEN R. MEEKS  
WSBA No. 13295  
2405 Evergreen Park Drive, Suite A-2  
Olympia, Washington 98502

Attorney for Appellant

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## **ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1: Entry of Summary**

#### **Judgment on Discrimination Claim**

##### **Issues Pertaining:**

- (1) Does the evidence establish a prima facie case of discriminatory motive?
- (2) Did the State meet its burden of producing evidence of a legitimate, nondiscriminatory reason?
- (3) Does the evidence establish genuine issues of material fact regarding whether the employer's stated reason is pretextual?

### **Assignment of Error No. 2: Entry of Summary**

#### **Judgment on Retaliation Claim**

##### **Issues Pertaining:**

- (1) Does the evidence establish a prima facie case of discriminatory motive?
- (2) Did the State meet its burden of producing evidence of a legitimate, nondiscriminatory reason?
- (3) Does the evidence establish genuine issues of material fact regarding whether the employer's stated reason is pretextual?

## STATEMENT OF THE CASE

### Pre-Litigation Events

Linda Evans began employment with the Department of Social and Health Services in 1987. In her private life, Linda is an ordained minister with an active ministry in the Tacoma area, known as The Upper Room Fellowship Ministry. In 1996, she was appointed as the Regional Administrator for the Community Services Division, Region 5, based in Tacoma. *CP 15.*

Linda rapidly proved herself to be an effective and valuable manager, earning high praise from her direct supervisors and from the Deputy Secretary of the Department, Liz Dunbar. Her November 1996 – October 1997 evaluation, *CP 319-324*, contains these comments:

**Leadership.** Ms. Evans motivates staff through the example she sets for them. She is known as an ethical, hard-working, intelligent person and one who will go to bat for the resources needed by her staff. She spends time in the offices throughout the region, and has established ways that supervisors and line staff can participate in the affairs of the region. People who work for and with Ms. Evans know what is expected of them. She sets high expectations for herself and others.

**Human Resource Management.** Ms. Evans is especially strong in this area, both because she has background and experience in this area, but also possesses an innate ability to think through the consequences of actions and decisions. Ms. Evans is respected by members of the CSD Management Team because she has demonstrated her strength in this area. As a result, she is asked to represent the division on task forces and work groups concerning human resource management, and she is often asked for advice by others.

Two years later, her June – November 1999

evaluation, CP 326-333, gave similar praise:

**Communication.** Linda encourages an open dialogue in her management team. She possesses excellent oral and written communication skills. Linda is respected by her peers and makes useful contributions in meetings with them.

**Interpersonal Skills.** Linda has a good working relationship with her staff. She is known as an even-handed administrator and enjoys the respect of her staff.

**Leadership.** Linda is decisive and forthright. She is honest in her relationships and has an excellent reputation for building her staff's skills. She manages one of the most culturally and racially diverse staffs in the state and appears to have the respect of all groups.

**Human Resource Management.** This is an area where Linda particularly excels. She has an excellent background in this area and her advice regarding personnel issues is respected. She is particularly good at spotting training needs and dealing with them in a positive way.

**Reviewer Comment by Dep. Sec. Liz Dunbar.** "I appreciate Linda's leadership in the region and their improvement in many key performance measures."

Beginning in 2000 and into 2001, Linda became the target of certain employees who were antagonistic to her for various reasons. These employees filed whistleblower reports with the state auditor alleging improper conduct by her in managing the office, both of which were determined to be unfounded. One of the complainants was an employee dismissed by Linda, Margaret Gonzales, who filed suit against the state alleging wrongful termination and retaliation against her by Linda. The case went to jury trial in Pierce County Superior Court in October 2002 and ended in a complete defense verdict. DSHS took the opportunity to

praise Linda and her fellow defendants by posting this news release, *CP 335*, on its website:

**Pierce County Jury Rules DSHS Acted Properly In Dismissing Employee**

**Olympia** - A Pierce County Superior Court jury in Tacoma has rejected claims by a former Department of Social and Health Services employee who charged the agency discriminated against her and then retaliated when she complained by firing her.

The former employee, Margaret Gonzales, had sought unspecified damages for emotional distress, lost wages, attorney's fees and other compensation. Gonzales, a WorkFirst contracts manager assigned to Tacoma, alleged disability discrimination, retaliation and wrongful termination. She alleged the dismissal was retaliation for making complaints about the agency to the Auditor's Office.

\* \* \*

Referring to DSHS supervisors who testified during the trial, [juror Jim] Sparks said, "I feel good knowing we have people like Linda Evans, Hillary Bryan and Jessie Jordan-Parker working for our state in management positions. They have awesome responsibilities and I appreciate their service very much."

In June, 2003, the attacks by one or more disgruntled employees began again. On June 5, a new whistleblower report against Linda was filed with the State Auditor, become its Case No. 03-034, *CP 337-343*, charging that Linda had used state resources for the private benefit of herself and her church, used her authority to bestow benefits upon employees who were church members, allowed e-mails to be sent on state computers that include religious messages, engaged in prayer meetings during work hours in her office with other employees, required her subordinate administrators and supervisors to hire fellow parishioners and family members,

and said and allowed to be said by others in the workplace things like "God Bless You," "Bless You," and "Have a Blessed Day."

About the same time, e-mails to the same effect were sent to DSHS management and came to the attention of Liz Dunbar, who on June 12 referred the allegations to DSHS's Division of Access and Equal Opportunity ("DAEO") for internal investigation. On September 15, 2003, DAEO issued its report finding the allegations to be unfounded. *CP 343-349.*

In September 2003, Linda's third employee evaluation report was completed under the main authorship of her direct supervisor Mike Masten. *CP 351-356.* Linda again earned her superiors' enthusiastic praise, in which the disgruntled employee personal attacks on her garnered significant mention:

**Significant Results Assessment:** "D. SSI approvals are currently at 121% of target, the highest in the state. Region 5 has demonstrated sound fiscal management practices. Linda had new business manager yet she was able to close out the fiscal year within 99.93% of budget."

**Other Significant Accomplishments:** "Linda has been working through a difficult period regarding personal attacks on her management of Region 5. In one case a disgruntled employee sued Linda and the Department. The jury found in favor of Linda and one juror publicly praised her management of the personnel situation. A number of anonymous attacks have challenged Linda's hiring practices and her religious affiliation. The allegations have been investigated and are without substance.

**Communication.** Linda ensures that staff in Region 5 are aware of changes and receive the necessary information to do their job. She takes an active role with her peers and responds positively to upper management.

**Decision Making.** Linda works closely with the Region 5 CSOA's to receive input on important decisions and then acts. She takes responsibility for decision making and outcomes. She has recently made an important personnel change in one of the CSO's aimed at providing better management and leadership to that office.

**Interpersonal Skills.** Linda is a team player who is sought out by our partners both within ESA and outside agencies. Linda has developed important working relationships with her peers and others within our Division and from other Divisions and Community organizations in order to further the mission. Linda is an avid learner who responds positively to constructive input. This has been critical to her growth through this challenging time.

**Leadership.** Linda is a good leader who is improving her skills at developing managers. She works closely with the CSOA's who report to her, setting clear goals and measures.

**Planning.** Identifying program performance issues, developing solutions, planning and implementing are primary activities in Linda's job. She possesses excellent skills in this area.

**Human Resource Management.** Linda's recent experience with some trying personnel issues is allowing her a learning opportunity in this area. Linda promotes diversity in the workplace and recognizes the importance of good assessment of employee skills and provides training to staff to achieve those skills.

**Interacting With the External Environment.** As stated above Linda is a team player who is sought out by colleagues from various agencies. Linda strives to have the Regions CSO's provide excellent customer service and respects both our employees and our customers.

**Supervisor Masten Comment:** I have counseled Linda to not get distracted by personnel issues; rather she should concentrate on improving the performance of her offices and on the development of her managers. Linda has responded very positively to that counsel. [She] is an experienced and valuable public servant. I enjoy working with her and appreciate the job she has done keeping Region 5 on target for achieving our goals.

(Emphases added.)

Deborah Bingaman (now Marley), although as yet unfamiliar

with Linda and her work due to her newness on the job as Assistant Secretary for the Economic Services Administration, approved and signed this evaluation report on September 18, 2003, *CP 356*, writing as her comment the following :

“Linda, it’s a pleasure to see and read about your performance. I look forward to working with you in the future.”

The Auditor’s investigation was still pending at this time. Linda continued in her position throughout the remainder of 2003 and into 2004, but that all changed beginning on February 9, 2004. Despite Linda’s superlative performance record, and the knowledge and recognition of the department at each link of Linda’s chain of command of the persistent failure of the disgruntled employee misconduct allegations, the decision was made to effectively remove Linda from her job as Regional Administrator by placing her on “home assignment,” where, despite continuing to be paid, all her duties and responsibilities were taken away from her and she was barred from the workplace. Ms. Bingaman expressed this decision in her letter to Linda dated February 9, 2004, *CP 357-358*:

“This letter is to notify you that effective upon receipt of this letter, you are reassigned to your residence as a result of the ongoing investigation by the State Auditor’s Office. This reassignment is intended to protect you and the department during this process and will remain in effect until further notice.”

This action generated substantial interest in the Seattle-Tacoma area print and broadcast news media over the next two months. Under this pressure, DSHS on April 7, 2004, *CP 360*,

issued this news release:

“Linda Evans, the Region 5 (Pierce and Kitsap counties) administrator of the Department of Social and Health Services’ Community Services Division, was placed on home assignment on February 9, 2004 after DSHS was informed that a whistleblower investigation had been initiated by the Washington State Auditor’s Office regarding assertions against her.

When DSHS is provided with the investigation report from the Auditor’s Office, it will determine the appropriate action to take at that time. DSHS does not comment on pending investigations.

Meanwhile, the agency is confident its four Community Services Offices in Region 5 are under capable management and that clients are being well-served.”

(Emphasis added.)

On July 12, 2004, the Auditor issued his final report, *CP 362-369*, the substance of which was that he had found, as is the limit of his statutory jurisdiction, that there was “reasonable cause to believe” that Linda had committed some form of misconduct in the areas being investigated. Pursuant to the statutory process, DSHS’s responsibility to decide what if any action should be taken and to file its report with the Auditor as to this decision commenced.

DSHS remained silent for the next four months. Linda remained in home assignment limbo awaiting word on the matter. Finally, on October 28, 2004, DSHS acted, with Ms. Bingaman notifying Linda by letter, *CP 371-373*, that DSHS was considering taking an employment action against her, up to and including termination of her Regional Administrator position, based upon the auditor’s findings, and that a “name-clearing hearing” as required by federal constitutional law would be scheduled. As required by

such law, the letter informed Linda of the nature of the charges being considered and the evidentiary basis for them:

“This information came to our attention pursuant to a whistleblower investigation initiated by the Washington State Auditor’s Office in June 2003. The above allegations were investigated by that office concluding in July 2004. Subsequent to the completion of their investigation, the DSHS reviewed the Auditor’s report as well as the working papers they compiled, including copies of e-mails, computer reports, interviews and official state documents. Further internal investigation by the DSHS was deemed to not be necessary and the allegations being considered above are based upon the results of the Auditor’s investigation. (Emphasis added.)

You or your representative have been provided with a copy of the working papers compiled by the Auditor’s Office and their final report. Those documents, the working papers and the final report, constitute the evidence I am relying upon in support of the above allegations. (Emphasis added.)

The above allegations, if true, provide grounds for employment action being taken against you, up to and including termination from your exempt position.”

The “name-clearing hearing” occurred shortly thereafter, at which Linda and her counsel presented evidence and argument to Ms. Bingaman to the effect that no substantial misconduct had occurred, because either the alleged conduct did not occur at all or that it fell well within legal standards of propriety. *CP 312.*

On February 15, 2005, without significant explanation, DSHS through the Secretary himself, Dennis Braddock, notified Linda that she was being terminated from her Regional Administrator position. *CP 221-222.* On February 25, Linda’s counsel wrote to Mr. Braddock requesting a signed written statement setting forth the reasons for the discharge, pursuant to WAC 296-126-050(3), *CP*

374. The Attorney General responded by letter of March 15, 2005, CP 376, stating:

“The reason her exempt appointment was terminated is that the DSHS Secretary decided to make a staffing change.”

This, as is obvious, is a non-answer because in effect it says only that the reason a staffing change was made was because Mr. Braddock decided to make a staffing change. Tort claim and lawsuit filing occurred shortly thereafter.

### **The State’s Summary Judgment Motion**

In November 2006, the State moved for complete summary judgment on Linda’s claims of discriminatory and/or retaliatory termination of her from her post as Regional Administrator.

#### **A. The State’s Supporting Evidence**

The motion was supported by two pieces of evidence: the declarations of Ms. Bingaman and AAG James. The Bingaman declaration, CP 230-260, in paragraph 8, CP 231, set forth her stated reason for her decision and recommendation to Secretary Braddock:

“I recommended to the Secretary of DSHS, Dennis Braddock, that Ms. Evans’ exempt appointment be terminated. As an exempt employee, Ms. Evans served at the discretion of the Secretary and could be removed from her position without cause. I believed that Region 5 needed new leadership and that a change would be in the best interests of DSHS, Region 5 and the clients who were going to be getting services in the region. \* \* \*”

(Emphasis added.)

The James declaration, CP 15-229, presented various exhibits, drawn primarily from the Auditor’s materials with certain

deposition testimony by Linda, as evidence of the commission of misconduct by Linda in three categories: (1) inappropriate use of state e-mail, (2) inappropriate use of the State phone system, and (3) preferential treatment of church members Roshan D. Souza, Paula Pelletier, Darlene Burton, Amanda Evans, B. J. Wilder-Morehead, and Donald Flanagan.

**NOTE:** There is a crucial evidentiary link missing in the State's evidence presentation: any statement by Ms. Bingaman that she based her termination decision and recommendation on the misconduct allegations/evidence. As will be shown, this omission has significant impact on the summary judgment analysis in this case. Another crucial omission is the lack of any evidence of specific facts to support Ms. Bingaman's conclusory statement of an ultimate fact as to the belief she formed, which, as discussed below, renders her declaration incompetent.

#### **B. Linda's Contrary Evidence**

By declaration, Linda presented competent evidence either contradicting or legitimately explaining the State's evidence. *CP 312-317*. The most telling contrary evidence is the deposition testimony of Mr. Braddock taken on March 29, 2006, *CP 278-381*, a key excerpt of which is:

Q. I guess what I'm getting at is, were you apprised that someone within your chain of command had concluded, based on the evidence, Auditor's report or anything else they had done, that Linda had committed misconduct in the form of using State resources for personal benefit or her position [for] the benefit of others or removing personnel documents of another employee without authorization?

A. I think there may have been people who concluded that, but there was no one who stated unequivocally that that was the reason that she needed – and my position would have been had the – all – had the most serious allegations been, in fact provable, that termination would have been appropriate, but the AG's

conclusion was that they were not.

\* \* \*

Q. Am I correct that your memory is that your sense was that Deborah Bingaman's recommendation for Linda's removal from her RA position was based upon the general –

A. A culminate –

Q. – turmoil –

A. The culmination of all the – all the circumstances surrounding the turmoil and the – and the questions.

Q. But she did not say that it was because of the findings of the Auditor's report?

A. The Auditor's report may have contributed to her conclusion, but I did not have the feeling from her that that was the prime reason of her -- for her conclusion.

The trial court granted the State's summary judgment motion on both counts, effectively declaring that the evidence of record on the motion did not establish the existence of a genuine issue of material fact on the issue of discriminatory and/or retaliatory motive for the firing and thus that the State was entitled to judgment as a matter of law. *CP 401-402*. This timely appeal followed. *CP 403-407*.

## **ARGUMENT**

### **I. STANDARD OF APPELLATE REVIEW**

Review of an order granting summary judgment is de novo. When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Like the trial court, the appellate court considers all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party and will uphold the order only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson*, 98 Wn.2d at 437. On appeal of a summary judgment, a trial court's findings are superfluous and the appellate court need not consider them. This includes a finding that there is no material issue of fact. *Lewis v. Krussell*, 101 Wn. App. 178 (2000).

### **II. STANDARD FOR SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION AND RETALIATION CASES**

#### **A. DISCRIMINATION**

Employment discrimination through disparate treatment is conduct motivated by a discriminatory intent. *E-Z Loader v.*

*Travellers Indemnity Co.*, 106 Wn.2d 901, 910, 726 P.2d 439 (1986). Although disparate treatment cases can involve a welter of subsidiary facts, the ultimate issue is almost always a simple one: whether discriminatory motive was a "substantial factor" in the challenged decision. See: *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 310 (1995); *Schonauer v. DCR Entertainment*, 79 Wn.App. 808, 826, 905 P.2d 392 (Div. II, 1995), *review denied*, 129 Wn.2d 1014, 917 P.2d 575 (1996). The question of an employer's intent to discriminate is "a pure question of fact." *deLisle v. FMC Corp.*, 57 Wn.App. 79, 82-83, 786 P.2d 839 (1990), *review denied*, 114 Wn.2d 1026, 793 P.2d 974 (1990); *Sellsted v. Washington Mutual*, 69 Wn.App. 852, 863, 851 P.2d 716 (Div. I, 1993), *review denied*, 122 Wn.2d 1018, 863 P.2d 1352 (1993). "[E]mployers infrequently announce their bad motives orally or in writing." *deLisle*, 57 Wn.App. at 83; *Sellsted*, 69 Wn.App. at 860. And "[d]irect, 'smoking gun' evidence of discriminatory animus is rare, since '[t]here will seldom be "eyewitness" testimony as to the employer's mental processes.'" *Hill v. BCTI*, 144 Wn.2d 172, at 179 (2001). Consequently, one can establish disparate treatment through entirely circumstantial evidence. *Hill*, 144 Wn.2d at 178-80; *Sellsted*, 69 Wn.App. at 860, 864; *deLisle*, 57 Wn.App. at 83; *Hollingsworth v. Washington Mutual*, 37 Wn.App. 386, 390, 681 P.2d 845 (Div. I, 1984), *review denied*, 103 Wn.2d 1007 (1984).

See also *Desert Palace v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 2154 (2003) (“Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”)

### **1. The “Substantial Factor” Test**

Washington has adopted the “substantial factor” test in RCW 49.60 discrimination cases. *Mackay*, 127 Wn. 2d at 302. Under it, one need not show an illegal motive was the only factor or the main factor in the decision. *Mackay*, 127 Wn.2d at 310-11. Nor need one prove it was a “determining factor” in whose absence the employer would have reached a different decision. *Id.* at 310. One need only show it “was a substantial factor in bringing about the injury even though other causes may have contributed to it.” *Id.*

Washington courts recognize that an illegal motive is often only one in a mix of reasons for a given decision. *Mackay*, 127 Wn.2d at 310. And they acknowledge it is “unfair to erect the high barrier to recovery implicated by” requiring an employee to show an illegal motive was more than a substantial factor.” *Mackay*, 127 Wn.2d at 311.

### **2. Shifting Burdens**

Disparate treatment claims typically entail a single factual issue -- namely, whether illegal intent was a substantial factor in the challenged decision. The burden of persuading the trier of fact on

the single issue of illegal motive remains throughout on the employee. *Hill*, 144 Wn.2d at 180-81. What shifts on a disparate treatment claim is only the burden of producing enough evidence to create a triable issue of fact. *Carle v. McChord Credit Union*, 65 Wn.App. 93, 98-102, 827 P.2d 1070 (Div. II, 1992); *Armstrong v. Richland Clinic*, 42 Wn.App. 181, 186-87, 709 P.2d 1237 (Div. III, 1985), *review denied*, 105 Wn.2d 1009 (1986). Consequently, on disparate treatment claims the analysis is used only on motions to test the sufficiency of the evidence, whether on summary judgment or at trial before the case goes to the jury. See: *Carle*, 65 Wn.App. at 98; *Armstrong*, 42 Wn.App. at 186.

Initially, the employee must make a prima facie case with evidence that raises an inference of discrimination. If this is done, the prima facie case creates a “legally mandatory” inference of discrimination. *Hill*, 144 Wn.2d at 181; *Kuest v. Regent Assisted Living*, 111 Wn.App. 36, 44, 43 P.3d 23 (Div. I, 2002), *review denied*, 149 Wn.2d 1023, 72 P.3d 762 (2003). The burden then shifts to the employer to rebut the inference by “articulat[ing] a legitimate, nondiscriminatory reason for” its decision. *Bulaich v. AT&T Information Systems*, 113 Wn.2d 254, 259, 778 P.2d 1031 (1989). But again, the employer's burden is one of production, not persuasion. *Hill*, 144 Wn.2d at 181. Put another way, the employer does not bear the burden of persuading the trier of fact of the

accuracy of its reasons or the absence of discrimination, just of stating what its reasons were. If the employer fails, there is no triable issue of fact, for the employer's silence in the face of the "legally mandatory" inference entitles the employee to judgment. If the employer succeeds, the presumption "drops from the case" as a legally mandatory inference, although it remains in the case as evidence of discrimination. *Hill*, 144 Wn.2d at 182, 184-85.

At this juncture the burden shifts back to the employee to show the employer's stated reason is a "pretext" for discrimination. If the employee fails, there is no triable issue of fact, for the employer is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 182. But "[w]hen all three facets of the burden of production have been met, the case must be submitted to the" trier of fact. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 667-68, 880 P.2d 988 (1994).

Ordinarily, the combination of the prima facie case plus proof of pretext creates a triable issue of fact on the merits of the claim. *Hill*, 144 Wn.2d at 182-87. Only when "no rational factfinder could conclude that the [employer's] action was discriminatory", such as when the record "conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision" or when there was "uncontroverted independent evidence no discrimination had occurred" should the case be taken away from the jury. *Hill*,

144 Wn.2d at 189; *Milligan v. Thompson*, 110 Wn.App. 628, 637-38, 42 P.3d 418 (Div. II, 2002). An employee can rely on at least some of the same evidence for a prima facie case and a showing of pretext. *Milligan*, 110 Wn.App. at 637.

## **B. RETALIATION**

The elements of a retaliation claim under Ch. 49.60 are (1) the employee engaged in a statutorily protected activity, (2) an adverse employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employee's adverse employment decision. *Schonauer v. DCR Entertainment*, 79 Wn. App. 808, 827 (1995).

## **III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT FOR THE STATE ON THE DISCRIMINATION CLAIM**

### **A. PRIMA FACIE CASE: EVIDENCE RAISES INFERENCE OF DISCRIMINATION**

The evidence establishes a reasonable inference that the State removed Linda from her job in substantial part because of her habitual, persistent, intentional, and legal use of religious faith-based expressions and ideas in her communications to co-workers and because of her association and activities in her private life with other employees arising from their shared religious faith and practices.

An inquiry into the intent of an employer in terminating a person's job necessarily involves examination of the employee's

conduct in the course of the job. Here, there are two aspects of such conduct: (1) Linda's professional performance, and (2) Linda's written and oral speech and associations based on her religious faith. The evidence permits a reasonable inference that there was no basis for removing Linda based on her professional performance, including the misconduct allegations, and without such basis, a reasonable inference that the true reason for the dismissal was her written and oral speech and associations based on her religious faith:

(1) As evidenced by her performance evaluations and DSHS's press release following the Gonzales trial, Linda was consistently regarded by her superiors, including Liz Dunbar and later Ms. Bingaman, as a highly capable and effective leader in her department in all aspects of that difficult job: leadership, human resource management, communication, interpersonal skills, and achieving superlative results in the objectives of her office.

(2) The charges made to the department in the June 2003 e-mails regarding Linda using her position to coerce employees into participating in her church activities and to obtain preferential treatment for church members were fully investigated by the department and found to be groundless,

with her supervisors regarding them to be personal attacks by disgruntled employees.

(3) Just four months after the last evaluation in September 2003, Linda was abruptly and without explanation was stripped of all job duties and responsibilities and barred from the workplace by being placed on home assignment pending the completion of the Auditor's whistleblower investigation which had already been in place for 9 months.

(4) The home assignment decision received substantial negative media publicity directed to the department about why a high-level manager was being paid for doing nothing.

(5) DSHS declared, in its letter of October 28, 2004, that it was considering taking an employment action against Linda, including potential termination of her position, based upon the allegations and investigation results of the Auditor whistleblower investigation. DSHS's intent in sending this letter was to comply with federal due process requirements for notice of the nature of the charges being considered and the evidentiary basis for them. The notice clearly states that the only charges and evidence being considered were those in the Auditor's report.

(6) Linda presented credible evidence and argument at the name-clearing hearing to the effect that the conduct described in the Auditor's report either did not occur or did not constitute any substantial violation of law or rule.

(7) After notification of the final termination decision by Secretary Braddock and Linda's request for a statement of reasons for the decision as required by law, DSHS through the Attorney General did not identify any item of claimed misconduct from the Auditor's report as a reason for the decision; it stated only that the staffing change was made because the Secretary decided to make a staffing change.

(8) Secretary Braddock is the person who made the termination decision, and he testified in deposition that Linda was not terminated from her Regional Administrator position based on any finding of misconduct referenced in the Auditor's report because the report and purported supporting evidence was not sufficient to establish any violation of law by Linda. Instead, he testified, the primary reason for Ms. Bingaman's removal recommendation was to eliminate the "turmoil" surrounding her alleged activities.

(9) The only "turmoil" shown by the evidence was the fact that Linda and other employees engaged in

religious speech and expressions and private associations with each other, and a few other employees did not like that.

Accordingly, a reasonable juror could conclude that a substantial factor in the decision to fire Linda from the Regional Administrator position was a desire to suppress and stop such speech and associations, and thus was a decision motivated by discriminatory intent. Therefore, the evidence establishes a prima facie case that creates a legally mandatory inference of discrimination.

**B. EMPLOYER'S STATEMENT OF REASON NOT SUFFICIENTLY PROVED**

With the establishment of the prima facie case, the inquiry turns to whether the State rebutted by competent evidence the inference of discrimination by articulating a legitimate, non-discriminatory reason for its decision. The only evidence it presented was Ms. Bingaman's declaration that she recommended the termination to Secretary Braddock, and that she did so because she "believed that Region 5 needed new leadership and that a change would be in the best interests" of DSHS and its clients.

This evidence is insufficient to meet the State's burden of production, for two reasons, either or both of which compel the conclusion that the State did not satisfy its burden of production by showing with competent evidence that the termination decision was for a legitimate nondiscriminatory reason, which means that the

burden of production never shifted back to Linda and that she was entitled to denial of the summary judgment at this point of the analysis. The two reasons are:

(1) Ms. Bingaman did not make the termination decision; Mr. Braddock did, and the State provided no linking evidence to the effect that Mr. Braddock did so based upon Ms. Bingaman's stated beliefs, which by its very nature could only come from Mr. Braddock. Accordingly, Ms. Bingaman's declaration is not competent evidence on this issue and thus cannot be regarded as proof of the required legitimate nondiscriminatory reason.

(2) The Bingaman declaration does not meet legal standards for legal sufficiency as proof of any fact on a summary judgment motion. CR 56(e) requires that affidavits used for summary judgment be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Bare allegations of fact by declaration without any showing of evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment because the purpose of the motion is to permit the court to pierce through such allegations of fact to determine if claimed fact issues

are genuine. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 674 (1966); *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960). Conclusions of fact, conclusory statements and ultimate facts are insufficient to raise a question of fact. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Ms. Bingaman's statement is nothing but a bare conclusory allegation of an ultimate fact: she believed that "new leadership was needed in the best interests of DSHS and its clients." She gives no factual detail whatsoever as to the basis for such belief. She may have formed the belief based on a legitimate, nondiscriminatory reason, but it is equally plausible that she formed the belief for a discriminatory reason such as that described in the previous section. In order to satisfy its burden of production at this stage, the requirement is that there be competent evidence that the belief and resulting decision were made for legitimate, nondiscriminatory reasons. Since Ms. Bingaman is silent on this, there is no such evidence.

The evidence of alleged misconduct presented in the James declaration does not cure this defect, because there is no statement by Ms. Bingaman that her decision was based upon such evidence.

**C. COMPETENT EVIDENCE AND REASONABLE INFERENCES THEREFROM SUPPORT A REASONABLE CONCLUSION THAT THE STATED REASON IS PRETEXTUAL.**

The stated reason is that Ms. Bingaman formed the belief that "new leadership was necessary in the best interests" of DSHS and its clients. Assuming *arguendo* that the burden of production shifts to Linda, the question becomes whether the evidence supports a reasonable inference by the trier of fact that a substantial factor in the decision was Linda's and other employees' faith-based speech and associations with each other. It does:

(1) The evidence supports a reasonable inference that there was no reasonable basis for deciding that a change of leadership was necessary in the best interests of DSHS based upon any defect in Linda's professional performance: as shown by her evaluations and the persistent failures of proof of the misconduct allegations, DSHS itself considered her to be a superb leader and implementer of its professional interests and the "turmoil" created by a few disgruntled employees insignificant.

(2) There is no evidence whatsoever in the record to the effect that DSHS client interests were in any way being adversely impacted and thus in need of protection.

(3) Undisputed evidence establishes that Ms. Bingaman declared, in an official notice written to satisfy the requirements of federal law, that the only basis for any negative employment decision she would make would be the allegations and evidence in the Auditor's report.

(4) Undisputed evidence establishes that the Auditor allegations and evidence were not a significant basis for the decision, including (1) the lack of any statement by Ms. Bingaman that the allegations and evidence in Auditor's report were any basis for her decision, (2) Mr. Braddock's testimony that they were not a significant factor because of insufficient proof, 3) Mr. Braddock's testimony that Ms. Bingaman identified the "turmoil" caused by Linda's faith-based speech, activities and association, not the Auditor allegations and evidence, as the reason for the decision, (4) the lack of any statement in Mr. Braddock's termination letter that the decision was based on misconduct, even though Ms. Bingaman had officially stated that the decision would be made only on this basis, and (5) the lack of any such reason given by the Attorney General under WAC 296-126-050(3) on behalf of Mr. Braddock in response to Linda's written request for a statement of the reasons for the decision.

(5) A reasonable person could conclude, given (1) the lack of evidence as to any failure of leadership or negative impact on DSHS or its clients in terms of Linda's professional performance, (2) the undisputed evidence that DSHS had officially declared that the employment decision would be made solely upon the misconduct allegations in the Auditor's report, (3) the undisputed evidence that the misconduct allegations were not found to be true and did not form any significant basis for the termination decision, and (4) the evidence from Mr. Braddock that the basis for her decision was the "turmoil" surrounding her faith-based activities, that Ms. Bingaman's decision that a leadership change was necessary was not based on anything related to Linda's professional performance.

(6) Given this, the same reasonable person could reasonably conclude that Linda's and others' faith-based speech, activities and association with each other was a substantial factor in the decision.

As noted earlier, the evidence of alleged misconduct presented in the James declaration is irrelevant because there is no statement by Ms. Bingaman that her decision was based upon such evidence and Mr. Braddock himself testified that neither Ms. Bingaman's recommendation nor his actual decision was based on

such evidence. Even if it were, however, the opposition evidence presented by Linda establishes the existence of genuine issues of material fact as to the allegations, namely:

(1) DSHS itself investigated and determined to be baseless the allegation of improper use of her position to benefit church members in state employment and other benefits.

(2) DSHS found that and all other allegations in the Auditor's report to be unsupported by sufficient evidence.

(3) Linda's declaration testimony sets forth specific facts challenging the truth of the allegations.

(4) For anything claimed to be admitted by Linda in deposition testimony, there is no further evidence or basis in law to establish that any of the admitted activities rose to the level of a law violation.

#### **IV. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT FOR THE STATE ON THE RETALIATION CLAIM**

As noted earlier, the elements of a retaliation claim under Ch. 49.60 are (1) the employee engaged in a statutorily protected activity, (2) an adverse employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employee's adverse employment decision. *Schonauer v. DCR Entertainment*, 79 Wn. App. 808, 827 (1995).

The State is not entitled to summary judgment on this claim for essentially the same reasons discussed with respect to the discrimination claim. The evidence establishes without question that Linda engaged in statutorily protected activity and suffered an adverse employment action, and establishes prima facie that the decision to take the adverse employment action was motivated in substantial part to punish Linda for engaging in and continuing to engage in the protected activity. As seen, the State did not satisfy its burden of production as to a legitimate nonretaliatory reason and thus is disqualified from summary judgment without any further inquiry, but, even if such inquiry is engaged in, it is clear that on the present evidence there are substantial genuine material issues of fact as to whether the claimed reason is or is not pretextual.

### **CONCLUSION**

The State is not entitled to summary judgment due to (1) its failure to satisfy its burden of production of evidence and (2) the existence of genuine issues of material fact. The court is requested to reverse and remand for trial.

Dated: May 25, 2007



Steven Meeks, WSBA 13295  
Attorney for Appellant

**PROOF OF SERVICE**

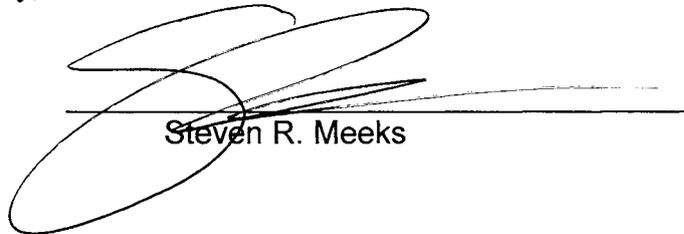
As a competent adult nonparty person, on May 25, 2007 I served a complete and true copy of the original of this document to:

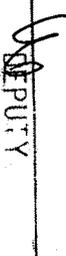
Attorney General of Washington  
Attention: AAG Paul James  
7141 Cleanwater Drive SW  
P.O. Box 40126  
Olympia, WA 98504-0126

**Via:**

- Deposit in United States Mail, first class, postage prepaid to the address shown, at Olympia, Washington
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I declare under penalty of perjury under Washington law that the foregoing is true and correct. Executed this 25<sup>th</sup> day of May, 2007.

  
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Steven R. Meeks

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