

No. 40446-0-II

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DIVISION II  
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STATE OF WASHINGTON  
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**IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON**

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BERYL FERNANDES, individually,  
Appellant,

vs.

JAY MANNING, Director, Department of Ecology, and the  
DEPARTMENT OF ECOLOGY and THE STATE OF WASHINGTON,

Respondents.

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REPLY BRIEF

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*Jones v. Kitsap County Sanitary Landfill, Inc.*, 60 Wn. App. 369,  
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**Federal Circuit Court Cases**

*Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027,  
(9th Cir. 2005).....3

**A. Argument in Reply**

If a defendant establishes a nondiscriminatory reason for a termination, a plaintiff can overcome this by showing that the reason given is mere pretext. *Jones v. Kitsap County Sanitary Landfill, Inc.*, 60 Wn. App. 369, 371, 803 P.2d 841 (1991). Plaintiff's burden is one of production, not persuasion. *Id.* at 372-73. Ecology's alleged reasons for investigating and firing Beryl are pretextual – the Director of Ecology and others in management conspired to fire Beryl, came up with a plan, and then executed that plan. As the Director of Ecology testified at her deposition, she did not contemplate terminating Beryl's employment until sometime toward the end of the summer or early fall of 2004. CP 719. However, Ecology's Human Resources Director, Joy St. Germain, testified that Linda Hoffman sought advice from her regarding terminating Beryl as early as January of 2004, months before the investigation even began. CP 714-15 and *See Exhibit B* to CP 638-40 at p. 15, ln. 12 – p. 16, ln. 10<sup>1</sup> and CP 526-27.

Director Hoffman provided Beryl with a termination letter many months later on October 4, 2004 stating, "This is to notify you of my decision to terminate your appointment, effective at the close of business on

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<sup>1</sup> Citation to this document is being made consistent with appellant's opening brief as certain portions of the record from the lower court were not copied and transmitted by the clerk of the lower court.

October 29, 2004.” CP 843. The letter gives no explanation for the termination except that Beryl’s position was as an exempt management position that served at the pleasure of the Director. *Id.* The letter concluded by thanking Beryl for her service and wishing her the best in her future endeavors. *Id.* The advice Human Resources Director Joy St. Germain gave to Hoffman as far back as January of 2004 included that exempt positions serve at the pleasure of the Director, that less specific information should be provided, and that the letter “should be short and simple: ‘Thank you for your year of service. Your last day is \_\_\_\_\_. Wishing you the best in your future endeavors.’ Do not put any criticisms or reasons in the letter at all.” CP 526-27 (emphasis added). Ms. St. Germain also advised Director Hoffman on how to set up the termination to most effectively oppose a claim of discrimination based upon the termination:

If challenged later, (e.g., lawsuit), you may need to give reasons and the basis and foundation for your decision, with concrete examples. If sued, we would need to demonstrate that the person was terminated for legitimate, non-discriminatory reasons. ***Doing a “dry-run” of these reasons could be done now*** and reviewed by Stewart. What measurable criteria can be shown that was used to assess her performance? Show the evidence of poor interactions. You can call out specific performance deficiencies, and show that clear expectations and assistance was provided by you and many others who want her to succeed.

*Id.* (emphasis added). As plaintiff explained more fully in her opening brief, she complained about the harassment she was enduring from the

members of the RMT and only then was an investigation initiated that quickly focused on her rather than on the harassers. Planning to fire someone well in advance and then searching for reasons to justify the termination in order to shield the employer from a discrimination suit is nothing more than pretext.

Additionally, a plaintiff can defeat an employer's proffered non-discriminatory reason by offering specific and substantial circumstantial evidence to show that the people she claims exhibited discriminatory animus influenced or participated in the decision-making process to end her employment. *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1039-1040 (9<sup>th</sup> Cir. 2005). Here, plaintiff has provided more than circumstantial evidence. The evidence shows that Ms. Hoffman was directly involved in the scheme to end Beryl's employment. She was the main decision-maker and she enlisted the help of Beryl's harassers to influence the decision-making process. Beryl's harassers in the RMT participated in the decision-making process when they provided statements and information during the investigation that was conducted – the investigation that quickly focused upon Beryl rather than her harassers. The evidence presented by plaintiff makes clear that Ecology's proffered reasons for firing Beryl were nothing more than pretext. The lower court

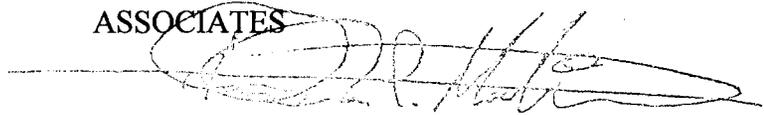
should not have dismissed plaintiff's causes of action on summary judgment.

**B. Conclusion**

The lower court erred when it dismissed plaintiff's causes of action for race discrimination, retaliation, and wrongful discharge. The evidence presented, when viewed in the light most favorable to the plaintiff and when viewing the totality of the circumstances, demonstrates that genuine issues of material fact exist making summary judgment improper on these causes of action. Plaintiff respectfully requests that the Court of Appeals reverse the lower court's order dismissing these causes of action and remand this matter for a jury trial.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of November, 2010.

THADDEUS P. MARTIN &  
ASSOCIATES

A handwritten signature in black ink, appearing to read 'Thaddeus P. Martin', is written over a horizontal line. The signature is stylized and somewhat cursive.

By \_\_\_\_\_  
Thaddeus P. Martin, WSBA 28175  
Attorney for Plaintiff

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**CERTIFICATE OF SERVICE**

I hereby certify that I am not a party to this action and that I placed  
for service on counsel of record the foregoing document via U.S. Mail and  
e-mail on the 22<sup>nd</sup> day of November, 2010.

STATE OF WASHINGTON  
BY \_\_\_\_\_  
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