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COURT OF APPEALS

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No. 40573-3-II

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

PHILIP GROH,

Appellant,

v.

MASON COUNTY FOREST PRODUCTS, LLC,
and PHILIP JOHNSON,

Respondents.

APPELLANT'S REPLY BRIEF

By WESLEY S. JOHNSON
Attorney at Appellant

WSBA #16930
WESLEY S. JOHNSON
600 Royal Street, Suite B
Kelso, WA 98626
Telephone: (360) 577-8700
Fax: (360) 577-8702

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530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).... 1, 2

Hill v. BCTI Income Fund-I,
144 Wn.2d 172, 23 P.3d 440 (2001)..... 1, 2

A. SUMMARY JUDGMENT

The defendants have failed to establish that “no rational factfinder could conclude that the action was discriminatory” as required in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

The defendants rely here on the case of *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001). On page 37-38 of their brief, they even claim that the *Hill* case requires us to prove an “actual discriminatory purpose” for their actions. They cite *Hill*, 144 Wn.2d at 185-186 for that proposition. What *Hill* says at that point is quite different, however. What *Hill* states is:

“Instead, we hold that while a *McDonnell Douglas* prima facie case, plus evidence sufficient to disbelieve the employer’s explanation, will *ordinarily* suffice to require a determination of the true reason for the adverse employment action by a factfinder in the context of a full trial, that will not always be the case.”

The Washington Supreme Court goes on to cite the *Reeves* case by saying:

‘Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff’s prima facie case, the probative value of proof that the employer’s explanation is false, and any other evidence that supports the employer’s case and that properly maybe considered on a motion for judgment as a matter of law.’ 530 U.S. at 148-49.

The case goes on to quote the *Reeves* case at 148 as follows:

'there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder can conclude if the action was discriminatory.' *Hill v. BCTI Income Fund-I*, 144 Wn.2d 189-190.

Although the defendant is correct that the court in *Hill* was impressed by the fact that the plaintiff was hired and fired by the same decision-maker like in our case, our case is very different in a number of respects. One of the big differences between the *Hill* case is that although: "...Hill's testimony brings into question of fact regarding the BCTI's explanation for firing her, its probative value in establishing Hill's ultimate claim of age discrimination proved minimal." *Hill*, p.190. In the *Hill* case although the plaintiff raised an issue about whether it was correct in its reason for terminating her,

"...[she] ultimately failed to show that it was in any way unreasonable for BCTI officials to conclude that she had. Even if the jury believed Hill's testimony, no "suspicion of mendacity" on BCTI's part was thereby established." Fn 14.

In our case, the discrepancies in the reasons given for the plaintiff's discharge are strongly suggestive of dishonesty on the part of the defendants. In fact, the story that Mr. Johnson tells about the plaintiff's performance did not come up until litigation. He did not mention it to the plaintiff and he did not mention it to Mr. Dun-

can, even when Mr. Duncan asked him. The defendants' response indicates that the reason for this is that Mr. Duncan was not involved in the decision. The problem with this is, however, that Mr. Duncan based his conclusion that performance was not an issue on what Phil Johnson told him. He did not just conclude this on his own. In addition, when the defendants sent a letter stating the reason for Mr. Groh's termination, it was Mr. Duncan that was chosen to send that letter. In addition, Mr. Johnson himself admits that terminating an employee without speaking with him or his supervisor would be unusual for him. Unlike the *Hill* case, in our case we have strong evidence of dishonesty on the part of the defendants about the reason for the plaintiff's discharge. A jury could certainly conclude that dishonesty is because the real reason was improper.

Another difference between this case and the *Hill* case is here we have several changes between the time the plaintiff was promoted and when he was discharged. Many are provided by the defendant's themselves. They needed to cut employees and a decision had to be made about who would be cut. The one chosen to be cut was the older man. The explanation was provided by Mr. Duncan himself. He told Mr. Groh that the defendants needed a place for Mr. Poppe, the younger man. Another explanation that is

provided by the defendants themselves is that the mill needed to change to compete in an export market. Apparently a decision was made that the younger man would be more suited to adjusting to that change, in spite of the opinion of his supervisor (Mr. Duncan) that plaintiff was the more skilled employee. Mr. Poppe was sent to computer classes, which is an opportunity that was not offered to the plaintiff. A jury could certainly conclude that the reason that Mr. Poppe was chosen to take the computer classes and to fill Mr. Groh's position was because a younger man might be better at adjusting to the changes and for learning how to run computers.

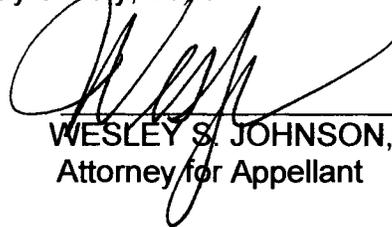
Finally, the defendants rely much on their observation that in general the defendants did not discriminate against older people. Our evidence is not based on statistics, however. Our evidence is that an older, but more qualified, person was terminated and replaced by a much younger man. When cuts became prudent, the employer had a choice between the two employees. A jury can certainly find that the defendants were dishonest about the reasons that they gave for choosing to cut the plaintiff. In fact, at many points their witnesses did not even want to admit that the younger man replaced the plaintiff. This is very different than the facts in the *Hill* case. As a result, defendants have not shown "that no rational

factfinder could conclude that the act was discriminatory.” As a result, summary judgment should be denied.

B. THE COURT REFUSAL TO ALLOW AN ADDITIONAL WITNESS AT TRIAL

We explained in our appellant brief why it is that we did not disclose Mrs. Groh as a witness and why she is in a better position to explain Mr. Groh’s suffering than Mr. Groh is. The fact that the plaintiff has difficulty talking about or even thinking about the mental suffering that he went through should not foreclose him from having his day in court on that issue. There is no evidence that this error was intentional or reprehensible. The defendants are taking the position that because the plaintiff indicated that he was not making that claim at his deposition and because he had not listed his wife on the initial discovery, he was now foreclosed from bringing her as a witness or bringing any other evidence relating to that issue. This is too extreme a penalty, even if a penalty is called for. These rules are not intended to be a trap and in the interest of justice, this evidence should not be excluded.

Dated this 19th day of July, 2010.



WESLEY S. JOHNSON, WSB #16930
Attorney for Appellant

