

NO. 42755-9-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JOHN PRESTON,

Appellant,

v.

STATE OF WASHINGTON,

Respondent

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**BRIEF OF APPELLANT PRESTON**

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## **I. INTRODUCTION**

Appellant John Preston (“Preston”) worked with the State Legislature for over forty years. The State accommodated Mr. Preston’s disability for decades. In 2009, however, the State refused to re-hire Mr. Preston for his long-time position based on Mr. Preston’s alleged inability to perform the job.

Mr. Preston could in fact perform his job with reasonable accommodation. The State Chief Clerk encouraged staff that they did not need to consider Mr. Preston for the position he held for 43 years after learning about Mr. Preston’s injuries on the job. Preston lost his job because the State refused to continue to reasonably accommodate Mr. Preston’s disability; and because of concerns over his injuries on the job.

The State brought a motion for summary judgment, resulting in dismissal of Mr. Preston’s lawsuit. The trial court erred in failing to recognize the multiple issues of fact precluding summary judgment on the issue of whether the State’s refusal to accommodate Mr. Preston was reasonable. To the extent there was a finding that Mr. Preston did not meet his burden, the trial court erred in finding that the burden ever shifted given the material gaps in the State’s evidence.

Mr. Preston respectfully requests that this Court overturn the granting of the State’s motion for summary judgment, and remand this case for a determination on its merits.

## II. ASSIGNMENTS OF ERROR

The trial court in this case did not enter formal findings of fact or conclusions of law. The following errors reference both the order entered at summary judgment and the verbatim report of proceedings (“RP”) when the trial court made its rulings.

**Assignment of Error No. 1:** The trial court erred when it found that there were no genuine issues of material fact, that Washington State was entitled to summary judgment as a matter of law, and dismissing all of Preston’s claims with prejudice.

**Assignment of Error No. 2:** The trial court erred when it held that the State met its burden in demonstrating a legitimate, non-discriminatory basis for not re-hiring Mr. Preston, sufficient to warrant a summary judgment determination in the State’s favor as a matter of law.

**Assignment of Error No. 3:** Alternatively, the trial court erred in finding that the questions Mr. Preston’s qualifications with respect to his position, whether the State’s accommodations were reasonable, were not questions for the jury.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. (Assignment of Error No. 1) Whether the trial court erred when it found that Washington State was entitled to summary judgment as

a matter of law, dismissing all of Preston's claims with prejudice, given the multiple genuine issues of material fact.

2. **(Assignment of Error No. 2)** Whether the trial court erred when it held that the State met its burden in demonstrating a legitimate, non-discriminatory basis for not re-hiring Mr. Preston, sufficient to warrant a summary judgment determination in the State's favor as a matter of law, given the multiple questions of material fact regarding the State's proffered reasons.

3. **(Assignment of Error No. 3)** Whether the trial court erred in finding that there were no genuine issues of material fact requiring submission to the fact finder, regarding Mr. Preston's qualifications with respect to his position, and whether the State's accommodations were reasonable.

#### IV. STATEMENT OF THE CASE

A. **Substantive Factual History – Mr. Preston's Disability and History with the State Legislature.**

There is no question that Mr. Preston suffers a disability. Mr. Preston has had ataxia almost his whole life. Difficulty with balance is the primary ramification of this disease with respect to Mr. Preston's ability to work. CP 43 (deposition, page 21). Mr. Preston lives alone in a house without a formal caregiver, demonstrating his ability to take care of himself. CP 46 (deposition, page 33).

Mr. Preston began work with the State Legislature in 1965. CP 44-45 (deposition, pages 7-8). There is no dispute that Mr. Preston held a position with the Legislature for forty-three years working the parking lot shack, until the State refused to hire him for the 2009 session. CP 16, 18.

There are several facts that indicate that Mr. Preston's disability was in fact the reason for the State's refusal to allow Mr. Preston's to return to his position with the Legislature. At a minimum, a reasonable person could conclude that the purported reasons for the State's refusal to re-hire Mr. Preston were pretextual; and that the State failed to provide reasonable accommodation to allow Mr. Preston to continue with his work for the State. These issues preclude a ruling on summary judgment.

**1. Qualifications and Reasonable Accommodation.**

The State challenges Mr. Preston's qualifications for the position he held for so long. The State claims either that there was no issue of material fact on this issue, or that Mr. Preston failed to show evidence supporting the idea that he was in fact qualified.

Mr. Preston did, however, establish through the State's own declarations that he could perform the essential functions of his position with only minimal reasonable accommodation.

The State offered two expert reports to argue that Mr. Preston could not perform the functions of a position he had held for over forty years. CP 93-104 (Decl. of Carl Gann and Exhibit); CP 66-79 (Decl. of

Zietak, MD and Exhibit pp. 1-2). But the State failed to close several critical gaps in tying Mr. Preston's condition to his job performance, or refute how the State could not have addressed the problems by providing the same reasonable accommodations it had for over four decades, requiring only slightly modified tasks. This is even more obvious when the State's reports are viewed in the light most favorable to Mr. Preston as the non-moving party.

The State's Job Analysis report, for example, notes several essential functions of Mr. Preston's job, the vast majority of which do not require substantial physical abilities. When viewed in the light most favorable to Mr. Preston, eighteen of the essential functions fall well within Mr. Preston's capabilities:

- Manage parking locations from list of parkers and assigned spaces;
- Greet entrants;
- View vehicle tags, perform facial recognition of Legislators and staff;
- Show and direct entrants to correct parking spaces;
- Greet and assist pedestrians, answer questions and give directions;
- Tag unpermitted vehicles;
- Report unpermitted parked car;
- Direct vendor vehicles and suppliers;

- Direct emergency vehicles;
- Walk to handicap parking slots to count available spaces;
- Answer the phone;
- Scheduling parking spaces for guest requests;
- Drive State minivan parking shuttle for one hour a day;
- Valet park;
- Use 2-way radio to communicate;
- Call State Patrol when necessary;
- Dispense first-aid supplies as necessary;
- Sweep out shack and wash windows.

CP 93-104. There is no showing as to why the State's refusal to continue to provide reasonable accommodation to cover the few remaining tasks, as they had for over four decades, was reasonable or non-discriminatory.

Preston offered the following reasonable accommodations, none of which the State refuted as unreasonable:

- "Chase" unpermitted entering cars to prevent parking in reserved lot. The State offers no testimony or evidence as to why this function could not either be handled without "chasing" (calling over the Nextel for assistance), or by another employee on site.
- "Occasionally" assist with loading and unloading. This is listed as a marginal function. The State offers no testimony or evidence as to why this occasional duty could not be reasonably handled by another employee on an as needed basis; why this courtesy task could be eliminated altogether; or why vendors are not responsible for their own loading or unloading.

- Respond to emergency situations and direct emergency vehicles. This is listed as a marginal function, with the specific note that the employee “may use Nextel phone.” The State does not offer testimony or evidence as to why Mr. Preston cannot perform the majority of functions listed for such an emergency (call for emergency responders, direct same, dispense first aid supplies from first aid kit in shack). Mr. Gann notes that Mr. Preston has access to 2-way radios and Nextel. The State offers no testimony or evidence as to why Mr. Preston could not call for another employee to assist with the occasional task where direct physical action by an employee is needed.
- Move barricade and sand bags on and off the entrance to contain vehicle flow. Mr. Gann notes that Mr. Preston has access to 2-way radios and Nextel. The State offers no testimony or evidence as to why Mr. Preston could not call for another employee to assist with this occasional task on an as needed basis.
- Valet park for legislators under a time crunch. On occasions where this may be difficult for Mr. Preston, the State offers no testimony or evidence as to why Mr. Preston could not call for another employee to assist with this task on the occasional basis it occurs.
- Shovel snow from the walk. Mr. Gann notes that Mr. Preston has access to 2-way radios and Nextel. The State offers no testimony or evidence as to why Mr. Preston could not call for another employee to assist with this occasional, seasonal task on an as needed basis.

CP 122-23. The State’s own expert lists the few functions the State alleges Mr. Preston cannot perform as “marginal,” “seldom” or “rare”. CP 93-104.

In short, the State acknowledges Mr. Preston’s disability; and presents evidence that Mr. Preston’s disability could be reasonably accommodated.

In addition, Mr. Preston's state of health severely declined after losing his career and the job he had held for 43 years, undermining the credibility of the State's evidence supporting its position that Mr. Preston was not qualified to do the job. The State does not contest Mr. Preston's testimony that he was severely depressed after losing his position, or that his condition substantially worsened since losing this job. CP 52-53; 31 (deposition pages 57-58; 13). The State did not conduct its exams until well after Mr. Preston lost his job. The State does not refute that the condition they evaluated him in was markedly declined from the time that he was in line to return to work. Thus, the State's evidence about Mr. Preston's capacity for the job is even more compelling, particularly when these facts are viewed in the light most favorable to Mr. Preston.

**2. Pretext: Elimination of Patronage System.**

The State claims that it had two legitimate non-discriminatory reasons for not re-hiring Mr. Preston. The first is the elimination of the patronage system. CP 17-18.

The State claims that its employee, Ms. Barbara Baker, was directed to consider the patronage system in making new hiring decisions.

However, a careful reading of Ms. Baker's declaration states something different. Ms. Baker does make reference to the prior patronage system, some support for Mr. Preston under that system, and that Mr. Preston was hired based on this system. Most of these statements

are hearsay, however, and thus not admissible testimony sufficient to support a summary judgment decision. In any event, the credibility of Ms. Baker's testimony is one for the jury.

Regardless, importantly, Ms. Baker does not testify that Mr. Preston was not qualified to do the job. Nor does Ms. Baker provide any admissible testimony that Mr. Preston was hired predominately on the patronage system. CP 105-111. Nor does Ms. Baker testify, as represented in the State's motion, that Ms. Baker was simply encouraging hiring the most qualified applicants; or that Ms. Baker told staff member Mr. Finley that he should not feel obligated to hire Mr. Preston absent qualifications based on an awareness that Mr. Preston had been hired for reasons other than qualifications in the past.

Instead, what Ms. Baker actually says is that she sent word that the Security staff no longer needed to feel obligated to find a position for Mr. Preston "*[a]fter becoming aware in 2008 of an increasing track record of injuries experienced by Mr. Preston.*" CP 108 (¶ 9). This is not a linkage between the elimination of the patronage system and the decision not to re-hire Mr. Preston; this is a linkage to Mr. Preston's disability.

In short, the State never made the necessary showing that Mr. Preston was hired only based on the patronage system; or that elimination of this system was the real reason that Mr. Preston was not hired back.

3. **Pretext: Economy.**

The State's other alleged reason for not re-hiring Mr. Preston was that there were budget cuts and an attendant reduction in staff. Mr. Preston does not refute the State's assertion that the Legislature was undergoing budget cuts.

What Mr. Preston does refute is the State's association of those cuts with the refusal to re-hire Mr. Preston.

Mr. Preston presented evidence that he held his position with the State for 43 years, a position he was able to capably perform with only minimal accommodation. The State's own experts confirm that Mr. Preston continued to be able to perform the essential functions of the job, particularly when the facts are viewed in the light most favorable to Mr. Preston. The State failed to associate either of its pretextual reasons for not re-hiring Mr. Preston with the actual decision regarding Mr. Preston. The State thus failed to meet its burden on summary judgment, and never shifted the burden to Mr. Preston.

Even if it had, Mr. Preston provided evidence that these reasons for not hiring him back were in fact just excuses. A reasonable fact-finder would conclude from Ms. Baker's own testimony that the real reason for not re-hiring Mr. Preston was because of his injuries on the job, particularly when viewed in the light most favorable to Mr. Preston.

At a minimum, this remains a genuine question of material fact requiring determination by a jury.

**B. Procedural History.**

***1. State's Summary Judgment Motion.***

The State brought its motion for summary judgment on September 15, 2011. CP 14-34 (motion); CP 34-135 (supporting documents).

The primary bases for the State's motion are as follows:

- There was an absence of evidence that Mr. Preston needed to prove certain elements of his claims. Specifically, the State alleged:
  - (1) Refute alleged inability to fulfill the essential function of the position. CP 23-4, 25-6.
  - (2) Provide comparator evidence. CP 23-4, 26-28.
- There is no question of fact that the House had a legitimate reason for the action at hand. CP 23-4; 28-29.
- There is no evidence to establish age discrimination. CP 29-31.
- Mr. Preston failed to mitigate his damages, and thus was precluded from seeking damages. CP 31-32.

The State thus argued that Mr. Preston could not establish a prima facie case on either discrimination claim. CP 24-25; 29-31.

***2. Preston's Opposition.***

Mr. Preston filed a timely response objecting to the State's motion. CP 116-130. Mr. Preston pointed out that the State failed to note all the ways that Mr. Preston could still perform, the fact that the alleged problems had been successfully handled through reasonable accommodation before, and the unique skills Mr. Preston offered given his 43 years of service in his position. *Id.*

Mr. Preston provided facts going to his qualifications (CP 118-119), and the medical and capacity concerns (CP 119-124).

Mr. Preston also noted that it was a matter of fact, not law, as to whether or not the alleged budgetary reasons for not re-hiring him were reasonable. Whether such reason was legitimate is also one of credibility, given the fact Mr. Preston had survived several prior eras of limited budgets. The State failed to demonstrate as a matter of law that Mr. Preston's condition during this round was any different than in prior economic downturns. CP 119. Such a question is one for the jury.

**3. State Reply.**

The State filed its reply on October 17, 2011. CP 131-35. The State argued first that summary judgment should be denied based on Mr. Preston's alleged lack of new evidence. CP 131-32. The State neglects to address, however, Mr. Preston's use of the State's own evidence to demonstrate the elements of his claim, and at a minimum to illustrate the multiple genuine issues of material facts as to whether or not his disability could be reasonably accommodated.

The State then argues that Mr. Preston suggested accommodations that the law did not require. CP 132-33. What the State fails to address is that the accommodations discussed were accommodations that the State had provided for over four decades. The State, not Mr. Preston, had set the pattern for reasonable accommodation, which established that Mr.

Preston could, in fact, perform the essential functions of the job with such accommodation. Whether or not the State's decision to refuse to continue to provide such accommodations was reasonable or discriminatory, are again questions for the jury.

The State proceeds to argue that Mr. Preston failed to meet his burden when claiming that the State could have accommodated Mr. Preston by re-assigning him to another position. CP 133-34. The State mischaracterizes Mr. Preston's argument. The question is whether or not the State's failure to explain its complete lack of any accommodation for Mr. Preston's disability – including (but not limited to) the potential for a new position – the State failed to meet its burden in demonstrating a complete lack any question of material fact.

Finally, the State argues that Mr. Preston failed to refute the argument that failure to mitigate damages, and thus failed to defeat summary judgment. However, the State never provided sufficient evidence to meet its initial burden on summary judgment on this issue to begin with, and this was not one of the bases for the trial court's order.

**4. Trial Court Decision.**

The court entered summary judgment in favor of the State on October 21, 2011. CP 137-38. The order included no specific findings of fact or conclusions of law. The order simply granted the State's motion and dismissed Mr. Preston's claims with prejudice.

The trial court based its decision on the State's argument that it showed a non-discriminatory basis not to hire Mr. Preston (budget cuts, stopped the practice of patronage hire). VP 13. The trial court appears to have found (though there is no specific finding as to the court's basis) that either there was no showing, or no question of material fact, regarding the State's stated reasons for not re-hiring Mr. Preston. *Id.*

The trial court also found that the questions of fact as to whether or not the State could have accommodated Mr. Preston, and what the essential functions of the job actually were, were not jury questions. VP 13. Instead, the trial court held that these are questions for the employer to decide. VP 13-14.

The trial court also indicated that the fact that Mr. Preston had been working in his position for 43 years may have influenced her decision:

- “When I read this, I have to say, 43 years, that is a long time for this person to be working, and so I looked to whether or not what the law is, and that's the unfortunate situation because I am going to grant summary judgment.” (VP 13).
- “They [the State] presented it, it's enough to survive summary judgment, so I have to grant it and I do so because I just think, 43 years, but ...” (VP 14)

The implication appears to be that the fact Mr. Preston had already had the position for 43 years had some influence on the trial court's

decision. To the extent this is true, with all due respect to the trial court, this is in error.

Mr. Preston timely filed this appeal. CP 138-40.

## V. ARGUMENT

### A. Summary of Argument.

The State argues that Mr. Preston failed to present evidence of his claim. As set out in the facts section above, this is simply not true.

The State then argues that it had two legitimate non-discriminatory reasons for not re-hiring Mr. Preston: elimination of the patronage system, and economics. But the State failed to meet its burden on either issue sufficient to shift the burden to Mr. Preston.

First, the State never actually tied the removal of the patronage system to the decision on Mr. Preston. Indeed, the only linkage is an encouragement to consider “qualifications” in light of Mr. Preston’s injuries on the job, which in turn relate directly to his disability.

Second, the State never directly tied the budgetary cuts to the specific decision not to re-hire Mr. Preston. There is evidence in the State’s own testimony that Mr. Preston’s injuries were a prominent reason in not re-hiring him. This undermines the State’s purported reasons for not re-hiring.

In addition, whether or not Mr. Preston could have performed the necessary functions with reasonable accommodation (in other words, whether he was qualified) is a question of fact. Mr. Preston – and the State – submitted evidence he could indeed perform the job. The State’s argument is essentially that it considered Mr. Preston’s qualifications *specifically without considering a reasonable accommodation*, which is in and of itself discriminatory.

To the extent the burden did shift, Mr. Preston demonstrated pretext, or at a minimum genuine questions of material fact regarding this determination. In the end, the State did not meet its burden to obtain a judgment as a matter of law.

The questions as to whether the State’s accommodations (or lack thereof) were reasonable, or whether Mr. Preston could perform the essential job functions, are questions of fact that preclude summary judgment.

**B. Standard of Review.**

Summary judgment should only be granted where there is “no genuine issue of material fact and ... the moving party is entitled to judgment as a matter of law.” CR 56; see also *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 253 (2002). Material facts are those “upon which the

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outcome of the litigation depends in whole or in part.” *Fraternal Order of Eagles* at 52 n.126, quoting *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798 (2001). All interferences are made in favor of the non-moving party. *Id.*

Even if the facts were undisputed, if reasonable minds could differ as to whether such facts create (or breach) a duty, or whether such facts constitute negligence, summary judgment is inappropriate. *See, e.g., Sjorgren v. Properties of Pacific NW, LLC*, 118 Wn. App. 144, 148 (Div. II 2003)(where duty depends on disputed facts, summary judgment inappropriate); *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 467 (1967)(if reasonable minds could draw different conclusions from undisputed facts, summary judgment must be denied).

In this case, there are substantive material facts in dispute. There is also the question of reasonableness of the State’s refusal to consider reasonable accommodation.

Several material questions of fact go to the claims at issue in this case. Accordingly, one issue before this Court is whether any genuine issues of material fact preclude the County’s motion. *Jacobsen v. State*, 89 Wn.2d 104, 107-08, 569 P.2d 1152 (1977).

A material fact is one upon which the outcome of litigation relies. *Jacobsen*, 89 Wn.2d at 108. Factual issues are those focused on the “who-what-when-where-and-how” questions, a determination of damage

awards, and issues such as reasonableness of an action under a specific set of circumstances. *See, e.g.*, Teglund, 14A Wash. Prac., Civil Procedure § 33.18.

The purpose of summary judgment is to avoid a useless trial. However, trial is not useless, but absolutely necessary, where there is genuine issue as to any material fact. *Jacobsen*, 89 Wn.2d at 108. In determining whether a genuine issue of material fact exists, the Court will construe all facts in favor of Noonan as the nonmoving party. *DiBlasi v. City of Seattle*, 136 Wash.2d 865, 872-3, 969 P.2d 10 (1998).

Under one avenue for summary judgment, the State, as the moving party, bears the initial burden to show the absence of any genuine issue of material fact. *Young v. Key Pharms, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden under CR 56(e) shifts to the nonmoving party only once the moving defendant meets its initial burden. *Id.* at 234-5.

If the moving party fails to sustain that burden, summary judgment should not be entered, even if the nonmoving party submits no affidavits or other supporting materials. *Young*, 112 Wn.2d at 235, quoting *Jacobson*, 89 Wn.2d at 108.

Even where the moving party met its initial burden, where the nonmoving party submits admissible evidence raising a genuine question of material fact, summary judgment cannot be granted. A plaintiff who is the nonmoving party must create an issue of fact in order to defeat

summary judgment. In meeting this burden, “an affidavit asserting *any* supportable, relevant fact inconsistent with the defendant's position will be sufficient to do so.” *Young*, 112 Wn.2d at 192.

Alternatively, the State argues that Mr. Preston failed to make a prima facie case. Mr. Preston did in fact present evidence – including reference to the State’s own supporting declarations – demonstrating an ability to prove the elements of his claim.

Finally, the State failed to meet its burden in showing that it had legitimate, non-discriminatory reasons for not re-hiring Mr. Preston.

**C. Prima Facie Case.**

The State first argues that Mr. Preston could not provide the evidence required to sustain his claims. Mr. Preston submitted facts demonstrating that the State’s true reason for not re-hiring him was because of his disability. The State’s own evidence supports this allegation. The State is thus not entitled to summary judgment as a matter of law based on a lack of evidence.

**D. State Failed to Demonstrate Non-Discriminatory Reasons as a Matter of Law.**

The State then argues that it had two non-discriminatory reasons for not re-hiring Mr. Preston: elimination of the patronage system and economics. The trial court based its determination on the State’s presentation of non-discriminatory reasons for re-hire. The State did not, however, meet its initial burden in showing, as a matter of law, that Mr.

Preston was not in fact qualified for his job, which in turn is a necessary showing to substantiate the State's position.

**1. Both reasons for non-hire require proof that Mr. Preston was not qualified for his position. The State failed to make such showing.**

Both of the State's reasons for not re-hiring Mr. Preston were rooted in Mr. Preston's alleged lack of qualifications. Thus, a determination as to whether Mr. Preston was actually qualified for his job is a necessary starting point. This is a question of fact, not law.

Mr. Preston presented evidence that he was in fact qualified to do his job. The State's own expert reports support Mr. Preston's position. This creates a question of fact for the jury, and preclude summary judgment as a matter of law.

**2. Patronage system.**

The State argues that once the patronage system was eliminated, Mr. Preston could not qualify for the job. Again, however, the State fails to show – as a matter of law – that Mr. Preston was not in fact qualified. The State failed to establish that Mr. Preston had been hired based solely (or even predominantly) based on the patronage system

The State presents the testimony of Ms. Baker and Mr. Finley, who does not actually say that Mr. Preston was not qualified to do his job. Instead, what Ms. Baker actually says is that she sent word that the Security staff no longer needed to feel obligated to find a position for Mr.

Preston “[a]fter becoming aware in 2008 of an increasing track record of injuries experienced by Mr. Preston.” CP 108 (¶ 9). Mr. Finley testified that Mr. Preston had difficulties and that there was a patronage system, but never tied the two together.

A fact finder may well conclude that the resulting decision for Mr. Preston was based not on the lack of a patronage system, but rather in response to Mr. Preston’s injuries, which in turn were a result of his disability. When viewed in the light most favorable to Mr. Preston, this creates a genuine question of material fact and undermines the State’s pretextual reason for not hiring Mr. Preston.

3. **Economy.**

The State then argues that the tight budget was to blame for not re-hiring Mr. Preston. This argument has inherent logical flaws. Surely the State does not claim that it has gone over forty years without considering merit in their hiring of Legislative workers. The State does not offer testimony or evidence as to why Mr. Preston should not survive this round of difficult economy just like he always had before, other than because of his physical disabilities.

The State does not directly associate the budget cuts with the refusal to re-hire Mr. Preston. To the extent there is some allegation that Mr. Preston simply did not measure up compared to other applicants, there is no evidence that Mr. Preston’s qualifications were weighed with due

consideration of reasonably accommodating his disability, as the State had done for over forty years. Indeed, the State's testimony is that this accommodation simply became "too much" in light of the economy. CP 87-88. But, whether or not an accommodation was unduly burdensome is question of fact, not law. The State did not meet its burden.

In summary, Mr. Preston presented evidence that he held his position with the State for 43 years, and capably performed in that position with only minimal accommodation. The State's own experts confirm that Mr. Preston continued to be able to perform the essential functions of the job, particularly when the fact are viewed in the light most favorable to Mr. Preston. The State failed to associate either of its pretextual reasons for not re-hiring Mr. Preston with the actual decision regarding Mr. Preston. The State thus failed to meet its burden on summary judgment, and never shifted the burden to Mr. Preston.

**E. Reasonable Accommodation a Question of Fact.**

The issue at hand all rest upon the primary question of whether or not Mr. Preston could perform the functions of his job, or was otherwise qualified.

These matters cannot be determined as a matter of law. "It is a jury question whether the employer's actions constituted a reasonable accommodation or whether the employee's requests would have placed an

undue burden on the employer.” *Phillips v. City of Seattle*, 111 Wn.2d 903, 911, 766 P.2d 1099 (1989).

The State bears the burden, as the moving party, to provide all facts and legal argument supporting its position, sufficient to demonstrate an absence of any genuine question of material fact. The State failed to meet its burden. The State offered no actual testimony or evidence that Mr. Preston could not adequately perform his job with minimal reasonable accommodation.

**F. Comparator evidence.**

The State then asserts that Mr. Preston must establish that a nondisabled person was hired in his place, citing *Roehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004). The four elements cited in *Roehl* are as follows:

- (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job;
- (2) the employee was qualified to perform the essential functions of the job in question;
- (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and
- (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality.

Proof of hiring of another non-disabled person is not a required element. In fact, per the State’s own argument, the positions within the Legislature substantively changed. It would thus be difficult, if not impossible, to demonstrate a nondisabled person was hired into a position the State

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claims no longer exists. Therefore, we go back to the essential elements of the claim.

The State does not dispute that Mr. Preston has a physical disability.

The State does not dispute that Mr. Preston gave the State notice of his challenges, and accompanying substantial limitations.

The disputes at issue are whether Mr. Preston was qualified to perform the essential functions of the job in question; and whether the State failed to affirmatively adopt appropriate measures. These are fact questions.

The State also asserts that Mr. Preston cannot dictate how the State should organize its workforce. The State fails to demonstrate, however, a lack of any genuine issue of material fact regarding reasonable accommodation for Mr. Preston. Again, the question of whether a particular accommodation is reasonable is one for the jury.

**G. Mitigation Not Relevant on Summary Judgment.**

The State argues that Mr. Preston's alleged failure to mitigate his damages precludes his claims. But, as the trial court correctly noted, any alleged failure to mitigate simply goes to the damages claim. VP 7. The trial court correctly found that this issue is a scope of damages issue, not one for summary judgment. *Id.*

**H. Attorney's Fees.**

To the extent allowed by law, Mr. Preston requests an award of attorney's fees and costs on appeal.

**VI. CONCLUSION**

In conclusion, the trial court erred in finding that the State met its burden in demonstrating a non-discriminatory reason for not re-hiring Mr. Preston as a matter of law. The trial court further erred in finding that Mr. Preston did not present sufficient evidence to create genuine questions of material fact, and thus was not entitled to present the factual issues regarding his qualifications, whether or not he could have performed his job with reasonable accommodation, and the extent that such accommodation was reasonable to the jury.

Mr. Preston respectfully requests that this Court overturn the trial court's determination, and remand this case for a determination on its merits.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of April,  
2012.

By:   
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**Certificate of Service**

I certify that on the 13 day of April, 2012, I served the party listed below with a true and correct copy of the foregoing Brief of Appellants in the above-entitled matter by ABC Legal Messenger:

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