

NO. 42755-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

2012 JUN 18 PM 3:35

FILED
COURT OF APPEALS
DIVISION II

JOHN PRESTON,

Appellant,

v.

STATE OF WASHINGTON,

Respondent

APPELLANT PRESTON'S REPLY BRIEF

ORIGINAL

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I. INTRODUCTION

Mr. Preston presented evidence at the trial level regarding both his capacity to perform the functions of his position, and the reasonable accommodation available to allow him to perform.

The State presents the argument that there is a bad economy and that Mr. Preston could no longer perform the necessary functions of his job. The State neglects, however, to make a supportable argument addressing why this issue was determinable on summary judgment as a matter of law, given the evidence in the record both establishing Mr. Preston's *prima facie* case, and refuting the State's position.

II. STATEMENT OF THE CASE - REBUTTAL

Mr. Preston sets forth the relevant facts in his opening brief; this rebuttal is limited to addressing certain conflicting issues in the State's responsive brief.

The State touches upon Mr. Preston's extensive history with the State Legislature from 1964 to 2008, forty-four years' worth of service. Notable in the State's overview is the lack of any meaningful history of problems with Mr. Preston's performance.

The questions of whether or not Mr. Preston could not, in fact, have performed the "essential functions", and whether the State's accommodations were reasonable, are questions of fact.

The fact that there are conflicting facts regarding the State's rendition of the past, and Mr. Preston's ability to perform his job functions when the State refused to re-hire him, is precisely why summary judgment is inappropriate.

A. Mr. Preston's capabilities and job performance.

The State sets forth the history of the patronage system. The State also points out that Mr. Preston was originally hired based on that system.

Notable, however, is what the State does not allege. The State does not allege that Mr. Preston was repeatedly re-hired for the subsequent forty-three years based on that system. The State does not allege that Mr. Preston lacked the qualifications to perform his job for those four decades, except in a vague way. There is no support for the inference that Mr. Preston could not perform his job with fairly minimal accommodation.

In both its motion for summary judgment and in response to this appeal, the State relies solely on the Declaration of Ron Finley when alleging any deficiencies in Mr. Preston's job performance in the years preceding 2009. CP 84-92. Mr. Finley also testified in his declaration, however, that he accommodated Mr. Preston's disability through how he assigned tasks. CP 87-88. Mr. Finley himself stated that Mr. Preston's job performance was not a useful criterion to evaluate his employment, as the arrangements made were working. *Id.*

B. The State's budgetary challenges.

No one challenges the fact that this State, along with the nation, has suffered serious economic challenges. The problem is that the State fails to offer sufficient proof to establish as a matter of law that the economy precluded it from offering a reasonable accommodation to Mr. Preston. The State argues that any accommodation was unreasonable. But Mr. Preston offered evidence that he could in fact perform the necessary functions of the job, and that the State could accommodate him with reasonable effort. The State's own witness testimony and expert reports support Mr. Preston's argument.

The State attempts to appeal to a generalized empathy with the so-called "Great Recession." In making this plea, the State resorts to relying on information that was not part of the underlying trial record, and thus is not suitable to consider on appeal. Response Brief at 5 and fn 13.

However, any empathy with the State's economic state does not provide a legally sound basis to dismiss Mr. Preston's claims as a matter of law. Mr. Preston could make the contrary emotional plea – that the State chose, at this difficult time, to put a forty-four year faithful employee with a severe disability, who had never known any other form of meaningful work, out on the street.

What is relevant to this case, and this appeal, is whether the State reasonably accommodated Mr. Preston's disability. The State admits that

Mr. Preston had a disability. The State’s argument is that it could “no longer” afford to accommodate that disability. But the question of whether such a decision was reasonable, or whether the accommodations that could have been made were reasonable, is a question for the jury.

III. ARGUMENT

A. Summary of Argument.

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.

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 on Summary Judgment.

The State talks about a “mistaken burden” on summary judgment, claiming that Mr. Preston failed to establish his case. But there is no such problem. Mr. Preston submitted sufficient evidence to establish a *prima*

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facie case for his accommodation claim. The State failed to rebut this evidence sufficient to establish its defense as a matter of law. Saying that Mr. Preston’s disability substantially impaired his ability to perform his job is not an excuse to let him go; it is admitting that Mr. Preston suffers a condition that requires the State to reasonably accommodate this impairment.

The questions of accommodation and reasonableness are not suitable for determination on summary judgment, they are questions of fact for the jury.

C. Mr. Preston Established a *Prima Facie* Accommodation Case.

The State cites *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 136 (2003) for the elements Mr. Preston needed to establish in demonstrating his *prima facie* case: that “(1) he had a sensory, mental, or physical abnormality that substantially limited his ability to perform the job; (2) he was qualified to perform the job; (3) he gave [the State] notice of the abnormality and its substantial limitations; and (4) upon notice, [the State] failed to affirmatively adopt measures available to it and medically necessary to accommodate the abnormality.” *Id.* at 138-9; citing *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 192-3 (2001) and *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 641-42 (2000).

Mr. Preston presented evidence on all four elements.

1. It is undisputed Mr. Preston suffers a physical disability.

There is no dispute that Mr. Preston is disabled. *See, e.g.*, State’s Brief at 4-5.

The State rests on its argument is that it is justified, as a matter of law, in not re-hiring Mr. Preston for his annual position because Mr. Preston was limited in his ability to perform his job. The problem with this argument under *Roeber* and *Pulcino* is that the “substantial” impairment of the ability to perform the job, and the resulting need for accommodation, is the very essence of defining a protected disability. *Roeber*, 116 Wn. App. at 136,¹ citing *Pulcino* 141 Wn.2d at 641-42.

This is not a reason to grant the State summary judgment; this is the first element of the accommodation claim. The State thus admits that Mr. Preston met the first element of a *prima facie* case, as he suffered a disability that substantially limits his ability to perform his job.

2. There is evidence that Mr. Preston was qualified.

The State attempts to argue that Mr. Preston was not qualified to do his job, but there are several problems with this argument. The critical

¹ “*Pulcino* holds that a disability is a sensory, mental, or physical abnormality that substantially limits the ability to perform the job. [141 Wn.2d at 641-42]. To show such an abnormality, the claimant may present evidence of a condition that is medically cognizable or diagnosable, or that exists as a record or history. *Id.* at 641[.] Although this definition of disability has not been applied to disparate treatment cases, we are convinced that its reasonable terms and consistency with Washington’s broad application of the discrimination laws support application here. *See id.* at 641-42[,], *see also Hill* at 192 n.19.”

factor is that none of these arguments satisfy the burden necessary to dismiss Mr. Preston's claims as a matter of law.

The State's entire argument that Mr. Preston was not qualified to do his job rests on the needs to accommodate Mr. Preston. However, as discussed above, the fact that the State needed to accommodate Mr. Preston's disability simply reinforces Mr. Preston's disability and accommodation claim. This does not excuse the State from failing to provide this accommodation.

Mr. Preston presented evidence at the trial level that he could, in fact, substantially perform his job. The State's own experts establish that Mr. Preston was, in fact, able to perform the vast majority of essential functions of his job, and confirmed that there were relatively few tasks he needed accommodation for. *See* Preston's Brief at 4-6, and citations to the State's declarations therein. This evidence is even more compelling when one considers that the State's expert examinations occurred some time after the State refused to allow Mr. Preston back into his position, and Mr. Preston's testimony established that his condition had severely declined in that time. *Id.* at 8 (citing CP 52-53; 31).

The State disagrees with this conclusion, and disputes whether Mr. Preston was sufficiently qualified for the position he performed, and for which the State consistently re-hired him, for 44 years. But, again, the fact that Mr. Preston's disability "substantially" limited his ability to

perform the job does not negate his general qualifications, it simply defines the fact Mr. Preston suffers a disability that is entitled to accommodation under law. *Roeber* at 136 (footnote 1 above).

The fact that the State argues about Mr. Preston's qualification does not establish as a matter of law that Mr. Preston was in fact not qualified, with reasonable accommodation, to fulfill his position. This is a disputed fact for the jury.

3. ***There is no dispute that the State was on notice of Mr. Preston's disability, and the need for accommodation.***

The State does not dispute that it knew of Mr. Preston's disability, or that it needed to accommodate his disability. The premise of the State's argument is instead that this accommodation was too burdensome and thus unreasonable. But again, this is a question for the jury.

4. ***Whether or not the State failed to adopt reasonable measures of accommodation.***

Finally, Mr. Preston presented evidence of accommodation the State could have made, which was simply the accommodation the State had made for his many years of service with the House and Senate. The State does not dispute this, and its own declarations cite to the accommodations of the past. *See, e.g.*, CP 87-88 (declaration of Ron Finley).

The State instead argues that accommodating Mr. Preston was no longer reasonable. The State does not establish a right to judgment as a

matter of law. The reasonableness of whether the suggested accommodations is not a question of law, it is one for the jury. *Roeber* reiterates the base line for employment cases: “Generally the question of an employer’s reasonable accommodation for an employee’s disability is one for the jury.” 116 Wn. App. at 141, citing *Pulcino*, 141 Wn.2d at 644.

5. **Roeber demonstrates Mr. Preston has presented sufficient facts to establish a prima facie case and survive summary judgment.**

Despite the State’s implication, *Roeber* is not applicable to this case. In *Roeber*, the claimant presented evidence of migraines, which could arguably be abnormalities. There was thus a disability.

The *Roeber* claimant did not, however, present evidence that this condition substantially impaired his ability to perform his job functions. *Roeber*, 116 Wn. App. at 137. That is not the case here.

Mr. Preston presented evidence of his disability, and the State acknowledges the same. Mr. Preston presented evidence that this condition substantially impaired his ability to perform his job, and the State acknowledges the same. Here, Mr. Preston’s difficulties in performing his job, and the history of the same, is the heart of the State’s argument. What is at issue is whether or not Mr. Preston could have performed his job with reasonable accommodation for his disability. This is a question of fact.

In *Roeber*, the company also presented evidence of a non-discriminatory reason for firing the claimant: fighting and other threatening behavior specifically prohibited in the employee manual. 116 Wn. App. at 137-8. Here, the State admits that the reason for not re-hiring Mr. Preston into his annual position was because he was unable to perform his tasks – e.g., because of Mr. Preston’s disability and the impact it has on his job performance. The State not only admits this, but that the failure to re-hire because of the need to accommodate Mr. Preston is the entire premise of the State’s argument that it was justified in such decision. What the State ignores is Mr. Preston’s ability to perform his functions with reasonable accommodation.

With respect to Mr. Preston’s showing on accommodation, the State generally misapplies *Roeber* to this case. In *Roeber*, the court held that the employee needs “to establish either that a specific accommodation or that accommodation was medically necessary.” The claimant in *Roeber* asked for an off-hours work shift, or a demotion. 116 Wn. App. at 141 (emphasis added). There was no evidence of such a position. *Id.*

Here, Mr. Preston established both of the alternate grounds for a *prima facie* case. Mr. Preston cites to a specific accommodation: the ability to have other employees cover the relatively few functions of his job that he had difficulty performing. The State acknowledges this, and its own declarations affirm that this was an accommodation the State made

for many years. Mr. Preston thus met his burden in showing a specific accommodation.

The State argues that this accommodation is now unreasonable; but this does not establish the State's defense as a matter of law. It simply demonstrates a question of reasonableness, a question of fact, to be determined by the jury. *Roeber*, 116 Wn. App. at 141, citing *Pulcino*, 141 Wn.2d at 644.

Roeber also sets out the alternate element of proof, that such accommodation was medically necessary. Both Mr. Preston and the State cite extensively to the evidence that Mr. Preston needed accommodation, and that such accommodation was medically necessary because of his disability. In addition to Mr. Preston's evidence of a specific accommodation (assistance in certain limited tasks by other employees), this evidence that such accommodation was medically necessary establishes the final element of accommodation in Mr. Preston's *prima facie* case.

The only question remaining is whether or not the proposed accommodation would be reasonable. This is a jury question.

IV. CONCLUSION

Mr. Preston presented sufficient facts to establish a *prima facie* case of accommodation. Mr. Preston thus presents several questions of fact for the jury, precluding dismissal of his claims as a matter of law.

RESPECTFULLY SUBMITTED this 18th day of June,
2012.

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Certificate of Service

I certify that on the 18th day of June, 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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