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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JOSEPH ALONSO

APPELLANT,

vs.

QWEST COMMUNICATIONS COMPANY, LLC,

RESPONDENT

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REPLY BRIEF OF APPELLANT

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## I. Introduction

Qwest continues to trumpet the various ethnicities and affiliations of Joseph Alonso's co-workers and supervisor as if that somehow is a defense to the discrimination and harassment that they meted out to Alonso in the workplace. Alonso's boss, Ben Martinez, was the instigator of the harassment, and co-workers joined in with Martinez's encouragement. Martinez harassed Alonso about being a disabled veteran. Although Alonso had surgery as a child to address a speech defect, his speech is still affected and worsened after his Gulf War service. Martinez and coworkers referred to his speech defect, claiming he spoke like a "ghetto hispanic". Whatever the national origin or veteran status of the colleagues involved, none suffered any disability. Alonso was singled out by Martinez and his colleagues for harassment because of his disabilities.

After Alonso complained, Martinez announced his intent to retaliate the following day and did whatever was in his power to make Alonso's work life a living hell. Martinez transferred Alonso to a less favorable assignment, took away the van he was assigned and gave him a damaged and unsafe van, took away his cell phone, subjected his work to enhanced scrutiny and further

harassed Alonso and allowed coworkers to continue harassing Alonso. Martinez's adverse actions and singling out of Alonso were not only obvious to Alonso, but also to various coworkers who submitted supporting declarations.

While Qwest wants to consider each discriminatory and unwelcome action on its own, under the totality of the circumstances approach followed by Washington courts, the offensive conduct is considered as a whole and, considering the facts alleged in Alonso's favor, there is sufficient evidence of discriminatory and retaliatory animus from which a jury could find in Alonso's favor, thus summary judgment should be reversed and the case remanded for trial.

## II. Argument

As this court recently held: "Direct evidence includes discriminatory statements by a decision maker and other smoking gun evidence of discriminatory motive." *Fulton v. DSHS*, 169 Wn. App. 137, 148 n. 17, 279 p.3d 500 (2012) (internal quotations and citations omitted). In this case the evidence reflects overt discriminatory statements by the Alonso's direct supervisor and decision maker, Ben Martinez, who referred to Hispanic's as "Spic's", told Alonso he spoke like "he was from the

ghetto” and overtly expressed his distaste for disabled veterans like Alonso. CP 4, 124-25,144, 233. While this alone is sufficient to go to the jury under a “direct evidence” theory, it is more than sufficient evidence to support the necessary elements of Alonso’s claims under the McDonnell Douglas analysis as well.

**A. Alonso Experienced Disparate Treatment Based on His Disability Culminating in Adverse Action.**

*“I will tell you what I hate, people that served in the first Gulf War for five days and claim a disability.”  
Ben Martinez - CP 233.*

Up front Martinez expressed his discriminatory animus and even hatred for veterans like Alonso who served in the first Gulf War and then claimed a disability. Martinez knew about Alonso’s service-related disability and spoke to Alonso about “crazy veterans” and asked Alonso if he was “crazy.” CP 233.

The McDonnell-Douglas approach is simple. If Alonso can establish a prima facie case of discrimination, then the burden shifts to Qwest to articulate legitimate nondiscriminatory reasons for its actions. At that point Alonso must then provide evidence to show that Qwest’s reasons are “pretextual” or “unworthy of belief” and that his disability and national origin was a substantial factor in the challenged actions. *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 859–60, 851 P.2d 176 (1993). To show

pretext, an employee is not required to produce evidence beyond that already offered to establish the prima facie case. *Id.* at 860.

To establish a prima facie case of disability discrimination based on disparate treatment, Alonso must show that he (1) is a member of a protected class; (2) was treated less favorably in the terms or conditions of his employment than a similarly situated, nonprotected employee, (3) who is doing substantially the same work. *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 81, 98 P.3d 1222 (2004). Alonso is of Mexican-American heritage and is also disabled. CP 95-96, 107, 119-121. His disabilities include a back injury, PTSD and a speech impediment. *Id.* While some of his colleagues are also of Mexican-American heritage, and some are veterans, none are disabled and none of them were discriminated against or ridiculed about their speech like Alonso was.

Alonso has provided evidence from himself and other colleagues to show Martinez treated him less favorably in the terms and conditions of his employment than his co-workers were not scrutinized and demoted as he was. CP 139-145. Accepting the facts in Alonso's favor there is substantial evidence that Martinez had it in for Alonso because of his disability. Qwest

responds, relying on *Sawyer v. Trane U.S., Inc.*, 2008 WL 748375, at \*6 (W.D. Ark. Mar. 17, 2008), a trial court decision from the Western District of Arkansas, that Martinez's hatred has nothing to do with disability discrimination but is instead expressing animus towards those who falsely claim to be disabled, which is not actionable. Resp. Br. at 33. However, the plaintiff in *Sawyer* admitted he did not have a disability of any sort and had no evidence of any statements by his supervisor to suggest that there was any bias against a disabled employee.

Here, it is undisputed that Martinez has service related disabilities (PTSD and a back injury) and a speech impediment that meet the definition of disability under WLAD. It is also undisputed that Alonso was subject to unwelcome and offensive comments that related to his actual disability of PTSD and the perceived disability related to his speech and accent. CP 140-145, 233.

Alonso does not have a direct comparator, because he was the only employee assigned to AQCB work for several years. Since his replacement Tuttle was still in the AQCB position after two years, even though Qwest claims Alonso was removed from the position so it could be "rotated" among other employees.

CP 238. The loss of the Alonso's assigned computer, office, van and cell phone also show how the change in positions was materially adverse. CP 232, 239-240, 248-255.

Washington courts have broadly defined "adverse employment action." The definition encompasses acts well beyond termination, including demotion or transfer. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002). While Qwest recognizes that a "demotion or adverse transfer, or a hostile work environment, may amount to an adverse employment action.", *Harrell v. DSHS*, 170 Wn. App. 386, 398, 285 P.3d 159 (2012), Qwest asserts that a reasonable person would not find Alonso's reassignment and removal of duties "materially" adverse. Similarly Martinez's harsh criticisms of Alonso and strict scrutiny of his work – holding him to different and more onerous standards than his non-disabled colleagues, were also adverse actions. CP 139-40, 145, 234-239. Qwest's argument only further highlights that this is a question of fact that a jury must decide. Here, the evidence provided, viewed in Alonso's favor rather than Qwest's, is sufficient that a reasonable person could find that this adverse transfer, removal of Alonso's duties, and

heightened scrutiny of his work was sufficient to constitute an adverse action.

Qwest wants to attribute the various adverse actions to Martinez being a “tough boss,” who was hard on everyone. In other words Qwest claims Martinez was an equal opportunity harasser, not discriminating against Alonso. While a jury may ultimately believe Qwest – or Alonso, that material factual determination is for the jury and should not have been determined by the court on summary judgment. Further, Alonso’s complaint is not that he had a “tough boss” but that his boss treated him differently than his coworkers based on his disabilities. This is supported not only by Alonso’s testimony, but by testimony from co-workers who personally observed Martinez’s negative focus on Alonso. CP 139-40, 145, 234-239. Coworkers also confirm that Martinez – and others who harassed Alonso – were well aware his speech impediment was a disability. CP 141-144. Alonso explained that it affects his speech in both English and Spanish. CP 119-121.

When coworker Margaret Buechel tried to explain that Alonso had a speech impediment, Martinez stated that Alonso simply did not speak “good English” and called Buechel “naïve”

for believing otherwise. CP 144-145. Martinez told Alonso and others that Alonso spoke like he was from the ghetto. CP 124-25, 144. Martinez, consistent with his negative comments about Alonso's service-related PTSD disability, refused to believe Alonso's disability entitled him to compensation. He set out to remedy this by making it harder on Alonso than anyone else, mocking his disabilities or disabled status and encouraging and permitting others' to harass Alonso.

Although Qwest is correct that trial counsel did not specifically brief National Origin discrimination on summary judgment, evidence of the hostile and offensive comments directed at Alonso was submitted to the trial court in response to the motion for summary judgment. While the briefing did not specifically address the national origin discrimination claim, the offensive conduct directed at Alonso including epithets and comments relating to his accent, and speaking like a "ghetto hispanic" and calling him a "spic" and allowing coworkers to call him "motherfucker" are properly considered as additional evidence of the hostile environment and adverse action directed at Alonso due to his disability discrimination and later in retaliation for complaining about discrimination. *Stenger v. State*,

104 Wn. App. 393, 16 P.3d 655, review denied 144 Wn.2d 1006 (2001); RAP 2.5; RAP 9.12.

**B. There is Substantial Evidence of a Disability-Based Hostile Work Environment.**

Washington courts have rejected arguments similar to Qwest's that the alleged discriminatory supervisor was abusive to all employees where there is evidence, as Alonso has provided, that the Plaintiff was singled out for especially abusive treatment:

In *Russell v. Department of Human Rights*, we addressed a similar issue interpreting discrimination provisions of Seattle's Fair Employment Practices Ordinance. *Russell*, 70 Wn. App. 408, 854 P.2d 1087 (1993) (affirming decision of human rights department finding discrimination under Seattle Municipal Code 14.04). In *Russell*, the supervisor claimed that he abused everyone and, therefore, did not subject an African American female employee to different treatment because of race or sex. *Id.* at 420. But because he was more abusive toward female employees, and because he made specific, derogatory comments about African-Americans to Russell and others, we concluded this was sufficient proof of conduct defined as discriminatory under the Seattle Municipal Code. *Id.* at 420-21, 854 P.2d 1087; see *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993) (explaining that a fact finder could find that conduct was gender-based because the supervisor's abuse of women was worse than his abuse of men).

*Kahn v. Salerno*, 90 Wn. App. 110, 123-24, 951 P.2d 321 (1998).

In *Robel v. Roundup Corp.*, 148 Wn.2d 35, 45-46, 59 P.2d 611 (2002), our Supreme Court addressed the elements of a disability-based hostile work environment claim, and addressing the level of proof needed to show that the conduct was motivated by the plaintiff's disability and that it was sufficiently severe to affect the terms and conditions of plaintiff's employment, largely tracking the standards set forth in the seminal Washington hostile environment harassment case, *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985).

Essentially, a plaintiff may show that the conduct is motivated by a disability in a variety of ways. One is when the conduct itself references a disability. Another is where the disabled plaintiff shows that he was singled out for hostile and offensive conduct while coworkers who are not disabled were not. Martinez experienced both. Offensive comments were made in his presence, directly referencing his disabilities. He was also subjected to hostile and offensive conduct, like being called "motherfucker" that did not mention his disability directly, but that he was singled out for. CP 126. Alonso's non-disabled coworkers did not experience experience similar hostile and offensive comments and conduct.

For example, coworkers placed a “gooey liquid” on Alonso’s phone receiver, glued Alonso’s mouse to the mouse pad, and on another occasion put a greasy substance on Alonso’s mouse. CP 78, 145. In another instance, Alonso found a puddle of liquid had been poured onto his office chair. CP 240. Martinez allowed these “practical jokes” to continue to harass Alonso. CP 145.

While Qwest claims Alonso did not have a desk or a phone, so the phone and desk that were smeared with slimy goo had nothing to do with him, the evidence in the record from Alonso is that this was his designated workspace. His coworkers knew he used this workspace and they watched and laughed when he had to deal with the trap they laid for him. CP 78, 140, 145, 232.

Finally, whether the conduct Alonso describes and complained about was sufficiently severe and pervasive is a question of fact that a jury should determine. For example, in *Davis v. Fred’s Appliance, Inc.*, \_\_\_ Wn. App. \_\_\_, 287 P.3d 51, 58 (October 23, 2012), a sexual orientation discrimination case, Division III considered whether three comments referring to the plaintiff as “Big Gay Al” were sufficient to create a material issue

of fact for the jury to determine whether the harassment was sufficiently severe and pervasive to create a hostile work environment. Alonso's repeated complaints to HR and visit to his doctor because his PTSD symptoms were aggravated by stress at work demonstrate that the conditions of his employment were not merely affected in a "trivial" way. CP 236, 242-43.

Here, the harassing conduct included not only the referenced offensive comments and conduct, but the specific adverse employment actions outlined above. Alonso provided evidence to show that these adverse actions affected his pre-existing PTSD and made it increasingly difficult for him to do his job in this work environment. *Id.* Other witnesses have objectively confirmed that Martinez singled out Alonso for mistreatment. CP 140-145. This evidence far exceeds what was found sufficient to preclude summary judgment in *Davis*.

Finally, Qwest's claim that as a matter of law none of this harassment is imputable to Qwest is incorrect. Harassment can be imputed to the employer where a manager participates in the harassment. *Glasgow*, 103 Wn.2d at 407. Under current Washington law, despite Qwest's attempts to ignore it, the current jury instruction to be used in conjunction with a hostile

work environment claim defines a “manager” as “a person who has the authority and power to affect hours, wages, and working conditions.” WPI 330.24. A manager need not be the “alter ego” of the corporation as Qwest argues, and Qwest itself asserts that Martinez had the authority to affect Alonso’s hours, work assignments and work conditions.

Also, even if Martinez were not a manager, the harassment can still be imputed to Qwest if the harasser is the plaintiff’s supervisor or co-worker and the employer “authorized, knew, or should have known of the harassment and ... failed to take reasonably prompt and adequate corrective action.”

*Glasgow*, 103 Wn.2d at 407. Here, the seven calls by Martinez to complain to Qwest’s hotline about the harassment, and the problems that continued after those calls clearly show that Qwest, after notice, did not take prompt action to bring an end to the harassment.

**C. Retaliation By Martinez Was Swift and Overt Once He Learned of Alonso’s Complaints.**

*“Someone is throwing rocks at the big dog, that big dog is going to get you, and that big dog is me.”  
Ben Martinez. May 1, 2010 - CP 145.*

Following Alonso’s complaints to the Qwest helpline about what he reasonably believed to be illegal discrimination,

Martinez's gloves came off and he openly began making Alonso's work life miserable. His overt hostility was noted by coworkers. CP 139-45. Martinez scrutinized Alonso's work to a higher level than other employees. CP 139. As Wright explains, "It was evident in the way that Ben Martinez treated Joseph Alonso that he did not like him and that he was trying to make Joseph's working conditions so poor that Joseph would quit." CP 140.

Qwest references its own redacted notes as conclusive proof that Alonso's complaints about prejudice and being singled out were not complaints about discrimination; however, that is a fact that Alonso disputes and this element cannot be resolved on summary judgment.

Once Martinez, "the big dog," turned his sights on Alonso after learning of his complaint, the adverse actions followed. CP 145. Qwest disputes the facts supporting the adverse actions, claiming that Alonso's job was taken away and he suffered an adverse transfer because of a need to "rotate" Alonso's position among his various co-workers. CP 48. However, two years later Tuttle, the person who replaced Alonso remains in the position. CP 238. This alone creates an inference that the reason for the action was pretextual.

It is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional, and it may be quite persuasive. Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

*Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 184, 23 P.2d 440 (2001) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000)), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006).

As explained in Alonso's opening brief, shortly after his complaints were made known to Martinez, his previous enhanced scrutiny of Alonso went up another notch. Martinez singled out Alonso for additional work that others were not tasked with, calling Alonso at a worksite, telling him to drop what he was doing, and "do whatever it takes" to complete a special project at another location. CP 235. After Alonso did this and put in an 11 hour day at Martinez's direction, Martinez chastised him for not seeking advance approval for this overtime. *Id.* Despite his current protestation to the contrary, Martinez never required

other employees to get pre-authorization for overtime. CP 236.

Alonso alone was singled out for that requirement.

Qwest ignores Alonso's evidence that the nicer van was assigned to Alonso several months before he was selected for the AQCB position. CP 232. The van was only taken from Alonso after his complaints. *Id.* Similarly, Alonso's co-workers who were not assigned to the AQCB position had company cell phones, as did Alonso before he complained. CP 239, 248-55.

Washington courts are clear in their instructions that WLAD must be liberally construed to protect employees. In accord with the recent Supreme Court decision in *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006), Washington courts will continue to take a broad view of what constitutes a materially adverse action by an employer in a retaliation context, which the Supreme Court has defined as "any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (internal citation and quotation omitted). It is clear that the actions Alonso experienced after his complaints would dissuade any reasonable person from complaining about workplace discrimination by Martinez.

Finally with respect to Qwest's claim that Alonso had no evidence of causation, this is the rare case where just such smoking gun evidence exists. The day after learning of Alonso's complaint Martinez announced his intention to the world, someone had the temerity to complain about him and he was going to "get" that person, who happened to be Joseph Alonso. CP 145. He then set out to do just that. This is far more evidence of causation and motivation than typically exists in employment cases and is sufficient that a jury should ultimately decide this issue.

The evidence, viewed in the light most favorable to Alonso, shows that his already hostile and discriminatory work environment worsened shortly after his complaints to Qwest were relayed to Martinez. Within a few weeks he lost his favored AQCB position his office, vehicle and other equipment were taken away, and the already oppressive scrutiny became even more overt. CP 75. A finder of fact could reasonably conclude that Alonso's hostile work environment became *more* hostile after he made his complaints and constitutes a retaliatory adverse action.

### III. Conclusion

As in most discrimination cases, the employee and employer view the events through quite different lenses. However, in the context of summary judgment, the Court must view all of the evidence – and inferences from that evidence – through Alonso’s lens and in his favor. When this is done it is clear that there are material facts in dispute and this matter should be decided by a jury. Alonso asks this court to reverse the trial court’s order granting Qwest’s motion for summary judgment and remand his disability discrimination and retaliation claims for trial.

Respectfully submitted this <sup>20th</sup>21 day of January, 2013.

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CERTIFICATE OF SERVICE

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The undersigned certifies that on January 29, 2013, she placed  
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I certify under penalty of perjury under the laws of the State of  
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