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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 358623

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ENRIQUETA SANCHEZ,
Appellant, Plaintiff

v.

MCDUGALL & SONS, INC., a corporation,
Respondent, Defendant

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant/Plaintiff Enriqueta Sanchez (“Sanchez”) brought employment tort law claims for disability discrimination in violation of RCW 49.60, failure to accommodate and terminating Sanchez because of her disability; and wrongful discharge in violation of public policy and violation of RCW 51.48.025. Respondent/Defendant McDougall & Sons (“McDougall”) brought a motion for summary judgment which the trial court incorrectly granted.

II. REPLY TO MCDOUGALL’S ARGUMENTS

1. McDougall Claims of Non-Discriminatory “Lay Off” of Seasonal Worker Are Disputed Material Facts and Contradicts McDougall’s Own Documentation.

The courts have recognized that "(d)irect, smoking gun evidence of discriminatory animus is rare since there will seldom be eyewitness testimony as to the employer's mental processes. (internal citation omitted), *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179, 23 P.3d 440 (2001). Indeed, "(c)ircumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence. *Desert Palace v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 2154 (2003). Shifting or contradictory explanations for the employer's termination decision may also support a fact finding of improper

motive." *Johnson v. Express Rent & Own, Inc.*, 113 Wn.App. 858, 862, 56 P.3d 567 (Div. II, 2002).

There are significant disputed material facts regarding the termination meeting of January 14, 2013. (CP 361) McDougall's claims in Def. Facts "G" that Sanchez was "laid off" at the termination meeting. (CP 362)

Everything of substance about the meeting of January 14, 2013, and McDougall's claim that Sanchez was "laid off" verses involuntarily terminated is in dispute despite McDougall's claim that somehow those facts are not disputed. (CP 362)

None of the paperwork McDougall can prove existed at the time of January 14, 2013, supports McDougall's claim that Sanchez was not terminated. (CP 362) For example, McDougall claims they orally offered Sanchez a night job at the C&M facility that Sanchez would not accept, which Sanchez adamantly denies. (CP 362)

McDougall's claim of offer of employment is also directly contrary to McDougall's own written statement about the termination of employment, documented in letter to Sanchez dated January 15, 2017. (CP 362) McDougall never put the now claimed offer of employment in writing. (CP 362) Ms. Chavez likewise had no credible explanation as to

why McDougall did not put the now claimed offer of employment at C&M in writing. (CP 363)

Q Do you see any reference in Exhibit 9 to the claimed offer of employment at C&M that is being claimed occurred at the January 14th, 2013, termination meeting?

A There's no reference in the letter.

Q Okay. Do you have any explanation as to why McDougall & Sons would write a letter like Exhibit 9 and not include the alleged position at C&M?

A I don't know.

(CP 364)

McDougall claims that McDougall offered Sanchez a job orally at C&M, contrary to the written statement of the time (CP 362) and the only documentation for that alleged offer is in Ms. Loreth's personal notes that were not revealed to anyone until after the lawsuit was filed. (CP 364)

To believe Ms. Loreth, you would have to believe that Ms. Loreth was falsifying the "lay off" so that Sanchez could get unemployment benefits and the only documentation of that claim are Ms. Loreth's private notes that she cannot prove actually existed at the time of the termination because she claims only she had them and did not reveal them to anyone until after the lawsuit was filed. (CP 365) Pretty convenient claim by McDougall, and highly suspect. (CP 365)

Adding to that suspect position is all of the other documentation Ms. Loreth prepared at the time of the termination supports the fact that it was a termination. (CP 365)

All of McDougall's witnesses testified that Sanchez always performed satisfactorily and was never subject to any kind of work place discipline or progressive discipline. (CP 365-366) Despite that reality, Ms. Loreth's contemporaneous documentation at the time of termination checked the boxes for unsatisfactory work performance and would not rehire, both consistent with an involuntary termination. (CP 366)

In addition to the fact that the contemporaneous termination paperwork of McDougall contradicts McDougall's claims, the facts of who attended the meeting on termination meeting of January 14, 2013, are in dispute and material as to whether Sanchez was laid off and orally offered another job as McDougall claims or terminated, as Sanchez claims and the contemporaneous documentation of McDougall states. (CP 371)

McDougall claims that Sanchez's husband attended the termination meeting. (CP 371) Both Sanchez and her husband adamantly deny that her husband attended the meeting. (CP 371) At the time of January 14, 2013, meeting, Sanchez was working the night shift and her husband was working the day shift. (CP 371)

On January 14, 2013, Sanchez was sitting in her assigned position in the bathroom on the night shift when Anna Chavez appeared and summoned her to a meeting upstairs in Ms. Loreth's office. (CP 371) Sanchez had no advance notice of the meeting or its purpose. (CP 371) Because her husband was working the day shift, they were driving separate vehicles and he was at home while she was working the night shift. (CP 371- CP 372) Neither Sanchez or her husband had cell phones at the time. (CP 372)

Sanchez did as directed and met in person with Ms. Loreth. (CP 372) This was the termination meeting and her husband was most certainly not there according to Sanchez and contrary to McDougall's claims. (CP 372) McDougall whether intentionally or accidentally are mixing up the termination meeting of January 14, 2013, with another meeting that Sanchez and her husband had with Ms. Loreth sometime in the Fall of 2013, when Ms. Loreth and her husband scheduled a meeting with Ms. Loreth and requested that Sanchez be switched from the night shift to the day shift. (CP 372) Again, Ms. Loreth claims she took contemporaneous notes of the meeting but those notes contradict the termination paperwork as described above and also were not provided by Ms. Loreth to anyone until after the lawsuit was filed, making those notes highly suspect at best. (CP 373)

Regarding the January 14, 2013, meeting, Sanchez's husband, Mr. Barragan, clearly testified that he was not at that termination meeting. (CP 379) Mr. Barragan was working the day shift and his wife was working the night shift and she told him about the termination when she came home after the January 14th meeting. (CP 379)

McDougall's letter about the termination (CP 594) repeatedly emphasizes Sanchez's "seasonal" employment ended, as if that was a legitimate category of employment pursuant to McDougall's written policies. (CP 384) Contrary to the McDougall letter (CP 594) McDougall's policies do not in any way support this "seasonal" employment category and the reality is the exact opposite. Sanchez was employed over a year period and according to the policies of McDougall, Sanchez was entitled to paid leave; health insurance, life insurance and 401(k). (CP 384).

All of these above contradictions and inconsistent explanations support a finding of improper motive and are certainly material facts for the jury to determine if this was a non-discriminatory "lay off" as the employer argues, or an involuntary retaliatory and discriminatory termination at Sanchez argues.

2. McDougall Asserts No Liability Because Sanchez Ultimately Deemed Unable to Work and Thus Cannot Perform the Essential Functions as a Result of Her Injuries.

The term "essential function" is defined as "a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job." *Davis v. Microsoft Corp.* 149 Wn2d 533 and n.5, 70 P.3d 126 (2003). Reasonable accommodation does not require that the employer eliminate an essential function of the job in question. *Id.* at 534, quoting *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 193, 23 P.3d 440 (2001).

An employee's ability to perform the essential functions of a job should be measured after reasonable accommodation. (*Davis v. Microsoft Corp.* 149 Wn2d 533 and n.5, 70 P.3d 126 (2003).

McDougall argues that the "reasonable accommodation" was creating the bathroom position and requiring Plaintiff to work the night shift. Sanchez argues this bathroom position was retaliatory for filing the original Labor and Industries claim, discriminatory due to her medical condition following the physical work place injury, and then subsequently it was that very position that her expert testifies caused the additional injury including Posttraumatic Stress Disorder rendering Sanchez unable

to work at all. The bathroom position only benefits McDougall in lowering their insurance experience rating. Sanchez would have been far better off had she been allowed to recover from her physical injuries from the physical on the job injury involving the box without being subjected to the bathroom position. Sanchez's expert Dr. Silverio Arenas summarized the situation as follows:

The client [Ms. Sanchez] suffered a psychologically traumatizing experience when she was compelled by her employer to sit in a workplace bathroom during the night shift to monitor fellow employees as they washed their hands. She was relatedly exposed to unpleasant and noxious fecal and urine smells and related excretory sounds, in an enclosed small space, with negative comments from facilities users. The client had already been emotionally affected by an injury at work on 7-7-12, with development of severe anxiety, depressive, and chronic pain disorders, for which she was ultimately found to be permanently totally disabled and relatedly pensioned earlier this year. Work injury-related physical and mental health treatments received were bureaucratically ended when her case was concluded, but she followed-up with some of the latter on her own post-pension. The client, however, has not been able to pay for subsequent care in spite of reported continued and ongoing severe-level anxiety, depression, and also post traumatic stress and chronic pain symptoms.

...

Her noted Posttraumatic Stress Disorder was not significantly manifested until she was forced into what proved to be a very emotionally traumatizing situation, the latter which also worsened the former, already initial injury-caused emotional condition.

Given that the client is now over 4 years since her injury at work, and almost 3 years from her posttraumatic stress experience, and considering that she has had some, albeit minimal psychological treatment, her progress for curative resolution of her presenting problems is not favorable. Treatment is not indicated, it would only be palliative, not curative. She has been left with severe level and permanent emotional and chronic pain impairments. She is now fixed and stable, and at maximum level of clinical improvement.

(Emphasis added.) (CP 347)

An “accommodation” which causes the employee more harm cannot be reasonable. The law states that an employee's ability to perform the essential functions of a job should be measured after reasonable accommodation. (*Davis v. Microsoft Corp.* 149 Wn2d 533 and n.5, 70 P.3d 126 (2003). In this case, the alleged retaliatory and discriminatory accommodation caused more harm including the Post Traumatic Stress Disorder and then as a result of that harm, McDougall uses that harm to now argue they have no liability because she can no longer perform the essential functions as a result of the accommodation they demanded.

3. McDougall’s Defense Alleges that Dr. Arenas Is “Speculating” that the Bathroom Position Caused the Post Traumatic Stress Disorder and Further Emotional Injury.

McDougall offered the hearsay evidence of Washington State Department of Labor and Industries (“L&I”) in an attempt to prove that

Sanchez was only injured by the on the physical job injury of July 7, 2012, and not by the subsequent injuries suffered from the alleged discriminatory and retaliatory actions of McDougall taken after the injury of July 7, 2012, which is the actual subject matter of this case. Those alleged subsequent actions form the basis for the retaliatory and discriminatory claims, not any actions of the employer that led to the physical injury of July 7, 2012.

Contrary to McDougall's argument that Dr. Arenas is "speculating," McDougall is asking the court to weigh expert testimony. Conflicting opinion testimony offered by opposing experts cannot be resolved at summary judgment. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wash. App. 168, 174, 313 P.3d 408, 411 (2013).

Sanchez's expert clearly opines that Sanchez's current condition is a result of the "worsening of such and presentation of severe posttraumatic stress symptoms after her negative bathroom experience." (CP 428)

Dr. Arenas' opinion further states:

Her noted Posttraumatic Stress Disorder was not significantly manifested until she was forced into what proved to be a very emotionally traumatizing situation [bathroom position], the latter which worsened the former, already initial injury caused emotional conditions.

(CP 429)

4. Contrary to McDougall's Argument, Tort Claims Regarding Disability Discrimination, Failure to Reasonably Accommodate A Disability, Retaliation and Wrongful Discharge Are Not Barred Exclusive Remedy Provisions of the Industrial Insurance Act.

Tort claims are not barred by exclusive remedy provisions of Industrial Insurance Act where there are two distinct injuries rather than one, and the dominant feature of a tort claim is intangible emotional damage (which includes Posttraumatic Stress Disorder caused by the bathroom position) rather than personal injury. *Wheeler v. Catholic Archdiocese of Seattle* (1992) 65 Wash.App. 552, 829 P.2d 196, review granted in part, denied in part 120 Wash.2d 1011, 844 P.2d 436, reversed on other grounds 124 Wash.2d 634, 880 P.2d 29.

While it is true L&I did grant awards related to the actual physical injury caused from the box falling on Sanchez and subsequently also granted award for "ANXIETY DISORDER AND DEPRESSIVE DISORDER" related to the specific injury of July 7, 2012, the L&I award did not award anything for any action McDougall took after July 7, 2012, including the subsequently caused worsening of her emotional condition and her Posttraumatic Stress Disorder. That is what this case solely

addresses, the actions taken by McDougall after the on-the-job injury of July 7, 2012.

The disability discrimination in violation of RCW 49.60 failure to accommodate and terminating Sanchez disparately impacting Sanchez because of her disability and in particular violating RCW 49.60.180 which states:

It is an unfair practice for any employer:

...

(2) To discharge or bar ... or the presence of any sensory, mental, or physical disability ...

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of ... or the presence of any sensory, mental, or physical disability ...

RCW 49.60.180 (Emphasis added).

And cause of action number 2, Wrongful Discharge in Violation of Public Policy and Violation of RCW 51.48.025 which states:

(1) No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title. ...

...

(4) In any action brought under this section, the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and to order all appropriate relief

including rehiring or reinstatement of the employee with back pay.

RCW 51.48.025 (Emphasis added).

The retaliation cause of action is the cause of action for termination in violation of public policy, they are one in the same. The Washington Supreme Court has long recognized the existence of a public policy tort protecting employees who are fired for pursuing a workers' compensation claim. *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 75-56, 821 P.2d 18 (1991).

The emotional damages available for both of the discrimination and retaliation causes of actions are above and beyond the award for the more limited awards for "anxiety disorder and depressive disorder" that the L&I awarded, and include the Posttraumatic Stress Disorder caused by the bathroom position.

Under Washington's industrial insurance scheme, an employer is immune from civil lawsuits by its employees for non-intentional workplace injuries. *Hildahl v. Bringolf*, 101 Wn. App. 634, 642, 5 P.3d 38, 42 (2000); citing *Flanigan v. Department of Labor & Indus.*, 123 Wash.2d 418, 422, 869 P.2d 14 (1994); *Newby v. Gerry*, 38 Wash.App. 812, 815-16, 690 P.2d 603 (1984); RCW 51.04.010.7. But, the goal of the act is to provide sure and certain relief to injured workers and their families, not to award full tort damages. *Tallerday v. Delong*, 68 Wn.

App. 351, 356, 842 P.2d 1023, 1026 (1993) citing *Clark v. Pacificorp*, supra, 118 Wash.2d at 186 n. 9, 822 P.2d 162.

Therefore, the statutory bar against actions by workers against their employers for workplace injuries is subject to the narrow exception. *Crow v. The Boeing Co.* (2005) 129 Wash.App. 318, 118 P.3d 894, review denied 156 Wash.2d 1028, 133 P.3d 473. Tort claims are not barred by exclusive remedy provisions of Industrial Insurance Act where there are two distinct injuries rather than one, and the dominant feature of a tort claim is intangible emotional damage rather than personal injury. *Wheeler v. Catholic Archdiocese of Seattle* (1992) 65 Wash.App. 552, 829 P.2d 196, review granted in part, denied in part 120 Wash.2d 1011, 844 P.2d 436, reversed on other grounds 124 Wash.2d 634, 880 P.2d 29. Here, aggravated emotional damages and Posttraumatic Stress Disorder caused by McDougall's retaliation and discrimination are a critical aspect of Sanchez's claims.

Likewise, the exclusive remedy provisions of Industrial Insurance Act do not bar workers from recovering for separate physical injuries or emotional injuries, such as the Posttraumatic Stress Disorder, under Law Against Discrimination, and for separate emotional injuries, under tort law, flowing from handicap discrimination in response to Industrial Insurance Act-compensable injury. *Goodman v. Boeing Co.* (1995) 127

Wash.2d 401, 899 P.2d 1265, amended. There are no double recovery problems with simultaneous Industrial Insurance Act action and law against discrimination action; damages are recoverable for law against discrimination claim when employer refuses to reasonably accommodate handicap. *Hinman v. Yakima School Dist. No. 7* (1993) 69 Wash.App. 445, 850 P.2d 536, reconsideration denied, review denied 125 Wash.2d 1010, 889 P.2d 498.

Similarly, and additionally, handicap discrimination claims of employees, who alleged their employers failed to reasonably accommodate their disabilities which resulted from their work-related injuries are not barred by exclusive remedy provision of the Industrial Insurance Act where employees claim to have suffered two separate injuries, i.e., workplace physical injury and subsequent injury arising from employers' alleged handicap discrimination. *Reese v. Sears, Roebuck & Co.* (1987) 107 Wash.2d 563, 731 P.2d 497. That is the case here, Sanchez's emotional condition was aggravated by the bathroom position resulting in "permanent emotional and chronic impairment" and "Posttraumatic Stress Disorder." (CP 347)

Furthermore, the Industrial Insurance Act does not bar employee's recovery of damages for emotional distress as result of wrongful termination of employment in violation of public policy. *Cagle v. Burns*

and Roe, Inc. (1986) 106 Wash.2d 911, 726 P.2d 434. Said another way, a former employee's claims against their former employer for intentional and negligent infliction of emotional distress, constructive discharge and handicap discrimination, arising from emotional distress suffered by a former employee as a result of McDougall's decision to require Sanchez to work the night shift in a demeaning bathroom position, are not barred by the former employer's immunity under Industrial Insurance Act where the claims are not based on an injury or occupational disease as defined by the Act. *Snyder v. Medical Service Corp. of Eastern Wash.* (1999) 98 Wash.App. 315, 988 P.2d 1023, review granted 140 Wash.2d 1028, 10 P.3d 407, affirmed 145 Wash.2d 233, 35 P.3d 1158.

RCW 49.78.410 itself specifically states: "This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6), and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act."

As the court held in *Birkliid v. Boeing Co.*, 127 Wash.2d 853, 870, 904 P.2d 278 (1995), "an injury that is of a different nature, arises at a different time, and stems from different causes than a workplace injury is not barred by the [Act], even though it may result from actions by an

employer that injure an employee.” (citing *Reese v. Sears, Roebuck & Co.*, 107 Wash.2d 563, 573–74, 731 P.2d 497 (1987) (holding that a worker who was injured on the job and was subsequently denied accommodations for his disabilities could bring a claim for discrimination notwithstanding the exclusivity provisions of the Act)). *Meyer ex rel. Meyer v. Burger King Corp.*, 101 Wn. App. 270, 276, 2 P.3d 1015, 1019 (2000), aff’d sub nom. *Meyer v. Burger King Corp.*, 144 Wn.2d 160, 26 P.3d 925 (2001). This was not intended to be a rigid mechanism, but was an explanation describing the same issues in the case at hand.

Sanchez’s WLAD claims relate to the general and special damages resulting from McDougall’s retaliation and discrimination of Sanchez for the injury of aggravated emotional harm and Posttraumatic Stress Disorder, not the original workplace physical injury itself, and the above laws directly allow them.

In sum, under the L&I system, employers received immunity for suit for negligence but that immunity never applied to deliberately caused actions which include discrimination claims.

Here, emotional damages from McDougall’s retaliation and discrimination are a critical aspect of her claims.

5. Contrary to McDougall’s Arguments, Statements Made to L&I Are Not Dispositive In Discrimination Retaliation Causes of Action.

With regard to both discrimination claims, McDougall essentially contends Sanchez should be held judicially estopped from asserting them because she allegedly made statements to state agencies which McDougall claims to be inconsistent with her claims in this lawsuit.

The Washington Supreme Court has described the doctrine of judicial estoppel:

The doctrine of “ [j]udicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” ” *Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams*, 134 Wash.App. at 98, 138 P.3d 1103). The determination of whether to apply judicial estoppel focuses on three core factors:

(1) whether “a party's later position” is “ ‘clearly inconsistent’ with its earlier position”; (2) whether “judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an

unfair detriment on the opposing party if not estopped.”

Id. at 538-39, 160 P.3d 13 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir.1982)). The purpose of the doctrine is “ ‘to preserve respect for judicial proceedings’ ” and “ ‘to avoid inconsistency, duplicity, and ... waste of time.’ ” *Id.* at 538 (alteration in original) (internal quotation marks omitted) (quoting *Cunningham*, 126 Wash.App. at 225, 108 P.3d 147.

Miller v. Campbell, 164 Wn.2d 529, 539-40, 192 P.3d 352 (2008).

Judicial estoppel is not applicable in the context of applications or certifications of disability or inability to work. That is because the former assertions do not occur in a court of law.

The Ninth Circuit has recognized the precariousness of applying estoppel doctrine to disability discrimination claims when applications or certifications for disability benefits have been made. This is due to the differing definitions involved with disability law and the qualification for disability plans and time loss programs. *Johnson v. Oregon*, 141 F.3d 1361, 1367 (9th Cir. 1998). An employee may qualify for disability benefits or time loss and still be a qualified employee “because she can work with reasonable accommodations, **if her employer would provide them.**” 141 F.3d at 1367 (emphasis added). Also, public policy

considerations dictate that a per se rule should not be applied because it may force individuals to forego their right to pursue a discrimination claim due to their immediate need for income in order to live. 141 F.3d at 1368.

The United States District Court at Tacoma recognized and followed *Johnson v. Oregon* decision in *Casteel v. Charter Commc'ns Inc.*, No. C13-5520 RJB, 2014 WL 5421258, at *6 (W.D. Wash. Oct. 23, 2014). The *Casteel* Court rejected the employer's summary judgment motion noting:

At the summary judgment stage, the requisite degree of proof necessary to establish a prima facie case under the ADA is minimal and does not even need to rise to the level of a preponderance of the evidence.

Id.

Sanchez should not be faulted for applying for and receiving time loss benefits.

6. McDougall Incorrectly Argues Sanchez Not Entitled to Lost Wages If Sanchez Prevails In Her Employment Tort Causes of Action.

McDougall argues Sanchez cannot recover lost wages and cites to *Weyerhaeuser Co v. Farr*, 70 Wn.App. 759, 765, 855 P.2d 711 (1993).

Unlike Sanchez, the injured worker in *Weyerhaeuser* voluntarily retired. *Weyerhaeuser*, 70 Wn.App. 760.

As described above in much greater detail, Sanchez did not voluntarily retire but was terminated. The fact that the resulting emotional injuries and Posttraumatic Stress Disorder from the bathroom position have now left her permanently disabled and unable to work was not of her choosing, unlike an employee who simply decided to retire.

7. The Trial Court Should Have Denied McDougall's Motion For Summary Judgment Because It Failed to Carry Its Burden Of Proving That There Are No Genuine Issues Of Material Fact.

The focus of this appeal brief has been to address the trial Court's opinion letter (CP 690 – CP 693), but that does not mean that there were not numerous other material facts which are supported by the record before the trial court which we recognize the appeal court reviews de novo.

In moving for summary judgment, McDougall undertook a very burdensome task. McDougall's burden is simply stated. It must demonstrate that there is **no** genuine dispute as to **any** material fact-- this is a well-grounded principle. *Morris v. McNichol*, 833 Wn.2d 491, 494, 519 P.2d 7 (1974).

This burden is further increased by the general principle that states the facts asserted by the non-moving party and supported by affidavits or any other evidentiary material must be taken as true. *State ex rel Bond v. State*, 62 W.2d 487, 491, 383 P. 2d 288 (1963).

McDougall's burden becomes even more onerous by the general principle that summary judgment is normally inappropriate in an employment discrimination case. *See Johnson v. DSHS*, 80 Wn. App. 212, 229, 907 P. 2d 1223 (1996).

Because of the nature of hidden discriminatory motives, summary judgment should rarely be granted in employment discrimination cases. *Johnson*, 80 Wn. App. at 229. Because viewing the facts in a light most favorable to Sanchez shows that genuine issues of material fact exist.

For example, was the bathroom position a hidden discriminatory and retaliatory motive as a result of Sanchez filing an L&I claim. As stated above, the only reason the bathroom position was created was to benefit the employer to reduce their L&I experience rating.

Was Sanchez terminated as she claims or a stated “lay off” as McDougall claims, but with hidden discriminatory motives? All of the contemporaneous documentation of McDougall supports termination, yet McDougall insists it was a “lay off.” These inconsistent positions of

McDougall, viewed in the light most favorable to Sanchez, support the discriminatory and retaliatory hidden motive.

Did McDougall have notice that the bathroom position caused Sanchez anxiety as the contemporaneous documentation demonstrates, or not as McDougall claims? Sanchez was given a choice, either accept the bathroom position or be terminated. (CP 344 - CP 345)

Was the bathroom position created as a hidden discriminatory and retaliatory motive to create a situation by which McDougall could create a work environment such as it was designed to encourage Sanchez to quit?

Sanchez was in the bathroom position from August 29, 2012 to January 14, 2013 (CP 594 – CP 596) and when she did not quit as was McDougall's hidden motive, they terminated her, although claiming it was a not a termination but a lay off.

Why did McDougall not accommodate Sanchez's request to at least place her on the bathroom position on the day shift as she requested and whether that denial of a very reasonable request was a discriminatory and retaliatory hidden motive.

III. ATTORNEYS FEES AND EXPENSES

Pursuant to RAP 18.1, Sanchez will request attorneys' fees and expenses including those in this appeal.

Washington has two important statutes providing for recovery of attorney's fees and costs to employees, Washington's wage statute, RCW 49.48.030, and the Washington Law Against Discrimination, RCW 49.60.030 ("WLAD").

Construing RCW 49.60.030, Washington courts consistently have recognized Washington's "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). "One of the primary purposes of remedial statutes like RCW 49.48.030 is to allow employees to pursue claims even though the amount of recovery may be small. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 50, 42 P.3d 1265 (2002).

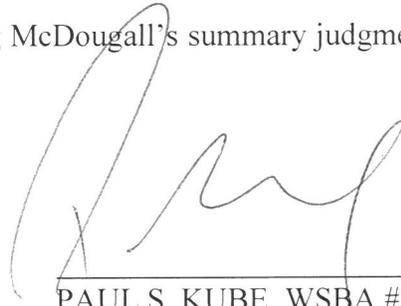
The courts have applied a similar construction to the WLAD noting the attorney's fee provision is "to be construed liberally in order to encourage enforcement of the Law Against Discrimination." *Blair v. Wash. State University*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987).

As the Washington Supreme Court has noted, in bringing an employment discrimination action, a prevailing party acts as a "private attorney general: by enforcing a public policy of substantial importance." *Allison v. Seattle Housing Authority*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991).

We note that Sanchez is not entitled to attorneys' fees and costs as prevailing party at this stage. Sanchez will be entitled to an award of all attorneys' fees and costs if she is ultimately the prevailing party, including the fees and costs to pursue this appeal.

IV. CONCLUSION

For the reasons discussed above, this Court should reverse the Superior Court decision granting McDougall's summary judgment motion and remand it for trial.



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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ENRIQUETA SANCHEZ)	CHELAN COUNTY
)	NO. 14-2-00853-2
Appellant,)	
)	COURT OF
vs.)	APPEALS NO. 358623
)	
MCDUGALL & SONS, INC.,)	
)	CERTIFICATE OF
Respondent.)	SERVICE
_____)	

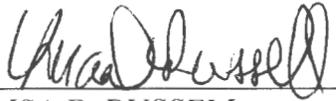
I hereby certify that on this 8th day of June, 2018, I caused to be served the original and a true and correct copy of *Reply Brief of Appellant* to:

Renee S. Townsley, Clerk/Administrator
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99210

and a true and correct copy to Respondent's counsel of record at the following address:

Matthew R. Jedreski
Davis Wright Tremaine LLP
1201 3rd Ave., Suite 2200
Seattle, WA 98101-3045

by depositing same in envelopes and addressing the enveloped to the stated address, postage prepaid and depositing the same in the United States mail at East Wenatchee, Washington.


LISA D. RUSSELL