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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

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. ASSIGNMENTS OF ERROR

1. Determining as a matter of law that Sanchez’s anxiety and depressive disorder were proximately caused by her workplace on-the-job physical injury and not by employer McDougall’s subsequent actions which Sanchez allege were discriminatory, retaliatory and a failure to accommodate her disability.
2. Determining as a matter of law that there was only one injury caused by the physical workplace injury of July 7, 2012, even though the factual basis for the causes of action brought in this case all as a result of the discriminatory and retaliatory actions McDougall subsequently took after the job injury of July 7, 2012.
3. Determining as a matter of law Sanchez’s employment tort claims are barred by exclusive remedy provision of Industrial Insurance Act.

4. Determining as a matter of law based on the Labor and Industries Notice of Decision that Sanchez was only injured by the physical on-the-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.
5. Determining as a matter of law that Sanchez was only injured by the on the physical job injury of July 7, 2012, directly contrary to Sanchez's expert's opinion thus inappropriately weighing the evidence rather than viewing Sanchez's expert's opinion in the light most favorable to Sanchez as required for purposes of summary judgment.
6. Determining as a matter of law that statements Sanchez made to L&I by Sanchez are dispositive in discrimination and retaliation causes of action.
7. Determining as a matter of law that the termination was not retaliatory for Sanchez filing a L&I claim.
8. Determining as a matter of law that the termination was not based on Sanchez's disability.

III. STATEMENT OF THE CASE

Sanchez was employed by McDougall. (CP 3) Sanchez was injured a first time on the job, on or about July 7, 2012. (CP 3) Sanchez's health care provider required limitations for Sanchez's work duties. (CP 3)

Sanchez was offered a "light duty" position by McDougall as a "Washroom Attendant." (CP 3) As a Washroom Attendant, Sanchez was required to sit in a chair in the women's bathroom with the stated purpose to insure that employees washed their hands after they used the toilets. (CP 3) The women's bathroom, in which Sanchez was stationed, is a small confined space without windows. (CP 3)

Sanchez suffered a second injury as a result of being placed in the women's bathroom emotionally, mentally, and physically due to her retaliatory assignment in the women's bathroom. (CP 3)

Human Resource Director for McDougall Judith Loreth created a "Washroom Attendant" position as a "light duty" position because McDougall had higher than average experience rating for industrial insurance and created the position in an attempt to lower those rates. (CP 343)

Ms. Sanchez repeatedly asked if they were going to force her to work in the bathroom, could they at least schedule her for the day shift so

she could work at the same time that her husband worked (who also works for McDougall) but that request was repeatedly denied. (CP 345)

Despite the appearance McDougall tries to put forward, the “Washroom Attendant” is not a position for which any governmental body or medical provider has specifically gone to the location of McDougall to actually observe the location McDougall mandates that injured employees work. (CP 346)

Further, McDougall utilizes the deceptive name of “Washroom Attendant” in the paperwork it submits to medical providers who would have no idea from that paperwork that McDougall is actually having injured workers sit in the bathroom and observe people going into the stalls, hearing and smelling all of the activities of others using the toilets. (CP 347) 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.

(Emphasis added.) (CP 347)

Likewise, McDougall did not rely on the policies of other employers or any “standard” in the industry regarding the bathroom job.

(CP 352)

McDougall temporarily allowed Sanchez to work light duty without mandating that she take the bathroom position and even initially had her work days in the bathroom, but then later mandated that she work only nights shifts and only in the bathroom position. (CP 355) As raised above, Ms. Sanchez was denied even moving to the day shift for the bathroom job. (CP 357) Ms. Sanchez’s husband testified about other potential light duty jobs McDougall has and could have assigned his wife to perform. (CP 359)

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).

Further, McDougall has cited to no hardship to place Sanchez at least on day shift. (CP 392)

Q So there's nothing prohibiting McDougall & Sons from assigning the bathroom position at days -- at a day shift for Ms. Sanchez?

A Again, our policy was to keep them on the shift that they're injured.

Q Other than the policy is there any other reason why McDougall & Sons could not have transferred Ms. Sanchez to the day shift?

A Generally speaking, no.

(CP 393- CP 394) (Emphasis added.)

McDougall was given notice that the depression and anxiety caused by bathroom job. (CP 397) McDougall's witness Ms. Loreth's testimony is inconsistent with contemporaneous documented evidence. (CP 397)

Q Did you -- have you recalled any of the people that were placed in that position prior to Ms. Sanchez ever having a pre-existing condition of depression?

A I was not aware Ms. Sanchez had a preexisting condition of depression.

Q Were you ever aware that Ms. Sanchez had a diagnosis of depression while she was still working at McDougall?

A It was part of, I believe, an IME discussion that I read.

Q Okay. Was Ms. Sanchez still employed then?

A Yes.

Q Did you take any actions to remove Ms. Sanchez from the Washroom Attendant position as a result of learning of her diagnosis of depression?

MR. JEDRESKI: Objection. Misstates testimony. Foundation.

MR. KUBE: Okay.

A I have never read, nor to this day have I understood, that the bathroom contributed to any of her depression.

(CP 397) (Emphasis added.)

Like much of Ms. Loreth's testimony, her testimony is inconsistent with the contemporaneous documentation regarding Ms. Sanchez because Ms. Loreth clearly knew about the anxiety as evidenced in the email message sent to her on September 12, 2012, by Ms. Chavez which states:

She has been bathroom attendant she complained **that she gets anxiety** and then she asked since her husband works days for us she want to work days or us to transfer him to nights.

(CP 398) (Emphasis added.)

Sanchez was terminated from her employment on or about January 14, 2013.

IV. ARGUMENT

1. This Discrimination And Retaliation Case Focuses Completely On The Actions Of McDougall Following July 7, 2012 On The Job Injury, And None Of Those Actions By McDougall Were Even Considered Or Allowed In The L&I Claim.

Tort claims are not barred by exclusive remedy provision 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.

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 “ANXEITY 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. 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.

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 provision 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, emotional damages from 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 worker from recovering for separate physical injuries, 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.

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 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 *Birklid 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, 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.

2. L&I Notice of Decision is Hearsay, Directly Contradicts Sanchez's Expert's Testimony and Cannot Correctly Be Relied Upon By the Trial Court For Basis of Decision As A Matter of Law.

The Labor and Industries Notice of Decision is hearsay and cannot correctly be the basis as a decision as a matter of law:

- (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
ER 801(Emphasis added).

McDougall offered the hearsay evidence of 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 injury of July 7, 2012.

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)

3. 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.

4. 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 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.

V. 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).

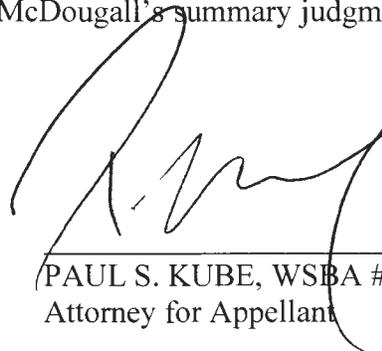
The courts have applied a similar construction to the WLAD noting the attorney's fee provision is "to be construed liberally in order to encourage enforcement of the Law Against Discrimination." *Blair v. Wash. State University*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987).

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.

VI. 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 10th day of April, 2018, I caused to be served
the original and a true and correct copy of *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 envelopes to the stated address, postage prepaid and depositing the same in the United States mail at East Wenatchee, Washington.


LISA D. RUSSELL