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NO. 71925-4

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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JONATHAN PEARSON, a single individual,

Appellant,

v.

STATE OF WASHINGTON, a political corporation; and WASHINGTON  
STATE DEPARTMENT OF TRANSPORTATION, an agency of the  
STATE OF WASHINGTON,

Respondents.

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**RESPONDENT'S BRIEF**

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ROBERT W. FERGUSON  
Attorney General

KENT LIU  
Assistant Attorney General  
WSBA #21599  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
206-464-7352  
OID #91019

STATE OF WASHINGTON  
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## **I. INTRODUCTION**

Appellant Jonathan Pearson left his job as a Master with the Washington State Ferries (WSF) in March 2000, and never returned. He took unauthorized leave from WSF for several years citing a sleep condition which, to this day, has never been verified. WSF eventually terminated Pearson's employment in May 2009, after holding pre-disciplinary conferences in 2003, 2004, and 2009. Pearson filed this lawsuit against WSF alleging denial of due process, wrongful termination, discrimination, and wrongful denial of military leave and retirement benefits. The trial court granted summary judgment in favor of WSF because Pearson failed to supply sufficient evidence to support any of his claims.

## **II. ISSUES PRESENTED**

1. Whether the trial court correctly dismissed Pearson's due process claim?
2. Whether Pearson failed to establish a prima facie case for wrongful termination?
3. Whether Pearson failed to establish a prima facie case for employment discrimination?

4. Whether Pearson failed to establish a prima facie case that his retirement and military leave benefits were incorrectly calculated?

5. Whether Pearson's retirement and military leave claims were properly dismissed based on his failure to exhaust administrative remedies?

### **III. STATEMENT OF THE CASE**

#### **A. Pearson's Employment and Termination**

Pearson was hired by WSF in 1984 and worked as a Master. CP at 213, 119<sup>1</sup>. The events that led to his termination began in March 2000, when he took unapproved leave citing "medical reasons." CP at 99. Pearson said he initially took time off from work because of a "foot problem." CP at 191:6-20. However, he acknowledged that he did not submit a request for extended leave. CP at 191:23-25. Pearson continued his leave of absence in April 2000, after allegedly discovering he had problems sleeping. CP at 192:8-14. Pearson admitted that he did not contact WSF about extending his leave. CP at 192:16-21.

WSF repeatedly asked Pearson to provide medical verification that he was unable to work due to a medical condition but he failed to do so. CP at 119-20. Yet, he remained on leave throughout 2001 and 2002.

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<sup>1</sup> WSF's April 14, 2009, letter to Pearson referenced his position as a "Master." However, Pearson has asserted that his position was a "Mate."

CP at 101. On October 22, 2001, WSF Human Resources Manager Lea Schmidt notified Pearson by mail that his leave was unapproved and requested that he submit medical verification of his inability to work from May to October 2001. CP at 99. Ms. Schmidt also provided Pearson with several options:

- First, he could return to his position which would require that he submit a verifying statement from a physician confirming his inability to work due to medical reasons from May 2001, to present (October 2001);
- Second, if he wished to be considered for reasonable accommodation, he was asked to complete a Request for Workplace Accommodation form and return it to WSF;
- Third, he was informed that he may be eligible for disability retirement, and he was directed to contact the Department of Retirement Systems for more information.

CP at 99.

On December 14, 2001, Pearson submitted a physician's note that stated he could perform the physical activities of his job. CP at 101. However, Pearson failed to submit any documentation that explained his inability to work from May through October of 2001, due to medical reasons. CP at 101.

On March 8, 2002, Pearson submitted a Request for Extended Leave form informing WSF that during May 2001, to February 2002, he

had been seen in a medical office and to “see attached.” CP at 123. Strangely, no medical note or verification was attached. CP at 123.

On January 10, 2003, WSF sent a letter to Pearson notifying him that he had been on unapproved leave from May 2001, to present. CP at 124-25. The letter informed Pearson that his absence from work for the past one and a half years may constitute job abandonment. CP at 124. The letter notified Pearson that his unapproved absence violated WSF’s code of conduct and the Collective Bargaining Agreement (CBA). CP at 124-25.

On November 12, 2003, WSF sent another letter to Pearson requesting a doctor’s note for his absences. CP at 104. In this letter, WSF indicated that it was still waiting for a Verification of Health Care Provider to be filled out by Pearson’s doctor for his unapproved absences. CP at 104. The letter reminded Pearson of Ms. Schmidt’s letter of October 22, 2001, and of the March 17, 2003, pre-disciplinary meeting requesting documentation from his doctor. CP at 104. WSF eventually received a doctor’s note on December 3, 2003, but it failed to contain any information explaining his inability to work due to a medical condition. CP at 119-20.

On December 15, 2003, Pearson submitted a letter to WSF from Christopher Shuhart, MD, stating that Pearson had tried to make multiple

appointments with the doctor between June 2001, and November 2001. CP at 120. However, no other medical information was provided in Dr. Shuhart's letter. CP at 120. On that same day, Pearson submitted to WSF a Certificate of Health Care Provider from his dentist Mitchell Marder, DDS. CP at 128. Dr. Marder stated that Pearson had been under his care since May 29, 2002, and he would continue to have recurring appointments every three to four months. CP at 128. Neither letter addressed a medical reason for Pearson's prior unapproved absences.

On June 11, 2004, WSF sent another letter to Pearson notifying him that he has not provided WSF with the requested documentation for his unapproved leave. CP at 113-14.

WSF held several pre-disciplinary conferences with Pearson to address his unapproved leave. The first meeting was held on March 17, 2003. CP at 135. Pearson attended the meeting with a union representative. RP at 20-21. A second pre-disciplinary meeting was held on June 24, 2004. CP at 113-14, 116. Pearson acknowledged in his deposition that he attended two pre-disciplinary conferences. CP at 193-94.

During the June 24, 2004, conference, Pearson claimed he had dental issues that caused his absence from December 2001, to March 2002. CP at 116. Following this conference, Pearson was asked again to

submit medical verification for his absences. CP at 116. He again failed to follow through. CP at 119. On July 30, 2004, WSF asked Pearson to provide verification from his dentist of the alleged dental condition that affected his ability to work. CP at 117. On August 18, 2004, instead of addressing WSF's questions, Pearson submitted a note from his dentist simply indicating that he was fit for duty. CP at 120.

From 2004 to 2008, Pearson was on inactive status. CP at 135-36. On December 4, 2008, WSF sent a letter to Pearson advising him that WSF intended to separate him from employment. CP at 135-36. The letter noted that Pearson was provided several opportunities to submit verification from his medical providers to show that his lengthy absence was due to a medical condition. CP at 135. The letter noted that Pearson submitted a variety of documents, however, none of the documents verified a medical reason for his unapproved absence. CP at 135. The letter further stated that in the absence of medical verification, the allegations of unauthorized leave in violation of WSF's code of conduct are supported and a separation date of December 18, 2008, was set. CP at 135-36. In addition, the letter noted that Pearson's license expired on August 28, 2006, therefore, he was ineligible to work. CP at 135.

On April 14, 2009, WSF sent Pearson a letter outlining his violations of the WSF's Code of Conduct and the CBA; specifically, his

failure to follow work regulations, his absence without approved leave, and his failure to provide documentation regarding his unapproved leave. CP at 119-21. The letter noted that WSF still had not heard from Pearson nor received notification from his physician that he was fit for duty despite a previously scheduled separation date of December 18, 2008. CP at 120. This letter informed Pearson that a pre-disciplinary hearing was scheduled for April 30, 2009, and he was given the option to attend in person or submit a written response. CP at 121. On April 30, 2009, Pearson responded in writing by submitting a four page letter to WSF. CP at 138-41. Pearson was terminated from WSF employment on May 19, 2009. CP at 143-44.

On June 22, 2009, the International Organization of Masters, Mates and Pilots (union) filed a grievance on Pearson's behalf under the CBA. CP at 166; 92-97. In a letter dated August 7, 2009, Paul Ganalon, the Labor Relations Manager for WSF informed Pearson that his grievance was denied based on his failure to provide medical verification that he was unable to work due to a medical reason. CP at 143.

Importantly, on August 18, 2009, the union informed Pearson that they decided, by a majority decision, not to further support Pearson's grievance because he was unable to produce documentation to the union to support his defense.

The MM&P Delegate Committee requested that Brother Pearson explain these absences and provide documentation to the committee supporting his explanation. No additional documents supporting his case were presented to the delegates. This inability to produce adequate supporting documentation for his defense was a key factor in this decision by the Delegates. In our opinion, we, the MM&P Delegate Committee have voted "NO", meaning we do not support moving Grievance #MMP 14-09 forward to arbitration.

CP at 146-47.

#### **B. The Public Employment Relations Commission Proceeding**

On February 12, 2010, Pearson filed an unfair labor practice complaint with the Public Employment Relations Commission (PERC). CP at 163. A hearing was held on November 8, 2011. CP at 164. At the hearing, Pearson claimed that WSF discriminated against him and wrongfully terminated him from employment because he suffered from "sleep related" issues. CP at 171-79.

The PERC Examiner found that WSF did not interfere with Pearson's rights and that Pearson failed to show his termination was connected to any union activity. CP at 163.

The Examiner made the following findings of fact:

- Pearson has not worked actively since May 2001;
- In October of 2001, the employer requested documentation regarding his medical inability to work;
- Pearson did not provide all of the documentation requested by the employer;
- In 2008, the employer attempted to remove Pearson and other inactive employees from its employment rolls. When

Pearson objected, the employer initiated disciplinary proceedings, which concluded with Pearson's termination;

CP at 168.

The PERC Examiner concluded that WSF did not engage in unfair labor practices when it terminated Pearson's employment. CP at 169.

### **C. Pearson's Appeal to the Marine Employees Commission**

Pearson appealed the PERC decision to the Marine Employees Commission (MEC)<sup>2</sup>. Pearson again argued that WSF violated his rights during the termination process. The MEC upheld the PERC Examiner's decision, finding that substantial evidence supported the Examiner's findings and conclusions. CP at 181.

### **D. Pearson's Lawsuit**

On July 9, 2012, Pearson filed this lawsuit alleging wrongful termination, denial of reasonable accommodation, denial of military leave, and wrongful denial of retirement benefits. CP at 1-7. WSF filed a motion for summary judgment on March 3, 2014, alleging that Pearson failed to establish a *prima facie* case for each of his claims. CP at 60-221. In response to WSF's motion, Pearson submitted a response brief, but did not provide evidence supporting any of his claims. CP 10-36.

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<sup>2</sup> In its opinion, the MEC noted that neither the MEC nor the PERC resolve "violation of the contract" allegations in the unfair labor practice proceedings. CP at 183.

A hearing on WSF's motion for summary judgment was held on April 4, 2014. CP at 43-44. Despite the deadline for submitting materials to the trial court having passed, the court nevertheless afforded Pearson an opportunity at the hearing to supply additional evidence to support his claims. RP at 26-28. Pearson submitted various documents to the trial court during the hearing. CP at 43. The court carefully considered all of the evidence submitted by Pearson and found that none of the evidence was material to his claims. RP at 33-41. The trial court granted WSF's motion for summary judgment holding that Pearson failed to supply sufficient facts to establish any of his legal claims. CP at 43-44. Pearson appeals the trial court's dismissal of his claims.

#### **IV. ARGUMENT**

##### **A. Summary Judgment Standard**

The trial court's order granting summary judgment is reviewed *de novo*, with the appellate court engaging in the same inquiry as the trial court. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003); *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). Summary judgment is appropriate when after reviewing the pleadings, affidavits, and depositions, and construing the facts in the light most favorable to the non-moving party, the trial court

finds that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babcock v. Mason Cnty. Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001); *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). A material fact is a fact that will affect the outcome of the litigation. *Id.* at 703. To prevail in a summary judgment motion, a defendant may either show that there are no material facts or that the plaintiff cannot meet the burden of proof to establish the required elements of the claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993), *review denied*, 122 Wn.2d 1010, 863 P.2d 72 (1993). The plaintiff may not rest on mere allegations or speculation in its pleadings, but must respond by setting forth specific facts showing that there is a genuine issue for trial. *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982).

Once WSF established the absence of evidence to support all of the elements of all of Pearson's claims, the burden shifted to Pearson to come forward with such evidence. *American Dog Owners Ass'n v. City of Yakima*, 113 Wn.2d 213, 218, 777 P.2d 1046 (1989). Here, Pearson produced no evidence to support his claims but came forward only with conclusory statements or arguments. Such statements or arguments are not sufficient to overcome summary judgment. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d

396 (1997); *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 260, 11 P.3d 883 (2000) (citing *PUD of Lewis County v. WPPSS*, 104 Wn.2d 353, 361, 705 P.2d 1195 (1985), *corrected*, 713 P.2d 1109 (1986)).

**B. Pearson Failed to Produce Any Evidence Showing That He Was Denied Due Process**

Pearson alleged that he was denied due process because he was not allowed the opportunity to appear and present evidence at his pre-disciplinary hearing. CP at 5. Pearson's claim is without merit since the undisputed evidence showed that he was provided with ample notice and multiple opportunities to be heard prior to his termination. CP at 119-21.

Under *Loudermill*, a tenured public employee is entitled to notice of charges against him and an opportunity to respond at a pre-termination hearing. *Danielson v. City of Seattle*, 108 Wn.2d 788, 798, 742 P.2d 717 (1987) (*analyzing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985)). The *Loudermill* Court held that although due process requires that an employee receive some kind of hearing before termination, the hearing need not be a full adversarial hearing. *Loudermill*, 470 U.S. at 545-46.

A pre-termination hearing appropriately consists of three elements: (1) oral or written notice to the employee of the charges against him, (2) an explanation of the employer's evidence, and (3) an opportunity to

respond. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995). The procedure containing these elements is not required to be elaborate. The procedure does not need to approximate a trial-like proceeding; in fact, the procedure may be very limited and still pass constitutional muster. A pre-deprivation hearing serves only as an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges are true and support the proposed action. *Fuller v. Emp't Sec. Dep't*, 52 Wn. App. 603, 607-08, 762 P.2d 367 (1988). The process need not be perfect—due process simply mandates an opportunity to refute the charge. *Codd v. Velger*, 429 U.S. 624, 627, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977); *Sherman*, 128 Wn.2d at 184, 206-07.

Prior to Pearson's termination, he attended two pre-disciplinary conferences. The first conference was held on March 17, 2003. CP at 104, 135. A second conference was held on June 24, 2004. CP at 113-14, 116. A third pre-disciplinary conference was scheduled on April 30, 2009, and Pearson was given the option of submitting a written response in lieu of attending the meeting. CP at 120-21. Pearson elected to respond in writing and he submitted a four page letter addressing the allegations against him. CP at 138-41. Pearson has subsequently complained that he

was not also allowed to testify in person. CP at 10-13. In his deposition, Pearson acknowledged attending “two or three” pre-disciplinary conferences. CP at 193-94. Prior to each conference, WSF provided written notice to Pearson outlining his violations of WSF’s Code of Conduct and the CBA. CP at 101, 113, 119.

The undisputed facts demonstrate that WSF provided Pearson with ample notification and multiple opportunities to be heard. The trial court correctly dismissed Pearson’s due process claims.

**C. Pearson Failed to Establish a Prima Facie Case of Wrongful Termination**

**1. Common law wrongful discharge claims do not exist in the context of public civil service employment, which is governed solely by statute.**

Pearson contends that he was wrongfully discharged. However, no such cause of action exists in the context of civil service employment and even if it did, Pearson failed to establish the elements for wrongful discharge.

The wrongful discharge cause of action was created by *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). In *Thompson*, the Supreme Court modified the common law employment-at-will doctrine by creating two exceptions. The Court allowed wrongful

termination actions if a termination contravened either an employer's employee manual or a mandate of public policy. *Id.* at 233.

In Washington, our courts have long held that public employment is strictly a creature of statutes and that the terms and conditions of public employment are governed only by statutory and constitutional provisions. *Yantsin v. City of Aberdeen*, 54 Wn.2d 787, 345 P.2d 178 (1959); *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979). Public employees have no right to their job absent statutory or constitutional protections such as civil service statutes, employment discrimination statutes, whistleblower statutes, collective bargaining statutes, etc. *Id.*

The question of whether the common law causes of action created by *Thompson* apply to statutory government employment was resolved in *McGuire v. State*, 58 Wn. App. 195, 791 P.2d 929 (1990). In that case, a Gambling Commission employee claimed that he was wrongfully terminated under *Thompson* because his employer had failed to follow provisions of its employee manual requiring cause for termination. The court rejected the argument that *Thompson* applied because no statutes gave the investigators for the Gambling Commission any right to challenge the cause for their termination (they were statutorily exempt from civil service). *McGuire*, 58 Wn. App. at 198-99.

Our Supreme Court has held that the tort of wrongful discharge in violation of public policy is a narrow exception to Washington's *employment-at-will doctrine*. *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001). Pearson was not an *at-will* employee. Rather, he was a public employee whose terms and conditions of employment are governed by civil service statutes. Pearson cannot sue for termination in violation of public policy unless there is a statute giving public employees a right to file such actions. Pearson cannot pursue a common law cause of action against his public employer when his employment relationship was exclusively governed by statute and the CBA, and not common law. *Yantsin*, 54 Wn.2d 787; *McGuire*, 58 Wn. App. 195.

**2. Plaintiff failed to establish a prima facie case of wrongful termination.**

Even if a wrongful discharge cause of action were available to Pearson, his claim did not survive summary judgment because he was unable to make a prima facie case. As discussed above, the Washington State Supreme Court characterized the basis of this cause of action as a “narrow” one. *Thompson*, 102 Wn.2d at 232. This narrow cause of action “properly balances the interest of both the employer and employee” by allowing employers to make personnel decisions without fear of incurring

civil liability, while at the same time protecting against employer actions that contravene a clear public policy. *Thompson*, 102 Wn.2d at 232-33.

A claim for wrongful termination requires Pearson to prove four elements:

- (1) The existence of a clear public policy (the clarity element);
- (2) That discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element);
- (3) That Plaintiff's public-policy-linked conduct caused the dismissal (the causation element); and
- (4) The employer must not be able to offer an overriding justification for the dismissal (the absence of justification element).

*Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). These elements are conjunctive. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Thus, a plaintiff must show each element in order to prevail. *Id.* at 458.

**a. Pearson identified no clear mandate of public policy.**

The question of what constitutes a clear mandate of public policy is one of law. *Dicomes v. State*, 113 Wn.2d 612, 625, 782 P.2d 1002 (1989). The employee bears the burden of establishing the existence of a clear mandate of public policy and that his discharge contravened that public policy. *Gardner*, 128 Wn.2d at 941. A claimed mandate of public

policy must not be merely arguable, but must be a clear mandate. “[T]he existence of [a] public policy must be clear.” *Vargas v. State*, 116 Wn. App. 30, 35, 65 P.3d 330 (2003) (citations omitted).

The Supreme Court has emphasized that the claim focuses on protecting the interest of the public collectively, not the purely private or personal interests of the individual employee. *Smith v. Bates Technical College*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000); *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 671-72, 807 P.2d 830 (1991) (to state a cause of action, the plaintiff must have been seeking to “further the public good, and not merely private or proprietary interests”).

Courts have found contravention of a clear mandate of public policy in four general areas:

(1) where the discharge was the result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination resulted because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee “whistle-blowing” activity.

*Dicomes*, 113 Wn.2d at 618.

In the present case, Pearson’s discharge did not fit into any of the above four areas. Pearson was not terminated from employment because he refused to commit an illegal act; or performed a public duty or obligation; or exercised a legal right; or reported misconduct. Rather,

WSF discharged Pearson because he took several years of unauthorized leave and failed to provide medical documentation for his absence, which violated the WSF Code of Conduct, and Pearson's CBA.

**b. Pearson failed to establish the jeopardy element.**

If a public policy exists, but is not jeopardized by the discharge, the wrongful discharge claim fails. Pearson must show that he "engaged in particular conduct and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy." *Gardner*, 128 Wn.2d at 945. Pearson must also "show how the threat of dismissal will discourage others from engaging in the desirable conduct." *Id.* at 945.

Here, Pearson made no showing to establish that his conduct directly relates to any public policy. However, even if he were able to make such a showing, he failed to establish that any other means for promoting that policy are inadequate. Pearson did not show that any inability on his part to bring a wrongful termination action to protect his personal interests jeopardizes the ability of other citizens from vigorously defending legitimate public policy interests.

**c. Pearson failed to establish the causation element.**

To prove causation, Pearson must prove that his public policy linked conduct actually caused his termination. *Gardner*, 128 Wn.2d at

941. It is not enough to merely allege causation; Pearson must set forth specific facts that demonstrate causation. *Smith v. Emp't Sec. Dep't*, 100 Wn. App. 561, 569, 997 P.2d 1013 (2000). Further, Pearson must "present sufficient evidence of a nexus between his discharge and alleged policy violation." *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 177-79, 876 P.2d 435 (1994).

Here, Pearson failed to provide any factual evidence of wrongful intent on the part of WSF to discharge him in contravention of public policy. Nor was he able to establish any nexus between his discharge and any alleged policy violation.

**d. Plaintiff cannot overcome the justification element.**

When an employer articulates a legitimate non-discriminatory reason or justification for its action, the burden shifts to the plaintiff to prove the absence of a justification. *Korslund v. DynCorp*, 121 Wn. App. 295, 322, 88 P.3d 966 (2004). Here, WSF has asserted a legitimate justification for Pearson's dismissal, namely, his failure to provide medical documentation for his lengthy unapproved leave. The legitimacy of that justification has been affirmed by the PERC. Consequently, it was Pearson's burden to show that the reasons articulated by WSF are pretextual. That is, Pearson must show there was an absence of justification.

*Korslund*, 121 Wn. App. at 322. Pearson failed to do so. Pretext is not shown by evidence that the employer's reason was incorrect or foolish. A plaintiff must produce evidence that the reason was phony, i.e., deceitful. An employee's speculation or subjective belief does not raise an issue of fact concerning whether the employer's reason was pretext. *Kuyper v. Dep't of Wildlife*, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995) (plaintiff must produce "specific substantiated evidence of pretext").

Here, the only outcome a reasonable jury could reach is that Pearson was terminated based on his lengthy unexcused absence and that WSF's termination of Pearson's employment was just. The trial court correctly dismissed Pearson's wrongful termination claim.

**D. Pearson Failed to Establish a Prima Facie Case of Discrimination**

The burden-shifting analytical framework first articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to state discrimination claims. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.3d 440 (2001). The employee must satisfy the first intermediate burden by producing the facts necessary to support a prima facie case. *Id.* at 180-81.

A plaintiff can proceed only if he shows facts that are sufficient to

create an inference of discrimination. *Id.* Plaintiff's opinions or conclusory facts are not enough to establish a *prima facie* case.

[T]o overcome an employer's summary judgment motion, the employee must do more than express an opinion or make conclusory statements. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). "The employee has the burden of establishing specific and material facts to support each element of his or her *prima facie* case." *Hiatt*, 120 Wn.2d at 66.

*Chen v. State*, 86 Wn. App. 183, 191, 937 P.2d 612 (1997), *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997). If a plaintiff cannot show a *prima facie* case, an employer is entitled to dismissal. *Hill*, 144 Wn.2d at 181.

Only if Pearson can establish a *prima facie* case does the burden of production shift to WSF to articulate a legitimate, non-discriminatory reason for the adverse employment decision. *Hill*, 144 Wn.2d at 181-82. Once such a reason is identified, the burden of production shifts back to Pearson to show that the proffered reason is pretext. *Id.* "If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law." *Id.*

**1. Pearson failed to make a *prima facie* case of discrimination for his participation in the National Guard.**

Pearson claimed that WSF discriminated against him because of his participation in the Washington National Guard. CP at 195. However,

in his response to WSF's motion for summary judgment, Pearson failed to produce any evidence that his participation in the National Guard was a factor in his termination. CP at 10-36. Even when afforded an opportunity to present additional evidence at the summary judgment hearing, Pearson failed to present any evidence to support his claims. RP at 37:1-11. The trial court found that Pearson failed to present any evidence that he was denied compensation for his National Guard duties or that his participation affected his working conditions. RP at 37:1-11. In fact, the trial court found that the evidence showed WSF does accommodate National Guard and other military service. RP at 37:7-9; CP at 46:13-23.

When Pearson was asked in his deposition to explain the basis of his discrimination claim, he simply offered his personal opinion that he was "outspoken" and "confident" and that "I had probably made some bureaucratic enemies." CP at 210:9-15. However, Pearson's personal opinions and conclusory statements are not enough to establish a *prima facie* case. *Chen*, 86 Wn. App. at 191. Pearson provided absolutely no evidence for a reasonable jury to conclude that he was subjected to discrimination, let alone discrimination based on his National Guard participation.

**2. Pearson failed to make a prima facie case of disability discrimination.**

Pearson also claimed he was discriminated against because of a disability. However, Pearson presented no evidence that he suffered from a disability or that WSF discriminated against him based on a disability.

A plaintiff's discrimination claim under both the Washington Law Against Discrimination (WLAD) and the American's with Disabilities Act (ADA) is generally analyzed under the same standards. *MacSuga v. Spokane Cnty.*, 97 Wn. App. 435, 983 P.2d 1167 *review denied*, 140 Wn.2d 1008 (1999); *Kees v. Wallenstein*, 161 F.3d 1196, 1199 (9th Cir. 1998); *Clarke v. Shoreline Sch. Dist. No. 412, King Cnty.*, 106 Wn.2d 102, 118, 720 P.2d 793 (1986). To state a disability discrimination claim, the employee must establish: (1) presence of a disability and that the disability was the substantial reason for the discharge; (2) satisfactory performance of essential job functions; (3) replacement by person outside the protected group; and (4) plaintiff was not reasonably accommodated. *Dedman v. Wash. Personnel Appeals Bd.*, 98 Wn. App. 471, 989 P.2d 1214 (1999); *Cluff v. CMX Corp. Inc.*, 84 Wn. App. 634, 929 P.2d 1136 (1997).

An accommodation claim essentially has two issues: whether the employee is disabled and whether the employer failed to reasonably

accommodate the disability. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 640, 9 P.3d 787 (2000). Once the employee establishes a prima facie case of disability discrimination, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the challenged act. *Dedman*, 98 Wn. App at 478 (citations omitted). The employer's burden is not one of persuasion, but rather a burden of production. *Chen*, 86 Wn. App. 183. If the employer articulates a legitimate nondiscriminatory reason for the challenged employment decision, it becomes the plaintiff's burden to show the employer's reasons are not believable or were a mere pretext for discrimination. *Id.* A legitimate nondiscriminatory reason includes termination of employment if the disability prevents the employee from performing essential functions of the job even with accommodation. *Dedman*, 98 Wn. App at 477; *Clarke*, 106 Wn.2d at 118.

**a. Pearson did not establish that he suffered from a disability.**

Although Pearson has maintained that he suffered from a sleep disorder, he has never produced any medical evidence to support this claim despite numerous opportunities to do so. WSF made many requests for Pearson to provide verification that he suffered from a medical

condition but he continually failed to do so.<sup>3</sup> When the trial court gave Pearson another opportunity at the summary judgment hearing to produce evidence to support his claims, he submitted a letter from Dr. Andrew Dym. RP at 17:7-19. Contrary to Pearson's claim, Dr. Dym's letter indicated that there was no evidence Pearson suffered from sleep apnea. RP at 17, 33-34. Thus, what little evidence Pearson did produce actually contradicted his own claim of a sleep disorder. Indeed, even Pearson's union declined to support his grievance against WSF because he could not produce any evidence to the union to support his sleep disorder claim. CP at 147. Pearson failed to establish the presence of a disability.

**b. Pearson failed to provide notice of his condition.**

When notifying an employer of a disability, the employee bears the burden of giving notification of both his disability and his associated

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<sup>3</sup> See CP at 99 (October 22, 2001, letter from HR Manager Lea Schmidt requesting verification from Pearson's physician); CP at 101 (January 10, 2013, letter from Captain Saffle scheduling pre-disciplinary hearing and noting Pearson's failure to submit verifying statement from his physician for his unapproved absence); CP at 104 (November 12, 2003, letter from Captain Saffle requesting a Verification of Health Care Provider form from Pearson's doctor); CP at 113 (June 11, 2004, letter from Captain Saffle scheduling a pre-disciplinary hearing and notifying Pearson that he has not provided WSF with the requested documentation for his unauthorized leave); CP at 116 (July 30, 2004, letter from Captain Saffle requesting information from Pearson's dentist regarding dental issues which Pearson claimed caused him to miss work); CP at 135 (December 4, 2008, letter notifying Pearson of WSF's intent to separate him from employment and noting that he was provided several opportunities to submit a verifying medical statement from his medical providers. The letter noted that Pearson submitted a variety of documents, however, none of the documents verified a medical reason for his unapproved absence). CP at 119-21 (April 14, 2009, letter from WSF scheduling pre-disciplinary hearing on April 30, 2009. The letter noted that during the last several years, Pearson had not presented sufficient information from his physicians to verify that his unapproved leave was medically necessary, despite repeated requests from WSF).

limitations for the employer to make a reasonable accommodation for the employee. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995); *Wurzbach v. City of Tacoma*, 104 Wn. App. 894, 900, 17 P.3d 707 (2001). After notification, the employee has a further obligation to cooperate with his employer in finding a reasonable accommodation. *Goodman*, 127 Wn.2d at 408; *Wurzbach*, 104 Wn. App at 900.

Here, Pearson failed to establish: (1) that WSF had notice of his alleged disability; and (2) that WSF failed to take affirmative steps to accommodate his disability. WSF had no notice of any alleged disability because Pearson was never able to provide the medical verification that WSF had repeatedly requested. Moreover, WSF cannot accommodate a disability when no accommodation was requested by the employee. Pearson admitted in his deposition that he never submitted a request for an accommodation.

- Q. Okay. So if we're -- I think your lawsuit focuses on from about 2001 on. Did you receive a second note or another note from Dr. -- Dr. Shuhart or Dr. DeAndrea saying that you needed an accommodation for work to only work day shifts?
- A. No.
- Q. Did you submit a request for accommodation, a written request, saying that, "I only can work day shifts," from 2001 -- 2000 to 2008?
- Q. I requested in 2000, when they offered me early-morning or late-night jobs, that I not be assigned those.

- Q. But you didn't follow up that personal request from you with a note from –
- A. My understanding was there wasn't – they wouldn't allow accommodations for the mariners at that time.
- Q. So if I could just complete the sentence to my question is you made a verbal request –
- A. Right.
- Q. -- to only have certain –
- A. Right.
- Q. -- shifts, but you did not submit an additional note from a doctor in 2000 to 2008 saying that, "Mr. Pearson cannot work night shifts due to his sleep disorder" –
- A. Right.
- Q. -- "so he needs to be accommodated by only working day shifts."
- A. Well, I didn't have a job, so –
- Q. But -- so the answer is you didn't have a note from the doctor saying –
- A. No.
- Q. -- you could only work day shifts --
- A. No.
- Q. -- as an accommodation. Okay.

CP at 206-07. Pearson has not only failed to establish that he suffered from a disability, but he also failed to carry his burden of showing that he gave notice of both his alleged disability and his associated limitations for WSF to make reasonable accommodations.

**3. WSF had a non-discriminatory basis for Pearson's termination.**

Even if Pearson had established a prima facie case of National Guard or disability discrimination, his claims still failed because WSF had legitimate, non-discriminatory reasons for its actions. Pearson was

discharged for his failure to comply with WSF's code of conduct and the CBA by taking lengthy unauthorized leave and failing to provide medical documentation for his leave. Thus, Pearson would have been terminated from WSF employment regardless of his National Guard participation or alleged sleep disorder. Because WSF had legitimate, non-discriminatory basis to terminate plaintiff's employment, the trial court correctly granted summary judgment in favor of WSF.

**E. Summary Judgment Was Properly Granted on Pearson's Retirement and Military Leave Claims**

**1. Pearson failed to make a prima facie case that his retirement date and military leave were miscalculated.**

Pearson claims that his retirement date was incorrectly calculated by WSF as the date of his termination rather than the date he turned 65 years old. In addition, he claims that he did not receive pay for two weeks of reserve duty back in 2002. However, Pearson failed to put forth any evidence to support his wrongful denial claims. In Pearson's response brief to WSF's motion for summary judgment, he presented absolutely no evidence in support of his claim that WSF miscalculated his retirement date and reserve pay. CP at 10-36. The trial court gave Pearson ample opportunity to produce such evidence by allowing him to submit additional evidence during the summary judgment hearing. RP at 10-11, 23:9-11, 42-44. However, besides his personal opinion and conclusion that his military

and retirement benefits were wrongfully denied, Pearson presented no evidence to show that his retirement benefits and military leave were miscalculated or wrongfully withheld. CP at 13; RP at 37:1-11.

Pearson may not rest on mere allegations or speculation in his pleadings, but he must set forth specific facts showing that there is a genuine issue for trial. *Brame*, 97 Wn.2d at 839. Pearson failed to make such a showing and the trial court correctly dismissed these claims. RP at 37:1-11.

**2. Pearson failed to exhaust his administrative remedies.**

Furthermore, the trial court correctly dismissed Pearson's claims because he failed to exhaust his administrative remedies. Pursuant to RCW 34.05.534, all employees of agencies, as defined under RCW 34.05.010(2), must first exhaust administrative remedies before initiating an action in state court. *Buechler v. Wenatchee Valley College*, 174 Wn. App. 141, 153, 298 P.3d 110 (2013). Exhaustion of administrative remedies is a well-founded and long established judicial doctrine barring suits in superior court until a litigant has exhausted their administrative appeals. *S. Hollywood Hills Citizens Ass'n v. King Cnty.*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984). The principle is founded on the belief that the judiciary should defer to a body with expertise in an area outside the conventional experience of judges. *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). The

policy supports several important judicial goals such as protecting the agency's autonomy by allowing it to correct its own errors, ensuring parties use administrative process, allowing the agency to develop a complete record, allowing the agency to apply its expertise, and to provide for a more efficient process to potential litigants and to the agency. *Mt. Vernon*, 133 Wn.2d at 866.

The exhaustion of remedies is mandatory where: 1) a claim is cognizable in the first instance by the agency alone; 2) the agency has a mechanism for resolution of complaints; and 3) the relief sought can be obtained by resort to an adequate administrative remedy. *S. Hollywood Hills*, 101 Wn.2d at 73.

In *Moran v. Stowell*, 45 Wn. App. 70, 724 P.2d 396 (1986), former police officers filed suit against King County for wrongful denial of sick leave. The Court of Appeals upheld the trial court's order granting summary judgment in favor of the County, holding that the plaintiffs must exhaust their contractual remedies through the grievance procedure provided for in the CBA. *Id.* at 75. The *Moran* Court held that a claim for wrongful denial of sick leave benefits is cognizable by the agency alone and there were clearly defined machinery for the submission and resolution of complaints by aggrieved parties. The court further held that the relief sought can be obtained by resorting to the administrative remedy.

In his deposition, Pearson was asked whether he took any formal action regarding his retirement claim. CP at 200. He testified that he asked WSF to change his retirement date but he never received an answer to his request. CP at 200-01. Pearson presented no evidence in either his response brief or at the summary judgment hearing that he pursued any administrative remedies. CP at 10-36; RP at 1-49.

With regard to his military leave, Pearson testified that he submitted a request to be paid for his two weeks of reserve duty in 2002, but it was denied. CP at 198-99. After his request was denied, he spoke to Captain Saffle but took no further action. CP at 198-99. Again, Pearson presented no evidence in his response to WSF's motion for summary judgment or at the summary judgment hearing that he pursued any administrative remedies. CP at 10-36; RP at 1-49.

The CBA provided Pearson with an avenue to resolve these issues with WSF. These are precisely the type of employment issues that are appropriate for resolution through the CBA. The CBA contains a clearly defined procedure for resolving disputes. CP at 92-97. Plaintiff's failure to exhaust his remedies under the CBA bars his claims and the trial court correctly dismissed his military pay and retirement benefit claims.

**V. CONCLUSION**

For the foregoing reasons, WSF respectfully asks the Court to affirm the trial court's order granting summary judgment dismissing all of Pearson's claims with prejudice.

RESPECTFULLY SUBMITTED this 26th day of February, 2015.

ROBERT W. FERGUSON  
Attorney General



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KENT LIU, WSBA #21599,  
OID 91019  
Assistant Attorney General  
Attorney for Defendant State of WA

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the state of Washington that on the undersigned date the original and one copy of the preceding Respondent's Brief was caused to be filed in the Washington State Court of Appeals, Division I, by ABC Legal Messenger, at the following address:

COURT OF APPEALS OF WASHINGTON, DIVISION I  
600 UNIVERSITY STREET  
ONE UNION SQUARE  
SEATTLE, WA 98101-1176

And, I further certify that a copy of the same was caused to be served on the Appellant at the following address, by U.S. Mail, postage prepaid:

JONATHAN PEARSON  
3315 NW 80TH STREET  
SEATTLE WA 98117

DATED this 26th day of February, 2015, at Seattle, Washington.

  
NICOLE SYMES  
Legal Assistant