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NO. 71269-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DONALD BROWNELL

Appellant,

v.

SNOHOMISH COUNTY PUBLIC UTILITY DISTRICT NO. 1

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Donald Brownell has now filed his Appellant's Brief and the Snohomish County Public Utility District has filed its Brief of Respondent in this matter. In short, Brownell claims that there exist issues of fact in this case sufficient to require a trial, while the PUD claims that Brownell's unsatisfactory performance is so well established that no trial is necessary. Brownell now files this reply brief to respond to that assertion by the PUD.

II. ARGUMENT

"A material fact is one upon which the outcome of the litigation depends." *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1287 (1993). The court is to consider the facts and all reasonable inferences in the light most favorable to the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Only if from all the evidence, reasonable persons could reach only one conclusion, should summary judgment should be granted. *Clements*, 121 Wn.2d at 249; *Wilson*, 98 Wn.2d at 437. These are all well established principles for consideration of a case for summary judgment.

Here a review of the PUD's brief reveals that it is largely devoted to arguing its factual case, which is that Don Brownell's documented history of counseling and discipline justifies a court finding as a matter of law that he did not establish the element of a his prima facie case that he was doing satisfactory work. See pages 1-16 of Respondent's brief. But the PUD ignores the fact that the evidence must be viewed in a light most favorable to Brownell. According to Brownell's evidence,¹ and even assuming that there is merit to much of what the PUD now asserts about his performance, Brownell was the victim of selective enforcement of PUD policy against him by Barry Chrisman, his direct supervisor who was the author and originator of all the documented counseling and discipline imposed on Brownell. That body of work occurred over a period of time which began with Chrisman's unsuccessful attempt to persuade PUD officials not to afford Brownell a promotion into a position supervised by Chrisman. In light of the fact that over that same time period Chrisman was looking the other way, and not issuing counseling or discipline to other employees under his supervision whose conduct was essentially the same as that of Brownell, the natural question arises as to why that was

¹ See Statement of Facts in Appellant's brief Nos. 4, 6, 10, 11, 12, 13, 15, 16, 17, 24, 25, 26, 27, 28, and 29.

so. Brownell's evidence² provides a plausible answer to that question, which is that Chrisman remained unhappy with the fact that Brownell had been allowed to occupy his position as Hydroelectric Constructor given Brownell's disabilities. Chrisman continued to raise that issue with his own chain of command, and with their approval continued to keep a file documenting his observations along those lines, which he disposed of after the discharge and before such could be produced in discovery in this case. Again, a claim for discrimination can be supported with either direct or circumstantial evidence that a discriminatory animus was a substantial factor for the adverse employment decision. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 359, 172 P.3d 688 (2007). If the plaintiff's evidence suggests that this was the case, as it does here, the burden shifts to the employer to prove that it would have taken the same action despite the discriminatory animus. 162 Wn.2d at 359-60. A jury in this case could easily conclude that, but for Chrisman's attitude toward Brownell based on Brownell's disabilities, the "paper trail" relied upon by the PUD might not have existed to the extent it does. Admitting that Mr. Chrisman did a masterful job of creating negative entries in Brownell's personnel file

² See Brownell's Facts Nos. 15, 16, and 18.

following Brownell's 2002 promotion, a question exists regarding what that file would have looked like absent Mr. Chrisman's fixation on what he thought to be Brownell's lack of physical ability to handle his job. Again, "Conduct resulting from the disability (e.g., decrease in performance) is part of the disability and not a separate basis for termination." *Riehl v. Goodmaker, Inc.*, 152 Wn.2d 138, 152, 94 P.3d 930 (2004). *Terminating an employee because of behavior brought on by the employee's disability is a termination of the employee because of the disability, itself.* See 152 Wn.2d at 152; *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1139-40 n.18 (9th Cir. 2001); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 875 (9th Cir.), *cert. denied*, 498 U.S. 814 (1990). It follows that building a negative file case against the employee based on perceived behavior brought on by the disability, which leads to discharge, is also a termination of the employee because of the disability. The Eighth Circuit, in *Kim v. Nash*, 123 F.3d 1046 (1997) has held that papering an employee's personnel file with negative reports, including written reprimands can be considered adverse employment action.

In this case the trial court judge did what the PUD hopes this court will do, it took Chrisman's paper trail at full value, assumed that it was not

created with the end in mind of firing a disabled employee, and concluded that Brownell could not meet his burden of showing that his work was sufficiently satisfactory to make out a case for discrimination. In doing so the court lost sight of the fact that the U.S. Supreme Court recognized in McDonnell Douglas, that the makeup of a prima facie case of discrimination may vary with the facts of each case.” *Marshall v. Arelene Knitwear, Inc.*, 454 F.Supp. 715, 723 (1978). “The ultimate issue is whether age was a factor in a decision of an employer to terminate [a] . . . claimant and whether the age of claimant made a difference in determining whether he was to be retained or discharged.” *Ackerman v. Diamond*, 670 F.2d 66, 70 (6th Cir. 1982). The difficulty in granting summary judgment in this case is that the issue is squarely one of identifying the intent of Mr. Chrisman, whose body of work drove this discharge. The general principle to be applied in Washington is that summary judgment is normally inappropriate in an employment discrimination case, where the issue is one of establishing a defendant’s intentionally unstated intent. *See Johnson v. DSHS*, 80 Wn. App. 212, 229, 907 P. 2d 1223 (1996). Here, Brownell also produced evidence that the PUD, and Mr. Chrisman specifically, chose to not discipline or discharge other employees for the

kind of alleged FERC violations which they claim to have relied upon to discharge Brownell. The PUD argues that Brownell, who was there at the time and actually observed the disparate approach, is speculating that the other employees were not disciplined or discharged. However, it is noteworthy that the PUD does not claim in its response that they were given any form of discipline. Where there is evidence, as in this case, that an employee has been singled out for disparate treatment through selective enforcement of policy, that evidence can be considered by a trier of fact in deciding whether the alleged misconduct was truly of a nature that would lead to discharge absent the presence of a discriminatory animus. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547-48 (10th Cir. 1988); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990). In fact, Division II has suggested that the existence of selective enforcement can be sufficient by itself to constitute a prima facie case. See *Subia v. Riveland*, 104 Wn.App. 105, 112 (2001). That evidence should be found to be even more persuasive in the face of evidence that Brownell's supervisor, who did the selective enforcement, was actually concerned about Brownell's disability-related behavior, kept a file on it, but went to great pains to not directly address it. That implies that he knew that to

take that route would subject him to a claim of discrimination. On these facts Mr. Brownell does establish a prima facie case of disparate treatment disability discrimination.

The PUD argues that Brownell cannot establish pretext. However, to create a jury issue on the question of pretext a claimant is simply required to produce evidence raising an issue of material fact as to whether the employer's reasons given for their discharge are unworthy of credence or belief or that they are merely a pretext for a discriminatory purpose.

To do this, a plaintiff must show, for example, that the reason has no basis in fact, it was not really a motivating factor for the decision, or was not a motivating fact in employment decisions for other employees in the same circumstances. *Renz v. Spokane Eye Clinic*, 114 Wn.App. 611, 619 (Div. III, 2002). As already argued, Brownell's evidence is sufficient make that showing.

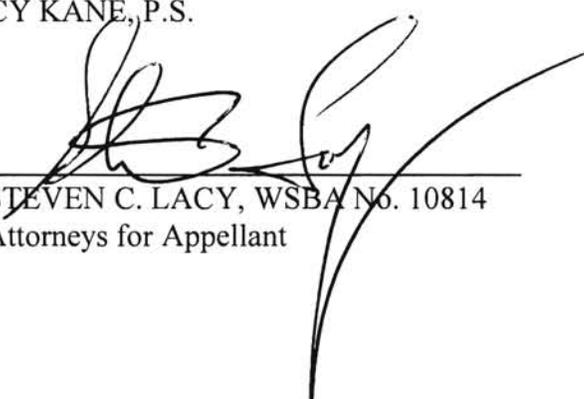
III. CONCLUSION

The court below should have denied the PUD's motion for summary judgment as to Brownell's claim for disparate treatment disability discrimination. Because Mr. Brownell can show a prima facie

case of discrimination and can establish sufficient evidence for jury consideration on the issue of pretext the court should reverse the ruling of summary judgment and remand this case for trial on the merits of the disparate treatment discrimination claim.

Respectfully Submitted this 15th day of May, 2014.

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