

No. 35941-3-II

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

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JUL 12 2011
OLYMPIA, WA
SW

LINDA J. EVANS

Appellant

v.

STATE OF WASHINGTON

Respondent

REPLY BRIEF OF APPELLANT

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ORIGINAL

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ARGUMENT

I. INTRODUCTION

This case involves two theories of recovery under RCW 49.60: discrimination and retaliation. For each, the summary judgment inquiry utilizes the familiar three-part burden shifting analysis discussed by both parties: (1) proof of prima facie case, (2) employer statement of legitimate reason, and (3) sufficiency of the evidence to support a reasonable inference by the trier of fact that a substantial factor in the termination decision was discriminatory or retaliatory intent, *i.e.* that the employer's claimed reason was pretextual.

The legal standard for proof of the prima facie case element is different as between discrimination and retaliation. For discrimination, the question is whether the evidence supports a reasonable inference of discriminatory intent. For retaliation, the question is whether the plaintiff engaged in statutorily protected activity, and suffered an adverse employment action. After completion of the judicial inquiry on these points, steps 2 and 3 of the analysis are the same.

In its response brief, the State argues that Ms. Evans has abandoned her discrimination claim, so does not discuss step 1 of it, and on step 1 of the retaliation claim, argues insufficiency of the evidence to prove her engagement in statutorily protected activity,

conceding by silence the indisputable occurrence of an adverse employment action.

II. STEP 1, DISCRIMINATION: REASONABLE INFERENCE OF DISCRIMINATORY REASON

Ms. Evans has not abandoned her discrimination claim: the claim is based on RCW 49.60, which in RCW 49.60.030(1) declares:

The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person is...a civil right...

“Disparate treatment” is one of the three basic types of employment discrimination claims under RCW 49.60¹: employment discrimination through disparate treatment is conduct motivated by a discriminatory intent. *E-Z Loader v. Travellers Indemnity Co.*, 106 Wn. 2d 901, 910, 726 P. 2d 439 (1986).

Ms. Evans lays out this law at pp. 16-18 of her opening brief, and discusses the state of the evidence in summary judgment analysis at pp. 21-25. She clearly has not abandoned this claim. The State cites no authority for the proposition that Ms. Evans must set forth evidence of a “comparator” employee, as implied in its one-sentence discussion of “abandonment” at p. 24 of the State’s brief.

¹ The other two are disparate impact and reasonable accommodation.

III. STEP 1, RETALIATION: STATUTORILY PROTECTED ACTIVITY

As noted by the State at p. 30, public employees do not relinquish First Amendment rights they would otherwise enjoy as citizens, but that, under certain circumstances, the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general, based on its interests in "promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

The conduct at issue here is Ms. Evans' and some other employees' use of religious or faith-based expressions in oral speech and e-mail communications in the workplace, such as "Have a Blessed Day," "God Bless You", and references to God and religious ideals in general. Ms. Evans does not contend that she has a constitutional right to violate department policy by using state resources for her personal interests, religious or otherwise.²

The State argues that Ms. Evans did not engage in statutorily protected activity because a department policy forbids the use of e-mail or the internet to promote their personal, religious or political beliefs, and that such religious speech may be

² The issue, when the subject becomes relevant, on any admitted or proven use of state resources for personal purposes is whether such use exceeded guidelines for such use under the "de minimis" standard that governs.

legitimately proscribed under the *Pickering* balancing test, as discussed in *Berry v. Department of Social Services*, 447 F. 3d 642 (9th Cir. 2006).

Berry is inapposite on its facts. There, the department policy prohibited him from discussing religion with department clients., not his coworkers. The court drew a sharp distinction here, saying “While [the department] allowed employees to discuss religion *among themselves*, it avoided the shoals of the Establishment Clause by forbidding them from discussing religion with its *clients*.” (Italics added.) Here, the conduct at issue is Ms. Evans’ speech to and from, and private religious associations outside of workplace with, co-workers, not clients, and *Berry* in fact establishes that doing so is statutorily protected activity.

Moreover, the DSHS policy referenced is only violated if the usage is to “promote” personal or religious beliefs. Whether a certain form of expression in the workplace or incidental reference to shared private beliefs or associational activities is a “promotion” of religious beliefs or is instead a constitutionally protected “expression” of beliefs is inherently a question of fact.

IV. STEP 2, BOTH: EMPLOYER’S STATEMENT OF REASON NOT SUFFICIENTLY PROVED

Step 2 of the burden-shifting analysis requires the employer to present admissible evidence stating the claimed reason for the employment decision claimed to be illegal. The State’s evidence of

such reason was Deborah Bingaman's declaration that she "believed that Region 5 needed new leadership and that a change would be in the best interests" of DSHS and its clients.

In her opening brief at pp. 25-27, Ms. Evans set forth detailed argument and evidence analysis to the effect that the State did not meet its burden of proof on Step 2 and thus was disqualified from summary judgment entitlement no matter what the evidence on pretext may be; in other words, the State did not meet its burden of proof, so the burden of evidence production never shifted to Ms. Evans. The points were that (1) Mr. Braddock made the decision, not Ms. Bingaman, so her declaration is not competent evidence of the reason for it, (2) her declaration did not meet legal standards for sufficiency as proof of any fact, because it was nothing but a bare conclusory allegation of an ultimate fact, with no evidentiary detail whatsoever, and (3) the evidence of alleged misconduct presented in the James declaration does not cure this defect because there is no statement by Ms. Bingaman -- or any other evidence -- to establish that the decision was based upon the misconduct evidence, and the State never even says such a thing in its argument: all it does is set forth the alleged misconduct events and argues their impact as if there were such necessary linkage evidence in the record.

The State has simply ignored these points and focuses its discussion on Step 3.

V. STEP 3, BOTH: COMPETENT EVIDENCE AND REASONABLE INFERENCES THEREFROM SUPPORT A REASONABLE CONCLUSION THAT THE STATED REASON IS PRETEXTUAL

Assuming *arguendo* that the evidence production burden shifted to Ms. Evans, the determinative question is whether the evidence, viewed as a whole in the light most favorable to Ms. Evans, would support a reasonable inference by the trier of fact that discrimination or retaliation was a substantial factor in the employment decision. As laid out in detail in Ms. Evans' arguments on this subject at pp. 28-30 of her opening brief, the undisputed evidence clearly supports a reasonable inference that Ms. Bingaman's stated reason is pretextual: there is no evidence of any defect in Ms. Evans' professional performance or that DSHS clients were being adversely impacted and in need of protection by her remaining in her position, Ms. Bingaman officially declared that the only basis for a negative employment decision would be the allegations and evidence in the Auditor's report, and by the deposition testimony of the decision-maker himself, such allegations and evidence were not a significant factor in the decision.

In a summary judgment context, one would expect the State to discuss the critical issue: whether the inference argued by Ms. Evans is a reasonable one on the state of the relevant admissible evidence. Instead, it simply states that Ms. Evans “offers no evidence” to establish a pretext inference (even though it is clear that she did) and that she “does not and cannot deny the numerous instances that lead [sic] to a lack of confidence in her leadership abilities,” referring to the misconduct allegations.

The argument is fallacious. First, as seen, there is no competent evidence that the misconduct allegations were what led Ms. Bingaman to purportedly lose her confidence in Ms. Evans’ leadership abilities, and the undisputed evidence is that they did not,³ so reliance on these “facts” as support for the legitimacy of the decision cannot support summary judgment for the State. Second, the discussion of the allegations is presented as if there is no genuine issue of material fact as to their truth or whether they rose to the level of a law or policy violation and thus constituted misconduct. As discussed by Ms. Evans at pp. 30-31 of her opening brief, such genuine fact issues are raised by the evidence that DSHS investigated and determined some of the allegations to be baseless, DSHS found that the allegations were unsupported by sufficient evidence, Ms. Evan’s specific declaration testimony

³ Just as it did at the trial level, the State simply ignores the content and impact of Mr. Braddock’s deposition testimony.

disputing them, and, for those conduct allegations she admitted, the lack of any evidence or discussion as to whether they exceeded the established standards for “de minimus” usage.

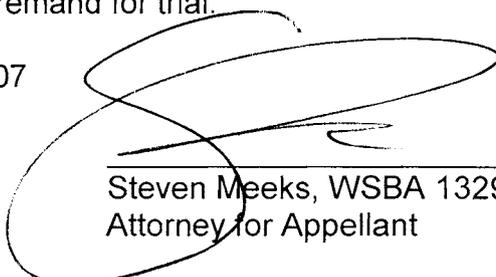
As noted by the State in its pp.28-29 citation of *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P. 3d 418 (2002), summary judgment for an employer is proper only when the record conclusively revealed some other, nondiscriminatory reason for the decision, or if the plaintiff created only a weak issue of fact as to whether the stated reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.”

The State comes nowhere close to meeting this standard, even assuming that it met its burden under Step 2. The stated reason is certainly not conclusively established, or, other than a bare conclusion of an ultimate fact, established at all under evidentiary standards, and there is no abundant and uncontroverted evidence that no discrimination had occurred.

CONCLUSION

The State is not entitled to summary judgment due to (1) its failure to satisfy its burden of production of evidence and (2) the existence of genuine issues of material fact. The court is requested to reverse and remand for trial.

Dated: July 29, 2007



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PROOF OF SERVICE

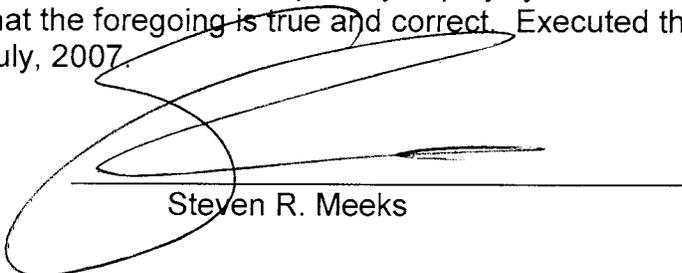
As a competent adult nonparty person, on July 30, 2007 I served a complete and true copy of the original of this document to:

Attorney General of Washington
Attention: AAG Paul James
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Via:

- Deposit in United States Mail, first class, postage prepaid to the address shown, at Olympia, Washington
- Certified Mail, Return Receipt requested to the address shown
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I declare under penalty of perjury under Washington law that the foregoing is true and correct. Executed this 30th day of July, 2007.


Steven R. Meeks

BY: [Signature]
DATE: 7/30/07
TIME: 10:00 AM
OFFICE: [Signature]