

NO. 35941-3

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

LINDA J. EVANS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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COURT OF APPEALS II
COURT REPORTERS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES.....1

II. SUMMARY OF ARGUMENT.....1

III. COUNTER-STATEMENT OF THE CASE.....2

 A. Allegations Of Misconduct.....3

 1. Inappropriate Use Of State E-Mail.....3

 2. Inappropriate Use of State Phone System5

 3. Preferential Treatment For Church Members.....7

 a. Roshan D’Souza.....7

 b. Paula Pelletier12

 c. Darlene Burton.....14

 d. Amanda Evans15

 e. B.J. Wilder-Morehead.....16

 f. Donald Flanagan17

 4. Other Misuse Of State Property18

 B. State Auditor’s Findings20

 C. Unrest In Region 5.....20

 D. Home Assignment.....21

 E. Termination Of Appointment As Regional Administrator22

 F. Procedural Summary.....23

IV. STANDARD OF REVIEW.....24

V.	LAW AND ARGUMENT.....	26
	A. The <i>McDonnell Douglas/Hill v. BCTI</i> Burden-shifting Analysis Applies To Plaintiff's Claims.....	26
	1. The <i>McDonnell Douglas</i> Burden-shifting Analysis.....	26
	2. The Court Can Weigh Evidence On A Motion For Summary Judgment In A Retaliation Case	28
	B. Ms. Evans' Retaliation Claim Was Correctly Dismissed Because She Did Not Meet Her Burden Of Establishing A Prima Facie Case Or Pretext.....	29
	1. Ms. Evans' Claim Fails For Want Of Any "Protected Activity"	29
	2. Ms. Evans Cannot Establish That The Legitimate Non-Discriminatory Reasons Articulated By The State For Removing Plaintiff From Her exempt Position Were Pretext.....	34
VI.	CONCLUSION	39

TABLE OF AUTHORITIES

Cases

<i>Aragon v. Republic Silver State Disposal, Inc.</i> , 292 F.3d 654 (9th Cir. 2002)	35
<i>Atherton Condo Ass'n v. Blume Development Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	25
<i>Baldwin v. Sisters of Providence in Wash., Inc.</i> , 112 Wn.2d 127, 769 P.2d 298 (1989).....	28
<i>Berry v. Department of Social Services</i> , 447 F.3d 642 (9th Cir. 2006)	31, 32, 33
<i>Brill v. Lante Corp.</i> , 119 F.3d 1266 (7th Cir. 1997)	34
<i>Chen v. State</i> , 86 Wn. App. 183, 937 P.2d 612, <i>review denied</i> , 133 Wn.2d 1020, 948 P.2d 387 (1997).....	27, 36
<i>Clay v. Holy Cross Hosp.</i> , 253 F.3d 1000 (7th Cir. 2001)	34
<i>Domingo v. Boeing Employees' Credit Union</i> , 124 Wn. App. 71, 98 P.3d 1222 (2004).....	28
<i>Griffith v. Schnitzer Steel Indus.</i> , 128 Wn. App. 438, 115 P.3d 1065 (2005).....	34
<i>Haubry v. Snow</i> , 106 Wn. App. 666, 31 P.3d 1186 (2001).....	33
<i>Henderson v. Ford Motor Co.</i> , 403 F.3d 1026 (8th Cir. 2005)	37
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.2d 440 (2001).....	passim

<i>Howland v. Grout</i> , 123 Wn. App. 6, 94 P.3d 332 (2004).....	24
<i>Hudesman v. Foley</i> , 73 Wn.2d 880, 441 P.2d 532 (1968).....	25
<i>Johnson v. Dep't of Social & Health Servs.</i> , 80 Wn. App. 212, 907 P.2d 1223 (1998).....	36
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 P.2d 231 (1998).....	30
<i>Kuyper v. State</i> , 79 Wn. App. 732, 904 P.2d 793 (1995).....	28, 35
<i>Manatt v. Bank of America, NA</i> , 339 F.3d 792 (9th Cir. 2003)	27, 35
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).....	26
<i>Millbrook v. IBP, Inc.</i> , 280 F.3d 1169 (7th Cir. 2002)	34
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002).....	passim
<i>Pickering v. Bd. of Educ.</i> , 391 U.S. 563 (1968).....	30, 31
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).....	28
<i>Russell v. Acme-Evans Co.</i> , 51 F.3d 64 (7th Cir. 1995)	34
<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	25
<i>Travis v. Tacoma Pub. Sch. Dist.</i> , 120 Wn. App. 542, 85 P.3d 959 (2004).....	27

<i>Wells v. Unisource Worldwide, Inc.</i> , 289 F.3d 1001 (7th Cir. 2002)	37
<i>Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.</i> , 123 Wn.2d 891, 874 P.2d 142 (1994).....	25
<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	25
<i>Wilmot v. Kaiser Aluminum & Chemical Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	28
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	25, 26

Statutes

RCW 41.06.070	2
RCW 41.06.076	2
RCW 49.60	33

Rules

CR 56	25
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I. ISSUES

Should this Court affirm summary judgment where a trial would be useless given plaintiff's inability to present a prima facie case that she suffered an adverse employment action in retaliation for exercising her rights to religious freedom and her inability to present evidence that defendant's reasons for its actions were pretextual?

II. SUMMARY OF ARGUMENT

The plaintiff, Linda Evans, is a former Regional Administrator of the defendant, State of Washington, Department of Social and Health Services (DSHS). Ms. Evans was the subject of a whistleblower investigation in 2003-2004 in which it was found that she had used state resources for personal benefit, used her position for personal benefit and the benefit of others and had removed documents from DSHS without authorization. CP at 206-10.

In February 2005 Ms. Evans was removed from her position as a Regional Administrator based on the belief that DSHS needed new leadership in her position and that a change would be in the best interests of DSHS and the clients it served. CP at 232. Ms. Evans was offered and accepted another position with DSHS. CP at 227. She voluntarily decided to terminate her employment with DSHS in September 2005. CP at 229.

The decision to remove Ms. Evans from her position as a Regional Administrator was not based on the exercise of her religious beliefs. Moreover, she has no evidence to suggest that DSHS's desire for a change in leadership at her position was merely a pretext for a true religious discriminatory motive. As a result, Ms. Evans failed to present prima facie evidence of religious discrimination. Under the burden shifting analytical framework used in discrimination cases, there was no genuine issue of material fact. This Court should affirm the trial court's summary judgment of dismissal in favor of DSHS.

III. COUNTER-STATEMENT OF THE CASE

Ms. Linda Evans was hired by DSHS in December 1989. CP at 23. In February 1996 she was promoted to DSHS Region 5 Administrator, a position that is exempt from Merit System Rules that grant employees certain due process rights before they can be removed from their position. CP at 25.¹ As an exempt employee, Ms. Evans could be removed from her position at the discretion of her employer, DSHS.

Ms. Evans had several interests outside her employment at DSHS. She was an ordained minister and pastor of a church known as The Upper Room Fellowship (TURF). CP at 33-34; 46. Also, Ms. Evans

¹ Exempt positions are authorized by RCW 41.06.070 and .076 and persons occupying such positions may be terminated without cause.

was the president of a nonprofit corporation that was operated by TURF Ministries and provided housing to low income and homeless people. CP at 37, 127-141. Finally, Ms. Evans was a landlord who owned or co-owned more than half a dozen properties in Pierce County, including a hotel that is jointly owned by TURF Ministries. CP at 143.

In June 2003 the Washington State Auditor's Office received a whistleblower report that alleged Ms. Evans was using state resources for her personal benefit. CP at 145. Thereafter, an investigation of Ms. Evans' activities as a DSHS Regional Administrator was commenced.

A. Allegations Of Misconduct

1. Inappropriate Use Of State E-Mail

DSHS has a written policy that forbids its employees from using office e-mail or internet to promote their personal, religious or political beliefs. CP at 151. Ms. Evans violated that policy in 2001 when she forwarded an e-mail containing several religious sayings. CP at 147. The matter was reported to the Washington State Auditor's Office as an improper use of state resources. CP at 149. When the matter was brought to Ms. Evans' attention, she sent two memos. One memo was sent to all staff in Ms. Evans' region reminding them to follow the

policy forbidding them from using office e-mail and internet for personal reasons. CP at 153. The second memo went to Ms. Evans' supervisor, Mike Masten, in which she stated:

I have myself along with my staff reviewed DSHS Administrative Policy 15.15, "Use of Electronic Messaging Systems and the Internet" in relation to the accusations made. We clearly understand the policy and I will not allow this type of email to happen again.

CP at 155.

During the State Auditor's 2003-2004 whistleblower investigation, a review of Ms. Evans' DSHS computer files for the period between June 3, 2002, and January 2, 2003, revealed that a minimum of 114 personal e-mail messages were either sent or received by Ms. Evans. CP at 157. These e-mail messages related to Ms. Evans' church, bible studies, religious faith, bible scriptures, the hiring of family members, housing for a family member, her rental properties and her nonprofit organization. CP at 157-59. The majority of the e-mails were sent between Ms. Evans and other DSHS employees. CP at 157-59.

During her deposition testimony, Ms. Evans admitted that she had used her DSHS computer to send and receive the e-mails discovered during the whistleblower investigation. CP at 116. Thus, Ms. Evans repeatedly violated DSHS policy prohibiting the personal use of state

property despite her awareness of the policy, her promise to comply with the policy, and her insistence that her staff comply with the policy.

2. Inappropriate Use of State Phone System

In June 2002 Ms. Evans received an e-mail on her DSHS computer from B.J. Wilder-Morehead, a DSHS Region 5 employee. CP at 161. The e-mail informed Ms. Evans of “The Church Funding Project, Network International Investment.” CP at 161. Unbeknownst to Ms. Evans, the organization was the brainchild of Abraham Kennard who was convicted in February 2005 of 116 counts which included mail fraud, money laundering and income tax evasion. CP at 163-64. Mr. Kennard defrauded more than 1,600 churches and other nonprofit organizations, including Ms. Evans’ church, out of \$9 million dollars by promising investors forgivable loans or grants in return for up-front fees paid to his organization. CP at 163-64.

During her deposition, Ms. Evans admitted that she used the SCAN system² to place long distance calls to Mr. Kennard’s organization. CP at 92-93. In addition, Ms. Evans approved the use by Lynette Davis, her confidential secretary, of the SCAN system to place long distance calls to Mr. Kennard’s organization. CP at 90. She admitted that her use and her confidential secretary’s use of the state phone system for calls that she

² The SCAN System is the State’s long distance telephone calling system.

made to Mr. Kennard's organization were not related to State business. CP at 89-90.

Ms. Evans was seeking \$1,475,000 through Mr. Kennard's organization to acquire property for her church. CP 93-96. In addition, Ms. Evans was intending to purchase a \$50,000 automobile with funds she received from Mr. Kennard's organization. CP at 93-96. Moreover, Ms. Evans was intending to acquire \$200,000 from Mr. Kennard's organization for church payroll, and another \$275,000 to pay for debts associated with her home, credit cards and loans. CP at 93-96. Ms. Evans' intent was to leave state employment to work full-time as a minister. CP at 93-96.

Ms. Evans gave Mr. Kennard's organization her telephone number at DSHS in case she could not be reached at her home. CP at 94. Ms. Evans also admitted to using the State fax machine to send information to Mr. Kennard's organization. CP at 98.

In her deposition, Ms. Evans had testified as follows:

Q: I probably should have asked that question first. Did you ever use state property in support of your church or ministry?

A: No I did not.

Q: If an employee has used state property in support of your ministry, is it fair to assume that that was done without your knowledge –

A: Absolutely.

Q: Did you at any time ask your executive secretary to perform non-DSHS related work during her working hours?

A: No I did not.

Q: Never?

A: Never.

CP at 30; 32; 54.

Also during her deposition, Ms. Evans testified that absent an emergency situation, such as where you are out traveling and need to contact home and your cell phone is out, an employee should never use the state phone system for long distance calls under the justification that it was *de minimus* use. CP at 28-29.

3. Preferential Treatment For Church Members

a. Roshan D'Souza

Roshan D'Souza was a member of Ms. Evans' church. CP at 78. He developed the church website and lived rent free in Ms. Evans' home. CP at 58. In an e-mail sent by Mr. D'Souza to Ms. Evans in July 2002 he mentioned that he had a visa provided by an ex-employer that is employer specific and, therefore, if the State were to hire him, the visa must be transferred to the State. CP at 166. Also in the e-mail, Mr. D'Souza thanked Ms. Evans for helping him with his job search and offered to

bring her a completed State job application and resume “later tonight at the Bible study.” CP at 166. In her response to Mr. D’Souza’s e-mail, Ms. Evans mentioned that she was bringing him some information about the visa renewal process. CP at 166.

During her deposition, Ms. Evans denied helping Mr. D’Souza obtain employment with DSHS and claimed to have helped him obtain a work visa only after he had been offered a position with DSHS. CP at 77. However, at another point in her deposition, Ms. Evans admitted that she told Mr. D’Souza about a position which lead to his being hired by DSHS. CP at 76. At yet another point during her deposition, Ms. Evans testified that she gave Mr. D’Souza a card to send into DSHS for an interview. CP at 79. Ms. Evans testified that she saw nothing improper about Mr. D’Souza giving her a State application for employment at their Bible study. CP at 79. Ms. Evans testified that her assisting Mr. D’Souza with obtaining employment at DSHS did not send a message to other DSHS employees that being a member of her church was a means to find and obtain State employment. CP at 80.

Ms. Evans provided information to the paralegal working on Mr. D’Souza’s visa. CP at 81. In her e-mail to the paralegal dated October 2, 2002, Ms. Evans stated:

Please let me know if you are going to be able to process this within the week because Mr. D'Souza [sic] offer was good until Oct. 1, 2002. I have sought an extension until Oct. 10, 2002. We [sic] you be able to meet that date of completing the approval process?

CP at 168.

Mr. D'Souza and Ms. Evans exchanged e-mails on October 11, 2002. In his e-mail to Ms. Evans, Mr. D'Souza attached a prayer and asked her if she wanted any changes. CP at 170. Ms. Evans responded that it was perfect and mentioned that she received documents from the paralegal to print at work, but she could not do that so she forwarded them to her home.

CP at 170. She ended by stating:

I pray you are having an awesome day. I wish I were home praying and not fighting the demons of the workplace.

CP at 170.

Ms. Evans signed the documents necessary for Mr. D'Souza to obtain a visa. CP at 81. In doing so, Ms. Evans agreed on behalf of DSHS to be liable for the reasonable costs of Mr. D'Souza's return transportation in the event he was dismissed before the end of his period of authorized stay. CP at 172-74. Ms. Evans did so without obtaining the consent of her superiors at DSHS. CP at 57-58. Also, Mr. D'Souza paid filing fees of \$1,130 in order to obtain his visa. CP at 235. In accordance with the American Competitiveness and Workforce Improvement Act (ACWIA) of

1998, the employer is required to pay the Premium Processing Service filing fee of \$1,000 and it is the State's practice to pay the \$130 standard filing fee. CP at 235. Mr. D'Souza was reimbursed by DSHS for his having paid these fees. CP at 235.

During her deposition, Ms. Evans acknowledged that the basis for hiring a non-U.S. citizen such as Mr. D'Souza to work for DSHS is that no one in the United States has the skills necessary to do the job. CP at 82. The process requires DSHS to conduct recruitment before making a hiring decision. CP at 82. In her letter dated October 9, 2002, to the U.S. Immigration and Naturalization Service, Ms. Evans stated:

We are extremely selective in our hiring and have found Mr. D'Souza to be the most qualified candidate available.

CP at 178. However, during her deposition, Ms. Evans testified that she was unaware of any effort made by DSHS to recruit for the position filled by Mr. D'Souza. CP at 83.

Ms. Evans signed the form necessary for Mr. D'Souza to be hired as a DSHS temporary employee for nine months. CP at 180. Ms. Evans sent a memo to Davis Garabato, DSHS Region 5 Personnel, in order to get Mr. D'Souza's employment with DSHS extended an additional three months. CP at 182. In her letter to the U.S. Immigration and Naturalization Service, Ms. Evans represented that Mr. D'Souza's intended employment

was for 3 years. CP at 185. Ultimately, Mr. D'Souza was hired as a permanent employee by DSHS. After he was hired by DSHS, Mr. D'Souza continued to volunteer his time and services for Ms. Evans' church. CP at 84.

On February 9, 2004, Ms. Evans was reassigned to her home as a result of the ongoing investigation by the State Auditor's Office. CP 237-38. Just prior to her reassignment, Ms. Evans removed documents from her office that related to Mr. D'Souza's work visa. CP at 49. During her deposition, Ms. Evans claimed the documents were not DSHS documents. CP at 49. Also, she claimed that she had informed her supervisor, Deborah Bingaman, of her intention to remove the documents and deliver them to her attorney and was not advised that she could not do so. CP at 49.

On February 9, 2004, Ms. Bingaman wrote Ms. Evans a letter in follow-up to an earlier e-mail of January 27, 2004. CP at 240. In her letter, Ms. Bingaman requested that Ms. Evans return Mr. D'Souza's personnel file to her or the State Auditor's investigator by February 10, 2004, including anything in her office that related to his hiring or his visa. CP at 240. Ms. Evans failed to return the documents by February 10, 2004. Her attorney returned the documents to Ms. Bingaman by letter dated February 23, 2004. D'Souza no longer works for DSHS. CP at 242.

b. Paula Pelletier

Paula Pelletier was a member of Ms. Evans' church. CP at 41. Ms. Pelletier assisted Ms. Evans in drafting the documents that created her church as a legal entity. CP at 48-49. Also, Ms. Pelletier was an officer in Ms. Evans' nonprofit corporation, the Upper Room Fellowship Program. CP at 69. Ms. Evans was aware that Ms. Pelletier tithed a portion of her income to the church. CP at 43. Ms. Pelletier was also a DSHS employee. CP at 68. Ms. Evans had promoted Ms. Pelletier from line staff to a supervisor before Ms. Evans was promoted to Regional Administrator. CP at 41. As Regional Administrator, Ms. Evans appointed Ms. Pelletier to be the assistant to Pierce South Community Service Officer Administrator Rebecca Coffey. CP at 70.

Ms. Evans learned from Ms. Pelletier that Ms. Coffey had allegedly been disparaging Ms. Evans by sending anonymous letters, by contacting officials in Olympia and by contacting individuals to get them to be a part of a movement against Ms. Evans. CP at 44. Ms. Coffey and Ms. Evans had competed for the Regional Administrator's position and, according to Ms. Evans, Ms. Coffey resented the fact that Ms. Evans got the position and she did not. CP at 45. As a result, Ms. Evans claimed that Ms. Coffey had been instigating trouble and undermining her authority. CP at 45. Therefore, Ms. Evans removed Ms. Coffey from her position and replaced

her with Ms. Pelletier. CP at 70. Thereafter, Ms. Coffey filed a tort claim against DSHS alleging that her removal as a Community Service Officer Administrator was religious discrimination on the part of Ms. Evans. CP at 187-94.

During her deposition, Ms. Evans admitted that promoting Ms. Pelletier to the position formerly held by Ms. Coffey was not a good decision. CP at 109. According to Ms. Evans, Ms. Pelletier did not perform well as a Community Service Officer Administrator. CP at 109. Ms. Evans removed Ms. Pelletier from the position in May 2003. Eventually, Ms. Pelletier resigned her employment with DSHS and, according to Ms. Evans, has filed a claim against DSHS for harassment. CP at 42.

On March 5, 2004, Ms. Pelletier had a check drawn that was made payable to Ms. Evans in the amount of \$10,000. CP at 71. During her deposition, Ms. Evans testified:

It was my money and she was giving it to us for the down payment on the motel and it was my money. I'm going to say that again, and she will address that. And I believe I've answered the question that it was money that she owed me that she was paying back, okay.

CP at 72. At the time of this transaction, Ms. Evans had been placed on home assignment pending the investigation by the State Auditor's Office. CP at 73. Ms. Evans had been Ms. Pelletier's direct supervisor. Ms. Evans

admitted that had she not been removed from her exempt position as a Regional Administrator, she would have found herself in a situation when she returned from home assignment where she had previously loaned a subordinate employee whom she directly supervised the sum of \$10,000. CP at 74. Ms. Evans did not see any conflict of interest with her having loaned Ms. Pelletier, her subordinate employee, thousands of dollars. CP at 74-75.

c. Darlene Burton

Darlene Burton was a member of Ms. Evans' church. CP at 67. She was also on the Board of Directors for TURF. CP at 63. Ms. Burton was also a vice-president of Ms. Evans' nonprofit corporation. CP at 64. She was hired into DSHS Region 5 while Ms. Evans was the Regional Administrator. CP at 62. Ms. Burton was hired as an emergency hire in November 2000. CP at 62. As an emergency hire, Ms. Burton did not have to compete with other potential candidates from the State Registry. CP at 65-66. Eventually, she was able to secure permanent employment with DSHS. CP at 65-66.

Ms. Burton is also an ordained pastor. CP at 63. At least as early as November 1, 2002, Ms. Burton began attaching a religious saying to her DSHS e-mails: "There will always be an answer for me. His name is Jesus." CP at 110. On April 7, 2003, Ms. Burton discontinued using the

religious saying on her e-mails. Instead, in her e-mail, Ms. Burton substituted the word “censored” where she had previously used the religious saying. CP at 113.

During the course of her deposition, Ms. Evans testified:

Q: Do you see below Ms. Burton’s name, the phrase written on the e-mail, “There will always be an answer for me, His name is Jesus”?

A: Yes I do.

Q: Did you ever advise Ms. Burton that you didn’t think that was an appropriate saying to put on a DSHS e-mail?

A: I didn’t see a problem with it. When people have Confusus and all other kind of logos, but people complained, she took it off.

CP at 110. Ms. Burton no longer works for DSHS. According to Ms. Evans, she terminated her DSHS employment due to continual harassment. CP at 67.

d. Amanda Evans

Amanda Evans is Ms. Evans’ daughter-in-law. CP at 86. She was also a member of Ms. Evans’ church and a DSHS Region 5 employee. CP at 86. In June 2002, Amanda forwarded to Ms. Evans an e-mail she had sent to Margaret Swigert, a DSHS Administrator. CP at 196. Amanda was seeking a position as a social worker in Ms. Swigert’s unit. In response to Amanda’s e-mail, Ms. Evans stated:

Amanda, Maragret is the CSOA at Bremerton. You know the person at the top. I'm talking to her as I'm writing you this email as we are talking. She told me that they have 3 plus 3+'s candidates and someone in the office who has been doing the job as a temp. So anyway the long and short is if it doesn't work out with them doing a justification to hire their own staff she will take you as a transfer. I'll keep looking because we will find you something.

CP at 196.

e. B.J. Wilder-Morehead

B.J. Wilder-Morehead visited Ms. Evans' church. CP at 88. She is a DSHS Region 5 employee. CP at 88. On August 27, 2002, Ms. Wilder-Morehead sent Ms. Evans an e-mail in which she stated:

The DJA that is on the sheet could be whatever you like, however Linda I really need to learn from you when it comes to Administration, and I don't think I have long before the lord call on you to work full time for him, so I hope we can look at a DJA. If we look at the future of DMS I can't help but think that this center will continue to grow adding additional staff and supervision. In order for this center to be represented at the boardroom table, Linda in reality it will need a Deputy. I would love to learn to be a Deputy and learn from you not just anybody. So if you would just give it some thought. *(plus I need to increase my tithing)*

CP at 198. (Emphasis added)

During her deposition, Ms. Evans was asked whether she thought it was appropriate for Ms. Wilder-Morehead to be asking for a promotion while in the same e-mail mentioning that she needs to increase her tithing.

Ms. Evans answered that she did not respond to Ms. Wilder-Morehead's e-mail in words or in action. CP at 104. She also stated:

Some things you don't need to respond to. She had a right to mention to increase her tithing. That's her personal philosophy like people believe in Confusus and whatever else they believe in. That's her opinion. It didn't mean anything to me and I did nothing with it.

CP at 103.

f. Donald Flanagan

Donald Flanagan was a member of Ms. Evans' church. CP at 87. He was also a tenant of Ms. Evans' and paid her rent. CP at 115. He was hired by DSHS Region 5 in November 2002. CP at 47. Mr. Flanagan has a past that includes felony drug convictions. CP at 75. He lived in Ms. Evans' home after he was released from prison. CP at 106. He was hired as an emergency hire and had no prior State service. CP 105. Ms. Evans was aware when Mr. Flanagan was applying for work with DSHS. She does not know whether he disclosed his felony drug convictions when he applied for employment with DSHS Region 5. CP at 75.

4. Other Misuse Of State Property

On October 18, 2002, Ms. Evans exchanged e-mails with Jessie Jordan-Parker³ utilizing the State's e-mail system. In her e-mail, Ms. Jordan-Parker states:

If I get enough done Saturday, I'll see you at church. If not I'll bring your Bosses day gift and my donation to give to you on Monday.

CP at 200. In her response, Ms. Evans states:

Did I give you your card with scripture we are standing on? Psalms 55:22

CP at 200. Ms. Evans admits that a portion of this e-mail was not work related. CP at 99-100.

On September 3, 2002, Ms. Evans exchanged e-mails with Michael Bryan⁴ utilizing the State's e-mail system. In his e-mail, Mr. Bryan states:

It was definitely encouraging to see the young couple, along with the child's mother. The father actually offered to help hand out fliers on Saturday. Whether he does or not, I am encouraged by his willingness. I gave him my office and home phone number.

CP at 202. In her response, Ms. Evans states:

That is great that he was willing. That shows a heart to invite and see folks attend our service. In the spirit I see the place packed out real soon. I believe God is answering our prayers about this ministry.

³ Ms. Jordan-Parker is not a member of Ms. Evans' church, but has attended the church on occasion.

⁴ Mr. Bryan is a member of Ms. Evans' church and a DSHS employee under her direct supervision.

CP at 202.

During her deposition, Ms. Evans admitted that these e-mails did not relate to State business and that she never advised Mr. Bryan to stop using his State phone for church business. CP at 101-02. When asked whether she thought it was appropriate to use the State phone system for church business, Ms. Evans replied:

I think that –yeah, not for church business, but I think people give out their phone numbers for lots of things.

CP at 102.

Ms. Evans admitted that she asked subordinate employees during working hours to do personal favors for her after hours. CP at 114. Ms. Evans does not believe that there is anything wrong with asking subordinate employees to do personal favors for her during their nonworking hours. CP at 55. Ms. Evans did not think it was a conflict for her to rent to and receive rental income from subordinate employees in DSHS Region 5, so long as she was not their direct supervisor. CP at 115.

Ms. Evans admitted that she allowed her son to use her DSHS computer to access information related to his college studies. CP at 56. Ms. Evans admitted that she used her DSHS Region 5 office address as the address for her nonprofit corporation. CP at 56. During her deposition,

Ms. Evans testified that she disciplined two different DSHS employees for using their computers for non-worked related reasons. CP at 220-22.

B. State Auditor's Findings

On July 12, 2004, the Washington State Auditor issued his official report on the whistleblower investigation concerning Ms. Evans. The findings included:

- Ms. Evans used state resources for personal benefit
- Ms. Evans used her position for personal benefit and for the benefit of others
- Ms. Evans removed documents from DSHS without authorization

CP at 206-10.

C. Unrest In Region 5

Examples of employee discontent in DSHS Region 5 were rampant. For example, during her deposition, Ms. Evans testified that there was a website that an anonymous employee in Region 5 had created where other employees could log on and post complaints about Ms. Evans' preferential hiring and promotion of members of her church. CP at 38-40. Those complaints were forwarded to the Secretary of DSHS, Dennis Braddock. CP at 39.

On March 5, 2003, the Washington State Executive Ethics Board received an anonymous complaint about Ms. Evans using her position as a DSHS Regional Administrator to hire and promote members of her church and family. CP at 213-14. On June 2, 2003, the Ethics Board notified Ms. Evans that it would investigate to determine whether the alleged facts were true. CP at 213-14.

On March 18, 2003, Ms. Evans' Supervisor, Mike Masten, received an anonymous report from an employee in the DSHS Region 5 call center complaining about racism, nepotism, the hiring of Ms. Evans' church members, and low employee morale. CP at 216.

On June 3, 2003, an anonymous memo was sent to Secretary Braddock and Ken Schram at KOMO 4 news entitled "Can someone help?????". CP at 218-19. The memo accused Braddock and Mike Masten of ignoring requests of DSHS employees to investigate Linda Evans for abuse of power, conflicts of interest, unjustified hiring, discrimination, nepotism and intimidation. CP at 218-19.

D. Home Assignment

In February 2004 DSHS Assistant Secretary Deborah Bingaman placed Ms. Evans on home assignment as a result of the ongoing investigation by the Auditor's Office. CP at 237-38. Ms. Bingaman did so to protect Ms. Evans and DSHS from liability. CP at 231. She was

concerned that Ms. Evans might retaliate against employees who were providing information to the investigator from the Auditor's Office. CP at 231. She was also concerned that Ms. Evans had accused two DSHS Region 5, employees of tampering with her computer. CP at 231. In the case of Richard Orr, she removed his ability to remotely access computers in Region 5 which interfered with his ability to do his job as an Information Technology Specialist. CP at 231.

While on home assignment, Ms. Evans was paid her full salary as a Regional Administrator. CP at 231. She was instructed not to have contact with staff during business hours or provide work-related consultation to staff. CP at 237. During her deposition, Ms. Evans testified that she had many conversations with DSHS Region 5 employee Paula Pelletier. CP at 111. She does not recall talking to her about work-related matters "any more than in passing." CP at 111. Also, Ms. Evans spoke with her confidential secretary, Linette Davis. CP at 111-12. She does not recall any work-related discussions. CP at 111-12.

E. Termination Of Appointment As Regional Administrator

In October 2004 DSHS Assistant Secretary Deborah Bingaman advised Ms. Evans that DSHS was considering terminating her appointment as a Regional Administrator. CP at 258-60. In February 2005, Ms. Evans was notified that her appointment to the exempt position

of Region 5 Administrator was being terminated. CP at 221-22. The decision to terminate her appointment was made by Secretary Braddock, upon the recommendation of Assistant Secretary Bingaman. CP at 225. Ms. Bingaman's recommendation was based on her belief that DSHS needed new leadership in Region 5 and that a change would be in the best interests of DSHS, Region 5, and the clients who were served in the region. CP at 232.

Ms. Evans was offered a position with DSHS Economic Services Administration. CP at 227. Ms. Evans accepted that position and commenced employment in her new position on March 1, 2005. CP at 227. Ms. Evans worked at her new position for three and a half months, until mid-June 2005. CP at 103-04. At that point, she took a leave of absence from work to care for her ailing mother. CP at 103-04. Ms. Evans never returned to employment with DSHS. She submitted her letter of resignation on September 17, 2005. CP at 229.

F. Procedural Summary

In Ms. Evans' complaint filed in this lawsuit on July 12, 2006, she alleged that the defendant, State of Washington, discriminated and retaliated against her based on her lawful expression of her religious beliefs. CP at 5. Ms. Evans also alleged that the defendant discriminated against her on the basis of race. CP at 6. On January 12, 2007, the trial

court granted the State's motion for summary judgment dismissing Ms. Evans complaint in its entirety. CP at 401-02.

In her brief, Ms. Evans does not claim that the State discriminated against her on the basis of race. As a result, Ms. Evans has abandoned that claim. Ms Evans does set forth the law related to disparate treatment cases. Br. of Appellant at 16-21. However, like her response to the State's summary judgment motion, Ms. Evans does not claim to have been treated less favorably in the terms and conditions of her employment than a similarly situated employee who utilized State resources for promoting their personal, political or religious beliefs. As a result, Ms. Evans has abandoned any claim of disparate treatment on the basis of her expressing her religious beliefs.

Thus, the sole remaining claim is Ms. Evans' claim that the decision to terminate her appointment as a Regional Administrator constitutes retaliation in violation of Chapter 49.60 RCW for exercising her rights to religious freedom.

IV. STANDARD OF REVIEW

Review of an order granting summary judgment is *de novo*, with the appellate court conducting the same inquiry as the trial court. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004). The purpose of summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73

Wn.2d 880, 886, 441 P.2d 532 (1968). Summary judgment is appropriate where the evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). An issue of material fact is one upon which the outcome of the litigation depends. *Atherton Condo Ass'n v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

To defeat summary judgment, the non-moving party must come forward with specific, admissible evidence to rebut the moving party's contentions and support all necessary elements of the non-moving party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions to the effect that unresolved factual issues remain are insufficient to create a genuine issue of fact. *Id.*; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

If the non-moving party fails to establish the existence of a necessary element to that party's case, summary judgment must be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

In such situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.

Id. (citation omitted).

V. LAW AND ARGUMENT

A. **The *McDonnell Douglas/Hill v. BCTI* Burden-shifting Analysis Applies To Plaintiff's Claims**

1. **The *McDonnell Douglas* Burden-shifting Analysis**

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 and federal retaliation claims. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.2d 440 (2001). In this and most employment cases, where there is no direct evidence of discrimination or retaliation, the employee must satisfy the first intermediate burden by producing the facts necessary to support a prima facie case. *Id.*; *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002) (burden-shifting scheme is the same for retaliation and discrimination claims).

To establish a prima facie case of retaliation under state or federal statute, Ms. Evans must present evidence demonstrating that:

- She engaged in a statutorily protected activity;
- Her employer took an adverse employment action against her; and

- A causal connection exists between the protected activity and adverse action

See Milligan, 110 Wn. App. at 638; *Manatt v. Bank of America, NA*, 339 F.3d 792, 800 (9th Cir. 2003). Unless a prima facie case is set forth, the employer is entitled to prompt judgment as a matter of law. *Hill*, 144 Wn.2d at 181. Opinions or conclusory facts are not enough. *Chen v. State*, 86 Wn. App. 183, 191, 937 P.2d 612, review denied, 133 Wn.2d 1020, 948 P.2d 387 (1997). Furthermore, to survive summary judgment, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value." *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 549, 85 P.3d 959 (2004) (citations omitted).

Only if the employee can establish a prima facie case does the burden of production shift to the employer 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 presumption of discrimination is rebutted. *Id.* The burden of production then shifts back to the employee to show that the proffered reason "was in fact pretext." *Id.*

To show pretext, the plaintiff must present evidence that the articulated reason for the action is unworthy of belief and was not believed in good faith by the decision maker. *Domingo v. Boeing Employees'*

Credit Union, 124 Wn. App. 71, 90, 98 P.3d 1222 (2004); *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793, 795 (1995). “If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law.” *Hill*, 144 Wn.2d at 182.

Moreover, both the United States and Washington Supreme Courts have repeatedly stated that while the burden of production may shift during the application of the burden-shifting protocol, the *burden of persuasion remains with the employee/plaintiff at all times*. *Hill*, 144 Wn.2d at 181-82 (*quoting Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)); *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 134, 769 P.2d 298 (1989).

2. The Court Can Weigh Evidence On A Motion For Summary Judgment In A Retaliation Case

In *Hill*, the Washington Supreme Court followed the U.S. Supreme Court’s guidance in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), and held that even where an employee produces some evidence of pretext, other factors may still warrant judgment as a matter of law. *Hill*, 144 Wn.2d at 182-87. The Court of Appeals applied this standard in *Milligan*:

A court may grant summary judgment even though the plaintiff establishes a prima facie case and presents some evidence to challenge the defendant's reason for its action.

. . . .

[W]hen the 'record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,' summary judgment is proper.

Milligan, 110 Wn. App. at 637, quoting *Reeves*, 530 U.S. at 148 (internal quotations omitted); *Hill*, 144 Wn.2d at 184-85.

Consequently, mere competing inferences are not enough to defeat summary judgment. Only when the record contains a *reasonable* but competing inference of retaliation or discrimination will the employee be entitled to a jury decision. *Id.* Applying the foregoing standards to this case, as argued below, the trial court's dismissal was correct and should be affirmed because the record does not contain a reasonable inference of retaliation.

B. Ms. Evans' Retaliation Claim Was Correctly Dismissed Because She Did Not Meet Her Burden Of Establishing A Prima Facie Case Or Pretext

1. Ms. Evans' Claim Fails For Want Of Any "Protected Activity"

In order to establish a prima facie case of retaliation, Ms. Evans must show that: (1) she engaged in a statutorily protected activity; (2) an

adverse employment action was taken; and (3) there is a causal link between the employee's activity and the employer's adverse action. *Milligan*, 110 Wn. App. at 638-39. Ms. Evans claims that she has been retaliated against in violation of Chapter 49.60 RCW for exercising her rights to religious freedom. Br. of Appellant at 21.

However, in order to determine whether an employee was engaged in protected activity, the court must balance the setting in which the activity arose and the interests and motives of the employer and employee. *Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 231 (1998) (quoting *Coville v. Cobarc Servs., Inc.*, 73 Wn. App 433, 439). Here the setting in which the alleged protected activity arose, Ms. Evans use of State property including the State e-mail system, long distance phone system and her State computer, to promote her ministry, occurred in the offices of a government agency. In *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) the United States Supreme Court recognized that public employees do not relinquish First Amendment rights they would otherwise enjoy as citizens. The Court, however, also recognized that 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." *Id.* It held that the reconciliation of these competing interests requires "a balance between the [employee], as a citizen, in commenting

upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.*

More recently, the Ninth Circuit considered the perilous position public employers face when confronted with issues of religious speech in the work place. In *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006), a social services department employee claimed that his employer’s rules restricting him from discussing religion with clients, displaying religious items in his cubicle, and using a conference room for prayer meetings, violated his right to religious freedom under the First Amendment. The court observed:

Mr. Berry, of course, is entitled to seek the greatest latitude possible for expressing his religious beliefs at work. The Department, however, must run the gauntlet of either being sued for not respecting an employee’s rights under the Free Exercise and Free Speech clauses of the First Amendment or being sued for violating the Establishment Clause of the First Amendment by appearing to endorse its employee’s religious expression.

Berry, 447 F.3d at 650. The court applied the *Pickering* balancing test in determining that the restriction on Mr. Berry’s religious speech with clients as well as the restriction on his displaying religious items in his cubicle was outweighed by the Department’s need to avoid possible violations of the Establishment Clause of the First Amendment by

appearing to endorse Mr. Berry's religious beliefs. *Berry*, 447 F.3d at 650-52.

As to the Department's restriction on using the conference room for prayers, Mr. Berry claimed that the room was open to other non-business related meetings and, therefore, allowing individuals to use the room for prayer would not be seen as endorsing religion. *Id.* at 652. The court disagreed, noting that the use of the conference room for birthday parties and baby showers did not convert the room from a nonpublic forum into a public forum. *Id.* at 654. Thus, the conference room was not intended to be forum for the public expression of ideas and opinions. Therefore, the Department's decision to restrict access to a nonpublic forum need only be reasonable. *Id.* at 653. Moreover, the lack of any evidence that the Department permitted the use of the conference room to other social organizations compelled the court to conclude that Mr. Berry was denied use of the room because he sought to use it for non-business related activity, and not because that activity happened to be religious. *Id.* at 654.

In this case, DSHS Administrative Policy 15.15 forbids employees using their State e-mail or the internet to promote their personal, religious or political beliefs. CP at 151. Ms. Evans acknowledged the existence of the policy and promised to follow it. CP at 155. Thereafter, she repeatedly violated the policy over 100 times and admitted doing so

during her deposition testimony. CP at 116. In addition, Ms. Evans violated DSHS policies related to using the State long distance phone system and fax transmission system to support her religious organization. CP 92-93. She even approved her confidential secretary's violation of the policy. CP 89-90.

There is no evidence that the State allowed other employees or organizations to use these State resources to promote their personal, religious or political beliefs.⁵ DSHS did not fail to respect Ms. Evans' religious rights under RCW 49.60 or, for that matter, the Free Exercise and Free Speech clauses of the First Amendment, by insisting she not use State resources to promote her ministry. Her use of State property to support her ministry ran a real danger of entangling DSHS with her religion. As in *Berry*, DSHS's interest in avoiding an Establishment Clause violation by appearing to endorse Ms. Evans' religious beliefs trumps any claim of entitlement to use State resources to promote her ministry. Therefore, Ms. Evans was not engaged in protected activity by defying the policies of her employer not to use State resources to promote her ministry.

⁵ The lack of such evidence would defeat any disparate treatment claim that Ms. Evans was treated less favorably than similarly situated employees. See *Haubry v. Snow*, 106 Wn. App. 666, 677, 31 P.3d 1186 (2001).

Any argument that the evidence establishes a reasonable inference that the “real reason” Ms. Evans was removed from her exempt position was retaliation for her refusal to submit to DSHS’s policy regarding the use of State resources to promote her religious beliefs is without merit. Ms. Evans had no right to force DSHS to allow her to use State resources to promote her religious beliefs and DSHS would have been entirely justified in disciplining her for her defiant refusal to follow its policies.

2. Ms. Evans Cannot Establish That The Legitimate Non-Discriminatory Reasons Articulated By The State For Removing Plaintiff From Her exempt Position Were Pretext

In addition to establishing a *prima facie* case, a plaintiff in a discrimination lawsuit must be able to produce some evidence that the legitimate reasons offered by an employer for an adverse action were mere pretext. *Hill*, 144 Wn.2d at 182-87. If a plaintiff cannot produce sufficient evidence of pretext, the court should dismiss the case. *Id.*

Pretext is not shown by evidence that the employer's reason was incorrect or foolish. Rather, a plaintiff must show that an employer’s stated reasons are unworthy of belief. *Griffith v. Schnitzer Steel Indus.*, 128 Wn. App. 438, 115 P.3d 1065 (2005). A plaintiff must produce evidence that the reason was phony, i.e., deceitful.⁶ An employee's

⁶ Pretext is "a lie," a phony reason. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995); *Brill v. Lante Corp.*, 119 F.3d 1266, 1273 (7th Cir. 1997). "Pretext' . . . means deceit used to cover one's tracks." *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir. 2001). Even if an employer's reasons were "mistaken, ill considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown." *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1175 (7th Cir. 2002).

speculation, or subjective belief in discrimination, does not raise an issue of fact on whether the employer's reason was pretext.⁷ Moreover, a court considering an employer's summary judgment motion is allowed to determine whether any evidence of pretext is sufficiently strong considering other evidence in the case. *Hill*, 144 Wn.2d at 185-86. Among the evidence that a court may consider is the strength of plaintiff's *prima facie* case, the probative value of plaintiff's evidence of pretext, and other evidence which supports the legitimacy of the employer's action. *Id.*

Ms. Evans cannot show that the State's decisions that effected her employment were phony, or a "pretext" for retaliation. The trial court found substantial nondiscriminatory reasons for the defendants' actions whereas the evidence of pretext was "so weak" as to be unable to support a claim for retaliation. RP 10; 22-23. As a result, the defendant/employer was entitled to dismissal as a matter of law.

An employee can demonstrate that the reasons given by the employer are not worthy of belief with evidence that: (1) the reasons have no basis in fact, or (2) even if based in fact, the employer was not motivated by the reasons, or (3) the reasons are insufficient to motivate an

⁷ *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"); *Manatt v. Bank of America, NA*, 339 F.3d 792, 801 (9th Cir. 2003) (summary judgment for employer must be affirmed where plaintiff failed to introduce direct evidence, or specific and substantial circumstantial; evidence, of pretext); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 663-64 (9th Cir. 2002) (employee's subjective beliefs do not prove pretext and defeat a legitimate, nondiscriminatory reason).

adverse employment decision. *Chen*, 86 Wn. App. at 190. Another test for pretext is whether (1) an employee outside the protected class (2) committed acts of comparable seriousness (3) but was not demoted or similarly disciplined. *Johnson v. Dep't of Social & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (1998).

Ms. Evans argues that the reason given for her removal from her exempt position, i.e., the belief that Region 5 would benefit from a change in leadership, is somehow evidence of pretext. Br. of Appellant at 26-27. As an exempt employee, Ms. Evans served as a DSHS Regional Administrator at the discretion of her employer and could be removed from her position *without cause* for any nondiscriminatory reason. Ms. Evans offers no evidence to suggest that DSHS's lack of confidence in her leadership is merely a pretext for a true religious discriminatory motive.

Ms. Evans does not and cannot deny the numerous instances that lead to a lack of confidence in her leadership abilities. Ms. Evans does not deny that she violated DSHS policies regarding the use of State property to promote her church and her religious beliefs. Nor can she dispute that her mismanagement of Region 5 included favoritism in the hiring of a member of her church, including her having made serious misrepresentations in the documents related to his immigration visa and the unauthorized removal of those documents from DSHS. Ms. Evans does not deny that she used the

State SCAN system in an attempt to obtain funds for her church and, ultimately, for her own personal benefit. Finally, Ms. Evans does not deny the facts underlying her obvious conflict of interest and appearance of impropriety surrounding her loan of thousands of dollars to a direct subordinate employee.

Despite all that, Ms. Evans argues that DSHS's stated legitimate, nondiscriminatory reasons for a change of leadership in Region 5 were just a cover-up for intentional discrimination. To show pretext, a plaintiff must offer evidence sufficient to rebut the employer's explanation of its actions and point to discrimination. Moreover, courts do not sit as "super personnel departments" to second-guess employers' facially legitimate employment decisions. *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1034 (8th Cir. 2005); *Wells v. Unisource Worldwide, Inc.*, 289 F.3d 1001, 1007-08 (7th Cir. 2002).

Even if Ms. Evans could prove that she was not guilty of misconduct, that is not evidence of pretext. The issue is not whether or not Ms. Evans engaged in misconduct, although the State asserts that she did and she has admitted doing so, or even whether the decision to remove Ms. Evans from her exempt position was wise or unwise. Rather, the issue is whether DSHS's motive was retaliatory based on the protected expressions of her religious beliefs. It was not and Ms. Evans offered no

evidence to the contrary. She has offered no evidence to show the reasons (most of which she admits) have no basis in fact, or were not in fact a motivation for removing her as an administrator. Even if DSHS's decision was wrong, and it was not, that does not mean that its decision-making was just pretext for actual discrimination. Ms. Evans' failure to offer evidence of pretext warranted summary judgment dismissal of her claims.

Nor did Ms. Evans show pretext by offering any evidence that other employees who did not openly display their faith in the work place had also committed acts of comparable seriousness but were not demoted or similarly disciplined. Ms. Evans has no such evidence because there were no other individuals who engaged in the sheer amount or seriousness of work related misconduct comparable to Ms. Evans' work related misconduct, particularly at Ms. Evans' position of authority as a Regional Administrator.

Instead, Ms. Evans provides former favorable evaluations that do not encompass the period of time during which it was discovered that she had willfully violated DSHS policies related to using state resources for personal benefit, used her position for personal benefit and the benefit of others, and removed DSHS documents without authorization. Such evidence does not establish that DSHS's stated legitimate, nondiscriminatory reasons for a

change of leadership in Region 5 were just a cover-up for intentional discrimination.

Thus, even if Ms. Evans could somehow make out a prima facie case, she still has not shown that the reasons for defendant's actions are a pretext to cover discriminatory retaliation. Under these circumstances when the employee's evidence of pretext is weak or the employer's non-retaliatory evidence is strong, summary judgment is appropriate. *Hill*, 144 Wn.2d at 182. As a result, the defendant/employer was entitled to dismissal as a matter of law.

VI. CONCLUSION

The Respondent, State of Washington, Department of Social and Health Services, respectfully requests this Court affirm the trial court's order granting the summary judgment of dismissal.

RESPECTFULLY SUBMITTED this 25~~th~~ day of June, 2007.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of June, 2007, at Tumwater, WA.


LAUREL B. DeFOREST