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DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO  
Cause No. 39915-6-II

Thurston County Superior Court Cause No. 07-2-02508-9

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CHRISTOPHER DAVIS,

Petitioner

v.

WASHINGTON STATE DEPARTMENT OF  
CORRECTIONS, et al

Respondents

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BRIEF OF PETITIONER

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John R. Bonin & Julie K. Cook

Bonin & Cook, P.S.  
1800 Olympic Hwy South, STE 1,2,3,  
PO Box 783, Shelton, WA 98584-0783

360-427-7474  
WSBA # 25760 & # 25298

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#### A. INTRODUCTION

Christopher Davis previously suffered PTSD and filed a lawsuit against DOC due to an incident in which he was forced to take the life of a dangerous escaped maximum-security inmate serving a life sentence that DOC had erroneously placed in a minimum-security status. That lawsuit was settled and Mr. Davis contemplated that he would desire to resume employment with DOC in the future after he recovered from

his PTSD from the incident. So as part of the settlement terms DOC agreed not to interfere with future employment. When Mr. Davis's therapist deemed Mr. Davis was capable of returning to DOC employment, Mr. Davis requested placement. Mr. Davis was never placed with DOC in spite of: 1) WACs requiring special assistance with reemployment for disability separated employees; 2) an excellent employment history; 3) seven years of experience, 4) a critical shortage of trained officers during the time period he requested placement; 5) training and certification as a law-enforcement officer that had not lapsed; 6) application for over eighty positions; 7) two successful interviews which resulted in Mr. Davis being given offers of employment, that were withdrawn without explanation. Consequently Mr. Davis brought suit again against DOC and the individuals that participated in the process of denying him job opportunities. Mr. Davis brought causes of action for Employment Discrimination pursuant to RCW 49.60, and 42 USC 12111 and 42 USC 12203; Retaliation; Emotional Distress- both Negligent Infliction and/or Intentional Infliction (aka Outrage); Breach of Contract; and Violation of Civil Rights under Washington law, 42 USC 1983 and 42 USC 1988.

DOC motioned for summary judgment and addressed only some of the causes of action. Mr. Davis responded and cross-motivated for partial summary judgment based upon DOC's failure to provide special assistance to a disability-separated employee pursuant to regulatory mandate. DOC belatedly filed supporting documents up until the day of argument on their motion for summary judgment. The trial court

continued the matter for additional briefing so that DOC's untimely-filed documents could be addressed. DOC was granted summary judgment on all causes of action in spite of the fact that DOC did not address some of the causes of action.

Also, issues of disputed fact should have prevented summary judgment. The most obvious material contested facts stem from DOC's offers of employment at two different facilities that were withdrawn without explanation. DOC did not follow through with the offers and now alleges that Mr. Davis did not complete the process. Mr. Davis asserts he did everything DOC requested. Therefore obvious issues of material fact exist regarding the withdrawal of those two offers.

DOC alleges that they did not follow through on the first offer of employment because Mr. Davis did not take a U/A. However, Mr. Davis asserts that no U/A was ever scheduled or requested. Evidence in addition to Mr. Davis's declarations was provided to the trial court that, a) supports Mr. Davis's assertion that no U/A was requested, and b) shows DOC's assertion he was not hired because he failed to take a U/A is fabricated. That evidence is as follows: 1) a witness declared that she heard the conversation in which the first job offer was made and the witness heard the fact that DOC was to call back and make final arrangements for employment that day; the witness confirms no second call ever came; 2) during the call Mr. Davis was told it would be up to Superintendent Waddington whether Mr. Davis was rehired as a CO1 or CO2.; 3) DOC sent a letter, dated the same day of the call, saying that another candidate was chosen; the letter makes no reference to any

requested U/A and states Mr. Davis's name would remain on the roster; 4) DOC policy is that if a drug test is not taken upon request it is treated as a failure and the candidate's name is removed from the roster; 5) this excuse was never communicated to Mr. Davis until after he filed an EEOC complaint.

After a second interview that occurred within a month of the initial job offer- at another DOC facility, Mr. Davis was again offered employment. Again DOC again gave no explanation and did not follow through with the offer (this time DOC requested a U/A and Mr. Davis took it and passed). Again for the first time after an EEOC complaint was filed DOC alleged that Mr. Davis did not complete a requested follow up interview on written psychological testing. Mr. Davis asserts he agreed to testing. This is the disputed fact concerning the second offer. DOC admitted that Mr. Davis should never have been given the written test pursuant to DOC policy; therefore no follow up evaluation could have been requested. In summary judgment documents DOC changed their position suddenly claiming that what they wanted was not a follow up on the disallowed questioning but an independent medical evaluation. Mr. Davis is adamant he never refused testing. Mr. Davis states that when Mr. Dowler called, a month after the second offer, Mr. Dowler's manner was aggressive and negative. Mr. Dowler's demanded that Mr. Davis repeat unnecessary training and complete the follow up review of the testing. Mr. Davis is adamant that he did what he always did and complied with DOC's requests whether they were against State rules and regulations or not, figuring that eventually DOC would either place him or the matter

would be litigated. Mr. Davis's goal was to resume employment as soon as possible, so he agreed to do what Mr. Dowler requested. Mr. Davis agreed to an evaluation of the lengthy written psychological testing but he requested that the colleague of the DOC therapist that was a defendant in Mr. Davis's original lawsuit not do the follow up. Mr. Davis also told Mr. Dowler that it was his understanding that retraining was unnecessary, as had been confirmed by DOC several times. Mr. Davis informed Mr. Dowler that he intended to proceed with his EEOC complaint and consult with his attorney. However, Mr. Davis agreed to further evaluation. DOC argued that Mr. Davis refused the evaluation, however DOC never scheduled any kind of evaluation with anyone, and never communicated with Mr. Davis or his counsel about the matter. Mr. Davis expected Mr. Dowler to schedule an evaluation at the end of the conversation, but he never did. DOC has admitted they did not follow proper procedure and improperly informed Mr. Davis several times about what training and testing was required, and profess ignorance of rules and what special assistance they were required to provide. DOC has never explained why if this was all a big misunderstanding as they have asserted they simply did not provide special assistance and place Mr. Davis when their errors were discovered.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment when issues of material fact existed about whether DOC discriminated against Mr. Davis in violation of public policy.

2. The trial court erred in dismissing the contract claim on summary judgment because an issue of material fact existed about whether or not DOC violated the settlement contract by interfering with Mr. Davis's right to future employment.
3. The trial court erred in dismissing the federal cause of action for violations of 42 USC 1983 because DOC did not raise any issues as to the claim in their motion for summary judgment except to state the obvious, that 42 USC 1983 was not a State cause of action. Mr. Davis responded that the federal causes of action had not been addressed by DOC in their motion.

#### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court error by not viewing the evidence in the light most favorable to the nonmoving party given the abundance of contested facts and evidence calling in to question DOC's alleged "overriding justification" for not rehiring Mr. Davis after he was disability separated for PTSD and had filed suit against DOC. Do the following facts create issues of material fact that should have prevented summary judgment?
  - a) The fact that DOC did not rehire Mr. Davis back during a period of critical shortage of correctional officers, as substantiated by Superintendent Waddington, and Mr.

Davis's personal knowledge, (based on public announcements in the newspaper and by the governor, and contacts with DOC personnel) that a certified, trained, experienced candidate with an exemplary record should have been hired during the over one year period of critical shortages of trained correctional officers.

- b) The fact that DOC was required to provide "special assistance" to Mr. Davis and instead DOC only identified one CO2 opening and secured only two interviews as required by WAC's, after months of requests for assistance by Mr. Davis and only after attorney involvement.
- c) The fact that Mr. Davis was given two offers of employment; that were withdrawn without explanation.
- d) The fact that Mr. Davis denies he refused to take a requested U/A or psychological evaluation, as later asserted by DOC as the reason for the previously unexplained withdrawal of offers.

- e) The fact that DOC offered Mr. Davis the first job and then later the same day DOC sent him a letter denying him the job.
- f) The fact that the letter Mr. Davis was sent gave a different explanation as to why he was not hired, then is now being asserted.
- g) Was the fact that the second job offer was denied based on an allegation that Mr. Davis refused to participate in a follow up review of psychological testing enough to create an issue of contest fact, given that Mr. Davis is adamant that he agreed to testing, but he asked that an unbiased person conduct the testing.
- h) The fact that another DOC facility confirmed that Mr. Davis need not do the follow up testing, based on the fact that two therapists including the one that they relied upon solely in disability separating Mr. Davis confirmed he was fit for duty.
- i) The fact that Mr. Davis was not required to participate in a written psychological testing and follow up as part of the hiring process pursuant to DOC rules.

j) Do all of the above facts and more together prevent summary judgment on the issues of

Disability/Whistleblower protection under the WLAD?

2. Did the fact that DOC agreed in the settlement of the first case that : “This settlement is not intended to effect the plaintiff’s right, if any to future employment by the defendant” create a cause of action in contract if DOC interfered with future employment with the defendant?
3. Did the trial court error in granting summary judgment on the issue of violation of 42 USC 1983 when the only argument raised by DOC was that 42 USC 1983 is not a State cause of action, and Mr. Davis responded that 42 USC 1983 is a federal cause of action.?

#### C. STATEMENT OF THE CASE

1. Mr. Davis was initially hired by DOC June 8, 1998, and worked as a CO2 from late 1999 until he was disability separated on March 24, 2005. CP 682-85, CP 687. Mr. Davis has an excellent employment history with DOC. CP 691-94, CP 619 pg 12 lines 1-5
2. On August 29, 2003 Christopher Davis as a Correctional Officer 2, was forced to take the life of an escaped maximum-security inmate serving a life sentence who had been placed by DOC in a

minimum-security facility. CP 712 paragraph 2 – CP 713 line 5, CP 367, CP 400-02

3. DOC was under tremendous pressure about the escape due to representations made to the Grays Harbor Community about the security status of offenders placed there, and due to a potential wrongful death lawsuit. CP 400-02
4. Tremendous pressure was placed on Mr. Davis to pretend all was well and return to his prior position. Dr. Smith evaluated Mr. Davis on behalf of DOC and pronounced him fit for duty and threatened on multiple occasions to see Mr. Davis never again worked in any capacity in law enforcement if he did not return to his prior position. As a result Dr. Smith was a party to a lawsuit Mr. Davis filed. CP 106, CP 772.
5. Mr. Davis suffered PTSD as a result of the incident and was placed in a position as an investigator even though he lacked the qualifications at the time, under Superintendent Doug Waddington's discretion. When Mr. Davis refused to violate the rules and allow an informant inmate to make an unmonitored personal call pursuant to a directive from Waddington, Mr. Waddington no longer allowed Mr. Davis in the position under his discretion. CP 713-14
6. Then on March 24, 2005 Mr. Davis was disability separated due to his PTSD. CP 395 (Mr. Waddington's separation letter due to disability to Mr. Davis dated January 20, 2005), CP 395

7. In August of 2005 the lawsuit against DOC was settled. Because it was anticipated that Mr. Davis would be reinstated once he recovered from PTSD, a provision of the settlement agreement was that “This settlement is not intended to effect the plaintiff’s right, if any to future employment by the defendant”. CP 392 lines 11-12.
8. In September of 2006 Mr. Davis requested immediate reinstatement to his prior position, and asked what documentation DOC needed from his therapist. CP 652. Then, in September of 2006 Mr. Waddington (DOC) replied he would work with Mr. Davis to secure placement, and asked Mr. Davis to specify which DOC facility he preferred and directed him to HR Manager Margaret Lee to secure a position at his preferred facility CP 654.
9. Mr. Davis supplied a release from his most recent therapist to return to work. CP 651.
10. DOC later requested a release from his Washington psychiatrist, which he provided dated December 19, 2006, which explicitly states he is fit to return to work as a corrections officer for the State of Washington. CP 656, CP 167-68 last paragraph continuing to page 168. Also DOC relied exclusively upon the same psychiatrist’s opinion to disability separate Mr. Davis, but then suddenly Mr. Dowler refused to rely upon the same psychiatrist’s opinion to reinstate him. CP 320 lines 7-13. Previously, another DOC facility had specified that the two opinions by treating doctors qualified him for reinstatement without the need for further evaluation. CP 798 lines 13-16.

11. DOC did not help Mr. Davis locate any positions. CP 319 lines 2-13. Mr. Davis worked very hard attempting to re-secure a position with DOC; he took numerous placement tests and applied for over 84 positions with the State of Washington. CP 724-34 However, every time he cleared one obstacle another one was created for him. First they alleged he had to take all the testing and training of a completely new person. CP 717-18. This stance was abandoned when it was pointed out it was contrary to the law. CP 648-49, CP 700 Then Mr. Davis was told he did not fill out the appropriate “form” to get in to the correct “pool”. CP 718
12. Finally, after months Mr. Davis was forced to involve legal counsel before DOC finally allowed him to interview for two positions. CP 718 Then Mr. Davis was given two offers of employment. CP 364, CP 702
13. Mr. Davis took the only drug and alcohol evaluation he was ever requested to take. CP 797-98. A witness verifies that no request for any drug test was made during the only telephone contact Mr. Davis had with multiple parties from DOC. CP 757-59, CP 762 Mr. Davis was told to expect another phone call that same day finalizing the position. CP 762, CP 797 Instead Mr. Davis later received a letter from the same person who told him to expect a call to finalize the position, saying he was denied the position. CP 644 Incredibly the letter was dated the same day he was told to expect contact and waited for her return call. CP 644, CP 406 (Gail Robbins letter dated 2/9/2007 informing Davis he had not been

“selected.”) DOC states in that letter they chose someone else, and discusses vague factors in selection as the reason he was not “selected”. Nowhere is a drug test mentioned, or the withdrawal of the previous offer. Instead of reinstating Mr. Davis DOC hired someone with no experience – a complete new hire. CP 648-49 Now, DOC is claiming Mr. Davis was not reinstated because he failed to take a drug test. However, a witness, Teresa Patten, heard the phone call and verified DOC did not call back to arrange the drug test that day. Later that same month in another interview Mr. Davis was asked to take a drug test directed where to go and took the test immediately and of course passed. CP 364-65 (Offer & PAC Lab Drug & Alcohol Test results.)

14. As a result of that next interview Mr. Davis was also offered employment at another DOC facility. In spite of having been told he did not have to complete the psychological testing pursuant to DOC policy, he had previously erroneously been given taken a four hundred to six hundred question written psychological test. CP 699 DOC never followed up in scheduling the evaluation, and now claims Mr. Davis refused to take the evaluation. Mr. Davis followed his pattern of doing everything DOC requested, but did ask that an associate of Dr. Smith’s (who was had previously threatened Mr. Davis after he did not comply with his demand to return to work) not evaluate the written test or conduct a follow up interview. CP 708-09

15. DOC never helped Mr. Davis secure employment following his release from disability separation as required by law. CP 319 lines 2-13 Instead, DOC even went so far as to refuse to provide his employment file to another potential employer. CP 703 last 4 lines to CP 704 During the February 9, 2007 phone call Mr. Davis was told the final decision about what rank he would be reemployed at was up to Superintendent Waddington. CP 798 line 23 to CP 799 line 6

#### D. ARGUMENT

##### SUMMARY JUDGMENT STANDARD IN EMPLOYMENT

##### DISCRIMINATION

The standard is very high for employers seeking summary judgment in discrimination cases.

A summary judgment motion can be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must consider the facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.(citation omitted)

Comodore v. University Mechanical Contractors, Inc. ,120 Wn.2d 120, 123, 839 P.2d 314 (1992).

Very little evidence is necessary for plaintiff to survive summary judgment in a discrimination case is needed because the ultimate question is one that can only be resolved through a “searching inquiry”- one that is most appropriately conducted by a fact finder, upon a full

record. (Citation omitted) Lam v. Univ. of Hawaii, 40 F.3d 1551, 1563 (9<sup>th</sup> Cir 1994). Summary judgment in employment discrimination cases in favor of the employer is seldom appropriate.” (Citation omitted) Riehl v. Foodmaker, Inc. , 152 Wn.2d 138, 144, 94 P.3d 930 (2004.)

The legislature has explicitly mandated liberal construction of the WLAD in order to eliminate employment discrimination.

RCW 49.60.180 is part of a comprehensive law by which the legislature declared it is an individual's Civil right to be free from various types of discrimination. RCW 49.60.030. The express purpose of the law is the elimination of discrimination. RCW 49.60.010. And the legislature has directed liberal construction of the provisions of RCW 49.60 in order to accomplish its purpose. RCW 49.60.020....

When, in 1973, the legislature chose to make this policy applicable to discrimination against the handicapped, we believe it is clear it mandated positive steps be taken. An interpretation to the contrary would not work to eliminate discrimination. It would instead maintain the Status quo wherein work environments and job functions are constructed in such a way that handicaps are often intensified because some employees are not physically identical to the “ideal employee”.

Holland v. Boeing Co., 90 Wash.2d 384, 387-89, 583 P.2d 621 (1978).

## DISCRIMINATION-PRIMA FACIA CASE & PRETEXT

### Elements

Mr. Davis made a prima facia case of discrimination and established pretext. The elements of discrimination in violation of public policy are: 1) engaging in a protected activity, 2) adverse employment action by the employer, 3) evidence that would allow a reasonable person to find a causal

link between the activity and the adverse employment action. Hegwine v. Longview Fibre Co.Inc. 132 Wash.App. 546, 132 P.3d 789 (2006).

Here, two different public policies are alleged to have been violated, both policies are protected under the WLAD. Those policies protect whistleblowers and persons suffering from disabilities. First, whistle blowing - DOC discriminated due to: 1) the prior lawsuit, 2) whistle blowing, and 3) the EEOC Complaint filed after it became apparent that DOC was not going to rehire Mr. Davis.

It is unlawful for “any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by [the law against discrimination], or because he or she has filed a charge, testified, or assisted in any proceeding under [the law against discrimination.]  
RCW 49.60.210(1)

If a finder of fact determines that Mr. Davis’s protected acts of confronting his prior employer with their wrongful and illegal acts were a substantial factor in DOC’s decision to not rehire Mr. Davis, then DOC is guilty of discrimination.

Second if Mr. Davis’s PTSD was a substantial factor in DOC’s decision not to rehire Mr. Davis then DOC is guilty of discrimination on that basis as well. Davis v. West One Automotive Group, 140 Wash.App. 449, 460, 166 P.3d 807 (2007), RCW 49.60.180 (2).

Therefore, in the present case Mr. Davis engaged in two protected activities either one of which satisfies the first element of discrimination.

The second element is an adverse employment action by DOC. The adverse employment actions here were failure to reemploy Mr. Davis, and refusing to turn his employment file over to another employer so they could employ him. CP 710 paragraph 3 to CP 711, 2CP 796 (Winlock Police Department Notarized Waiver and Authorization to Release information dated 1/14/08.)

The third element of discrimination is evidence that would allow a reasonable person to find a causal link between the activity and the adverse employment action. Hegwine v. Longview Fibre Co.Inc.132 Wash.App. 546, 132 P.3d 789 (2006). This is established by showing much the same facts that show pretext: 1) DOC did not rehire Mr. Davis during a period when a critical shortage of correctional officers existed, 2) instead DOC employed people less qualified, 3) put numerous obstacles in his path, 4) only gave him two interviews despite numerous openings, 5) did not give him “special assistance” for two years as required by, WAC 357-19-465, 357-19-470, and 6) fabricated reasons for suddenly withdrawing two offers of employment. Thus all of the elements of discrimination are met, if the facts are viewed in the light most favorable to Mr. Davis as required in the context of summary judgment.

DOC alleges that Mr. Davis must show that a less qualified person was placed. However this is not true. CP 648-49 In addition, even if it were true Mr. Davis need not prove a less qualified person was hired if from the facts asserted a reasonable person could find discrimination occurred.<sup>1</sup>

The McDonnell Douglas factors should be used flexibly to address the facts in different cases. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-55, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981) ( McDonnell Douglas burden shifting should be used flexibly to meet different fact situations; burden to show prima facie case “is not onerous”); *Grimwood v. University of Puget Sound, Inc.*, 110 Wash.2d 355, 363, 753 P.2d 517 (1988) ( McDonnell Douglas test to be used flexibly, or not at all). However, the McDonnell Douglas test need not be used, if it makes the analysis needlessly complex, or if the plaintiff chooses some other method to meet the burden of producing evidence that would allow the fact finder to find unlawful discrimination by a preponderance of the evidence. See, e.g., *Parsons v. St. Joseph's Hosp. and Health Care Ctr.*, 70 Wash.App. 804, 809, 856 P.2d 702 (1993).

*Johnson v. Department of Social and Health Services*, 80 Wash.App. 212, 227, 907 P.2d 1223, 1232 (Div. 2,1996) at FN 21.

#### Pretext

In addition, DOC has completely failed in their burden to provide any nondiscriminatory reason for the following: 1) refusing to turn over Mr. Davis's employment file to a perspective employer, 2) not considering Mr. Davis for open positions he was qualified for after his EEOC Complaint was

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<sup>1</sup> The court was aware at the time of summary judgment that a motion to compel discovery was pending that would have required DOC to disclose information on job openings and new staff. The following are the initial responses to requests for production on those issues, showing no information was provided and DOC's statement they wanted to “reserve the right to modify or supplement this response if appropriate, as Defendants' investigation is continuing”. CP 443 request for production 63 to 445 request for production 68.

filed in March of 2007, 3) not following through with “special assistance” for two years – even after he finally managed to get placed in the GGTP in December of 2006. Consequently, a prima facia case and pretext have been established by the above facts. There are many ways to establish pretext (a reasonable basis to believe the employer’s alleged nondiscriminatory reason for the discriminatory act is false) among them are: (1) the reasons have no basis in fact, or (2) even if based in fact, the employer was not motivated by these reasons, or (3) the reasons are insufficient to motivate an adverse employment decision. Chen v. State, 86 Wash.App. 183, 190, 937 P.2d 612 (1997).

In the summary judgment context, this translates into a requirement that the plaintiff create an issue of fact calling into question the otherwise legitimate reasons proffered by the employer. This is, as we indicated above, because the employee's burden at this stage in the proceedings is only to produce sufficient evidence, including that adduced to support his prima facie case, to raise a genuine issue of material fact. **Where, as here, the record contains “reasonable but competing inferences of ... discrimination” because the employer's reasons have been called into question both by the conflicts among the reasons themselves and by evidence rebutting their accuracy or believability, “it is the jury's task to choose between such inferences.”** Carle, 65 Wash.App. at 102, 827 P.2d 1070 (citing United States v. Stanley, 928 F.2d 575, 577 (2nd Cir.), cert. denied, 502 U.S. 845, 112 S.Ct. 141, 116 L.Ed.2d 108 (1991)). (emphasis added)

Sells Ted v. Washington Mutt. Save. Bank, 69 Wash.App. 852, 862-63 851 P.2d 716 (1993.) overruled on other basis.

DOC' s allegation that Mr. Davis refused the drug test is shown to be pretextual by direct evidence and inferences including:

- a. Mr. Davis has stated DOC never requested he take a drug test. CP 552 line 13 to CP 553 line 13, CP 797-98
- b. A witness to the phone call that occurred on February 9, 2007 in which Mr. Davis was offered the WCC job confirms no drug test was requested. CP 757-59, CP 762, CP 797 The parties to the conference call were Mr. Davis, and two WCC employees Gail Robbins and Margaret Lee. CP 644.<sup>2</sup> On February 9, 2007 Mr. Davis was told to expect a call back from WCC during which final arrangements for employment would be made. Mr. Davis made sure he was available that day at work for the phone call in which he expected to be told where and when to take the drug test. CP 762, CP 797
- c. Mr. Davis was told during the February 9, 2007 phone call that no follow up on the written portion of the psychological evaluation would be required and Ms. Lee instructed Ms. Robbins to have the expert opinions from the two doctors that verified Mr. Davis was fit for duty placed in his file. CP 798 lines 13-16 This confirmed prior phone calls

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<sup>2</sup> DOC did not want the court to consider Ms. Patten's declarations and therefore alleged it lacked foundation. However, Mr. Davis supplied the foundation in his declaration by reference to Ms. Patton's witnessing the call, that only one phone call came from DOC and who the parties to the phone call were. CP 644, CP 649 lines 17-24, CP 797-98.

from WCC stating that pursuant to policy and procedure psychological testing and retraining are not required of employees that have been employed by DOC within two years, and were prior permanent employees prior to 1999. CP 767 (DOC Protocols for Correction Officers) at pg 4 subsection starting “Psychological Assessment” and CP 769 beginning at “Reemployment”, CP 623 lines 14-25, CP 629 lines 1-14 CP 695 (Letter from Waddington cc: to Margaret Lee with hand written notations regarding time frame.)

- d. Mr. Davis was told during the February 9, 2007 call that Doug Waddington, then superintendent of WCC, would be making the determination about whether Mr. Davis was hired as a CO1 or as a CO2. CP 798 line 23 to CP 799 line 6. Doug Waddington was a defendant to the prior suit against DOC, and Mr. Davis blew the whistle on some of Doug Waddington’s activities. CP 772 at sec 1.5, CP 713 –14 The witness to February 9, 2007 phone call verifies no follow up call came in at work that same day as expected. CP 759
- e. Instead of a phone call Mr. Davis received a letter the following week that is DOC’s standard letter sent if a more qualified candidate is chosen for the position. CP 672 Mr. Davis was shocked and made notes at that time, of the day of the phone call and the fact the letter was mailed the same day. CP 797, CP 644 line 21 –23.

- f. DOC has another form letter called a “Failure Notification Letter” they send out if some one refuses a drug test, this letter was not mailed to Mr. Davis. Furthermore, if “a candidate refused testing, it is considered the same as a failure result” and “they will be removed from any applicable register for one year”. CP 670 (Pre-employment Drug Testing Process under subheading Refusal and Failure result.) The letter sent to Mr. Davis says nothing about drug testing and gives other unrelated reasons another candidate may be offered the job and explicitly states, “Your name will remain on the register”. CP 672 last paragraph
- g. The allegation that Mr. Davis failed to take a drug test as requested was unknown to Mr. Davis until DOC included it in the inadmissible response to the EEOC complaint Mr. Davis later filed. CP 705 paragraph 1.<sup>3</sup> Shortly thereafter, when Mr. Davis went to his next

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<sup>3</sup> DOC has alleged that their response to Mr. Davis’s EEOC Complaint is admissible even though Mr. Davis has object that it is hearsay. DOC did not allege any hearsay exception. Mr. Davis referred to the document when referencing the fact that DOC alleged for the first time in their response to EEOC complaint that he did not follow through with required testing. Therefore, as used by Mr. Davis the EEOC complaint is not hearsay- the use of the document does not depend upon the truth of the statements referenced. However DOC is using the response to allege the hearsay within is admissible, and it cannot be used for that purpose. ER 801 Similarly, there is hearsay within the declarations asserting that “someone” left a message requesting that Mr. Davis take a U/A or that Mr. Davis refused to take a U/A. These statements are inadmissible hearsay.

interview at SCC, DOC followed establish procedure and gave Mr. Davis written instructions about where and when to take his drug test. CP 670 (Pre-employment Drug Testing Process under subheading - Pre-Employment Drug Testing appointments will be made by Human Resources.) Mr. Davis took the drug test as requested and passed. CP 736

2. DOC's allegation that Mr. Davis's offer of employment at SCC was withdrawn because he refused to take psychological testing is shown to be pretextual by the above facts and this additional direct evidence and inferences.
    - a. Mr. Davis took a lengthy written psychological test when he went in for the first interview at WCC. CP 699
    - b. WCC confirmed that the test and subsequent review thereof was unauthorized and unnecessary because Mr. Davis was returning to work within two years of disability separation and was a permanent employee prior to 1999. CP 767 (DOC Protocols for Correction Officers) at pg 4 subsection starting "Psychological Assessment" and CP 769 beginning at "Reemployment", CP 623 lines 14-25 Therefore, the test was not sent on for follow up review of the answers and a meeting between Mr. Davis and the interviewer, and he was offered
-

the job. It was verified that the intake psychological testing and training were not required. CP 798 lines 13-16

- c. WCC, also did not request any independent medical exam about his disability, because Mr. Davis provided DOC with an expert opinion from his treatment doctor that he had overcome his disability when he requested reinstatement in September of 2006. CP 651, CP 706 –07 last paragraph. DOC requested a second expert opinion that he had overcome his disability of PTSD from the same expert doctor that previously treated Mr. Davis and whose opinion DOC relied upon exclusively in forcing Mr. Davis's disability separation in the first place. Mr. Davis provided that opinion as well. CP 656, CP 706 –07 last paragraph.
- d. But later Mr. Dowler at SCC contacted Mr. Davis and told him he was sending his psychological test on to be reviewed and asked him to participate in the follow up psychological review of that test, and said Mr. Davis needed to retrain. CP 645 line 17 to CP 646 line 3 Mr. Davis informed Mr. Dowler that DOC had informed him several times that the usual intake psychological evaluation and retraining are not required due to his hire date and the date of his disability separation. CP 708 Mr. Dowler insisted that he was going to send the test on anyway and schedule Mr. Davis for an interview. Mr. Davis followed the now well

established pattern of agreeing to what ever DOC asked, but does request Mr. Dowler not schedule the interview with a specific therapist that worked with Dr. Smith who was a defendant in the prior lawsuit and accused of working in conjunction with DOC to deprive Mr. Davis of employment among other threats. CP 798 line 5 to 20.CP 708 last sentence. Mr. Dowler never scheduled the follow-up interview, as was his responsibility pursuant to DOC procedure. CP 767 (under “psychological assessment;”)

- e. The first time Mr. Davis found out DOC claimed that the second offer of employment was withdrawn because they suddenly claimed he failed to complete a psychological evaluation, was when the inadmissible response to the EEOC Complaint was received. CP 798 line 6-12.
- f. DOC never set up an independent medical evaluation concerning his PTSD. Mr. Dowler only told Mr. Davis he wanted him to complete the usual psychological question and answer review for new employees. CP 699.

Here, DOC has not even addressed all of the allegations. Why was Mr. Davis never placed in spite of a sever shortage priority placement in the GGTP pool and excellent scores on exams, experience and an excellent work

history? DOC also ignores the fact that Mr. Davis continues to date to search for employment with DOC. Why during a long period of a critical shortage could DOC not find one position? CP 639 line 24 to 640 line 11 (Waddington admitted shortages in 2006 through 2007) CP 709 last line to first line CP 710, CP 661. Mr. Davis was very a well-qualified candidate, as established by DOC's offer of two positions and his several commendations by DOC. If the withdrawal of two offers was only a misunderstanding as alleged by DOC, and they really just needed another UA or to set up an independent medical evaluation why did DOC not do so? The answer is obvious- the prior and pending legal actions and/or the PTSD are the reasons. The reasons offered by DOC are insufficient to motivate DOC's continued refusal to reemploy Mr. Davis, or to justify their acts especially in light of the contested facts.

Furthermore, DOC is not credible because DOC would be expected to do exactly what they indicated they would do in their initial response to Mr. Davis's letter, which was requesting immediate placement in September of 2006. Namely ask Mr. Davis where he wanted to be placed, and interview him for placement at those facilities. CP 654 DOC admits they had the power to do just that in responsive briefing, but never states why the following procedure set out in WAC 357-19-460 was not followed:

(1) Employers may directly reemploy without certification former permanent status employees who have submitted an application for employment as long as:

(a) The employer's internal layoff list or statewide layoff list for the class has no eligible candidates;

(b) The former employee satisfies the competencies and other requirements of the position to which the employee is being reemployed; and

(c) The former employee has applied for reemployment in accordance with any employer-established time frames within which former employees must apply.

(2) Upon reemployment, the employee must serve a probationary period unless the employer determines otherwise.

In the end Mr. Davis's dogged persistence and legal counsel's assistance were the only things that finally got him interviewed. CP 666 line 5-20. The sheer number of calls he made and tests he took is staggering. CP 711, CP 712 first line.

DOC has never conducted another interview with Mr. Davis since February of 2007. CP 799 lines 6-7 Mr. Davis has been unable to secure any State employment in spite of the enormous number of applications, and the obligation to offer special reemployment assistance. CP 799

DOC never offered any special reemployment assistance as required by statute, they did not identify that he was a qualified CO2 and set up interviews. CP 319 lines 2-21. They never set up any interviews after March 2007 when Mr. Davis filed his EEOC Complaint. CP 799 lines 6-7

At the time of his deposition in January of 2009 Doug Waddington the superintendent of WCC admitted they were still using temporary less qualified people in three different positions, and could not say why Mr. Davis was not placed in one of those positions. CP 634- 36. When Mr. Davis signed a release so that another potential employer could review his DOC employment file. DOC refused to release the file. CP 703 line 21 to CP 704 line 10.

Consequently, all of the elements of a prima facia case and direct and circumstantial evidence of pretext have been shown. Therefore factual issues prevent summary judgment.

MR. DAVIS WAS NOT PROVIDED SPECIAL REEMPLOYMENT  
ASSISTANCE

DOC has alleged that Mr. Davis was not entitled to any priority and was only entitled to be placed in a pool where he had to be considered for positions. This argument ignores the facts and the law. DOC is required by law to give “special reemployment assistance” to disability-separated employees for two years following separation pursuant to WAC 357-19-465, which reads as follows:

Employers must provide special reemployment assistance to separated former permanent status classified employees of the employer for two years following separation due to disability under the provisions of WAC 357-46-160.

The law states that the DOC was required to determine, (1) What job class and positions Mr. Davis was qualified for and consider him for those positions. As set out in WAC 357-19-470 as follows:

The employer will provide assistance, such as the following, to an eligible former employee seeking reemployment under the provisions of WAC 357-19-465:

- (1) Determination of job classes and/or positions for which the former employee is qualified;
- (2) Assistance regarding the employment/application process;
- (3) Reemployment consideration in accordance with the employer's certification procedure for positions for which the individual meets the competency and other position requirements; and
- (4) Access to training programs relevant to the job classes for which the former employee may become qualified.

However, instead of being identified as a qualified CO2 and interviewed for those positions Mr. Davis was told him to go on line like everyone else and attempt to get placed. So he did without any assistance from DOC. CP 319 lines 2-21, CP 724-34. After months going by with no help counsel contacted DOC and DOC finally set up two interviews. CP 718

DOC had still not met the requirement of WAC 35-19-470 by identifying Mr. Davis as a qualified CO2 and interviewing him for CO2 positions. In fact Mr. Davis was told they did not hire CO2s. CP

718 During the phone call when Mr. Davis was offered the first job, Mr. Davis he was told it would be up to Superintendent Waddington whether he was hired as a CO1 or a CO2. CP 798 line 23 to CP 799 line 6. Superintendent Waddington was a defendant in the prior lawsuit. CP 772 sec, 1.5, CP 713-14. This explains why instead of calling back to finalize employment details as promised including scheduling a U/A, DOC wrote a rejection letter that day. CP 644 line 21 –23.

#### CONTRACT CLAIM

A written settlement contract was entered into in which DOC agreed not to interfere with Mr. Davis’s right to future employment due to the prior suit. “Settlement agreements are considered to be contracts; thus, the legal principles applicable to contracts govern their construction.” Trotzer v. Vig, 149 Wash.App. 594,605, 203 P.3d 1056 (2009) citing Stottlemyre v. Reed, 35 Wash. App. 169, 171, 665 P.2d 1383 (1983), review denied 100 Wash.2d 1015 (1983). The relevant portion of the settlement agreement reads:

“This settlement is not intended to effect the plaintiff’s right, if any to future employment by the defendant.” CP 392 lines 11-12

DOC has not reemployed Mr. Davis. This term imposes an obligation not to infer with future employment. The entire context of a settlement

agreement must be considered, and provisions are not given a useless meaning. Courts may not adopt a contract interpretation that renders a term absurd or meaningless. Seattle – First Nat’l Bank v. Westlake Park Assocs., 42 Wn.App. 269, 274, 711 P.2d 361 (1985), review denied, 105 Wn.2d 1015 (1986). The term was put in because Mr. Davis anticipated that DOC be unwilling to reemploy him after the lawsuit and whistle blowing. If the jury believes the facts as set out by Mr. Davis, and that DOC interfered with his right to be reemployed due to the lawsuit and resulting settlement then DOC has violated a term of the settlement contract and they are liable for breach.

The legal effect of a contract is as a matter of law where there are no disputed facts. Yeats v. Estate of Yeats, 90 Wash.2d 201, 204, 580 P.2d 617 (1978). Here, the facts are disputed. Therefore whether or not the contract was violated is an issue of fact and cannot be decided on summary judgment.

DOC NEVER RAISED ANY ISSUE ABOUT THE 42 USC 1983

#### CLAIM

“It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.” White v. Kent Medical Center, Inc., 61 Wn.App.

163, 168, 810 P.2d 4 (1991). Here DOC raised no issue for Mr. Davis to respond to, therefore summary judgment should not have been entered.

The only reference to 42 USC 1983 by DOC states that 42 USC 1983 is not a State cause of action. CP 311 Of course it is not a State cause of action. It is a federal cause of action. In the complaint under the heading Violation of Civil Rights, first plaintiff realleges all other paragraphs, then addresses Washington law. Finally at section 3.27- 3.28 Mr. Davis alleges: “The defendants denied the right to have the opportunities discussed under color of law and in deprivation of the plaintiff’s rights as set out. The actions of the Defendants are, and amount to violation of Plaintiffs rights under 42 USC 1983.” CP 66

In response to DOC’s argument that 42 USC 1983 did not create a state cause of action, Mr. Davis replied that DOC raised no issues as to the federal causes of action. CP 347 lines 12-13. DOC was given the opportunity afterward to file additional briefing due to their own late filings, they still raised no issue as to the 42 USC 1983 cause of action, anywhere in DOC’s reply. CP 487-496

#### E. CONCLUSION

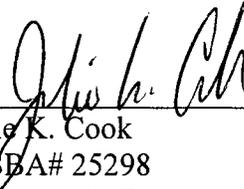
To avoid further delay of trial we request that since discovery cut off and dispositive motions deadlines have past and DOC has already been allowed extensions of time to address issues -that the case be remanded for

trial setting on the discrimination claims raised pursuant to the WLAD  
protections provided to whistleblowers and persons perceived as disabled,  
and on the breach of contract claim, and the 42 USC 1983 claim.

Dated this 14<sup>th</sup> day of January, 2010

Respectfully submitted,

Bonin & Cook, P.S.



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Julie K. Cook

WSBA# 25298

Attorney for Petitioner Christopher Davis

Declaration of Mailing

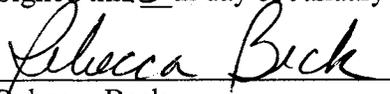
I, Rebecca Beck, certify under penalty of perjury of the laws of the State of Washington that on January 15, 2010, I caused to be mailed the following documents by US Mail 1<sup>st</sup> class postage prepaid:

Appeal Brief (Amended)

Upon:

Marie Colleen Clarke  
Office of the Attorney General  
PO Box 40126  
Olympia, WA 98504-0001

Signed this 15 th day of January 2010, Shelton, WA

  
Rebecca Beck

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