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DIVISION II

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STATE OF WASHINGTON

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

CHRISTOPHER DAVIS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, an agency of the State of Washington; and BELINDA STEWART, Superintendent of Stafford Creek; SUPERINTENDENT DOUG WADDINGTON, former Superintendent of Stafford Creek and current Superintendent of Washington State Corrections Center; CHIEF WHALEY, individually and in his capacity as DOC investigator; CARRIE FLEIG, Human Resources Manager of Stafford Creek Corrections Center; and MARGARET LEE, Human Resources Manager of Washington of Washington State Corrections center; and TODD DAWLER, the Southwest Regional Human Resources Officer of the Washington State Department of Corrections; JENNY WARNSTADT, Human Resources Specialist of Stafford Creek; and ANGELA ROBERTS, Human Resources Specialist of Stafford Creek ,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Appellant, Christopher Davis (“Davis” or “Appellant”), is a former corrections officer who shot and killed an escaped inmate in August 2003. On March 24, 2005, Davis was disability separated by the Washington State Department of Corrections (“Department”) due to post-traumatic stress as a result of the shooting. According to his psychiatrist, Davis would never be able to work for the Department again in any capacity. In March 2005, Davis also filed a disability discrimination and negligence lawsuit against the Department, claiming that the Department was liable for his emotional distress caused by the shooting.

Thereafter, in September 2006, Davis requested to be rehired by the Department and provided a release from a different doctor. Although Davis received two conditional offers of employment from the Department, he failed to take a required drug test or complete a psychological examination and physical abilities test upon which the offers were conditioned.

On December 14, 2007, Davis filed this action alleging disability discrimination and retaliation and included a claim under 42 U.S.C. §1983 that the named defendants violated his rights to reemployment under an

unspecified Washington State law. Additionally, Davis raised claims for breach of contract and emotional distress.¹

On August 21, 2009, the lower court granted summary judgment holding that Davis failed to state any cognizable claims under 42 U.S.C. §1983 or for breach of contract or emotional distress. Additionally, the court concluded that Davis's failure to satisfy the conditions of employment precluded him from establishing a prima facie case of discrimination or retaliation, or rebutting the Department's legitimate reasons for failing to rehire him as a corrections officer.²

II. RESTATEMENT OF THE ISSUES

A. Procedural Bar

1. Is summary judgment properly affirmed on Davis's civil rights claim under 42 U.S.C. §1983 that Respondents violated his right to reemployment under an unspecified Washington State law when violations of state law are not actionable under 42 U.S.C. § 1983?

2. Is summary judgment properly affirmed on Davis's emotional distress claim when, as a matter of law, emotional distress is an element of damages in an employment action, not a separate cause of action?

¹ CP at 95-96.

² CP at 859-861 and RP at 26-31.

3. Is summary judgment properly affirmed on Davis's breach of contract claim where the settlement agreement between the Department and Davis to resolve his 2005 lawsuit did not require the Department to give Davis preferential consideration for reemployment, nor change the Department's obligations under applicable legal and administrative rules?

B. No Prima Facie Case

1. Is summary judgment properly affirmed on Davis's disability discrimination where the undisputed evidence does not support a prima facie claim of disability discrimination when the Department made conditional offers of reemployment, but Davis failed or refused to satisfy valid conditions to include a drug test, psychological assessment and physical abilities test?

2. Is summary judgment properly affirmed on Davis's retaliation claim where no causal link exists to support a prima facie case of retaliation based on Davis's 2005 lawsuit, when the Department subsequently assisted Davis in getting placed on the proper register, interviewed Davis for available positions despite his lower test score, and made two conditional offers of reemployment, but Davis thereafter failed or refused to satisfy valid conditions to include a drug test, psychological assessment and physical abilities test?

C. No Pretext

1. Is summary judgment properly affirmed on Davis's disability discrimination and retaliation claims where the Department's legitimate, non-discriminatory, and non-retaliatory reasons for not rehiring Davis, his failure or refusal to satisfy valid conditions of employment to include a drug test, psychological assessment, and physical abilities test, were not shown to be pretextual?

2. Should a plaintiff be permitted to defeat summary judgment by submitting a declaration that materially alters his testimony offered at an earlier deposition?

III. RESTATEMENT OF THE CASE

A. 2003 Escape and Shooting

On August 29, 2003, an inmate escaped from the Stafford Creek Correctional Center ("Stafford Creek") in Aberdeen, Washington.³ Christopher Davis was a Corrections Officer 2 at Stafford Creek at the time and was assigned to an escape detail. Davis and another employee found the escapee. When the inmate refused to comply with Davis's direction to get on the ground, Davis fired a warning shot, then shot and killed the escapee.⁴

³ CP at 619; 687.

⁴ CP at 367; 400-402; 744; 773-775.

B. 2005 Disability Separation

Following normal procedure, Davis was placed on fully-paid administrative leave immediately after the shooting, which was investigated and found to be justified. After unsuccessfully attempting to return to work as a corrections officer in October 2003, Davis was allowed to work in an alternate duty position at Stafford Creek as a corrections investigator on April 16, 2004.⁵ Nevertheless, on October 14, 2004, Davis's personal psychiatrist, Dr. Pamela Moslin, advised that Davis could not work and could never return to any type of work at the Department.⁶

On January 20, 2005, Stafford Creek Superintendent Doug Waddington notified Davis that he would be separated from his Department employment effective March 24, 2005, due to his inability to work because of his disability.⁷ In his letter, Superintendent Waddington also advised Davis that “for the *one (1) year period* following your separation, should your physician or licensed mental health professional indicate that you are able to perform the duties of a job class for which you meet minimum qualifications, you are eligible to have your name placed on the reduction-in-force and promotional registers.”⁸

⁵ CP at 396; 409.

⁶ CP at 397. The Department did not contest this diagnosis.

⁷ CP at 109-112.

⁸ *Id.* (emphasis added).

C. 2005 Lawsuit

On March 14, 2005, Davis filed a disability discrimination and negligence lawsuit against the Department, in which he ostensibly claimed that the Department was liable for his emotional distress caused by the shooting. Davis and the Department resolved the case through Davis's acceptance of an offer of judgment, his agreement to release the Department from any future assertions of the same or related claims, and the dismissal of his lawsuit in exchange for \$25,001.⁹

D. 2006 Request for Rehire

On September 14, 2006, three years after he last worked as a corrections officer and 1½ years after his disability separation, Davis wrote to Superintendent Waddington requesting immediate reinstatement. Stating that his new psychiatrist had released him to return to work at the Department without restrictions, Davis attached a letter from Dr. Deborah Lucas, D.O., in Long Beach, California.¹⁰ Dr. Lucas's letter was addressed to "whom it may concern" and opined that Davis was stable and competent to return to work, but did not reference the Department or

⁹ CP at 87-107.

¹⁰ CP at 652. It is not clear that Dr. Lucas is a psychiatrist. "D.O." appears to be an abbreviation for Doctor of Osteopathy defined as "[a] system of medicine based on the theory that disturbances in the musculoskeletal system affect other bodily parts, causing disorders that can be corrected by various manipulative techniques in conjunction with conventional therapeutic procedures." Websters II New College Dictionary, 776 (1995).

corrections work in particular.¹¹ Nor had Dr. Lucas administered any testing or examination before issuing her letter, apparently relying on Davis's opinion that he was ready to return to work.¹²

E. Reemployment Assistance

Doug Waddington, who was then the Superintendent of the Washington Corrections Center in Shelton, Washington, wrote back to Davis on September 20, 2006, noting that he was pleased Davis was doing well, and requested additional information about which facility or facilities Davis was interested in working. Waddington additionally advised Davis that there was a new process governing reemployment under the Collective Bargaining Agreement.¹³ He referred Davis to

¹¹ CP at 651.

¹² CP at 255.

¹³ CP at 654. Shortly after Davis's disability separation, the regulations governing Washington civil service employment changed. Under a new Collective Bargaining Agreement for 2005-2007, covering all corrections officers, an employee separated by disability who submits a written request for reemployment will be placed in the General Government Transition Pool, rather than the reduction-in-force and promotional registers, which was the prior procedure referenced in Waddington's separation letter to Davis. Article 15.2(C) of the Collective Bargaining Agreement further provides: "*Employees in the General Government Transition Pool Program who have the skills and abilities to perform the duties of the vacant position may be considered along with all other candidates who have the skills and abilities to perform the duties of the position.*" (Emphasis added). Consequently, under the new rules, a disability separated employee receives no hiring preference but competes on equal footing with other applicants for the position. CP at 505.

Margaret Lee, the Human Resources Manager at the Washington Corrections Center, should he have any questions.¹⁴

Ms. Lee thereafter talked to Davis by phone, and explained to him how to have his name placed on the appropriate register and the General Government Transition Pool. With the assistance of Lee and the Department of Personnel, Davis's name was placed in the General Government Transition Pool in December 2006, after he completed a required questionnaire.¹⁵

Additionally, because of Davis's stated preference to work at Stafford Creek, Ms. Lee contacted Carrie Fleig, the Human Resources Manager at Stafford Creek.¹⁶ Ms. Fleig agreed to work with Davis regarding his request to be reemployed as a corrections officer.¹⁷ She contacted Davis and requested that he obtain a release from the physician who had previously advised that Davis would never be able to work for the Department again.¹⁸ Davis did so. Ms. Fleig also told Davis that

¹⁴ CP at 654. Appellant's contention at p. 14 of his brief that Waddington referred him to Margaret Lee to secure a position at his preferred facility finds no support in the record cited.

¹⁵ CP at 143; 362; 404.

¹⁶ CP at 233; 144.

¹⁷ CP at 144.

¹⁸ CP at 181. Davis thereafter provided a release to return to work from Dr. Pamela Moslin dated December 19, 2006. CP at 211. The release was provided after Davis made telephone contact with Moslin, and did not entail any additional testing or assessment of Davis. CP at 265.

reemployment procedures had changed, and she would need to research the correct procedures.¹⁹

F. Failure To Satisfy Conditional Offer Of Employment From The Washington Corrections Center

Davis applied for a Corrections Officer 1 position at the Washington Corrections Center on January 23, 2007.²⁰ Ms. Lee directed the prison's Roster Manager, Gail Robbins, to schedule Davis for an interview.²¹ Ms. Lee took affirmative steps to assist Davis because there were more than 658 applicants on the register with a score of 100, and reaching Davis with a score of 90 would be difficult.²²

Davis was interviewed at the Washington Corrections Center on January 29, 2007, and thereafter given a conditional offer of employment and instructions that he would need to take a drug test to continue the hiring process.²³ On February 1, 2007, Human Resources employee Carla Cox called Davis and left a message directing that he submit to drug testing within 24 hours. After Davis failed to do so, Roster Manager Gail Robbins called and left Davis another message on February 5, 2007,

¹⁹ CP at 181.

²⁰ CP at 534. Davis's contention at p. 15 of his brief that he applied for over 84 positions, only to face numerous obstacles, is misleading. Of the 84 positions listed, only 5 were positions with the the Department of Corrections as a Corrections Officer and, of those, three applications are listed as having been "Withdrawn" and one application is listed as "Below Passing Score." The remaining applications were for positions with different state agencies. CP at 195-204.

²¹ CP at 565-566.

²² CP at 404.

²³ CP at 121; 673-675.

advising him that he needed to take a drug test within 24 hours.²⁴ The next day, on February 6, 2007, Robbins called Davis and was able to speak with him directly and asked that he submit to the required drug test within 24 hours.²⁵ Davis failed to submit to drug testing as requested, and another candidate was selected. Robbins sent Davis a letter dated February 9, 2007, noting he was free to seek employment at other Department facilities and could request another interview for positions at the Washington Corrections Center after one year.²⁶

G. Failure to Satisfy Conditional Offer Of Employment From Stafford Creek

Soon after applying for the Corrections Officer 1 position at the Washington Corrections Center, Davis applied for a higher level Corrections Officer 2 position at Stafford Creek. He was granted an

²⁴ Although Davis claims that he never timely received these messages, he acknowledges that he eventually retrieved one of the messages from his father's answering machine. CP at 320.

²⁵ CP at 121. Davis claims that this call occurred on February 9, 2007, in the presence of a co-worker, Theresa Patten. Davis's own notes, attached as Appendix B), which he alleges were contemporaneously made, state that the call witnessed by Patten was from Gail Roberts (*sic*), an apparent reference to Roster Manager Gail Robbins at the Washington Corrections Center. According to Davis's notes: Robbins asked him if he received her messages and if he was still interested in the Corrections Officer 1 position at the Washington Corrections Center; Robbins explained that Davis would have to take both a drug test and a psychological test; Davis admittedly complained that they were requiring him to test as if he were a new employee; Davis also informed Robbins that he had an interview at Stafford Creek for a Corrections Officer 2 position; and Robbins "seemed upset" and told him that "she was going to remove my name from the register." CP at 561; 649.

²⁶ CP at 406. The one-year break was required as the result of Davis's failure to submit to drug testing.

interview on February 13, 2007.²⁷ After the interview, Davis signed a Conditional Offer of Employment which conditioned any final offer upon:

- A background investigation of previous criminal history.
- A check of references with previous employers.
- A psychological assessment to determine job suitability as interpreted by a licensed clinical psychologist.
- A drug test.
- A medical verification to attend the Corrections Officer Academy (provided by the applicant).²⁸

On February 27, 2007, Davis submitted to a drug test pertaining to the Stafford Creek position and passed.²⁹ On March 15, 2007, the Department's Southwest Regional Human Resources Manager, Todd Dowler, called Davis to discuss the next steps in the hiring process.³⁰ Dowler explained that Davis needed to complete a psychological assessment³¹ as well as well as the Physical Abilities Test³² to meet the

²⁷ CP at 119.

²⁸ CP at 119.

²⁹ CP at 206.

³⁰ CP at 123-125; 506-507. Dowler contacted Davis while filling in for his subordinate employee, Carrie Fleig, Stafford Creek Human Resources Manager. CP at 123.

³¹ *Id.* A pre-employment psychological assessment is a part of the usual hiring process for corrections officer positions but may be waived for applicants who left the Department within the past year. Because Davis last worked as a corrections officer more than 3 years previous and because of conflicting information from Davis's medical

requirements of the conditional offer of employment. Although Davis had previously signed a Conditional Offer of Employment outlining these requirements, Davis responded by telling Dowler that he should not be required to undergo any testing because he had not been separated from the Department more than two years.³³ Davis further told Dowler that he (Davis) would instead “contact my attorney, John Bonin, and move forward with my EEOC complaint.”³⁴

WAC 357-19-475, the regulation governing the process of considering a disability separated employee for employment, explicitly provides that to be eligible for reemployment following disability separation, a former employee must “[m]eet the competencies and other requirements of the class and/or position for which the former employee is applying.” WAC 357-19-475 (2). Additionally, the Department is

providers about his ability to return to the Department, and as authorized in WAC 357-19-475 (3)(b), attached as Appendix A, specifically authorizing a medical examination, Dowler determined that Davis needed a psychological assessment. CP at 123-124.

³² Dowler required the Physical Abilities Test in reliance on the Department’s newly revised policy dated August 31, 2006, which required retraining for employees at who had more than a one-year break in service, as Davis did. CP at 499.

³³ Davis claims he was relying on Human Resources Manager Fleig’s representations that because Davis’s break in service was less than 2 years, he did not need to be retested or retrained. However, Davis acknowledges he received contrary opinions and instructions from Fleig’s superior, Dowler, as well as Human Resources personnel at the Washington Corrections Center. CP at 162-163; 168-169.

³⁴ CP at 236. Mr. Dowler offered to make arrangements to have Dr. Monica Pilarc, who was under contract with the Department, conduct Davis’s psychological assessment. Davis stated that he did not believe he needed to complete the assessment. When Davis also expressed concern about Dr. Pilarc’s ability to be unbiased because of a lawsuit he filed against a doctor with whom she was affiliated, Dowler inquired whether Davis would submit to an assessment by a different provider. Davis responded that he should not have to and would instead contact his attorney. CP 148-149.

authorized to “require that the former employee be examined by a licensed health provider of the employer’s choice” to ensure that the formerly disability separated employee is fit for employment. *See* WAC 357-19-475 (3)(b).³⁵

IV. ARGUMENT AND AUTHORITIES

A. Summary Judgment Standards Were Appropriately Applied

The purpose of summary judgment is to avoid unnecessary trials. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once a moving party points out the absence of evidence to support an essential element in the opposing party’s case, the burden shifts to the opponent to come forward with such evidence. *American Dog Owners Ass'n v. City of Yakima*, 113 Wn.2d 213, 218, 777 P.2d 1046 (1989). If, at this point, the non-moving party fails to make a showing sufficient to establish any element essential to the party's case on which that party will bear the burden of proof at trial, then the trial court should dismiss the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989).

³⁵ Mr. Dowler attempted, without success, to explain to Davis the reemployment requirements of the Collective Bargaining Agreement and provisions of WAC 357-19-475 (3)(b), effective July 1, 2005, which authorized an employer to require that the former employee be examined by a licensed health provider. CP at 123-124.

The non-moving party may not rest on mere allegations or speculation in its pleadings, but must respond by setting forth specific facts showing that there is a genuine issue for trial. *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982); *Diamond Parking, Inc. v. Frontier Bldg. Ltd. P'ship*, 72 Wn. App. 314, 319, 864 P.2d 954 (1993), review denied, 124 Wn.2d 1028 (1994). Inadmissible evidence cannot defeat a summary judgment motion. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255, 261 (1991). Furthermore, trial is not warranted unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson*, 477 U.S. at 249.

B. The *McDonnell Douglas/Hill v. BCTI* Burden-Shifting Analysis Applies To Davis's Claims

The burden-shifting analytical framework first articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to state discrimination claims. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.2d 440 (2001). This same framework is used for retaliation cases as well. *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002).

In this and most employment cases where there is no direct evidence of discrimination or retaliation, the employee must first produce

the facts necessary to support a prima facie case. *Id.* 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).³⁶

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 burden of production 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’*

³⁶ Because the opposition materials submitted by Davis were replete with inadmissible, argumentative and conclusory opinions, the defendants filed a motion to strike those portions. CP at 835-837. Without issuing a specific order outlining the portions of evidence stricken, the lower court agreed to restrict its ruling to admissible evidence. RP at 4.

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. 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 and 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).

In *Hill*, the Washington Supreme Court additionally followed *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. As stated by the Court of Appeals 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 discrimination or retaliation.

C. Davis's Disability Discrimination Claim Was Properly Dismissed

To establish a prima facie case of disparate treatment disability discrimination under Washington's Law Against Discrimination, Davis was required to show that:

- (1) he was within a statutorily protected group;
- (2) he applied for and was qualified for an available position;
- (3) he was not offered the position; and
- (4) the position went to a person outside of the protected group.

See Kirby v. City of Tacoma, 124 Wn. App. 454, 466, 98 P.3d 827 (2004); *see also Kuyper v. State*, 79 Wn. App. at 735; *McDonnell Douglas Corp.*,

411 U.S. at 802. Davis was also required to show that he was treated differently from similarly-situated persons outside of his protected class. *See Domingo*, 124 Wn. App. at 80. In the absence of a prima facie case, the employer is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 180-81.

1. Davis Did Not Establish A Prima Facie Case Of Discrimination

Davis alleges that the Department discriminated against him based on his disability by not rehiring him as a corrections officer. He did not succeed on this claim because he was unable to show that he satisfied the conditions of employment, nor was he able to show that any other similarly-situated employee was treated more favorably under similar circumstances.

Davis's entire case is premised upon his contention that (1) he was not requested to take a drug test for the Washington Corrections Center position; and (2) he was told by Carrie Fleig, the Human Resources Manager at Stafford Creek, that he was not required to take the same drug, psychological, and physical ability testing required for new hires, because he had been disability separated for less than two years.³⁷ However, Davis acknowledges that the Regional Human Resources Manager with

³⁷ CP at 240. At the time of summary judgment proceedings, the Human Resources Manager at Stafford Creek, Carrie Fleig, was no longer employed by the Department and provided no testimony.

supervisory authority over both Stafford Creek and the Washington Corrections Center (Todd Dowler), as well as the Human Resources Manager (Margaret Lee) and the Roster Manager at the Washington Corrections Center (Gail Robbins), all advised Davis that he could not be employed without meeting certain retesting requirements.³⁸ Reliance on Ms. Fleig's representation is not reasonable when contradicted by every other communication he received. Additionally, Ms. Fleig was responding in an unusual context; even Davis concedes that he has no direct knowledge of anyone attempting to return after being disability separated due to psychological fitness.³⁹

Moreover, there is nothing discriminatory about the Department complying with applicable Department policies, its Collective Bargaining Agreement, and legal administrative rules to ensure that former employees seeking reemployment currently meet all requirements of the positions. The regulation governing disability separated employees, explicitly provides that to be eligible for reemployment a former employee must “[m]eet the competencies and other requirements of the class and/or position for which the former employee is applying.” WAC 357-19-475 (2).

³⁸ CP at 123-124; 544-545; 697-716.

³⁹ CP at 272. It is understandable, therefore, that Ms. Fleig may have misunderstood the requirements.

Additionally, WAC 357-19-475(3)(b) authorizes the Department to request clarification and an examination from a health care provider to ensure that a formerly disability separated employee is truly fit for employment in a corrections officer position. In this case, it was especially important to request clarification given the opinion expressed by Davis's former psychiatrist at the time of his disability separation in 2005 that Davis could never return to work for the Department.

Notably, it was Todd Dowler, the Southwest Regional Human Resources Manager with supervisory authority over both the Washington Corrections Center and Stafford Creek Human Resource programs,⁴⁰ who tried to inform Davis of the correct timeframes and position requirements. Davis refused to submit to those requirements, and informed Dowler that he was "wrong"⁴¹ and that he would instead contact his attorney and proceed with an Equal Employment Opportunity ("EEOC") complaint.⁴² Davis's own refusal to comply with the established requirements for employment kept him from being reemployed, not any unlawful actions or motivation on the part of the Department or its officials.

⁴⁰ CP at 147.

⁴¹ CP at 708.

⁴² CP at 236.

2. Davis's Claim That He Was Not Asked To Submit To A Drug Test Contradicts His Prior, Sworn Testimony

Davis's assertion in his brief at p. 6, ¶3 that Washington Corrections Center staff never asked him to take a drug test is contradicted by his sworn admission that a message about required drug testing was left on his father's voicemail, but that he did not find out about it until later.⁴³ Davis's admission corroborates Gail Robbins's declaration and exhibits showing that she and her staff made several attempts to contact Davis about his need to take a drug test for the Washington Corrections Center position.⁴⁴

Moreover, the declaration of Teresa Patten, upon which Davis relies to show that he was not requested to take a drug test in connection to the Washington Corrections Center position, is too vague to accomplish its purpose. Although Patten says that she listened to a call that Davis received from Department staff, her declaration does not indicate who called Davis or the particular substance of the contact. Additionally, her statement reflects no knowledge of whether Department staff attempted to contact Davis in some other way, at some other time, either before or after the contact she referenced. In fact, her declaration does not reflect

⁴³ CP 320-321.

⁴⁴ CP at 544-546.

whether the alleged contact related to the Washington Corrections Center position or the Stafford Creek position.

Additionally, even though Patten's declaration does not reflect the substance of the telephone call, Davis's own notes state that the call allegedly witnessed by Patten on February 9, 2007, was from Gail Roberts (apparently referencing Roster Manager Gail Robbins at the Washington Corrections Center) who, according to Davis, asked if he received her messages and inquired if he was still interested in the Corrections Officer 1 position at the Washington Corrections Center. Davis's notes indicate that Robbins explained that he would have to take both a drug test and a psychological test. Davis admittedly complained that they were requiring him to test as if he were a new employee, and he informed Robbins that he had an interview at Stafford Creek for a Corrections Officer 2 position. According to Davis's notes, Robbins seemed upset and told him that she would remove his name from the register.⁴⁵ Davis's own notes and admissions confirm the fact that he understood that a drug test and psychological test would be required for reemployment, that he was displeased about having to take such tests, and he communicated his displeasure to Ms. Robbins. They are also consistent with his stated

⁴⁵ CP at 561.

preference to work at Stafford Creek and his failure to take the drug test for the position at the Washington Corrections Center.⁴⁶

3. Davis's Claim That He Did Not Refuse To Take A Psychological Evaluation Contradicts His Prior, Sworn Testimony

Similarly, Davis's supplemental declaration filed in opposition to the Defendants' motion for summary judgment wholly contradicts his prior deposition testimony. Davis acknowledges in his supplemental declaration that Dowler informed him that he needed to retrain and that Dowler wanted to schedule him for a psychological interview. Davis then claims he agreed to the interview, but asserts Dowler never scheduled it.⁴⁷ However, Davis described this conversation differently in his earlier deposition. In his deposition, Davis admitted that he was told he would have to "redo all this testing" since he had not worked for the Department in over one year, that he and Dowler "argued about it," that "it was a pretty heated conversation," that he told Dowler "this conversation's going south," and that he "would contact [his] attorney, John Bonin, and move forward with [his] EEOC complaint."⁴⁸ Dowler, who did not hear from

⁴⁶ CP at 232.

⁴⁷ CP at 320.

⁴⁸ CP at 830. Davis admitted that he argued with Dowler about whether retesting could be required since it was Davis's view that one had to be disability separated for two years or more (not one year or more as explained by Dowler pursuant to the Department's Policy No. 880.030 in effect at the time Davis sought reemployment, found at CP 517-521). See CP at 517-527. Davis told Dowler he was "wrong" and he would "challenge" that requirement. CP at 833. See also, Davis's initial declaration, in which

Davis again, was left with no doubt that Davis would not participate in the requested psychological assessment or retraining.⁴⁹

“When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *Ramos v. Arnold*, 141 Wn. App. 11, 19, 169 P.3d 482, 486 (2007), (citing *Marshall v. A C & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)). Where the plaintiff gives no explanation for the change in his or her testimony, Washington courts disregard the declaration and conclude that there is no issue of fact. *Id.* The superior court properly disregarded Davis’s supplemental declaration.

4. Davis Cannot Rebut The Department’s Legitimate, Non-Discriminatory Reasons For Its Hiring Decisions

Davis could not survive summary judgment unless he could successfully refute the Department’s legitimate reasons for its actions and show that they were really a pretext for discrimination. The evidence demonstrates that the Department’s decisions were based on Davis’s failure to timely and adequately meet the requirements for the positions he

Davis alleges Dowler told him he needed to retrain and submit to a psychological assessment because Davis had been gone more than one year, but that Davis told Dowler “he was wrong” and insisted the period of time was “24 months.” CP at 708.

⁴⁹ Dowler testified that Davis stated he felt he did not need to take the exam, would contact his attorney, and Dowler never heard from Davis again. CP at 593.

sought. Davis did not establish that he met those requirements, nor did he show that the Department's perceptions of Davis's failures were not the legitimate reasons for the Department's decision not to reemploy Davis.

A "pretext is 'a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.'" *Johnson v. Express Rent & Own, Inc.*, 113 Wn. App. 858, 862, 56 P.3d 567 (2002) (quoting Webster's Third New International Dictionary 1797 (1969)). Pretext is also defined as a lie or 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). An employee's subjective beliefs do not prove pretext or defeat a legitimate, non-retaliatory reason. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 663-64 (9th Cir. 2002).

A legitimate non-retaliatory reason is not "pretextual" unless it was completely fabricated by the employer to cover up the real retaliatory reason for the action. *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1175 (7th Cir. 2002). It is not enough that the employer's reason was incorrect or foolish. Employees must show that their employers did not, in good faith, believe their articulated justifications for their actions. *Domingo*, 124 Wn. App. at 88-89. "In judging whether [the employer's] proffered justifications were 'false,' it is not important whether they were objectively false ... courts 'only require that an employer honestly believed

its reason for its actions, even if its reason is foolish or trivial or even baseless.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (quoting *Johnston v. Nordstrom, Inc.*, 260 F.3d 727, 733 (7th Cir. 2001)).

There was simply no evidence of pretext in this case. The undisputed evidence showed that Davis failed to submit to drug testing within the required 24 hours, and refused to take a psychological examination. The Department’s Human Resources officials acted in accordance with established policies and legal requirements by declining to continue Davis with the hiring process. Because Davis did not rebut the Department’s reasons for its actions, Davis’s discrimination claim was properly dismissed.⁵⁰

D. Davis’s Retaliation Claim Was Properly Dismissed

Davis also asserted that the Department retaliated against him because of his prior lawsuit by failing to rehire him.⁵¹ To make out a prima facie case of retaliation under Washington’s Law Against Discrimination, a plaintiff must show that:

⁵⁰ Davis’s allegation at p. 31 of his brief that the Department hired “less qualified people” for the positions he sought finds no support in the record cited.

⁵¹ CP at 95. Appellant’s allegations that he was also a “whistleblower” at p. 24 of his brief finds no support in the record. Additionally, Davis did not make any claim below for retaliation under Washington’s State Employee Whistleblower Protection Act, RCW 42.40.

- (1) he or 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 (citing *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862, *review denied*, 141 Wn.2d 1017, 10 P.3d 1071 (2000)); *Coville v. Cobarc Services, Inc.*, 73 Wn. App. 433, 439, 869 P.2d 1103 (1994); *Kahn v. Salerno*, 90 Wn. App. 110, 129, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998).

The burden-shifting scheme for retaliation claims is the same as discrimination claims. *Wilmot*, 118 Wn.2d at 68-69. A plaintiff must make out a *prima facie* case; the employer must present evidence of a non-retaliatory reason for its actions; and, then, the plaintiff must present evidence that the proffered reason is pretextual.

1. Davis Did Not Establish The Element Of Causation

Davis was unable to present evidence to establish the third element of a retaliation claim: a causal connection between the alleged adverse action and the alleged protected activity. Under the Washington Law Against Discrimination, factors suggesting retaliation include temporal proximity or suspicious timing between the adverse action and protected activity, along with satisfactory work performance and evaluations.

Vasquez v. State, Dept. of Social and Health Services, 94 Wn. App. 976, 985, 974 P.2d 348 (1999).

Notably, a significant passage of time between the activity and the alleged adverse employment action is evidence against retaliation. *Wilmot*, 118 Wn.2d at 69. In *Francom*, 98 Wn. App. at 845, for example, the Court of Appeals held that a period of 15 months between plaintiff's complaint and the alleged adverse action suggested there was no nexus between the complaint and the alleged adverse action. *Id.* at 862-63.

Here, Davis's claimed protected activity was the filing of his lawsuit on March 14, 2005. Davis's first communication to the Department indicating a desire to return did not occur until he wrote to Superintendent Waddington 18 months later. No negative employment decision appears to have occurred until February 2007; nearly 2 years after Davis filed his first lawsuit. A causal connection based on temporal proximity cannot be made based on these facts, since causation from temporal proximity can only be inferred if the protected activity and adverse action are temporally close together. *See generally, Clarke Cy. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (citing cases holding that three or four month lapses are too long); *Manatt v. Bank of America*, 339 F. 3d 792, 800-02 (9th Cir. 2003) (three and four months was too long to infer causation).

Moreover, *subsequent* to Davis's 2005 lawsuit, the Department and its staff affirmatively assisted Davis in his efforts to seek reemployment, by helping Davis apply and get placed on the proper register and in the General Government Transition Pool, interviewing Davis for available positions despite his low test scores, and making two conditional offers of reemployment.

2. Davis Did Not Rebut The Department's Legitimate, Non-Retaliatory Reasons For Its Hiring Decisions

Additionally, as explained in connection with Davis's discrimination claim, he simply could not establish an inference of retaliatory animus or that the Department's explanation for its hiring decisions was pretextual. Davis applied for a corrections officer position at the Washington Corrections Center on January 23, 2007, and at Stafford Creek on February 13, 2007. Davis's applications were processed and the Department affirmatively assisted him by scheduling interviews despite a large pool of applicants and his lower test scores. When Davis was asked to submit to drug testing for the Washington Corrections Center position, he failed to appear as requested. Similarly, when told he needed to submit to a psychological evaluation for the Stafford Creek position, he refused.

It is both legitimate and reasonable that the Department would require that Davis submit to a psychological assessment, particularly given

his prior disability separation due to his psychiatrist's diagnosis of post traumatic stress disorder and her conclusion that Davis "could never work for the Department again."⁵² It was incumbent upon the Department to ensure that Davis was, in fact, psychologically fit to perform the duties of a corrections officer before making any final offer of employment. The Department could not meet this obligation due to Davis's unwillingness to be evaluated. In short, Davis could not rebut the real reason for the Department's decisions: Davis's own failure or refusal to satisfy the conditions of reemployment.

E. Davis's 42 U.S.C. § 1983 Claim Was Properly Dismissed

In his complaint, Davis alleges that Respondents' actions violated his rights to reemployment under an unspecified Washington State law, giving rise to an alleged claim under 42 U.S.C. § 1983. Specifically, Davis alleges that "Plaintiff had rights under Washington State Law to be afforded proper opportunity to be reemployed upon his meeting of specified conditions."⁵³ Davis further alleges that "[t]he actions of the Defendants are, and amount to violations of Plaintiff's rights under 42 U.S.C. § 1983."⁵⁴

⁵² CP at 111.

⁵³ CP at 97.

⁵⁴ *Id.* at ¶ 3.28.

1. Violations Of State Law Are Not Actionable Under 42 U.S.C. § 1983

42 U.S.C. § 1983 is not, in itself, a substantive cause of action. Rather, this federal statute is a vehicle for those seeking to address claimed violations of their federal constitutional rights. Alleged violations of state law are not actionable under 42 U.S.C. § 1983. *See Waller v. State*, 64 Wn. App. 318, 336 (1992); *Spurrell v. Block*, 40 Wn. App. 854, 860-62, 701 P.2d 529, *review denied*, 104 Wn.2d 1014 (1985); *Systems Amusement, Inc. v. State*, 7 Wn. App. 516, 518-19, 500 P.2d 1253 (1972). Consequently, the lower court properly dismissed this claim on procedural grounds as there is no federal constitutional claim.⁵⁵

2. Davis Had No Right To Reinstatement Under State Law

Moreover, Davis had no right under state law to be reinstated after his disability separation, contrary to his assertions otherwise. Between Davis's disability separation and his attempt to return from that separation, the regulations governing Washington civil service employment changed.⁵⁶ Under the applicable rules in effect at the time Davis sought reemployment, a disability separated employee is placed in the General

⁵⁵ Contrary to Appellant's assertions at pp. 5 and 34-35 of his brief, the Defendants did move to dismiss Davis's 42 U.S.C. §1983 claim in their summary judgment motion. See CP at 139-140; 496. Additionally, to the extent that Davis may have intended to allege violations of the federal Americans with Disabilities Act, the Defendants properly asserted that no such claim could be asserted against the Department or its officials. CP at 488.

⁵⁶ CP at 117.

Government Transition Pool and receives no hiring preference. The employee competes on equal footing with other applicants for vacant positions.⁵⁷

When Davis first attempted to return in late 2006, Superintendent Waddington referenced a change in procedures in his September 20, 2006, letter to Davis. When Davis was not immediately given a hiring preference and called in for an interview, due to the hundreds of other applicants for the same positions who had equal or better test scores,⁵⁸ Davis immediately assumed ill motivation on the part of the Department. However, Davis simply was not entitled to a hiring preference, let alone the immediate reinstatement he expected after his disability separation without having to submit to any retesting.

3. The Department Assisted Davis

Davis's claim that he received no employment assistance is wholly unsupported by the undisputed evidence in this record. The evidence shows that Superintendent Waddington referred Davis to a Human Resources Manager for assistance, and this same manager helped Davis get on the correct register and placed in the General Government Transition Pool.⁵⁹ Davis was invited to interviews at two facilities when

⁵⁷ CP at 124; 505-507.

⁵⁸ CP at 404.

⁵⁹ CP at 404.

his test score alone was unlikely to lead to an interview,⁶⁰ and was then made two conditional offers of employment. It is difficult to understand how Davis can claim that he received no assistance in light of these facts.

F. Davis's Breach Of Contract Claim Was Properly Dismissed

Davis's breach of contract claim is totally unsupported by the record or legal precedent. Davis bases this claim on a sentence from the stipulated judgment approving the settlement of his previous 2005 lawsuit; the sentence merely stated that the settlement was "not intended to effect [*sic*] the plaintiff's right, if any, to future employment by the defendant."⁶¹ This language created no legal obligation for either party and simply clarified that the stipulated judgment did not preclude Davis from pursuing future employment with the Department. The settlement agreement did not, in any manner, require that the Department give Davis a hiring preference or take actions that would be inconsistent with any applicable WACs, Collective Bargaining Agreement, or Department policies affecting reemployment or retesting of former employees. Certainly, the undisputed evidence shows that Davis was not precluded from seeking reemployment and, in fact, Davis was made two separate conditional offers of reemployment. Consequently, his breach of contract claim was properly dismissed.

⁶⁰ *Id.*

⁶¹ CP at 102.

G. Davis’s Emotional Distress Claim Was Properly Dismissed

Davis failed to show any evidence that would support an outrage claim. In any event, in Washington, emotional distress is available only as an element of damages in a discrimination claim. Claims for negligent infliction of emotional distress do not stand on their own as separate causes of action in employment cases. *Bishop v. State*, 77 Wn. App. 228, 234-35, 889 P.2d 959 (1995); *Johnson v. Dept. of Soc. and Health Servs.*, 80 Wn. App. 212, 230-31, 907 P.2d 1223 (1996); *Chea v. The Mens’ Warehouse, Inc.*, 85 Wn. App. 405, 412-13, 932 P.2d 1261 (1997).

In *Bishop*, the plaintiff filed a lawsuit against her supervisor alleging that she was “singled out” and treated unfairly by the supervisor and that she suffered emotional distress as a result. The trial court allowed the emotional distress claim to be presented to a jury, separate from any discrimination claim, and the jury entered a verdict in plaintiff’s favor. On appeal, the Court of Appeals reversed and dismissed the damage award, holding that “absent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress in responding to workplace disputes.” *Bishop*, 77 Wn. App. at 234-35.

Here, Davis did not allege any emotional distress injury other than the same wrongs and injuries he alleges in his underlying discrimination

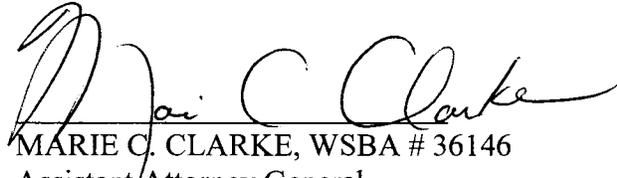
and retaliation claims. Because he may not maintain an independent emotional distress claim under the circumstances, his claim was duplicative and properly dismissed by the superior court. *Id. See also, Francom*, 98 Wn. App. at 865.

V. CONCLUSION

For the foregoing reasons, Respondents respectfully ask the Court to affirm the order granting summary judgment and dismissing Davis's claims with prejudice.

RESPECTFULLY SUBMITTED this 19th day of March, 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Marie C. Clarke", written over a horizontal line.

MARIE C. CLARKE, WSBA # 36146
Assistant Attorney General
Attorneys for Respondents

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:

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- State Campus Delivery
- Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of March, 2010, at Tumwater, WA.



Breanne Higginbotham, Legal Assistant

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APPENDIX A

WAC 357-19-475

To be eligible for reemployment following disability separation under WAC 357-19-465 what must the employee do?

To be eligible for reemployment the former employee must:

- (1) Complete and submit an application(s) for reemployment to the employer;
- (2) Meet the competencies and other requirements of the class and/or position for which the former employee is applying; and
- (3) Submit to the employer a statement from a licensed health care provider affirming the former employee's fitness to return to work and specifying any work restrictions due to a physical, sensory, or mental disability of the individual.
 - (a) If the licensed health care provider's statement provides inadequate information, the former employee will obtain the necessary clarification from the licensed health care provider or provide a release to the personnel officer/appointing authority to communicate directly with the licensed health care provider regarding the disabling condition as it relates to employment. Such information will be obtained at the former employee's expense.
 - (b) The employer may require that the former employee be examined by a licensed health care provider of the employer's choice at the employer's expense.

[Statutory Authority: Chapter 41.06 RCW. 05-12-077, § 357-19-475, filed 5/27/05, effective 7/1/05; 05-01-206, § 357-19-475, filed 12/21/04, effective 7/1/05.]

APPENDIX B

Feb. 9. received phone call
work. (witnessed by a co-worker
Theresa Patton 360-632-1700; Gail Roberts
She asked if I got her message I stated
- didn't. She asked if I was still interested
as a C/O. at W.C.C. I informed her
that I had an interview as a C/O at
S.C.C. She seemed upset and stated
she was going to remove my name
from the register. I informed her of my situation
again that I was disability separated on the
G.C.T.P. and it's been less than two
years and they were requiring me test
if I was a new employee. I then
received a phone call from H.R. mgr.
Margaret ~~Lee~~ at W.C.C. asking if I
was informed I ~~in fact~~ didn't have to
test as a new C/O and if I would be
interested as a C/O. She stated it was
up to Doug Wadding (Supt.) if they would
offer this. Then a three way phone
call was made by Margaret to Gail,
myself and she was informed as a
possible C/O candidate and she directed
me to contact S.C.C. regarding my Dr.'s
use. Gail stated that I would have to
psych. test, drug test. even though that
contradicts S.C.C. H.R. mgr. Kerry Flay -

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