

NO. 42755-9-II

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

JOHN PRESTON,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

As a result of the Great Recession, the State of Washington has faced unprecedented budget constraints. Since 2007, the State has cut billions of dollars from its budget, resulting in the elimination of thousands of positions across state government. At a time when the State has had to cut funding for education and social services for the needy to the bone, there are certain forms of largess the State simply can no longer afford. This includes hiring employees due to their political connections when those employees are not qualified for their positions. Appellant John Preston was one of the individuals affected by this change.

Between 1965 and 2008, Mr. Preston was repeatedly hired by the Washington State House of Representatives (House) for temporary positions during legislative sessions. Although a degenerative brain condition prevented Mr. Preston from performing many of the essential functions of the position he was hired for, Mr. Preston was nonetheless hired at the behest of his father's friend, Representative Hal Wolf. As a result, the House had other employees perform the duties that Mr. Preston was not capable of performing.

Due to the State's worsening budget outlook before the 2009 legislative session, however, the House had to cut costs. Since that time, its biennial budget has been reduced by \$10 million, which included the

elimination of 25 positions. As a result, the House simply could no longer afford to hire individuals who were unable to perform the essential functions of their positions. As Mr. Preston's physical limitations rendered him unqualified for the Parking and Security Attendant position that he had previously filled, he was not hired for the 2009 session.

In this appeal, Mr. Preston contends that the House unlawfully failed to accommodate his disability by declining to do what it had done in the past – hire him for a temporary position and simply have other employees do parts of his job for him. The Washington Supreme Court, however, has held that employers are not required to “eliminate or reassign essential job functions” to accommodate employees. While the House is grateful for Mr. Preston's years of service and sympathizes with his circumstances, hiring employees who cannot perform the essential functions of their positions is something that government can simply no longer afford to do. The Superior Court's order dismissing Mr. Preston's claims should be affirmed.

II. RESTATEMENT OF ISSUES

A. **Did The Trial Court Properly Dismiss Mr. Preston’s Disability Accommodation Claim Where The Only Accommodations Proposed By Mr. Preston Involved The Elimination Or Reassignment Of Essential Functions Of His Position?**

Yes. The Washington Supreme Court has expressly held that employers are not required to “eliminate or reassign essential job functions.”

III. RESTATEMENT OF THE CASE

A. **Mr. Preston Was Originally Hired Because Of Family Connections Without Regard For His Qualifications**

The House formerly engaged in a practice commonly known as “patronage.”¹ This practice involved hiring session-only employees (temporary employees who worked only for the duration of each legislative session) at the behest of an elected member of the House, or some other person of influence, without serious consideration of that employee’s qualifications.² As a result, supervisors at the House had to tailor assigned tasks to the abilities of specific employees, rather than simply hiring employees who were qualified for the positions to begin with.³

¹ CP at 107.

² CP at 107.

³ CP at 86, 107.

Mr. Preston was first hired for a patronage, session-only position in 1965 at the behest of Representative Hal Wolf, Mr. Preston's father's friend.⁴ Because he was hired through the patronage system, Mr. Preston did not have to fill out an application or interview for a position. Rather, Representative Wolf's signature on Mr. Preston's application was sufficient for Mr. Preston to get a job.⁵

Mr. Preston was repeatedly hired for session-only positions from 1965 through 2008.⁶ For the 2003 through 2008 legislative sessions, Mr. Preston was hired as a Parking Attendant within the House's Security and Facilities department.⁷ In this position, Mr. Preston was tasked with, *inter alia*, keeping assigned parking spaces open for members and staff, checking parking permits on vehicles in his assigned parking lot, and assisting visitors in locating parking, buildings and offices.⁸

Mr. Preston, however, was unable to perform all of these tasks himself. Mr. Preston has cerebellar ataxia, a degenerative condition similar to multiple sclerosis that limits balance, coordination, and speech.⁹ As a result, Mr. Preston's supervisor often assigned another employee to

⁴ CP at 40, 44, 46.

⁵ CP at 44-45.

⁶ CP at 6, 46.

⁷ CP at 85-88.

⁸ CP at 87.

⁹ CP at 41, 43-44, 78.

work with Mr. Preston to perform the tasks that Mr. Preston could not.¹⁰ Unfortunately, due to absences, meal and rest breaks, and adjustments in staff workload it, was not possible to provide this double coverage at all times.¹¹ When Mr. Preston worked his position alone, there was a notable increase in complaints due to some of Mr. Preston's duties not being attended to.¹²

B. Budget Constraints Required That The House Only Hire Employees Qualified For Their Positions

Since 2007, the state of Washington has faced severe budget constraints with the Legislature being forced to cut approximately \$2 billion and 5,000 positions from the State's biennial budget. The House itself has been affected as well, losing approximately \$10 million, which included the elimination of 25 positions from its biennial budget.¹³ As a result, in advance of the 2009 legislative session, the House underwent a reorganization.¹⁴ Barbara Baker, Chief Clerk of the House, directed all staff directors, including Ron Finley, who supervised the House Security and Facilities department where Mr. Preston had historically worked, to

¹⁰ CP at 87.

¹¹ CP at 87.

¹² CP at 87.

¹³ These figures were obtained from <http://fiscal.wa.gov> and reflect reductions in the Near General Fund budget from that originally passed for the 2007-2009 biennium to the most recent supplemental budget passed in 2012.

¹⁴ CP at 81, 89, 108.

eliminate redundant positions and cross-train their staff to handle more duties.¹⁵ She also directed her staff directors to base their hiring decisions on the actual qualifications of session only applicants, rather than on who those applicants knew.¹⁶

The resultant efforts directly affected the House Security and Facilities department.¹⁷ Three of the thirty-three positions in that particular department were eliminated, and the remaining positions were given increased responsibilities, including responding to emergencies throughout the capitol campus.¹⁸

C. Mr. Preston Was Not Hired For The 2009 Session Because He Was Not Qualified For The Position

Pursuant to Ms. Baker's directive to hire session-only staff based on qualifications rather than patronage, when it came time to hire session-only staff for the 2009 legislative session, Mr. Finley compared Mr. Preston's qualifications against those required for a Parking and Security Attendant.¹⁹ Although Mr. Preston believed that his job as a Parking and Security Attendant only required him to "talk to people and

¹⁵ CP at 84-85, 88-89, 107-09.

¹⁶ CP at 88-89, 107-09.

¹⁷ CP at 89.

¹⁸ CP at 81-82, 89.

¹⁹ CP at 84-85, 88-90, 107.

park cars,”²⁰ the job actually entailed more than that. The essential functions of the position included, *inter alia*, the following:

- Chasing unpermitted cars to prevent unauthorized parking in the reserved lot.
- Assisting with loading and unloading.
- Responding to emergency situations and directing emergency vehicles.
- Moving up to 32 pound barricades and sand bags to contain vehicle flow.
- Valet parking for legislators on an urgent basis.
- Shoveling snow from the walk around the parking shack.²¹

The qualifications for the position also included CPR certification and the ability to administer CPR.²²

After comparing Mr. Preston’s abilities to the required qualifications for the position, Mr. Finley determined that Mr. Preston was

²⁰ CP at 47.

²¹ CP at 97-99. These functions are derived from the expert report of Carl Gann, a Certified Rehabilitation Counselor and Certified Disability Management Specialist who performed an on-site job analysis of the position. CP at 93-104. Mr. Finley reviewed Mr. Gann’s report and agrees that it accurately describes the duties of a Parking and Security Attendant. CP at 90.

²² CP at 98.

not qualified.²³ Mr. Finley's conclusion is corroborated by the expert opinion of Dr. Aleksandra Zietak.²⁴ After reviewing Mr. Preston's medical records and the essential functions for a Parking and Security Attendant, Dr. Zietak concluded that, in her professional opinion, Mr. Preston was unable to carry out the functions of the position.²⁵ She pointed to Mr. Preston's cerebellar degeneration that has resulted in his own neurologist noting that he has such impaired balance that his gait is "grossly unsafe."²⁶ The result is that Mr. Preston could not perform the physically demanding portions of the position, such as moving barricades and sand bags, and responding quickly to emergency vehicles.²⁷ Nor was he able to perform the marginal but mandatory functions of his position, such as administering CPR.²⁸

Ron Finley contacted Mr. Preston in December 2008 and explained to him that, due to new budgetary constraints and the increased security responsibilities of the relevant positions, he was not going to be hired for

²³ CP at 90.

²⁴ CP at 66-79. Dr. Zietak is Board Certified in Physical Medicine and Rehabilitation, and she serves as the medical director of Highline Medical Center Acute Rehabilitation and an associate professor at the University of Washington Medical Center. CP at 66.

²⁵ CP at 78.

²⁶ CP at 78.

²⁷ CP at 78-79.

²⁸ CP at 78-79.

the 2009 session.²⁹ In addition to Mr. Preston, five other former session-only staff were also not hired back for the 2009 session.³⁰

D. Procedural History

On July 15, 2010, Mr. Preston filed a complaint in Thurston County Superior Court, claiming that the House's decision to not hire him for the 2009 session constituted disability and age discrimination.³¹ On October 21, 2011, the superior court granted the Defendant's motion for summary judgment and dismissed Mr. Preston's claims with prejudice.³² On November 2, 2011, Mr. Preston filed a notice of appeal.³³ In his brief,

²⁹ CP at 90. The patronage system did not go down without a fight. Shortly before the beginning of the 2009 session, a lobbyist confronted Ms. Baker about the House's decision to not hire Mr. Preston, and threatened her by stating that "the House had always found a position for Mr. Preston and . . . it would get uncomfortable for [Ms. Baker] as Chief Clerk if that was not the case again that year." CP at 109. These efforts to pressure Ms. Baker were unsuccessful. CP at 110.

³⁰ CP at 90.

³¹ CP at 5-8. The nominal defendant in this action is the State of Washington. For clarity and consistency, this brief refers to the defendant as the "House."

³² CP at 136-37. Mr. Preston asserts that now-retired Judge Christine Pomeroy was improperly motivated to dismiss Mr. Preston's claims because he had held his position for such a long time. Brief of Appellant Preston (Appellant's Br.) at 14-15. Although the fact that this Court's review is *de novo* renders Judge Pomeroy's reasoning irrelevant, Judge Pomeroy's comments make clear that she sympathized with Mr. Preston due to the number of years of service, not that she believed his claims should be dismissed because of them. RP at 13-14.

³³ CP at 138.

Mr. Preston challenges only the dismissal of his disability discrimination claim, thus abandoning his age discrimination claim.

IV. ARGUMENT

A. Standard Of Review

When reviewing an order of summary judgment, this Court engages in the same inquiry as the trial court. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463, 98 P.2d 827 (2004). The purpose of summary judgment is to avoid unnecessary trials. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). If there is no genuine issue of material fact, summary judgment shall be granted. CR 56(c). This Court may affirm the trial court's ruling on any grounds adequately supported in the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); RAP 2.5(a).

B. Mr. Preston Was Required To Establish That A "Specific Reasonable Accommodation Was Available" That Would Have Allowed Him To Perform The Essential Functions Of The Position

To survive summary judgment, Mr. Preston bore the initial burden of establishing a prima facie case of a failure to reasonably accommodate his disability. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-81, 23 P.3d 440 (2001), *overruled on other grounds McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006); *Roeber v. Dowty Aerospace*

Yakima, 116 Wn. App. 127, 138-39, 64 P.3d 691 (2003). As such, Mr. Preston's assertion that the House had the "initial burden in showing, as a matter of law, that Mr. Preston" could not establish a prima facie case, Appellant's Br. at 19-20, is incorrect. A party seeking summary judgment need only "alleg[e] that the nonmoving party failed to present sufficient evidence to support its case." *Pacific NW. Shooting Park Assoc. v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006).³⁴ After this occurs, "the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact." *Id.*

To establish his prima facie case, Mr. Preston was required to show, with specific and material facts, that (1) he had a disability; (2) he was qualified to perform the essential functions of the job in question; (3) he gave the House notice of his disability and its limitations; and (4) upon notice, the House failed to affirmatively adopt measures available to it and medically necessary to accommodate the disability. *Hill*, 144 Wn.2d at 192-93; *Roeber*, 116 Wn. App. at 135. Alternatively stated, Mr. Preston had "the burden of showing that a specific reasonable accommodation was available to the [House] at the time [his] physical limitation became known and that accommodation was medically necessary." *Pulcino v.*

³⁴ To do so, the moving party does not even need to support its motion with affidavits. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 22, 851 P.2d 689 (1993).

Federal Express Corp., 141 Wn.2d 629, 643, 9 P.3d 787 (2000), *overruled on other grounds McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006). If Mr. Preston had established a prima facie case, the burden would have then shifted to the House to demonstrate that the proposed accommodation was an undue hardship. *Pulcino*, 141 Wn.2d at 636, 643.

For the purposes of this appeal, the parties do not dispute that Mr. Preston was disabled or that the House had notice of Mr. Preston's disability and its limitations. Rather, this appeal turns on whether Mr. Preston provided evidence of a specific reasonable accommodation available to the House that would have allowed Mr. Preston to perform the essential functions of a Parking and Security Attendant. Because he failed to do so, the trial court's dismissal of Mr. Preston's claim should be affirmed. *Roeber*, 116 Wn. App. at 141 ("[W]hen the employee fails to establish . . . that a specific reasonable accommodation was available . . . the burden of production never shifts to the employer to show that the proposed solution was not feasible. . . . In such case, the employer is entitled to judgment as a matter of law.").

C. Mr. Preston's Proposed Accommodation Of Having Coworkers Perform Essential Functions Of His Job Is Unreasonable As A Matter Of Law

Mr. Preston does not dispute that he was unable to perform at least six essential functions of the position without accommodation, including:

- Chasing unpermitted cars to prevent unauthorized parking in the reserved lot.
- Assisting with loading and unloading.
- Responding to emergency situations and directing emergency vehicles.
- Moving up to 32-pound barricades and sand bags to contain vehicle flow.
- Valet parking for legislators on an urgent basis.
- Shoveling snow from the walk around the parking shack.

Appellant's Br. at 6-7.³⁵ With respect to each of these essential functions, Mr. Preston states that the House "offers no testimony or evidence as to why" these functions could not simply be performed by another employee.

³⁵ Mr. Preston does not dispute that these functions are essential functions – he cites neither any legal authority nor any evidence in the record demonstrating that these functions were not essential. Mr. Preston does assert that the "State's own expert lists the few functions the State alleges Mr. Preston cannot perform as 'marginal,' 'seldom,' or 'rare.'" Appellant's Br. at 7. However, with respect to his assertion that "loading and unloading" and "responding to emergency situations and directing emergency vehicles" are listed as "marginal" functions, Appellant's Br. at 6-7, he is incorrect. Both "assist with loading and unloading" and "[r]espond to emergency situations and direct emergency vehicles" are listed as essential, not marginal, functions. CP at 97-98. The related, but different, functions of "[r]espond to emergencies including perform[ing] CPR" and "[a]ssist vendors with loading and unloading vehicles" are those that are listed as marginal. CP at 98. Further, even functions identified by Mr. Gann as occurring "seldom" or "occasionally" still occur at least once an hour on average. CP at 98.

Appellant's Br. at 6-7. With respect to one task—assisting with loading and unloading—Mr. Preston also states that the House “offers no testimony or evidence as to why this . . . task could [not] be eliminated altogether.” Appellant's Br. at 6.³⁶

As an initial matter, Mr. Preston's argument fundamentally misunderstands his burden on summary judgment. It was *his burden* to demonstrate that a “specific reasonable accommodation was available,” *Pulcino*, 141 Wn.2d at 643, not the *House's burden* to demonstrate that such an accommodation was *not* available.³⁷ As Mr. Preston failed to provide any evidence that other employees were available to perform these

³⁶ Before the trial court, Mr. Preston also argued that the House should have accommodated Mr. Preston by “offering an alternate position that was less physically demanding.” CP at 126. To prevail on such a claim, “the employee must prove[, *inter alia*,] that he or she was qualified to fill a vacant position[.]” *Pulcino*, 141 Wn.2d at 643-44. As the record contains no evidence regarding any vacant, alternate positions—much less evidence that Mr. Preston was qualified for such positions—this argument was insufficient to survive summary judgment as well.

³⁷ For the same reason, Mr. Preston's assertion that the fact that the House's expert examined Mr. Preston after his health allegedly deteriorated “undermine[s] the credibility of the State's evidence supporting its position that Mr. Preston was not qualified to do the job,” Appellant's Br. at 8, misses the mark. It is Mr. Preston's burden to demonstrate that he *was* qualified for the position, not the House's burden to demonstrate that he *was not*. *Hill*, 144 Wn.2d at 192-93. Further, the only evidence in the record regarding Mr. Preston's qualifications—the reports of the House's two experts—demonstrate that he was not qualified for the position. CP at 66-79, 93-104. Thus, even if the burden rested with the House, it has carried that burden.

essential functions for Mr. Preston, the trial court should be affirmed on this ground alone.

More fundamentally, however, Mr. Preston's argument fails because it proposes accommodations that have been repeatedly held to be *unreasonable* as a matter of law. While it is true that whether a specific accommodation is reasonable is generally a question of fact, "certain types of requests have been found unreasonable *as a matter of law*." *Pulcino*, 141 Wn.2d at 644 (emphasis added). Mr. Preston's sole proposed accommodations are that the essential functions he cannot perform be either reassigned to a different employee or eliminated altogether. Appellant's Br. at 6-7. Yet the Washington Supreme Court has expressly held that employers are "not required to reassign an employee to a position that is already occupied, to create a new position, to alter the fundamental nature of the job, or *eliminate or reassign job functions*."³⁸ *Pulcino*, 141 Wn.2d at 644 (emphasis added); *see also Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998) ("It is well settled that an employer is under no obligation to reallocate the essential functions of a position that a qualified individual must perform. . . . As a result, Frontier is not required

³⁸ For the same reason, Mr. Preston's implicit contention that summary judgment was improper because he could allegedly perform most of the essential functions of his position without accommodation, Appellant's Br. at 4-6, is incorrect, as this would have required the House to eliminate essential functions for Mr. Preston.

to revise its bidding system or to eliminate Moritz's gate duties. . . . Furthermore, Frontier is not obligated to hire additional employees *or reassign existing workers to assist her in her gate duties.*" (collecting cases) (emphasis added)).³⁹

As Mr. Preston has failed to "establish . . . that a specific *reasonable* accommodation was available," he failed to establish a prima facie case and the trial court properly dismissed Mr. Preston's claim. *Roeber*, 116 Wn. App. at 141 (emphasis added).

D. The House's Prior, Supererogatory Accommodations Of Mr. Preston Did Not Render Those Accommodations Reasonable

Mr. Preston argues, without citation to any authority, that the fact that the House had previously accommodated his disability through the elimination and reassignment of certain essential functions renders these accommodations reasonable. Appellant's Br. at 11-13, 21-22. Yet, as discussed above, to the extent the House provided such accommodations in the past, those accommodations exceeded what the law requires. As Judge Richard Posner stated in *Vande Zande v. State of Wisconsin Department of Administration*, 44 F.3d 538, 545 (7th Cir. 1995):

³⁹ Washington Courts look to federal case law interpreting federal accommodation laws when interpreting Washington accommodation laws. *See, e.g., Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 240-41, 35 P.3d 1158 (2001).

And if the employer, because it is a government agency and therefore is not under intense competitive pressure to minimize its labor costs or maximize the value of its output, or for some other reason, bends over backwards to accommodate a disabled worker—goes further than the law requires—by allowing the worker to work at home, it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation. That would hurt rather than help disabled workers.

The same is true here—to hold that the House’s prior accommodations of Mr. Preston demonstrates that those accommodations are reasonable would hurt, rather than help, disabled workers by discouraging employers from going beyond what the law requires.

Further, this argument ignores the fact that the reorganization that occurred just prior to the 2009 legislative session resulted in additional responsibilities being assigned to Parking and Security attendants, including responding to emergencies throughout the capitol campus.⁴⁰ Thus, Mr. Preston’s ability to perform the essential functions of the position prior to this reorganization does not reflect his ability to perform those functions as they existed after the reorganization. *Hennagir v. Utah Dep’t of Corrs.*, 587 F.3d 1255, 1262 (10th Cir. 2009) (“[T]he essential function inquiry is not conducted as of an individual’s [original] hire date. The ADA does not limit an employer’s ability to establish or change the

⁴⁰ CP at 81-82, 89.

content, nature, or functions of a job. We must look instead to whether a job function was essential at the time it was imposed on [the employee].” (quotation marks and citations omitted)).

E. The Disparate Treatment Analysis Does Not Apply In This Case And, Even If It Did Apply, Dismissal Was Still Appropriate

Finally, as a point of clarification, it should be noted that Mr. Preston’s analysis conflates two distinct types of disability discrimination claims by extensively briefing the issue of pretext. “An employer who discharges, reassigns, or harasses for a discriminatory reason faces a disparate treatment claim; an employer who fails to accommodate the employee’s disability, faces an accommodation claim.” *Pulcino*, 141 Wn.2d at 640. The prima facie elements Mr. Preston relies upon relate solely to an accommodation claim. Appellant’s Br. at 23 (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004)); *see also* Appellant’s Br. at 1 (“The trial court erred in failing to recognize the multiple issues of fact precluding summary judgment on the issue of whether the State’s refusal to accommodate Mr. Preston was reasonable.”). Despite Mr. Preston’s repeated references to pretext, Appellant’s Br. at 2-3, 8-10, 15, 19-22, it is not part of the analysis associated with an accommodation claim.

A different analysis – one that does include pretext – applies to disparate treatment claims. For disparate treatment claims, a plaintiff’s initial burden is to establish a prima facie case by showing that he or she (1) was disabled, (2) applied for and was qualified for an available position, (3) was not offered the position, and (4) the position went to a non-disabled individual. *Rhodes v. URM Stores, Inc.*, 95 Wn. App. 794, 798-99, 977 P.2d 651 (1999); *Kuyper v. State*, 79 Wn. App. 732, 735, 904 P.2d 793 (1995). If the plaintiff meets this initial burden, the burden then shifts to the defendant to articulate, but not prove, legitimate, non-discriminatory reasons for its decision to not hire the plaintiff. *Hill*, 144 Wn.2d at 181. After the defendant does this, the burden then shifts back to the plaintiff to demonstrate that those reasons were pretext for discrimination. *Id.* at 182.

Through his statement that “[p]roof of firing another non-disabled person is not a required element,” Appellant’s Br. at 23, Mr. Preston has conceded that he is not pursuing a disparate treatment claim, and thus his brief’s discussion of pretext is irrelevant. Even if Mr. Preston were pursuing a disparate treatment claim, that claim was properly dismissed for failure to establish a prima facie case because the only evidence in the record regarding Mr. Preston’s alleged replacement is Mr. Preston’s

testimony that he believes he *was replaced by another disabled individual*.⁴¹

Further, as the trial court stated, even if Mr. Preston had established a prima facie case, he failed to establish that the legitimate, non-discriminatory reasons for not hiring him were pretext for discrimination.⁴² To establish pretext, Mr. Preston was required to provide evidence that the stated reasons he was not hired for the position – namely, Mr. Preston’s lack of qualifications for the position, the end of the patronage system, and unprecedented budget constraints – “(1) have no basis in fact; or (2) even if the reasons are based on fact, the employer was not motivated by the reasons; or (3) the reasons are insufficient to motivate the adverse employment decision.” *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997). Mr. Preston failed to demonstrate pretext as to his lack of qualifications for the reasons discussed above. He failed to demonstrate pretext as to the end of the patronage system because he provides no evidence that this did not occur. He also failed to demonstrate pretext as to the unprecedented budget constraints. Mr. Preston states that “[t]he State does not offer testimony evidence as to why Mr. Preston

⁴¹ CP at 49. Such a claim would have also failed for the same reason his accommodation failed – i.e., Mr. Preston failed to establish that he was qualified for the position.

⁴² RP at 13.

should not survive this round of difficult economy just like he always had before,” Appellant’s Br. at 21, but he provides no evidence regarding any previous “difficult economies.”⁴³

In short, given that Mr. Preston is not pursuing a disparate treatment claim, pretext is not relevant. Even if Mr. Preston were pursuing a disparate treatment claim, summary judgment was properly granted.

V. CONCLUSION

At a time when it was eliminating billions of dollars and thousands of positions from state government, it was important that the House ensure that its own fiscal house was in order. This included only hiring employees qualified for the positions they sought. Mr. Preston contends that he would have been qualified for his position with the provision of certain accommodations, but the Washington Supreme Court has held that those accommodations are unreasonable as a matter of law. Accordingly, this Court should affirm the trial court’s order granting summary judgment and dismissing Mr. Preston’s claims with prejudice.

⁴³ Notably, the then-existent recession resulted in the greatest reduction in Gross Domestic Product since 1945. See http://en.wikipedia.org/wiki/List_of_recessions_in_the_United_States. Thus, there were no comparable “difficult economies” during Mr. Preston’s tenure with the House.

RESPECTFULLY SUBMITTED this 9th day of May, 2012.

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PROOF OF SERVICE

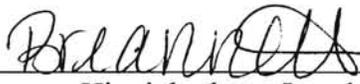
I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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

DATED this 9 day of May, 2012, at Tumwater, WA.



Breanne Higginbotham, Legal Assistant

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