

No. 93731-1

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

KIM MIKKELSEN

Petitioner

v.

PUBLIC UTILITY DISTRICT #1 OF KITTITAS COUNTY, JOHN
HANSON, PAUL ROGERS, ROGER SPARKS, and CHARLES
WARD,

Respondents

SUPPLEMENTAL BRIEF OF PETITIONER

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SHORT
CITE



I. INTRODUCTION

The term “Pyrrhic victory” comes from king Pyrrhus of Epirus, whose army suffered irreplaceable casualties in beating the Romans in battle. They “won the battle but lost the war.” Such is the case herein. Petitioner successfully convinced the Court of Appeals to make a change, or clarification in existing discrimination law analysis. She won the battle. Despite this victory, the Court went on to hold that such victory was irrelevant and dismissed her claim on other grounds. She lost the war. The granting of this petition presents the opportunity to wage the war again. Both the trial court and the court of appeals erred in granting summary judgment in this action so that reversal is appropriate and the case should be remanded back to trial.

A. It Was Error to Dismiss the Discrimination Claim

Initially, it is necessary to address the “elephant in the room.” No party to this appeal has asked the Court to review the issue of the change that the Appellate court made in discrimination claim analysis. However, there is no question that is undoubtedly the primary reason that review was granted. Hence, petitioner will devote a section of this brief to that issue.

It is important to keep in mind the proper context of the discrimination claim made. There are two “pathways” to making the claim: (1) direct evidence of discrimination; and (2) circumstantial evidence of

discrimination. There are also two applications of these standards: (1) at trial; or (2) at the summary judgment stage. In their previous briefing, the respondents often “mix and match” standards and concepts from the various types, forms and stages of litigation of discrimination cases. However, analysis should focus on a circumstantial evidence method of proving discrimination at the summary judgment stage.

The ultimate proof requirement at **trial** differs from that at the summary judgment stage, *see Scrivener v. Clark College*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). The requirements are far different at the summary judgment stage of the proceeding and the Court has set forth specific requirements to survive a summary judgment motion.

This is not a “direct evidence” case nor was the decision made at trial. This case was presented as a “circumstantial evidence” case and was decided at the summary judgment stage. Courts recognize that employers typically don’t leave an identifiable trail of discriminatory practices so that the circumstantial evidence standard makes sense:

Direct, “smoking gun” evidence of discriminatory animus is rare, since “[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes,” *United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), and “employers infrequently announce their bad motives orally or in writing. *deLisle v. FMC Corp.*, 57 Wn. App. 79, 83, 786 P.2d 839 (1990). Consequently, it would be improper to require every plaintiff to produce “direct evidence of discriminatory

intent.” *Aikens*, 460 U.S. at 714 n.3, 103 S.Ct. 1478. Courts have thus repeatedly stressed that “[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff’s burden. *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993). **“Indeed, in discrimination cases it will seldom be otherwise. . . .”** *deLisle*, 57 Wn. App. at 83, 786 P.2d 839.

Hill v. BCSTI Income Fund-I, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001)(emphasis added).

The “circumstantial evidence” pathway is laid out in the framework referred to as the *McDonnell Douglas* analysis first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), first adopted in Washington in *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988) (“McDonnell Douglas analysis”).

The *McDonnell Douglas* analysis establishes a three part “shifting burden” procedure to be followed in such a circumstantial evidence situation. See *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007). The first showing to be made is by the plaintiff. Plaintiff must establish a prima facie case of discrimination looking to several factors only one of which is at issue herein. Once the plaintiff satisfies this first prong, a presumption of discrimination arises and the burden shifts to the employer to present a legitimate, nondiscriminatory reason for the termination of employment. If the employer makes this

showing, the burden shifts back to the plaintiff to show that the proffered reasons were “pretextual.” *See Scrivener*, 181 Wn.2d at 446.

The granting of a summary judgment to the defendant employer is rarely appropriate in a WLAD case because of the inherent proof problems that exist in such cases. *See Scrivener*, 181 Wn.2d at 445; *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144, 94 P.3d 930 (2004). The prima facie showing by the plaintiff carries a burden that is “not onerous.” *See Fulton v. State, Dept. of Social & Health Services*, 169 Wn. App. 137, 152, 279 P.3d 500 (2012). Indeed, “the requisite degree of proof necessary to establish a prima facie case . . . is **minimal** and does not even need to rise to the level of a preponderance of the evidence.” *Fulton*, 169 Wn. App. at 152 (emphasis in original).

The *Grimwood* Court noted that these factors listed within the prima facie analysis were not “absolutes.” *Grimwood*, 110 Wn.2d at 362-63. In fact, it has been specifically noted that these four elements of a “prima facie” case should not be used as a “rigid, mechanized, or ritualistic or exclusive method for proving the claim. *See Hatfield v. Columbia Federal Sav. Bank*, 57 Wn. App. 876, 881-82, 790 P.2d 1258 (1990).

At issue herein is the fourth factor which has been stated as a showing that the employee was replaced by someone outside the class. Washington courts have done away with this fourth factor in the context of

age discrimination cases. In *Hatfield*, the court held that the fourth element as it related to the replacement of a discharged employee by a younger person was not applicable. It went on to analyze the case in accordance with the other functions. *Hatfield*, 57 Wn. App. at 881-82. In fact, in *Grimwood, supra*, the Court in discussing the prima facie case as it related to an age discrimination case specifically noted:

In *Loeb*, the court also points out that the element of replacement by a younger person or a person outside the protected age group is not absolute; rather, the proof required is that the employer “sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills.” *Loeb*, at 1013.

Grimwood, 110 Wn.2d at 363.

It is undisputed that The PUD hired someone to fill the position previously held by Mikkelsen. The replacement started work on August 23, 2011 the same day Mikkelsen was fired. (CP 272, 383).

Washington courts have also done away with a similar “fourth element” in the context of a “failure to hire” discrimination claim, and noted the flexible standard that was set forth the *McDonnell Douglas* analysis and the Court then eliminated a previous “factor” that the person had to have applied for the job considered:

As the United States Supreme Court has specifically cautioned, and our state Supreme Court has agreed, **“The prima facie case method established in *McDonnell*”**

Douglas was ‘never intended to be rigid, mechanized, or ritualistic’ ” or the exclusive means of proving a discrimination claim. Because the facts in employment discrimination cases vary, the *McDonnell Douglas* model for proving a plaintiff’s prima facie case “is not necessarily applicable in every respect to differing factual situations.” *McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S.Ct. 1817. **Instead, the *McDonnell Douglas* prima facie elements should be used “flexibly to address the facts in different cases” and should not be “viewed as providing a format into which all cases of discrimination must somehow fit.’** *Grimwood*, 110 Wash.2d at 363, 753 P.2d 517 (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016–17 (1st Cir.1979); *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wash.App. 212, 227 n. 21, 907 P.2d 1223 (1996)).

Fulton v. State, Dep’t of Soc. & Health Servs., 169 Wn. App. 137, 152, 279 P.3d 500 (2012)(footnoted omitted)(emphasis added).

Similarly, this fourth “replacement” prong of the prima facie case has also been eliminated in a disability discrimination claim under the WPLA. *See Callahan v. Walla Walla Housing Authority*, 126 Wn. App. 812, 820, 110 P.3d 782 (2005). The same has been held in a handicap discrimination claim. *See Cluff v. CMX Corp. Inc.*, 84 Wn. App. 634, 638-39, 929 P.2d 1136 (1997). Washington Courts have followed the “flexible” “non-rigid” approach and have held that this fourth prong is not a fatal showing in a discrimination case. This Court should so hold as well. There is a long existing list of situations under Washington law where this fourth prong has been not required and the “flexible, non-rigid” approach has been

adopted. This situation presents the opportunity to specifically set forth that policy and specifically make it applicable to WLDA claims.

Federal courts have likewise eliminated this fourth prong and have done so in gender discrimination claims. Federal decisions, while not binding on this court are persuasive authority and provide a “source of guidance.” See *Grimwood*, 110 Wn.2d at 361-62.

In a sex discrimination case, the Court in *Piviroto v. Innovative Sys., Inc.*, 191 F.3d 344, 347 (3d Cir. 1999) specifically analyzed this issue and held that the fourth prong of showing that a male had been hired in the female’s place was not a necessary showing so as to prove a discrimination claim and make a “prima facie” showing. *Piviroto*, 191 F.3d at 347

In *Piviroto*, the plaintiff, a female, could not meet the fourth element to show that her replacement who was hired after she was terminated was a male. *Piviroto*, 191 F.3d at 349. The *Piviroto* Court reasoned that it made absolutely no sense to have such a requirement since it added nothing to the discrimination analysis:

By contrast, a plaintiff's inability to prove that she was replaced by someone outside of her class is not necessarily inconsistent with her demonstrating that the employer treated her “less favorably than others because of [her] race, color, religion, sex, or national origin.” *Id.* (internal quotation omitted). Even if the plaintiff was replaced by someone within her own class, this simply demonstrates that the employer is willing to hire people from this class—which in the present context is presumably true

of all but the most misogynistic employers—and does not establish that the employer did not fire the plaintiff on the basis of her protected status.

As we find this issue quite straightforward, we are not surprised to find that seven of the eight federal courts of appeals to have addressed it have held that a plaintiff need not prove, as part of her prima facie case, that she was replaced by someone outside of the relevant class.

Pivrotto, 191 F.3d at 353 (emphasis added).

Even given that a man was hired to fill her position, she still could have been discriminated against:

In other words, even if a woman is fired and replaced by another woman, she may have been treated differently from similarly situated male employees. This seems to us to be self-evident.

Pivrotto, 191 F.3d at 353-54.

Seven other federal circuits in the country, in addition to the 3d Circuit, have held that the fourth “replacement” prong is not a necessary showing in order to make out a prima facie case. Those decisions were previously set forth in prior briefing.

The *Pivrotto* and related other federal circuit cases support the policy of affording victims of discrimination to present their cases to a jury. Washington recognizes the “flexibility” of the *McDonnell Douglas* factors and specifically recognizes that they are not to be considered some form of ridged or mechanically applied test. This Court should clarify this concept

to make it clear that such flexibility is mandated. Washington courts have already, in other discrimination areas and including within an age discrimination setting, not required the “replacement” showing to be made. As is set out in detail in *Pivrotto*, the policy reasons for requiring a showing of replacement of someone outside your class does not support the strict application of this factor. The employee can still satisfy the circumstantial evidence test and satisfy the “minimal showing” that need be made at this stage for summary judgment. Mikkelsen has easily crossed that bar.

The second broad issue presented in this claim revolves around the second and third shifting burdens of proof. Once the plaintiff successfully presents a prima facie case the burden then shifts to the defendants come forward with evidence of a legitimate, nondiscriminatory reason for the discharge. See *Grimwood*, 110 Wn.2d at 364. As to her firing, Mikkelsen was called into a meeting by defendant Ward and fired because, “it was not working out.” (CP 319, 398-99). Defendant Ward read from a script he prepared. He stuck to the script. (CP 398-99) Even though Plaintiff asked, defendant Ward would not elaborate on what “it” was. (CP 319). That’s what Mikkelsen was told as to the “reason” for her termination. While the respondents now attempt to trump up other reasons that it now claims exist to “justify” the firing, there is no evidence in the record that those other issues were **ever** discussed with plaintiff.

The first issue is whether an amorphous explanation of “it’s just not working out,” can satisfy this second prong. There is no applicable case law but normal summary judgment standards would support the position that specific facts must be alleged. This is simply a conclusory statement. Defendants have not met their burden of proof at summary judgment.

Even if the defendants could meet their shifting burden of proof to show a nondiscriminatory reason for termination of employment, the burden of would then shift back to the Mikkelsen under the *McDonnell Douglas* burden shifting test to show that the alleged reasons were just a pretext (“pretext prong”).

In order to meet this burden, the plaintiff could do **nothing** with respect to presenting additional evidence and still satisfy that burden.

The employee resisting summary judgment then must produce evidence that raises a genuine issue of material fact on whether the reasons given by the employer for discharging the employee are unworthy of belief or are mere pretext for what is in fact a discriminatory purpose. *Sellsted*, 69 Wash.App. at 859, 851 P.2d 716. **The employee is not required to produce evidence beyond that offered to establish the prima facie case, nor introduce direct or “smoking gun” evidence.** *Sellsted*, 69 Wash.App. at 860, 851 P.2d 716. Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff’s burden. *Sellsted*, 69 Wash.App. at 861, 851 P.2d 716. He must meet his burden of production to create an issue of fact but is not required to resolve that issue on summary judgment. “For these reasons, summary judgment in favor of employers is

often inappropriate in employment discrimination cases.”
Sellsted, 69 Wash.App. at 861, 851 P.2d 716.

Rice, 167 Wn. App. at 89 (emphasis added).

The plaintiff need not disprove each of the defendants’ articulated reasons in order to satisfy this third “shifting” burden of proof. *Scrivener*, 181 Wn.2d at 447. In fact as identified above, plaintiff need do nothing. This showing can be made directly or indirectly by showing that the defendants’ proffered explanation is unworthy of credence. *See Carle*, 65 Wn. App. at 101.

Despite the fact that Mikkelsen was only told that “it’s not working out,” the alleged rationale that the defendant Ward later sets forth for Ms. Mikkelsen’s termination is classic pretext. It is found in a memorandum that is dated the day prior to her termination (August 22, 2011). It is a memorandum addressed to the Board. (CP 242-46). It is undisputed that defendant Ward never communicated any of those facts to Mikkelsen. It is undisputed that this memorandum was not in Mikkelsen’s employee file.

The point by point refutation of each of the “reasons” listed by defendant Ward are set forth in prior briefing. At the very least issues of fact exist as to both the sex and age discrimination claims made in this case. From a policy standpoint, an employer cannot be permitted to give general, conclusory statements as to termination and satisfy its burden of proof.

That's what the defendants have done. Once the "specifics" were put forth in a memorandum, Mikkelsen refutes every one of those "reasons" set forth. At the very least, issues of fact exist and it was inappropriate to grant summary

B. It Was Error to Dismiss the Claims Related to the Policy Enforcement of the PUD

There are two recognized paths an at-will employee may take to enforce the terms of company policy statements. First, the contractual relationship between employer and employee can be modified by statements contained in employee policy statements. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 228, 685 P.2d 1081 (1984). This pathway presents an issue of fact for the jury to determine. *See Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522, 826 P.2d 664 (1992). This is termed the "implied contract" theory. *See Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 433, 815 P.2d 1362 (1991).

The second pathway is distinct and independent of the first. The second pathway examines whether the employer has created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and the employee is induced thereby to remain on the job and not actively seek other employment. *See Thompson*, 102 Wn.2d at 228-29. This inquiry also presents issues of fact to be decided by the trier of fact

and thus not normally amenable to a summary judgment motion. *See Swanson*, 118 Wn.2d at 525. This is often referred to as the specific treatment, promissory estoppel, or justified reliance theory. *See Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 27 P.3d 1172 (2001). These are two different theories with two different proof elements.

The Court has set forth the guiding principle related to the enforcement of employee handbooks:

An employee handbook is only useful if the policies and procedures set forth in it are followed by the employer and its management personnel. **Instead of looking for new ways to avoid liability when handbook provisions are not followed, employers should concentrate on setting forth reasonable policies and ensuring compliance with these policies.**

Swanson, 118 Wn.2d at 541; quoting *The use of Disclaimers to Avoid Employer Liability Under Employee Handbook Provisions*, 12 J.Corp.L.105, 119 (1986)(emphasis added).

Both the Trial Court and the Appellate Court focused on the fact that the PUD Policy Statement had language that said it was “discretionary.”

The rules set out here are intended only as guidelines, and do not give any employee a right to continued employment or any particular level of corrective action.

(CP 346).

One of the primary issues presented in this claim is whether including “discretionary” language in the employee policy creates a “safe harbor” for employers or, rather, whether the extrinsic evidence as

envisioned in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), and its progeny is applicable.

Kuest v. Regent Assisted Living, Inc, 111 Wn. App. 36, 51, 43 P.3d 23 (2002), cited by the Court of Appeals has no applicability since it involved a situation with an express disclaimer within the policy that the at will doctrine was not being abrogated. No such “disclaimer” is present in the PUD policy. That was a “safe harbor” argument because it was an express disclaimer. That situation is not presented herein. Mikkelsen has created issues of fact in the application and implementation of the policy and, accordingly, summary judgment was inappropriate.

This Court should first consider the framework for contract analysis first set forth in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) when interpreting the employee policies. *Berg* mandates that “extrinsic evidence” be viewed to aid the Court in determining the intent of the parties and thus interpret the contract. *Berg*, 115 Wn.2d at 667. This analysis is consistent with the rationale set forth in *Thompson, supra*, that, “the idea that whether the parties intended policies in an employment document to be part of their employment contract **involves issues of fact.**” *Swanson*, 118 Wn.2d at 523 (emphasis added).

In *Swanson v. Liquid Air Corp., supra*, the plaintiff was fired for fighting and sued his employer because fighting was not found in a list of

offenses that would result in immediate termination. *Swanson*, 118 Wn.2d 512, 826 P.2d 664 (1992). The defendants in *Swanson* argued that disclaimer language stating that employees remained “at will” effectively precluded Plaintiff from relying on anything to the contrary. Similar argument to that presented herein.

The Court held that summary judgment was inappropriate because it was up to a jury to determine whether a memorandum containing a provision about “Work Rights” and employee discipline modified the employee’s at will employment status. *Swanson*, 118 Wn.2d at 519-520. Even if equivocal or disclaimer language is included in an effort to preclude the employee gaining anything but “at will” employment status, the courts will look at an employer’s conduct to see if it negates or overrides a disclaimer. *Swanson*, 118 Wn.2d at 519.

The progressive disciplinary provisions in the Corrective Action policy are specific enough to be enforced as contract terms. The extrinsic evidence existing shows that the Corrective Action policy was adopted when Plaintiff was the interim manager at the PUD in 2009. Others assisted in the work up of the document. The union steward and the union representative as well as her fellow managers Matt and Brian also reviewed and worked on it prior to the presentation to and adoption by the PUD Board. (CP 416, 421).

The primary purpose for developing the Corrective Action policy and presenting it to the Board was that Plaintiff wanted guidelines, approved by the Board, to be followed in the discipline process. This was especially important with the union employees that existed. (CP 417-18). Once the policy was adopted in 2009, it has been followed on two instances, both of which involved the issuance of a verbal warning. Once, while Plaintiff was interim general manager (CP 419-20) and once while Mr. Ward was the General Manager. (CP 317; 556). There was never any discussion nor dispute as to the use of the policy. There is no evidence that the policy was “not” used until Plaintiff was terminated by Defendant Ward. Thus, there is a question of fact as to whether the defendants’ actions effectively contravened any disclaimer of the terms of the Corrective Action Policy and thus modified the at-will employment of plaintiff.

The issues of whether the policy issued contains a promise of specific treatment in specific situations; whether the employee justifiably relied on the promise and whether the promise was breached **all involve questions of fact** that are not appropriate for resolution on summary judgment. *See Burnside*, 123 Wn.2d at 105. Thus, it is not appropriate to decide those issues as a matter of law.

Under paragraph 1.3 of the Policy (CP 344), it states, under a section entitled **Employee Rights** the following rights under the policy:

Corrective action must be administered with due consideration of, and respect for, employee rights and expectations, whether those rights and expectations drive from employment policies, operation of law, or contract. As just one example: all union-represented employees are entitled to union representation during any meeting that may reasonably be expected to lead to disciplinary action.

(emphasis added).

Previously briefing set forth the history of this policy. It has always been used. It was developed to provide certainty to both employees and employers. It was intended to set forth what the “rules of the game,” were. At the very least, issues of fact exist as to whether these provisions and the progressive discipline policy, which is clearly set forth and not followed in this case, should have been used in this case.

The primary, if not exclusive, reasons that employers even issue such employment policies is to create an atmosphere of fair treatment and job security for the people that work there. *See Parker v. United Airlines, Inc.*, 32 Wn. App. 722, 726-27, 649 P.2d 181 (1982). While an employer is clearly not required to establish such additional policies, once it does so, the employees clearly have the right to take those into consideration.

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will

be treated fairly.... It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices ... [the policies] established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation “*instinct with an obligation*”.

(Italics ours.) *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 613, 292 N.W.2d 880 (1980). **It would appear that employers expect, if not demand, that their employees abide by the policies expressed in such manuals. This may create an atmosphere where employees justifiably rely on the expressed policies and, thus, justifiably expect that the employers will do the same. Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory.**

Thompson, 102 Wn. 2d at 229-30 (emphasis added).

The issues presented herein are **issues of fact**. As the Court in *Swanson* stated:

Moreover, the questions whether statements in employee manuals, handbooks, or other documents amount to promises of specific treatment in specific situations, whether plaintiff justifiably relied upon any such promises, and whether any such promise was breached present material issues of fact.

Swanson, 118 Wn.2d at 525.

No matter which theory is presented on this issue, issues of fact are involved and those issues were presented to the Court. The policy was always followed and there are at least issues of fact as to the application of

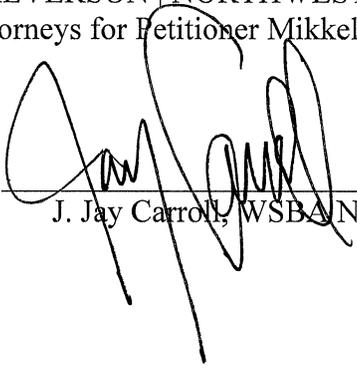
that policy to the situation faced herein. There is no dispute of fact that the policy was not followed in this case. Accordingly, summary judgement was inappropriate and this case should be remanded for trial on the merits.

II. CONCLUSION

For the reasons set forth above, the decisions of the Court of Appeals and the Trial Court should be reversed and this matter should be remanded back to the trial court for trial on the merits. The application of the prima facie discrimination claim should remain “flexible” and there should be no requirement to show that a worker was replaced by someone outside the class. Issues of fact exist as to whether the defendant met the second prong of the test and whether plaintiff met the third prong thus making summary judgment inappropriate. As to the Employer Policies, it is clear that they were not followed and issues of fact exist as to whether such enforcement is appropriate thus making summary judgment inappropriate.

RESPECTFULLY SUBMITTED this 10 day of March, 2017.

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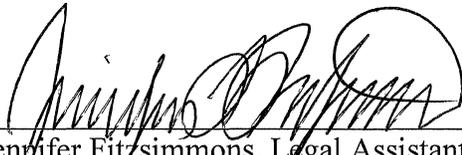
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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

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