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NO. 71269-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

DONALD BROWNELL,

Appellant

vs.

SNOHOMISH COUNTY PUBLIC UTILITY DISTRICT NO. 1,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant, Donald Brownell (“Brownell”), has a long history of substandard job performance as an employee of Respondent, Snohomish County Public Utility District No. 1 (“the PUD”). His substandard job performance is well documented in the numerous disciplinary warnings he was issued, cautioning him about the need to pay greater attention to details and to abide by the PUD’s policies, rules, and regulations and the requirements of his job. Each disciplinary warning also cautioned Brownell that continued substandard performance and failure to follow the PUD’s policies, rules, and regulations would subject him to further discipline, up to and including termination from his employment. Brownell’s long history of substandard job performance, not his claimed disabilities (the first of which occurred almost 20 years prior to his termination), is the legitimate, nondiscriminatory reason for his discharge. There exists no genuine issue of material fact as to Brownell’s claim of disparate treatment disability discrimination. The trial court properly granted the PUD’s motion for summary judgment and dismissed Brownell’s claim for disparate treatment disability discrimination.¹ The

¹ Brownell does not seek review of the trial court’s summary judgment dismissal of his other claims.

trial court's order granting the PUD's motion for summary judgment should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUE

Is the PUD entitled to summary judgment dismissal of Brownell's disparate treatment disability discrimination claim where he cannot produce specific and material facts as to each element of his *prima facie* case because he was not performing satisfactory work and was not discharged under circumstances giving rise to a reasonable inference of unlawful discrimination? Even assuming, *arguendo*, Brownell established a *prima facie* case, is the PUD entitled to summary judgment dismissal of Brownell's disparate treatment disability discrimination claim where the PUD had a legitimate, nondiscriminatory reason for discharging Brownell, specifically his long and well-documented history of substandard job performance, and where there is no evidence that this reason was pretextual?

III. STATEMENT OF THE CASE

A. The PUD and the Jackson Project

The PUD provides electric and water services to residents of Snohomish County and Camano Island. CP 403-04. The PUD provides these services, in part, through its three hydro projects, which generate hydroelectric power. CP 404.

The Jackson Project, where Brownell was employed until his termination, is the PUD's largest hydroelectric project and generates the majority of the PUD's hydroelectric power. CP 404. The Jackson Project includes two dams, a powerhouse capable of producing 112 megawatts of electricity, Chaplain Reservoir, 1,870-acre Spada Lake Reservoir, and miles of tunnels and pipelines. CP 334.

The hydro plant superintendent at the Jackson Project was, at all times relevant to this appeal, Barry Chrisman. CP 404. Chrisman supervised Brownell and was primarily responsible for holding Brownell accountable to the performance expectations of his position, training and overseeing Brownell, providing performance counseling, reporting poor performance, and recommending discipline when necessary. CP 404.

B. Brownell's Employment with the PUD

1. 1988 to May 2002

Brownell was initially hired by the PUD in 1988 and worked as a Hydro Operator Constructor at the Jackson Project. CP 246. In 1999, Brownell successfully bid for a position as Energy Control Dispatcher. CP 249. He was terminated from that position after only a few months because of performance issues and serious safety violations. CP 326. Brownell grieved this termination. As a result of the grievance, Brownell

was still terminated from the Energy Control Dispatcher position, but remained a PUD employee. CP 250.

Following his termination from the Energy Control Dispatcher position, Brownell worked as a part-time flagger and then as a janitor for the PUD. CP 253.

At the end of 1999, Brownell returned to the position of Hydro Operator Constructor at the Jackson Project. CP 254.

2. May 2002 – October 2010

In May 2002, Brownell was promoted to the position of Hydroelectric Constructor.² CP 258. The position of Hydroelectric Constructor encompassed the same duties as the position of Hydro Operator Constructor, plus additional duties. CP 329-31 (description of the Hydroelectric Constructor position); 323-24 (description of the Hydro Operator Constructor position).

Ensuring the safe operation of the power plant was central to Brownell's responsibilities as a Hydroelectric Constructor. CP 329 (job description stating that a "distinguishing characteristic" of the position is "ensuring safety rules and regulations are followed"). In describing his job responsibilities as Hydroelectric Constructor, Brownell acknowledged

² As discussed below, Brownell's promotion occurred just a few months after he was injured on the job in a chainsaw accident. The residual effect of this accident is one of three disabilities Brownell claims he has.

that he was responsible for operating the power plant safely and efficiently and for providing safe working conditions for the maintenance personnel. CP 246. He also acknowledged responsibility for maintaining the generation of power, checking equipment, taking daily readings on the equipment, reporting abnormalities to his superiors, and being present in case of unplanned outages or other emergencies. CP 247.

Another important responsibility of Brownell's job of Hydroelectric Constructor was environmental stewardship. CP 333. The PUD is committed to protecting the environment, and wildlife and fish biologists work at the Jackson Project to ensure that wildlife and fish habitats are preserved and protected. CP 333. Brownell knew that as a Hydroelectric Constructor he was responsible for monitoring river flow and for being an environmental steward. CP 273.

Brownell also knew that an essential attribute of a Hydroelectric Constructor is good attention to detail. CP 265. He knew that workers could be killed by equipment or drowned if a Hydroelectric Constructor failed to operate the equipment safely. CP 264.

Brownell held the position of Hydroelectric Constructor at the time he was terminated in October 2010.

C. Brownell's 1995 and 2005 Diagnoses

In July 1990 – over 20 years before he was terminated – Brownell was diagnosed with myasthenia gravis, a condition with symptoms including double vision and weakness in the fingers and arms. CP 352-53.

In 2005, the PUD notified Brownell that the results of a hearing test indicated that he possibly had a loss of hearing. CP 73.

D. Brownell's 2002 Industrial Injury

In January 2002, Brownell sustained an injury to his right arm while using a chainsaw to clear a service road at work. CP 353. He received industrial insurance benefits as a result of this injury, and was assessed as having partial permanent disability in his right hand. CP 357.

Just a few months after this injury, in May 2002, Brownell took an exam to qualify for a promotion to the position of Hydroelectric Constructor. CP 257-58. Brownell's physician certified Brownell as physically able to perform the duties of a Hydroelectric Constructor. CP 360. Brownell passed the exam for the position and he was promoted to Hydroelectric Constructor in May 2002. CP 258.

When the Hydroelectric Constructor position became open in 2002, Brownell discussed the job with Chrisman, but did not discuss any concerns about any physical limitations and their possible impact on his ability to perform as a Hydroelectric Constructor. CP 261. Rather,

Brownell assumed that Chrisman was aware of Brownell's claimed limitations, relying solely on a conversation between him and Chrisman that occurred in 1991 – over a decade earlier – and involving only Brownell's myasthenia gravis, not the chainsaw injury.³ CP 261.

In May 2003, Brownell was again certified by a physician as able to perform the physical activities of the job of Hydroelectric Constructor. CP 362-66. Even so, the PUD lightened Brownell's duties by restricting him from operating chainsaws and snowmobiles. CP 262. Although in this lawsuit, Brownell alleges that operating the gantry crane was a physical challenge, he never complained about operating it or requested that he no longer be required to operate it. CP 263. Nor did Brownell ever complain or report that he was physically limited in his ability to perform other functions, such as removing scotch broom, using a jackhammer, and spreading grass seed. CP 313-15.

E. Brownell's Repeated Discipline for Substandard Performance and Safety Violations as a Hydroelectric Constructor

Brownell's performance in the Hydroelectric Constructor position fell short of the performance standards for the position, just as did his performance as Energy Control Dispatcher. Brownell's substandard

³ Chrisman does not recall this conversation with Brownell. CP 347. This is not, however, a material fact that precludes summary judgment dismissal of Brownell's claim. Even if the conversation did in fact occur, summary judgment dismissal is nevertheless appropriate, as discussed below.

performance and safety violations began shortly after he was promoted to Hydroelectric Constructor. Brownell does not dispute that he committed the errors and safety violations for which he was disciplined.

1. September 2003 Written Warning

In September 2003, Chrisman issued Brownell a written warning “due to several recent safety incidents and [Chrisman’s] concern with a continuing pattern of poor performance.” CP 370-71. Brownell’s errors called into question his ability to concentrate on multiple tasks, to use good judgment, and to pay attention to detail. CP 370. Specifically, Brownell (1) failed to comply with the PUD’s Switching and Clearance Manual with respect to a clearance, which could have jeopardized the safety of workers in the area; (2) improperly permitted other agencies to render the sluice gate automated control useless, which could have led to a river flow rate violation; and (3) mistakenly switched the intake gate to “remote,” thereby compromising the ability to activate an emergency gate closure. CP 370.

Brownell’s errors were of particular concern to Chrisman given that Brownell’s position was a journey-level position and Brownell had been counseled about similar incidents in the past. CP 370. Chrisman warned Brownell of the need to immediately correct his behavior and performance. CP 371. Chrisman stated his expectation that Brownell

follow the PUD's policies, guidelines, and safety rules; otherwise, Brownell could be subject to further disciplinary action up to and including termination of his employment. CP 371.

Brownell agreed with the description of his errors and substandard performance as set out in the 2003 written warning, did not disagree with the warning, and did not think the warning was in any way improper or unfair. CP 264. He also admitted that he and Chrisman "talk[ed] about safety all the time." CP 264. Further, Brownell admitted that the claimed weakness in his hands and arms did not contribute to his committing the three safety violations addressed in the 2003 written warning. CP 263.

2. May 2006 Written Warning

In May 2006, Brownell received a written warning regarding his internet and email use in violation of the PUD's policies. CP 373-74. Brownell admitted to his superiors that he used the PUD's computers to visit websites related to his outside employment as a real estate agent. CP 373. Not only did this violate the PUD's policy on internet and email use, but it also violated the PUD's conflict of interest policy. CP 373. The warning cautioned Brownell that his continued failure to abide by the PUD's policies could subject him to further disciplinary action up to and including termination. CP 374.

As with the 2003 written warning, Brownell agreed that the PUD was justified in issuing this warning in 2006 and did not feel issuance of the warning was unfair. CP 267. Brownell did not grieve this warning. CP 267.

3. October 2006 Verbal Warnings

On October 23, 2006, Chrisman verbally warned Brownell of the need to pay attention to details. This warning arose after Brownell simply copied log book entries from one day to the following day, causing incorrect information to be entered in the log book. CP 376.

Again, Brownell admitted his error. CP 268. He also admitted that he acted “hastily” and did not pay attention to details. CP 268-69. And once again, Brownell stated that any problem with his arms and hands played no role in his committing this error. CP 268.

Two days later, on October 25, 2006, Manager Zeda Williams again warned Brownell about the need to pay attention to details. CP 378. Brownell does not dispute that this warning was given. CP 270.

4. March 2008 Written Warning

In March 2008, Chrisman issued Brownell a written warning based on Brownell’s unacceptable job performance and failure to follow the PUD’s standards while performing his duties as Hydroelectric Constructor. CP 398-99. This warning arose out of a series of errors

Brownell committed that caused the river to decrease more quickly than the PUD's license from the Federal Energy Regulatory Commission (FERC) allowed, thereby causing the PUD to commit a rate ramp violation. CP 398.

Brownell committed these errors in March 2007, but because he did not log the error or report it to his superiors, the PUD did not discover Brownell's errors until a year later, when it was collecting data for an annual report. CP 398. Under the PUD's licensing agreement with FERC, the PUD is required to report errors such as those Brownell committed within 14 days of their occurrence. CP 398. Failure to timely report the error violated the licensing agreement with FERC and subjected the PUD to possible fines or the loss of its license to operate the Jackson Project. CP 398. In the written warning, Chrisman states that Brownell's action in causing a rate ramp violation and in failing to timely report his errors indicated a continuing pattern of poor judgment. CP 399. Accordingly, Chrisman informed Brownell that he intended to continue to monitor Brownell's performance. CP 399. Chrisman also cautioned Brownell once again that his continued poor performance could result in further disciplinary action up to and including termination of his employment with the District. CP 399.

Brownell does not dispute that he committed the rate ramp violation in March 2007. He admits that, while transferring generation from one unit to another, he allowed the river level to decrease too quickly. CP 273-74. He also admits that the USGS had equipment on site at the powerhouse he could have used to check whether a rate ramp violation occurred, but did not do so. CP 274. As with his other errors, Brownell admitted that the problems with his arms and hands did not contribute to his commission of the rate ramp violation.⁴ CP 275-76.

5. November 2009 Suspension

In November 2009, Brownell was suspended without pay for poor performance and violation of the PUD's employee rules of conduct. CP 401-02. The suspension arose out of another error by Brownell with respect to river flow. Specifically, for a certain month each year, the river flow must be maintained between 300 and 400 cubic feet squared (CFS) to preserve the habitat for migrating Chinook salmon. CP 279. Brownell, however, allowed the river flow to exceed 400 CFS for four to four and a half hours. CP 280. Brownell admitted his error, stating that he was either out of the control room or distracted and addressing another issue while the river flow exceeded the 400 CFS limit. He later claimed to

⁴ Brownell also does not claim that either or both of his other claimed disabilities – myasthenia gravis and hearing loss – contributed in any way to any of the mistakes and substandard job performance that resulted in any of the disciplinary warnings he received.

Manager Zeda Williams that he allowed the river flow to exceed 400 CFS because the morning had been very busy and because he was under emotional stress due to an issue with his brother-in-law. CP 288.

In addition to damaging the fish habitat, Brownell's error in allowing the river flow to exceed 400 CFS potentially cost the PUD \$100,000 in revenue because once the river flow was elevated the PUD had to maintain the elevated flow through the end of the fish migration period. CP 290, 401-02.

Chrisman's letter to Brownell informing him of the suspension stated that suspension is "an extremely serious form of progressive discipline" and again warned that Brownell's continued failure to abide by the PUD's policies and directives could result in further discipline up to and including termination of his employment with the PUD. CP 402.

6. December 2009 Written Warning

In December 2009, Chrisman issued a written warning to Brownell due to Brownell's unacceptable job performance and failure to follow the PUD's standards while performing his job duties as Hydroelectric Constructor. CP 387-88. This warning arose out of Brownell's failure to follow required safety procedures when issuing clearances to other employees. Specifically, the PUD's Switching and Clearance Procedures required Brownell to verify that the switching and personal

logging/tagging devices are properly completed prior to his issuing a clearance. CP 387. Even though Brownell had followed this procedure dozens of times in the past, on the date in question, he failed to do so without justification. CP 387. Again, Chrisman told Brownell that he was concerned about Brownell's job performance and intended to continue to monitor his job performance. CP 388. And this warning, like the other written warnings Brownell received, clearly informed him that continued poor performance could result in further disciplinary action up to and including termination of employment with the PUD. CP 388.

Brownell admitted that he failed to follow the proper safety procedures with respect to issuing clearances.⁵ CP 282-83. Brownell estimated that, at the time of his mistake, he had issued 150 clearances using the lock out/tag out procedure that was in effect in 2009. CP 286.

7. April 2010 Written Warning

In April 2010 Chrisman issued yet another written warning to Brownell due to Brownell's unacceptable job performance and failure to

⁵ The clearance requirements are contained in the state regulations setting forth safety standards for electrical workers. *See* WAC 296-45; *see also* CP 284. Brownell testified that the clearance requirement was not included in the PUD's safety clearance procedure. CP 283. This is not a material fact for purposes of the PUD's motion for summary judgment. Brownell was aware that the procedure to be followed at the Jackson Project was to verify that the switching and personal logging/tagging devices were properly completed prior to issuing a clearance, but he nevertheless issued a clearance without following that procedure. CP 283.

Also not material to the PUD's motion for summary judgment is whether the wiremen to whom Brownell issued the clearance agreed or disagreed with Brownell's version of events.

follow the PUD's standards while performing his job duties as a Hydroelectric Constructor. CP 383-85. This written warning encompassed two separate deficiencies in Brownell's job performance and, like the other written warnings Brownell received, cautioned that continued poor performance could result in further disciplinary action up to and including termination of Brownell's employment with the PUD. CP 383-85.

a. Inaccuracies in FERC Report

One deficiency in Brownell's performance addressed in the April 2010 written warning concerned incorrect information Brownell included in a report the PUD submitted to FERC. In January 2010, the PUD received a letter from FERC regarding deficiencies in the PUD's July 2008 – June 2009 Dam Safety Surveillance and Monitoring Report for the Jackson Project. CP 380-81. Brownell explained that in his monthly updates to the report, he failed to show that an intake structure that had been out of service for maintenance had in fact been returned to service. CP 295-96. Instead, Brownell simply kept carrying forward the incorrect information that the intake structure was out of service. CP 295.

b. Falsely Reporting Inspections

The second incident of Brownell's substandard job performance addressed in the April 2010 written warning was his misreporting that he

had done physical inspections of a site at Blue Mountain from January 2008 to May 2008. CP 383. In fact, during those months the snow levels at Blue Mountain made the site inaccessible. CP 383. Brownell claimed he mistakenly checked the wrong box on the inspection form and mistakenly indicated that he did on-site inspections during those months. CP 298.

F. The “Woods Creek Incident” and Brownell’s Termination

The final incident that precipitated Brownell’s termination occurred in August 2010 while Brownell was assigned to work at Woods Creek. At that time, Brownell had been assigned to supervise summer hires in the removal of sandbags after some summer maintenance. CP 306. Once the removal of the sandbags was completed, Brownell got permission via radio from a superior to close the gate at Woods Creek and “water up” the hydro plant. CP 308. Brownell closed the gate, thinking that closing the gate would water up the penstock and then, when the penstock was filled up, the extra water would flow into the river. CP 308. Brownell did not, however, check to see that the bypass valve was closed. In fact, the bypass valve was open, so the penstock did not fill with water; rather, the water bypassed the plant entirely and flowed into the river. CP 309. Because the bypass valve was not closed, a 300-foot stretch of Woods Creek between the diversion structure and the falls dried up. CP

390. If left unchecked, allowing a section of a stream system to become dewatered could potentially strand endangered species of fish, negatively affect the PUD's credibility with natural resource agencies, and lead to monetary fines imposed by FERC.⁶ CP 390. Brownell testified that he "felt terrible" about his mistake. CP 309.⁷

On September 30, 2010, Kim Moore, Assistant General Manager of Generation and Water Resources, informed Brownell by letter that he was recommending that Brownell's employment with the PUD be terminated due to Brownell's "ongoing pattern of poor performance and lack of good judgment as a journey-level employee, and failure to adhere to the District's Employee Rules of conduct Directive #34."⁸ CP 390-93. In the letter, Moore afforded Brownell an opportunity to respond to his recommendation before the PUD reached a final decision.⁹ CP 391.

⁶ Whether FERC ultimately found that Brownell's mistakes at Woods Creek constituted a violation of the PUD's licensing agreement, or whether the incident caused the PUD to lose credibility with FERC, are not material facts for purposes of this appeal. The material fact, which Brownell does not dispute, is that he failed to properly perform the duties of his job with regard to closing the gate.

⁷ Brownell disputes whether his actions in improperly closing the gate at Woods Creek allowed the creek to dry up. Whether the creek did or did not dry up is not a material fact for purposes of this appeal. Again, the material fact, which Brownell does not dispute, is that he failed to properly perform the duties of his job with regard to closing the gate.

⁸ The PUD's Directive #34 states that PUD employees are expected to perform work in an efficient and competent manner and take care of the PUD's property and equipment as well as that of other persons and entities. CP 391.

⁹ In his brief, Brownell claims that many of the prior disciplinary notices Brownell received that are referenced in the September 30, 2010 letter "had expired, according to PUD policy." Br. of Appellant at 2, n.1; 9. In support of this assertion, Brownell cites several pages of Chrisman's deposition. In fact, however, the portions of

Brownell filed a response to Moore's letter and an addendum to his response. CP 395-96. On October 5, 2010, Moore informed Brownell by letter that his employment with the PUD was terminated effective that day. CP 393-94. In the letter, Moore noted that Brownell's response did not challenge the findings of the PUD's investigation nor did it provide sufficient mitigating factors. CP 393.

G. Brownell Lacks First-Hand Knowledge of the PUD's Treatment of Other Employees

A significant portion of Brownell's argument is based on his allegations that he was disciplined more severely than other PUD employees. His argument is, however, based on nothing more than speculation and therefore is insufficient to withstand the PUD's motion for summary judgment.

The employees Brownell claims committed equally egregious performance violations as he did, but were not similarly disciplined, are

Chrisman's testimony he cites do not mention anything about the expiration of disciplinary notices. *See id.* (citing CP 164-67). Further, each and every written disciplinary notice Brownell received plainly stated that it would be removed from his personnel file after two years *unless further disciplinary action was taken*. CP 371, 374, 385, 388, 402. Here, further disciplinary action *was* taken.

Brownell also asserts that Sara Kurtz, employee resource consultant, acknowledged that written warnings given to employees "expire after two years at the Snohomish County PUD." Br. of Appellant at 8. Again, the portions of the record Brownell cites in support do not, in fact, support his assertion. Brownell's counsel asked Kurtz whether warnings "typically expire after two years at the PUD, unless you decide apparently not to let them expire for some reason, right?" CP 193. Kurtz responded "Un-huh, yes." CP 193.

Importantly, however, whether a warning had or had not expired is of no relevance to the undisputed material fact that these warnings were issued in the first place.

Bill Easterling and Gaylin Larson.¹⁰ CP 299. However, neither of these employees held the same position as Brownell. Easterling worked as an Electrical Technician, and Larson worked as an Electrician, despite his job title of Hydro Constructor. CP 300. Brownell cites to no evidence in the record showing that persons holding the positions of Electrical Technician or Electrician were responsible, as was Brownell as Hydroelectric Constructor, for ensuring that all applicable safety rules and regulations were followed at the Jackson Project. In fact, the job description for Hydroelectric Constructor shows that a person in that position must not only be able to perform the duties of the Electrical Constructor, but must also ensure that the safety rules and regulations are followed. CP 329. Brownell's attempt to use Easterling and Larson as comparators, without showing that they had comparable job duties and that they were responsible for ensuring that safety rules and regulations were followed, renders his attempted comparisons ineffective.

Further, Brownell testified that he has no personal knowledge of whether Easterling or Larson were disciplined for any violations or mistakes Brownell claims they committed:

- Q. Do you know if Bill Easterling received any discipline?
A. I don't believe he did, as far as I know.

¹⁰ In his deposition, Brownell claimed that Gary Anderson also committed violations but was not disciplined. CP 299. On appeal, Brownell does not include Anderson in his arguments.

Q. Did you ever talk with anyone about whether he did or did not?

A. No Ma'am, I didn't.

Q. So you don't really know one way or the other?

A. It was never mentioned by any of the staff members or the superintendent that he had.

Q. Or that he had not?

A. Or that he had not, no.

CP 301-02.

Q. Do you know what, if any, discipline [Easterling] received [for the incident with the CO2 bottles]?

A. I don't know. I have no information on that.

CP 302.

Q. And what discipline, if any, did Galyin [sic] get, if you know?

A. None that I'm aware of.

Q. So no one told you he got discipline but no one told you he did not?

A. That is correct.

CP 303.

Q. Do you know if Galyin [sic] Larson was disciplined for not carrying forward clearances?

A. I do not know.

CP 304.

Q. Do you know if [Larson] received any discipline [for damaging a PUD truck]?

A. I don't have any knowledge of that.

CP 305.¹¹

¹¹ Brownell's citation to a spreadsheet apparently maintained by the PUD regarding "incidents" at the Jackson Project and the FERC's responses to some of these incidents, Br. of Appellant at 15-16, does not help his argument. None of the documents

H. Plaintiff's Complaint for Discrimination and Wrongful Termination is Dismissed on Summary Judgment

In August 2012, Brownell filed a complaint for discrimination and wrongful termination. CP 356-58. His complaint alleged causes of action for (1) disparate treatment disability discrimination in violation of RCW 49.60, (2) age discrimination in violation of RCW 49.60, and (3) wrongful discharge in violation of public policy and RCW 51.48.025.

The PUD filed a motion for summary judgment dismissal of Brownell's action in its entirety. CP 413-44. In response to the PUD's motion for summary judgment, Brownell conceded that there was no genuine issue of material fact as to his age discrimination claim and also abandoned his claim of wrongful discharge in violation of public policy. CP 204-27. The trial court, the Honorable Richard Okrent, granted the PUD's motion for summary judgment and dismissed Brownell's claims in their entirety. CP 6-7.

Brownell appeals. His argument on appeal is limited to the summary judgment dismissal of his claim for disparate treatment disability discrimination. He does not seek reversal of the summary judgment dismissal of his claim of wrongful discharge in violation of RCW 51.48.025.

identify which employees at the Jackson Project were responsible for the incidents, which employees, if any, were disciplined for their conduct, or what discipline was imposed.

IV. ARGUMENT IN RESPONSE

A. Standard of Review

On review of an order granting summary judgment, this Court's review is de novo, and the Court engages in the same inquiry as the trial court. *Utter v. Building Industry Assoc. of Washington*, 176 Wn. App. 646, 655, 310 P.3d 829 (2013). Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). Questions of fact may be determined as a matter of law on summary judgment when reasonable minds could reach but one conclusion. *Cornerstone Equipment Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 902, 247 P.3d 790 (2011).

To overcome an employer's summary judgment motion in an employment discrimination case, the employee must do more than express an opinion or make conclusory statements. *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997); *see also Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 365, 753 P.2d 517 (1988) (a plaintiff's conclusory opinions do not constitute material facts sufficient to show genuine issues of material fact to defeat summary judgment). Rather, the employee must establish *specific and material facts* to support each element of his *prima facie* case. *Chen*, 86 Wn. App. at 190. Here, Brownell has failed to establish such specific and material facts and relies instead on his opinions

and conclusory statements. This is not enough to overcome the PUD's motion for summary judgment. Accordingly, summary judgment dismissal of his disability discrimination claim was appropriate.

B. The McDonnell Douglas Burden-Shifting Scheme Applies

Where, as here, the plaintiff brings an individual, disparate treatment action under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, and lacks direct evidence of discriminatory motive, the plaintiff's claim is properly analyzed under the *McDonnell Douglas*¹² burden-shifting scheme. *Fulton v. State, Dept. of Social & Health Servs.*, 169 Wn. App. 137, 148, 279 P.3d 500 (2012). Under that analysis, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination. If the plaintiff fails to do so, the defendant is entitled to judgment as a matter of law. *Id.*, 169 Wn. App. at 148.

Only if the plaintiff establishes a *prima facie* case of discrimination does the burden shift to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *Id.*, 169 Wn. App. at 169. Once the defendant articulates such a legitimate, nondiscriminatory reason, the burden shifts back to the plaintiff to show that the defendant's reason is a pretext for discrimination. *Id.* At all times, however, the ultimate burden of showing that the employer

¹² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

intentionally discriminated against the plaintiff remains with the plaintiff. *Texas Dep't of Com'ty Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). “Even if both parties meet their requisite burdens, summary judgment is still proper if no rational trier of fact could conclude the action was discriminatory.” *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 78, 98 P.3d 1222 (2004). Under these principles, summary judgment dismissal of Brownell's disparate treatment claim was appropriate.

C. Brownell Did Not Establish a Prima Facie Case of Disability Discrimination

To establish a *prima facie* case of disparate treatment disability discrimination, a plaintiff must show that he was (1) disabled, (2) subject to an adverse employment action, (3) doing satisfactory work, and (4) discharged under circumstances that raise a reasonable inference of unlawful discrimination. *Brownfield v. City of Yakima*, ___ Wn. App. ___, ___ 316 P.3d 520, 533 (2014).

Summary judgment dismissal of Brownell's disparate treatment disability discrimination claim was appropriate because he failed to establish each element of his *prima facie* case by specific and material facts. *See Chen*, 86 Wn. App. at 190. Specifically, Brownell did not establish, by specific and material facts, that he was doing satisfactory

work and that he was discharged under circumstances that raise a reasonable inference of unlawful discrimination.¹³

1. Brownell Cannot Establish He Was Doing Satisfactory Work

Brownell's long history of substandard performance of his job duties, detailed above, speaks for itself. Brownell does not dispute that he made the mistakes that resulted in the numerous disciplinary notices and warnings. Nor does he dispute the fact that each and every written warning he received explicitly warned that his continued failure to abide by the PUD's policies, rules, and regulations regarding job performance could lead to further disciplinary action, up to and including termination.

Instead, Brownell's argument that he was performing satisfactory work consists of four assertions, none of which have merit. *See* Br. of Appellant at 22. First, Brownell argues that the PUD cannot establish that his job performance had been rated as substandard because it did not conduct performance evaluations. Brownell does not, however, establish that in order for an employee's job performance to be deemed substandard, the employer must conduct performance evaluations, particularly where, as here, there exists a long and detailed history of

¹³ The PUD assumes, for purposes of this appeal only, that Brownell was disabled as that term is used in the WLAD. *See* RCW 49.60.040(7) (WLAD's definition of "disability").

disciplinary notices issued precisely because of the employee's substandard job performance.

Second, Brownell argues that he was performing satisfactory work at the time of his termination because "there was evidence to establish that most of the written warnings relied upon by the PUD in its summary judgment motion had expired." Br. of Appellant at 22. Notably absent from Brownell's assertion is a citation to this "evidence" in the record. In fact, Sara Kurtz, employee resource consultant, testified that disciplinary warnings "typically" expire after two years, unless the PUD determines that the warnings should not expire. CP 193. And Brownell entirely ignores the plain language in each and every disciplinary warning he received that the notice would not expire if further disciplinary action was taken. Here, further disciplinary action was, in fact, taken. Contrary to Brownell's unsupported assertion, there is no evidence in the record to establish that the written disciplinary warnings he received had expired at the time he was terminated. Even if they had expired, however, the material and undisputed fact is that the numerous disciplinary warnings were issued in the first place.

Third, Brownell argues that the "PUD decision-makers acknowledge that they had not established any standard for discharge of PUD employees." Br. of Appellant at 22. On the contrary, the record

plainly shows that the PUD bases a decision to discipline an employee's violation of a FERC rule or regulation on the same factors it uses to decide whether to impose discipline for other types of employee misconduct. CP 189-90.¹⁴

Finally, Brownell argues that "there was evidence that the PUD had never severely disciplined or discharged any employee for the kind of alleged FERC violations which they claim to have relied upon to discharge Brownell." Br. of Appellant at 22. But, as detailed above, Brownell has *no knowledge* of whether the two employees he uses as comparables (Easterling and Larson, even though they occupied different jobs than Brownell) were disciplined for the workplace violations Brownell alleges they committed. Because of Brownell's testimony as to lack of knowledge, the absence of any other evidence in the record showing whether and how other employees were disciplined, and the fact that the employees he uses as comparables held entirely different jobs than Brownell, he has no evidentiary basis upon which to argue that he was

¹⁴ "We take a look at the circumstances surrounding the issue, the employee's disciplinary track record, so to speak, any possible monetary fines, or if were a safety issue, any safety issues that were violated. We look at the whole picture. We look at any comparable issues that may have happened that we have knowledge of.

"And then, we have a discussion with the various people I mentioned earlier [the manager or supervisor involved, the employee resources consultant, the Director of Employee Resources, and one or more members of the in-house legal staff – CP 188], to arrive at a recommendation for discipline."

Kurtz also enumerated the factors the PUD uses to determine whether to discharge an employee for substandard job performance, which are substantially the same as the foregoing factors. CP 192-93.

disciplined any differently from similarly situated employees or singled out for selective enforcement of the PUD's policies.¹⁵

2. Brownell's Discharge Was Not Under Circumstances Raising a Reasonable Inference of Unlawful Discrimination

Brownell's long and documented history of discipline for his failure to follow the PUD's rules and regulations, detailed above, clearly establishes a legitimate, nondiscriminatory reason for the PUD's decision to discharge him. Each written disciplinary warning Brownell received clearly cautioned him that continued failure to abide by the PUD's rules and regulations would subject him to further discipline, up to and including the termination of his employment. Brownell admits to committing the mistakes and violations of the PUD's rules and regulations.¹⁶

Further, Brownell was discharged from his employment long after the PUD learned of his disabilities. Brownell was discharged in October

¹⁵ Brownell argues that his "selective enforcement" argument should be "even more persuasive" because Chrisman was "actually concerned about Brownell's disability-related behavior, but went to great pains to not directly address it." Br. of Appellant at 24. It is unclear what "great pains" Brownell is referring to because he cites no evidence to support this allegation. Further, far from not addressing Brownell's disability, the PUD lightened the physical requirements of Brownell's job by restricting him from using chainsaws and snowmobiles, even though Brownell had been cleared for duty without the need for any medical accommodation. CP 262.

¹⁶ Even if, however, Brownell claimed that his performance was satisfactory, a reasonable inference of discrimination would not arise. See *Chen v. State*, 86 Wn. App. 183, 191, 937 P.2d 612 (1997) ("An employee's assertion of good performance to contradict the employer's assertion of poor performance does not give rise to a reasonable inference of discrimination.").

2010. CP 393-94. He told Chrisman of his myasthenia gravis in 1991 – nearly *20 years* earlier. CP 260. Brownell’s chainsaw accident happened in January 2002, over eight years before he was terminated. CP 353. And, Brownell’s hearing loss was diagnosed in 2005, five years before he was terminated. CP 73. The temporal distance between when the PUD learned of Brownell’s conditions and when it terminated him seriously undermines any argument that Brownell was discharged under circumstances giving rise to a reasonable inference of discrimination. *See Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 489, 8 P.3d 1231 (2004) (noting that Wal-Mart did not discharge the plaintiff after her first workplace injury or after her second workplace injury necessitated a leave of absence; further finding that the fact that Wal-Mart discharged the plaintiff just days after she returned to work from the workplace injury did not give rise to a reasonable inference of discrimination given the plaintiff’s ongoing failure to produce a valid Social Security card).

In sum, Brownell has not shown specific and material facts to support each element of a *prima facie* case of disparate treatment disability discrimination. Accordingly, the PUD is entitled to judgment as a matter of law and summary judgment dismissal of Brownell’s claim was appropriate. *See Fulton*, 169 Wn. App. at 148.

D. The PUD Had a Legitimate, Nondiscriminatory Reason to Discharge Brownell

Even assuming Brownell could establish a *prima facie* case of disparate treatment disability discrimination (which he cannot), summary judgment dismissal of his claim was nevertheless appropriate because the PUD had a legitimate, nondiscriminatory reason to discharge him.

An employee's substandard job performance is a legitimate, nondiscriminatory reason for the employee's discharge. *Grimwood*, 110 Wn.2d at 364-65. Again, Brownell's long, documented history of substandard job performance and failure to abide by the PUD's policies, rules, and regulations are the relevant, undisputed facts. Brownell does not dispute that he committed the violations and mistakes that formed the basis of the disciplinary warnings he received. Nor does he dispute that the warnings clearly informed him that continued substandard performance could result in his discharge. This long history of substandard performance is a legitimate, nondiscriminatory reason for the PUD's decision to discharge Brownell.

E. No Issue of Fact Exists as to Pretext

An employee does not create a pretext issue without some evidence that the employer's articulated reason for its employment decision is unworthy of belief. *Brownfield*, ___ Wn. App. at ___, 316

P.3d at 533. Where, as here, an employee is discharged for substandard performance, the legitimacy of the employer's reasons are bolstered by the fact that the substandard performance was documented long before the employee's termination. *Grimwood*, 110 Wn.2d at 364-65.

In his brief, Brownell argues that the fact that no other employees were disciplined and the fact that the FERC decided that the Woods Creek incident was not a violation of its licensing agreement with the PUD "strongly imply" pretext. Br. of Appellant at 26. On the contrary, as discussed above, Brownell testified that he has no knowledge of whether other employees were disciplined for any workplace violation. Additionally, whether the FERC determined that the Woods Creek incident was or was not a violation of the licensing agreement does not alter the fact that the Woods Creek incident was yet another in a long line of incidents when Brownell's job performance fell below the standards set in his job description and by the PUD's policies, rules, and regulations. The evidence on which Brownell relies does not create a genuine issue of material fact on the issue of pretext.

V. CONCLUSION

The PUD discharged Brownell because of his long history of substandard job performance, fully documented in the numerous written disciplinary warnings he was issued and not disputed by Brownell. The

evidence simply does not support Brownell's argument that he was discharged because of his disabilities -- one of which he had almost 20 years before his discharge, one of which he had 8 years before his discharge, and one of which he had 5 years before his discharge. The trial court properly granted the PUD's motion for summary judgment dismissal of Brownell's disability discrimination claim. For the reasons discussed in this brief, this Court should affirm the trial court's order granting the PUD's motion for summary judgment and award the PUD its costs on appeal.

DATED this 28 day of April, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Respondent on:

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by the following indicated method or methods:

- by **emailing** full, true, and correct copies thereof to the individuals at the email address shown above, which is the last-known email address for the individuals' offices, on the date set forth below.
- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the individuals as shown above, the last-known office address of the individuals, and deposited with the United States Postal Service at Seattle, Washington, on the date set forth below.
- by **faxing** full, true, and correct copies thereof to the attorney at the fax numbers shown above, which are the last-known fax number for the attorney's offices, on the date set forth below. The receiving fax machines were operating at the time of service and the transmissions were properly completed.
- by causing full, true and correct copies thereof to be **hand-delivered** to the individuals at their last-known office address listed above on the date set forth below.

DATED this 28th day of April, 2014.



Duffy Romnor