IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHRISTOPHER DAVIS, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, an agency of the State of Washington; and BELINDA STEWART, Superintendent of Stafford Creek; SUPERINTENDENT DOUG WADDINGTON, former Superintendent of Stafford Creek and current Superintendent of Washington State Corrections Center; CHIEF WHALEY, individually and in his capacity as DOC investigator; CARRIE FLEIG, Human Resources Manager of Stafford Creek Corrections Center; and MARGARET LEE, Human Resources Manager of Washington State Corrections Center; and TODD DAWLER, the Southwest Regional Human Resources Officer of the Washington State Department of Corrections; JENNY WARNSTADT, Human Resource Specialist of Stafford Creek; and ANGELA ROBERTS, Human Resources Specialist of Stafford Creek, Respondents.	No. 39915-6-II UNPUBLISHED OPINION

Alexander, J.P.T.[1] — Christopher Davis sued the Department of Corrections, Belinda Stewart, Doug Waddington, "Chief Whaley," Carrie Fleig, Margaret Lee, Todd Dawler, Jenny

[1] Justice Gerry Alexander is serving as judge pro tempore of the Washington Court of Appeals pursuant to CAR 21(c).

Warnstadt, and Angela Roberts[2] (collectively the "DOC") for (1) disability discrimination, (2) retaliation, (3) emotional distress, (4) breach of contract, and (5) 42 U.S.C. § 1983 violations. The trial court granted the DOC's summary judgment motion as to all claims. Davis appeals. We affirm.

FACTS

Christopher Davis worked as a corrections officer for the DOC from 1998 to 2005. On August 29, 2003, Davis shot and killed an escaping inmate. The shooting was later deemed justifiable, and Davis soon began receiving disability payments from the Department of Labor & Industries because of post-traumatic stress disorder (PTSD) that he developed after the shooting. After an unsuccessful attempt to return to work, Davis's treating psychologist recommended that Davis never return to the DOC. As a result, the DOC notified Davis in January 2005 that, effective March 24, he would be separated due to disability.[3] The letter indicated that if Davis's doctor approved him to return to work within one year following his separation, Davis would be eligible to have his name placed on the DOC's preferential hiring registers.

On March 14, 2005, Davis sued the DOC, Stafford Creek Corrections Center (hereafter Stafford Creek) Superintendent Douglas Waddington, and two other DOC employees for negligence, emotional distress, retaliation, violation of 42 U.S.C. § 1983, and disability discrimination. The DOC and Davis settled the case for $25,001. The parties also agreed that

[2] These individuals are DOC employees who had varying levels of involvement in Davis's attempt to become reemployed with the DOC.

[3] A separated employee is terminated from state employment for nondisciplinary reasons. WAC 357-01-301.

"[t]his settlement is not intended to [a]ffect [Davis's] right, if any, to future employment by the [DOC]." Clerk's Papers (CP) at 102.

In September 2006, Davis notified Waddington that a new doctor had released him to return to work without restrictions; Davis requested "immediate reinstatement." CP at 114. Even though Davis had not specified the corrections facility at which he wished to work,[4] Waddington stated that he would work with human resources (HR) to guide Davis in the new hiring process under the collective bargaining agreement (CBA).[5] Waddington directed Davis to contact Margaret Lee, the Washington Corrections Center (WCC) HR manager, with any questions.

Sometime after September 2006, Lee explained to Davis how to get on the DOC's hiring registers and the general government transition pool (hereafter general pool). In November 2006, Lee again spoke with Davis. Davis indicated that he wanted to return to Stafford Creek, so Lee referred him to Stafford Creek's hiring manager, Carrie Fleig. Davis again contacted Lee and told her that he had activated his name on the corrections officer 2 (CO2) register with a score of 90. Lee directed Davis to the correct register, the corrections officer 1 (CO1) register. Lee also

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[4] By the time of Davis's reemployment request, Waddington was the superintendent of the Washington Corrections Center, not Stafford Creek, where Davis and Waddington had previously worked.

[5] At the time of Davis's separation, a reduction-in-force pool existed. A disability-separated employee who returned would be placed on that register and received hiring preference over regular applicants. Under the new CBA in effect when Davis sought reemployment, a disability-separated employee would be placed in the general government transition pool (hereafter general pool) if he or she requested reemployment and met the reemployment requirements. Under the new system, the former employee receives no hiring preference. Davis believed that he was entitled to be considered ahead of all other candidates.

explained that there were currently more than 658 applicants on the CO1 register with a score of 100 and adding Davis to the interview list with a score of 90 would be difficult.

The DOC placed Davis in the general pool in December. DOC employees continued to work on his reemployment request. Several employees tried to find out how long Davis had been separated and whether he had to take a psychological assessment as part of the reemployment process. The DOC also asked Davis for a medical release from the physician who had originally stated that Davis could never again work for the DOC, which Davis provided.

Despite Davis's low test score, Lee had Davis's name added to the interview list for a CO1 position at the WCC. The DOC takes no more than 20 candidates from the general pool, and without Lee's assistance, Davis would not have received an interview. Davis interviewed for the CO1 position at the WCC on January 29, 2007. Both parties agree that the DOC left Davis a message asking him to submit to a drug test, though they dispute the date of the request. By February 9, Davis had not submitted to a drug test, so Gail Robbins, an HR employee, sent Davis a form rejection letter stating that the DOC had selected another candidate.

Despite the problems with his WCC interview, Davis interviewed for a position at Stafford Creek on February 13, and received a conditional job offer. The signed conditional offer was contingent on a background check, reference check, psychological assessment, drug test, and medical verification that Davis could attend the Corrections Officer Academy.

On February 27, Davis took and passed a drug and alcohol test. The parties dispute whether Davis refused to complete a psychological assessment and physical ability test. Davis still has not undergone the assessment.

On December 14, 2007, Davis filed a complaint against the DOC alleging (1) disability discrimination in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW and 42 U.S.C. §§ 12111 and 12203; (2) retaliation based on unspecified protected activities; (3) intentional and negligent infliction of emotional distress; (4) breach of contract based on the 2005 settlement agreement; and (5) violation of his civil rights under 42 U.S.C. § 1983, because the DOC did not comply with WAC 357-19-465.[6]

On April 10, 2009, the DOC moved for summary judgment, arguing that Davis had failed to show disability discrimination and that he had not been rehired because he refused to submit to the required pre-employment tests. The DOC argued that Davis failed to show breach of contract because the settlement agreement did not create any obligation for either party in regards to Davis's reemployment rights. The DOC also argued that Davis failed to prove his 42 U.S.C. § 1983 claim because he based the claim on an alleged violation of state law. The DOC later amended its motion to argue that Davis also could not show that a similarly-situated employee was treated more favorably under similar circumstances.

The trial court found that there were no genuine issues of material fact and that DOC was entitled to judgment as a matter of law. The trial court granted DOC's summary judgment motion as to all claims and defenses and dismissed with prejudice Davis's entire complaint. Davis appeals.

[6] WAC 357-19-465 requires the DOC to provide special reemployment assistance to disability-separated employees.

ANALYSIS

I. Unappealed claims

At the outset, we observe that Davis has not appealed the trial court's orders dismissing several of his claims. Notably, the trial court's order granted the DOC's motion for summary judgment as to all of Davis's claims, yet he appealed only as to his WLAD, retaliation, breach of contract, and 42 U.S.C. § 1983 claims. Davis did not assign error to the order's dismissal of his 42 U.S.C. §§ 12111 and 12203 and negligent and intentional infliction of emotional distress claims.[7] These claims are also not referenced in his issue statements. We will review only a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g). Davis also included no argument on these issues in his appellate brief. Without argument or citation to authority, an appellant waives an assignment of error. RAP 10.3(a)(6); *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). Because Davis failed to preserve these claims on appeal, the trial court's order as to these claims remain undisturbed.

II. Summary Judgment

Davis contends that the trial court erred in granting the DOC's summary judgment motion dismissing his claims because genuine issues of material fact existed.

[7] Although the DOC addresses Davis's emotional distress claims, Davis acknowledges that he did not appeal the emotional distress claims. Therefore, we do not address the DOC's arguments.

A. Standard of Review

We review an order granting summary judgment de novo, and engage in the same inquiry as the trial court. *Kahn v. Salerno,* 90 Wn. App. 110, 117, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). We must consider all reasonable inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). A defendant moving for summary judgment bears the burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The moving party may meet this burden by demonstrating that there is an absence of evidence to support the nonmoving party's case. *Young*, 112 Wn.2d at 225 n.1. In such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Young*, 112 Wn.2d at 225. We hereafter discuss each of Davis's claims.

B. Disability Discrimination

It is an unfair practice for any employer to refuse to hire any person because of the presence of any sensory, mental, or physical disability unless based on a bona fide occupational

qualification. RCW 49.60.180(1). In addition, it is an unfair practice for any employer to discharge, bar from employment, or discriminate in compensation or other terms or conditions of employment because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(2)-(3). "Disability" means the presence of any sensory, mental, or physical impairment that (1) is medically cognizable or diagnosable, (2) exists as a record or history, or (3) is perceived to exist whether or not it exists in fact. Former RCW 49.60.040(25)(a) (2007) (Laws of 2007, ch. 317, § 2).

Where there is no direct evidence of discrimination, we apply the *McDonnell Douglas*[8] test. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007); *Kastanis v. Educ. Emp. Union*, 122 Wn.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993). Under this test, the plaintiff must first establish a prima facie case of discrimination by showing that he or she was: (1) within a protected group, (2) suffered adverse employment action, (3) replaced by a person outside the protected group, and (4) qualified for the job. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Kastanis*, 122 Wn.2d at 490.

Davis failed to produce evidence that the DOC hired a person outside the protected group, that is, that the positions were given to a person who did not suffer a disability. Davis admitted in his deposition that he did not know the names of any persons hired for positions to which he applied. Although the DOC concedes that no other disability-separated employee attempted to return, there is no evidence that the persons hired instead of Davis are not disabled within the definition of former RCW 49.60.040(25)(a).[9]

[8] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).
[9] For instance, the new hires could have been former soldiers who overcame PTSD caused by

Davis argues that he attempted to obtain this information from the DOC during discovery, but the record does not support this assertion. Although Davis points to his requests for the production of documents, the documents he requested would not have revealed whether any person hired in his place was disabled. Davis asked the DOC to generate a list from the more than 600 people above him on the general pool who "were actually qualified,[10] available, and had met all other requirements as they existed at [that] time." CP at 444. He also asked for the address and phone number of each person on this list.[11] Thus, Davis was not seeking to learn whether the DOC hired a disabled person. He was, irrelevantly, attempting to find out whether the DOC hired a less-qualified candidate. The new hire's disability status, not résumé, is relevant at this point.

Davis and the DOC argue about whether disputed issues of material facts exist as to the other elements, particularly whether Davis was qualified for the job because he allegedly failed to submit to pre-employment tests. But failure to prove an essential element of one's claim renders all other facts immaterial. *Young*, 112 Wn.2d at 225. Davis has not shown, nor could he based on the discovery he requested, that the DOC hired someone from the general pool, let alone hired a non-disabled person. Davis, therefore, failed to present a prima facie case of disability discrimination. *McDonnell Douglas*, 411 U.S. at 802; *Kastanis*, 122 Wn.2d at 490. The trial court, therefore, did not err by granting the DOC's summary judgment motion as to Davis's

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combat trauma. The new hires also could have suffered PTSD for other reasons or even suffered from some other disability that the Department did not discriminate against.

[10] By "actually qualified," Davis appears to mean "more qualified."

[11] The DOC objected to this request because Davis requested the home address and telephone numbers for state employees, which it was not permitted to make available to public inspection.

disability discrimination claim.

C. Retaliation

Davis argues that he did not receive an offer of permanent employment because he confronted the DOC with "their wrongful and illegal acts." Br. of Appellant at 19.

It is an unfair practice for any employer to discriminate against any person because he or she has opposed any practices chapter 49.60 RCW forbids, or because he or she has filed a charge, testified, or assisted in any proceeding under chapter 49.60 RCW. RCW 49.60.210(1). It is an unfair practice for a government agency to retaliate against a whistleblower as defined in chapter 42.40 RCW. RCW 49.60.210(2). To show a prima facie case of retaliation under WLAD, Davis must show that: (1) he opposed an activity forbidden by WLAD, (2) the DOC took an adverse employment action against him, and (3) retaliation was a substantial factor behind the DOC's adverse employment action. *Campbell v. State*, 129 Wn. App. 10, 22, 118 P.3d 888 (2005), *review denied*, 157 Wn.2d 1002 (2006).[12]

Davis argues that the DOC discriminated against him because of his prior lawsuit, his unidentified "whistle blowing," and his Equal Employment Opportunity Commission (EEOC) complaint. Br. of Appellant at 19 ("First, whistle blowing – DOC discriminated due to: 1) the prior lawsuit, 2) whistle blowing, and 3) the EEOC [c]omplaint filed after it became apparent that DOC was not going to rehire Mr. Davis").[13] But Davis has failed to demonstrate that he was a

[12] Davis incorrectly cites these elements in support of his disability discrimination claim.

[13] Davis also alleges that the DOC engaged in a retaliatory act by not turning over his employment file to the Winlock Police Department. He fails to show how this resulted in adverse employment action, though, because he also admits that the police department hired him. It is also worth noting that Davis gives apparently inconsistent claims about the DOC's alleged refusal to turn

whistleblower as defined in former RCW 42.40.020(10) and therefore that he engaged in activity protected by WLAD.

A whistleblower is, relevantly, an employee who in good faith reports alleged improper governmental action to the auditor, initiating an investigation. Former RCW 42.40.020(8)(a) (Supp. 1999). An "employee" is any individual employed or holding office in any department or agency of state government. Former RCW 42.40.020(2).

First, Davis failed to demonstrate that he was a whistleblower when he filed his EEOC complaint because he was not a state or department employee at the time. In addition, Davis failed to show that by filing the EEOC complaint he reported any improper government action. Improper governmental action does not include personnel actions for which other remedies exist, including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, violations of the state civil service law, claims of discriminatory treatment, or any other disciplinary action. Former RCW 42.40.020(5)(b). Davis claims he filed his EEOC complaint after it became apparent the DOC would not rehire him. Thus, Davis bases his whistleblowing claim on the DOC's failure to reinstate him, a personnel action. Davis failed to show that by filing his EEOC complaint, he reported any improper government action.

Second, Davis appears to support his whistleblower claim by pointing to evidence that while working for the DOC after the shooting he refused to take actions he felt violated DOC regulations. Davis claimed that when he returned to work after the shooting, he refused to allow

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over his employment file. In an earlier declaration, Davis claimed that the DOC was attempting to refuse to turn over his file, yet he later claimed they did refuse to turn over the file.

a confidential informing inmate to "supercede the security phone system," as instructed by his supervisor. CP at 713. But Davis does not appear to have notified anyone other than his supervisor, who is not the auditor. It is not enough that he refused to take some action that he thought illegal or wrong; he needed to report the alleged improper government action to the auditor. Former RCW 42.40.020(8)(a).

Third, Davis's 2005 lawsuit is also not a basis to support his whistleblowing claim. On the record before us, Davis has failed to show that by filing a lawsuit he notified the auditor. Former RCW 42.40.020(8)(a). Specifically, Davis fails to show how the lawsuit was intended to notify, and whether it did notify, the auditor.

In sum, Davis failed to show that he was a whistleblower who opposed action forbidden by the WLAD. Davis failed to prove an essential element of his claim. *Young*, 112 Wn.2d at 225. The trial court did not err in granting the DOC's summary judgment motion as to Davis's retaliation claim.

We note that the DOC has disputed only the final element of a retaliation claim, i.e., that Davis demonstrated a causal link between his alleged protected activities and the DOC's failure to hire him. Because Davis failed to show that he was a whistleblower, we need not reach this argument.

D. Breach of Contract

Davis next alleges that the trial court erred in granting the DOC's summary judgment motion as to his breach of contract claim. He contends that he raised a genuine issue of material fact by alleging that the DOC breached the settlement agreement by "interfer[ing]" with his future employment. Br. of Appellant at 33.

We interpret settlement agreements in the same way we interpret other contracts. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008). In doing so, we attempt to determine the parties' intent by focusing on their objective manifestations as expressed in the agreement. *McGuire v. Bates*, 169 Wn.2d 185, 189, 234 P.3d 205 (2010).

First, there is no evidence of an objective manifestation that the DOC would have any duty to rehire Davis. The settlement agreement stated, in pertinent part, "This settlement is not intended to [a]ffect [Davis's] right, if any, to future employment by the [DOC]." CP at 102. There is no language in this agreement that would impose a specific course of conduct on the DOC except that the DOC could not use the prior lawsuit as a basis for denying Davis employment. Davis has failed to show that the parties intended to create a duty for the DOC. Again, Davis failed to prove an essential element of his claim. *Young*, 112 Wn.2d at 225. The trial court did not err by granting the DOC's summary judgment motion as to Davis's breach of contract claim.

E. 42 U.S.C. § 1983

Finally, Davis argues that the trial court erred in granting the DOC's summary judgment motion as to his 42 U.S.C. § 1983 claim because the DOC's only argument was that such a claim was not a state cause of action. The DOC argues that summary judgment was proper because state law cannot be the basis for a 42 U.S.C. § 1983 claim.[14]

To sustain a cause of action under 42 U.S.C. § 1983, a plaintiff must establish that a federally protected constitutional or statutory right has been violated by state action or persons acting under state law. *Van Blaricom v. Kronenberg*, 112 Wn. App. 501, 508, 50 P.3d 266 (2002). Davis claimed that he had rights under "Washington State Law to be afforded proper opportunity to be reemployed upon his meeting of specified conditions" and that the DOC's denial of that opportunity amounted to a violation of 42 U.S.C. § 1983. CP at 66. Davis based his § 1983 claim on the alleged violation of state law, not a federally protected constitutional or statutory right. He failed to establish a claim under § 1983. *Van Blaricom*, 112 Wn. App. at 508. Consequently, the DOC was entitled to judgment as a matter of law. We hold that the trial court did not err in granting the DOC's summary judgment motion as to Davis's § 1983 claim.

III. CONCLUSION

For the reasons set forth above, we affirm the trial court's order granting the DOC's summary judgment motion on all of Davis's claims.

[14] Davis replies that because the DOC did not raise this argument below, it cannot raise it for the first time on appeal, and that because DOC did not raise the argument, he never had a burden to respond. Davis is incorrect. The DOC argued that it was entitled to summary judgment because "alleged violations of the state constitution are not independently actionable torts or under 42 U.S.C. § 1983." CP at 140.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Alexander, J.P.T.

We concur:

Armstrong, J.

Worswick, A.C.J.