Case No. 45087-9-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARGARITA MENDOZA de SUGIYAMA,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON,

Defendant/Respondent,

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. William T. McPhee)
(Hon. Gary R. Tabor)

Case No. 11-2-01374-7

BRIEF OF APPELLANT

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I. INTRODUCTION

In her deposition, WSDOT Secretary Paula Hammond admitted that she terminated a 25-year State employee, Margarita Mendoza de Sugiyama, in part because she complained "outside the agency" regarding sexual harassment, hostile work environment, and violation of federal regulations. Yet, the Superior Court granted *summary judgment* in favor of WSDOT on all of Mendoza de Sugiyama's claims under the Washington Law Against Discrimination and the State Employee Whistleblower Protection Act. The judgment should be reversed.

Plaintiff Margarita Mendoza de Sugiyama built a successful, long-term career working for the State of Washington for almost 30 years. She was passionate about her work on diversity issues, including addressing internal civil rights complaints for WSDOT by managing its affirmative action, disability accommodation, and other non-discrimination programs. She worked to resolve internal conflicts before they escalated and valued the independence of the WSDOT Internal Civil Rights Branch of the Office of Equal Opportunity, where she worked.

As with any oversight entity, the ICRB's success depended on its independence. Indeed, during the 1990s WSDOT removed the ICRB out from under the control of WSDOT Human Resources due to actual and potential conflicts of interest.

Then, in August 2009, not long after becoming WSDOT's Chief of Staff, Steve Reinmuth sought to end the ICRB's independence. Mendoza de Sugiyama and her direct supervisor believed that the proposed move was in violation of federal regulations. After repeatedly complaining internally, Mendoza de Sugiyama wrote a letter to Governor Gregoire, copying Attorney General McKenna, expressing her belief that the proposed move was against federal regulations. She also complained to the Governor and the Attorney General that ICRB would be under HR Director Kermit Wooden, who had subjected her and other women to differential treatment because of sex, and had fostered a gender-based hostile work environment. When the governor's office did not respond favorably, Mendoza de Sugiyama directed her concerns to the Federal Highway Administration. She needed help.

Shortly thereafter, Reinmuth began investigating her for alleged retaliation against a disabled subordinate. After an internal investigation conducted at Reinmuth's behest, Secretary Hammond terminated Mendoza de Sugiyama on September 24, 2010—on Reinmuth's recommendation. Yet two weeks before terminating the Appellant, Reinmuth and Hammond received a memorandum from three female HR managers complaining of harassment by Wooden. Two weeks after Mendoza de Sugiyama's termination, Hammond fired Wooden.

The trial court committed numerous errors in granting summary judgment for the State on all of Mendoza de Sugiyama's Washington Law Against Discrimination and State Employee Whistleblower Protection Act claims. The trial court applied incorrect legal standards to her hostile work environment and whistleblower retaliation claims, improperly weighed the evidence on summary judgment, and found that Mendoza de Sugiyama's whistleblower complaints were "without merit," rather than applying a "good faith" standard. The trial court also improperly found that Mendoza de Sugiyama needed to show *direct evidence* of gender and race discrimination in order to prevail at summary judgment. What's more, the trial court denied Mendoza de Sugiyama access to emails sent between key witnesses in the case—evidence that would likely have precluded summary judgment even under the court's own flawed analysis. This Court must correct these errors on appeal and reverse the trial court on all grounds.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting the State's motion for summary judgment when it dismissed Plaintiff's whistleblower retaliation claims, her gender and race discrimination claims, her hostile work environment claims, and her WLAD retaliation claims, despite compelling direct and circumstantial evidence supporting Plaintiff's claims. (CP 1532-36, 1583-85).

2. The trial court abused its discretion when it denied Mendoza de

Sugiyama's motion to compel the production of electronically stored information ("ESI") in the form of emails to and from twelve key individuals, finding that the requests were overly broad and unduly burdensome, even though the State's CR 30(b)(6) designee testified that she had already identified the responsive emails and all that was needed to be done was a privilege review. (CP 397-98).

B. Issues Pertaining to Assignments of Error

1. Whether the trial court erred in granting the State's motion for summary judgment, and in denying Mendoza de Sugiyama's motion for reconsideration, when it dismissed her whistleblower retaliation claims, her gender and race discrimination claims, her hostile work environment claims, and her WLAD retaliation claims?

    a. Whether the trial court erred in finding that the State's investigation could overcome Mendoza de Sugiyama's evidence at summary judgment when the so-called "independent" investigator relied on information from the biased supervisors and subordinate?

    b. Whether the trial court erred in finding on summary judgment that Plaintiff, should be held to a higher procedural standard than other whistleblowers, and should have understood that her whistleblower complaints should have been filed initially with the State Auditor's Office, not the Governor, Attorney General, or FHWA, because of her own work?

    c. Whether the trial court erred in finding on summary judgment that the substance of Plaintiff's letters to the governor and the FHWA did not meet the definition of a whistleblower complaint of improper governmental action?

    d. Whether the trial court erred in determining that Mendoza de Sugiyama's whistleblower complaints were "without merit" rather than using a "good faith" standard?

    e. Whether the trial court erred in finding that Plaintiff filed her whistleblower complaint with the State Auditor's

Office *after* her termination when she filed her complaint with the auditor on September 23, 2010 and her date of termination was September 24, 2010?

f. Whether the trial court erred in finding that Plaintiff needed to show direct evidence of discrimination in order to establish her claims for gender and race discrimination when she presented sufficient circumstantial evidence of discrimination to raise a genuine issue of material fact?

g. Whether the trial court erred in finding that Mendoza de Sugiyama failed to establish her WLAD retaliation claim?

h. Whether the trial court erred when it improperly struck entire paragraphs of Plaintiff's own declaration, some of which contained foundation for admission of exhibits?

3. Whether the trial court abused its discretion when it denied Plaintiff's motion to compel the production of emails to and from twelve key individuals, finding that the requests were overly broad and unduly burdensome, even though the State's CR 30(b)(6) designee testified that she had already identified the responsive emails and all that was needed to be done was a privilege review?

III. STATEMENT OF THE CASE

A. Procedural History

Margarita Mendoza de Sugiyama brought claim against her former employer, WSDOT, for race/national origin and gender discrimination, hostile work environment, and retaliation in violation of the Washington Law Against Discrimination, RCW 49.60, *et seq.*, and whistleblower retaliation in violation of the State Employee Whistleblower Protection Act, RCW 42.40, *et seq.* CP 6. Prior to being terminated, Plaintiff had a long and successful career working for the State of Washington in various

capacities, most recently as the Diversity Programs Administrator for the WSDOT's Office of Equal Opportunity ("OEO"). CP 13.

In discovery, Mendoza de Sugiyama requested all documents, including emails, between or among specific witnesses and departments related to the allegations in her complaint. CP 90-94 (Requests for Production Nos. 29-44). The State objected, so Plaintiff limited her discovery requests to emails between twelve key individuals. CP 47-48. The State claimed it was too costly to review the emails for privilege, and that the requests, as narrowed, were still overly broad and unduly burdensome. CP 23. Rather than narrowing the requests itself and producing a smaller subset of documents, the State maintained that appellant should be required to suggest key-word search terms. *Id.* After motions practice, CP 23, 45, the trial court denied appellant's discovery requests for the emails, in their entirety. CP 395-98, RP 4/27/12 at 1-39. Mendoza de Sugiyama then requested the same emails under the Public Records Act, RCW 42.56, and the State sued her to prevent disclosure. *See* Court of Appeals, Case No. 43859-3-II. The very same trial judge was assigned to the PRA litigation, and ordered disclosure of the emails under the PRA. *Id.* Rather than disclose the emails, the State appealed and the trial court granted a stipulated stay pending appeal and preventing

disclosure. *Id.*[1] The State then moved for summary judgment on all of Plaintiff's claims. CP 402. After oral argument, CP 1532, RP 4/12/13 at 1-21, a newly-assigned judge dismissed all of Plaintiff's claims by letter dated May 22, 2013 and order dated June 7, 2013. CP 1532, 1535. The court also denied Plaintiff's motion for reconsideration. CP 1537, CP 1583, RP 7/12/13 at 1-17. This timely appeal followed.

B. Plaintiff is an Experienced Civil Rights Leader Who Received Positive Evaluations and Was Never Disciplined Prior to Her Termination

Mendoza de Sugiyama is a Mexican-American woman and identifies as Latina. CP 1220. She has over 25-years of service working for various Washington State agencies. *Id.* Prior to working for WSDOT, she gained civil rights experience in the affirmative action, discrimination, and disability accommodation fields with the Office of Financial Management, as the Governor's Senior Executive Policy Coordinator for Affirmative Action, and with the Department of Labor and Industries as the Office of Human Resources' Diversity Program Manager. CP 1221. From 2000-2003, Mendoza de Sugiyama worked for the Attorney General's Office as the Director of Consumer Services. *Id.*

In June 2003, Mendoza de Sugiyama began working as the

[1] Plaintiff moved to consolidate the PRA litigation with this appeal, but the Appeals Court Commissioner denied that request. Mendoza de Sugiyama filed a motion to modify the Commissioner's ruling, but has yet to receive a ruling on that motion. On December 6, 2013, oral argument was heard by this Court in Case No. 43859-3-II.

Diversity Programs Administrator for WSDOT's Office of Equal Opportunity ("OEO"), reporting to OEO Director Brenda Nnambi. CP 1221. During that time, the OEO managed and monitored WSDOT's Equal Opportunity, Affirmative Action, Contract Compliance, and Non-Discrimination programs. *Id.* The OEO had two basic departments: (1) The External Civil Rights Branch ("ECRB"), which handled issues pertaining to non-WSDOT employees, and (2) the Internal Civil Rights Branch ("ICRB"), which handled WSDOT employee civil rights issues. *Id.* The OEO was its own independent department, separate from HR. *Id.*

Plaintiff managed and supervised, statewide, the OEO ICRB offices and staff located in WSDOT OEO headquarters, as well as regional and Ferries offices. CP 1221. She managed the WSDOT affirmative action, equal opportunity, and diversity training programs affecting the WSDOT workforce statewide, and provided executive-level consultation. *Id.* Between 2003-2007, Plaintiff had seven direct reports and one indirect report located throughout the state and managed them through regularly scheduled in-person and phone meetings and quarterly office visits. *Id.*

Prior to terminating her on September 24, 2010, WSDOT Director Nnambi consistently (for years) gave Mendoza de Sugiyama positive employee evaluations. CP 1412. Direct report Julie Lougheed described the Plaintiff as a hardworking and extremely competent manager. CP 904-

07. Lougheed observed Plaintiff's workload and noted it nearly always exceeded that of her subordinates. *Id.* Plaintiff served as an inspiration to her peers in the ECRB, including direct report Shawn Murinko, who later claimed she retaliated against him. CP 915.

C. The WSDOT OEO Organizational Structure was Historically Discriminatory and Reorganized to be Independent from HR, But Reinmuth Reinstated the Discriminatory Structure, Consistent with His Discriminatory Intent

1. In 1991, WSDOT Reorganized to Make OEO a Director Level Organization Reporting Directly to the Secretary of WSDOT Due to a Discriminatory History

In 1991, a WSDOT consultant recommended reorganization of the OEO office to combat discrimination:

> In view of the size and complexity of the Washington State Department of Transportation and the negative perceptions regarding the Department's effectiveness and credibility in equal employment and Affirmative Action, I recommend that the proposed position of Equal Employment Affirmative Action Officer report directly to the highest level in the organization—the Secretary of Transportation.

CP 1281. The recommendation was designed to implement a "culture change." *Id.* The plan envisioned an internal and external office and a director who would report to the WSDOT Secretary, and specifically rejected the notion that HR would monitor the internal organization:

> The current plans propose having the Personnel Office monitor these internal functions. In most organizational systems, many of the discrimination complaints are lodged against the Personnel system itself since, in many organizations, there is the perception that the Personnel

> Office defends the organization rather than performs an unbiased investigatory function. I recommend removing the EEO/AA function from within the Personnel system so that there will be neither a conflict of interest nor the appearance of conflict of interest—almost an inevitability when any Office is required to investigate itself.

CP 1282. Plaintiff herself participated in the early days of the creation of the modern OEO in her position as Policy Coordinator with Governor Gardner's Office of Financial Management. CP 1226-27.

2. WSDOT Chief of Staff Reinmuth Sought to Return to the Days Where the OEO Was Controlled by HR

In 2005, WSDOT hired Steve Reinmuth as its Director of Government Relations reporting to Paula Hammond, then Chief of Staff. CP 1056-57. Reinmuth became Chief of Staff in 2007 when Hammond became Secretary of WSDOT. *Id.* From the outset, Reinmuth wanted to end OEO independence. In his view, ICRB (Plaintiff's internal OEO group) was "notoriously insular in the way that they did their work." CP 1068. He claimed that "it became more and more apparent...that the insulation around [Plaintiff's] work and her particular organization and team was a liability and risk to the agency." CP 1069-70.

Around August 2009, Nnambi learned of Reinmuth's plans to move the ICRB under the authority of the HR Office. CP 1224. In December 2009, at the WSDOT Human Resources Managers meeting, HR Director Kermit Wooden and HR Labor Relations Manager Jessica

Todorovich announced that the OEO would move to HR. *Id.* Reinmuth pitched the move to Wooden and Nnambi, stating in part:

- I believe that our current Human Resources Division is very different from the Personnel Division **from twenty years ago** that prompted the creation of the...current structure.
- The reports from twenty years ago show that there needed to be a collaborative structure between HR and OEO. I don't believe that that collaboration exists currently and am counting on both of you to improve the information shared on informal and formal complaints, status of investigations, legal advice, training, etc.
- **OEO staff need to move away from their perception that HR only acts for managers and does not address employee civil rights concerns** [the same concern that motivated the change in 1991].
- Our current structure has posed the risk of legal liability for WSDOT, due to poor communication and the **unnecessary sense of independence on internal civil rights matters.**

CP 649 (emphasis added). Reinmuth made it clear that he did not want OEO to be an independent investigative organization. *See id.*

D. In 2009 and 2010, Plaintiff Openly Opposed the Proposed Move of the Independent ICRB to HR and Filed Numerous Whistleblower Complaints with State and Federal Agencies

Mendoza de Sugiyama opposed relocation of the ICRB from its independent position, to Wooden's HR organization, which reported to Administrative Services Division Assistant Secretary Bill Ford. CP 1224. Plaintiff complained to OEO Director Nnambi that the proposed move of OEO/ICRB would violate the Code of Federal Regulations applicable to state transportation agencies, as well as the requirements of the Baseline Assessment prepared by the Federal Highways Administration Office of

Civil Rights. *Id.* Nnambi agreed and opposed the move for the same reasons, that it was inconsistent with federal regulations, and in her words, was like the "fox guarding the hen house." CP 980-81. Plaintiff also objected because Wooden and Ford had engaged in sexual improprieties with subordinate women, creating a sexually-hostile work environment for Plaintiff and other women. CP 901, 1008, 1012, 1020, 1030, 1245.

In January 2010, at the Northwest Region HR meeting, Wooden announced that OEO Disability Program Manager/ADA Compliance Officer Murinko would be transferring to Human Resources, and would oversee the ECRB. CP 1224. Plaintiff opposed Murinko's promotion because he lacked the qualifications and experience to do the job. *Id.* She also felt Wooden's actions constituted gross mismanagement and were potential violations of federal laws and rules. *Id.* She began opposing and reporting improper governmental actions to the superiors in her chain of command, primarily through verbal complaints to OEO Director Nnambi. CP 1224-25. Throughout January 2010, Plaintiff tried to work within her chain of command to address these issues. *Id.*

After making no progress using informal channels, Plaintiff wrote a letter to Governor Gregoire on February 2, 2010 and copied Attorney General McKenna, raising concerns about WSDOT's decentralization of the civil rights functions of the OEO and explaining that it was contrary to

the Code of Federal Regulations required of state transportation agencies and the Federal Highways Administration Office of Civil Rights National Baseline Assessment. CP 1225, 1245. Plaintiff outlined the national standard and risks associated with not having an independent OEO office, and raised specific concerns about moving the OEO functions under the supervision of HR in light of the record of sexual impropriety of Wooden and Ford.[2] *Id.* Finally, Plaintiff reported false accusations, hostility and discrimination by Reinmuth, Wooden, and Murinko. *Id.*

On March 25, 2010, Plaintiff reiterated her complaints by letter to Governor Gregoire's Chief of Staff about the OEO consolidation and employment discrimination issues. CP 1228, 1365.

When Governor Gregoire's office failed to respond favorably, on March 29, 2010, Plaintiff wrote to the Federal Highway Administration, submitting a Title VI complaint. CP 1229, 1368. She again stated that WSDOT's proposed plan would not comply with the federal regulatory civil rights mandate for state transportation agencies, and reiterated her concerns about Murinko's lack of qualifications and limited practical experience in external ADA issues. CP 1229.

On September 23, 2010, just before her termination, Mendoza de

[2] In separate incidents, subordinates brought sexual harassment lawsuits against Ford and Wooden. Reinmuth testified WSDOT paid $100,000 to settle Ford's case, and Hammond testified that Wooden was required to repay some of the attorney's fees. CP 1040-41, 1146-48. **The State did not terminate or demote Ford or Wooden based on these incidents.** *Id.*

Sugiyama filed a whistleblower complaint with the State Auditor's Office through the SAO website. CP 1161, 1230. She identified her letter to the Governor, her letter to the FHWA, her SAO complaint, and one other complaint in discovery responses. CP 1168-69.

E. Wooden and Reinmuth Created a Hostile Work Environment Based on Appellant's Race and Gender, and Discriminated Against Her on the Basis of Race and Gender

Reinmuth and Murinko are Caucasian men. CP 1230. Nnambi is an African-American woman. *Id.* Wooden is an African-American man, and Hammond and Todorovich are Caucasian women. *Id.*

1. Wooden Frequently Spoke to Plaintiff in a Demeaning Way, Unfairly Criticized Her Work, and Refused to Meet with Her

Wooden frequently questioned the work of OEO, and the ICBR in particular. CP 1230. After one of her very first interactions with Wooden in 2003, Plaintiff verbally complained to Nnambi about his demeaning treatment of her. *Id.* In 2008, Wooden criticized Plaintiff for her alleged failure to follow HR protocols. CP 1230, 1385. Wooden offered to meet Plaintiff, but then ignored her when she reached out to him. CP 1230. Plaintiff complained about Wooden's treatment of her to Nnambi and Reinmuth, but the issue was never resolved. *Id.* Indeed, Nnambi was aware that Wooden created a hostile work environment for Plaintiff, noting that after a dispute, Wooden refused to apologize to her and

thereafter cancelled or failed to attend scheduled meetings with her. CP 1031. Reinmuth confirmed that Wooden refused to speak with Mendoza de Sugiyama and frequently cancelled meetings that were set with her or expressed little interest when he did attend. CP 1014.

With the proposed move to place the ICRB within HR, under the direction of Wooden and ultimately under Ford, Mendoza de Sugiyama became increasingly concerned about the hostile work environment she would experience. CP 1233. She was also concerned that Wooden and Ford would have oversight of the internal civil rights functions of investigations on cases that were similar to the sexual harassment charges filed against them by subordinates. *Id.* Reinmuth testified that he understood Plaintiff believed Wooden was a "sexual predator" and that "moving the internal civil rights branch to a sexual predator would be problem." CP 1140. Additionally, her letter to the Governor put Reinmuth on notice of a hostile work environment. CP 1015.

Several other women, ER 404(b) witnesses, also experienced harassment by Wooden. Former HR employee Kathy McGuire believed Wooden created a hostile work environment for her, which caused her to be physically and emotionally ill. CP 901-03. Wooden's harassment eventually forced McGuire to leave HR. *Id.* Numerous other women brought lawsuits against Wooden claiming hostile work environment or

discrimination, including Nicole Emanuel, Karen Johnson, Elena Brunstein, Terry Townsend, and Lea Schmidt. CP 1023-24. On April 3, 2010, Schmidt sent Mendoza de Sugiyama a distressed email regarding a meeting with Wooden where Wooden "showed his yelling, arrogance, and bullying," which caused one female employee to storm out of the meeting in tears. CP 1397. Schmidt asked appellant to meet to discuss possibly filing a claim with OEO. *Id.*

Prior to Mendoza de Sugiyama's termination, in early September 2010, three female HR managers presented Reinmuth with a two-page memorandum outlining Wooden's misconduct and harassment. CP 1008, 1016-17, 1026. As a result, Hammond terminated Wooden on October 4, 2010, less than two weeks after she terminated Plaintiff. CP 1027.[3]

2. Reinmuth Repeatedly Criticized Plaintiff's Work and Refused to Meet Individually with Her, While Caucasian Employees had Direct Access to Him

Reinmuth testified that Mendoza de Sugiyama's group was "notoriously insular" and targeted her group even prior to his appointment as Chief of Staff, when he was at the Attorney General's Office. CP 1068-70. He felt Mendoza de Sugiyama demonstrated "indignation" any time he questioned her work. CP 1069. Reinmuth criticized OEO's stance as an independent agency, believing that OEO did not properly consult or

[3] In contrast to Wooden's treatment of women, Murinko testified that he had no complaints about working with Wooden and that he liked working with HR. CP 1183, 1188.

coordinate with the AG or HR on civil rights issues. *Id.* Reinmuth believed that Plaintiff had no interest in what he had to say. CP 1086-89.

Plaintiff acted respectfully at all times in her communications with Reinmuth. CP 1233. Reinmuth never disciplined or proposed discipline for her prior to terminating her. *Id.* During Reinmuth's deposition, he insinuated that Mendoza de Sugiyama was rude, insubordinate, and that he tried numerous times to coach her, but when pressed, he had to admit that she was not rude or insubordinate, and he made no effort to "coach" her. CP 1087-94. When asked why he did not meet with Mendoza de Sugiyama one-on-one, he stated that it was his practice to have managers attend such meetings with subordinates, "whether I am just listening to understand both sides of an issue, but, particularly, when I am providing direction." CP 1082-83, 1091-92. Yet, he repeatedly met individually with Caucasian employees Murinko and Todorovich to address their concerns. CP 1115-16, 1120, 1188, 1194, 1196-97. In fact, Reinmuth admitted to meeting with Murinko one-on-one because "inviting the retaliatory chain of command [Mendoza de Sugiyama and Nnambi]" might have "a chilling effect" on Murinko. CP 1119-21. This double standard is discrimination, pure and simple.

Prior to Murinko's move to HR, Murinko repeatedly met with Reinmuth to criticize Mendoza de Sugiyama's work performance,

undermining her in the eyes of her boss:

> The fact that Ms. Mendoza de Sugiyama routinely came in late, that she routinely left early, that nobody knew what she did, that he was being paid to do her job and his, that she would refer to her employees as the jewels in her crown, and that he felt that it was not a healthy work environment.

CP 1121. After hearing from the Caucasian, Reinmuth's response was to go to (African American) Nnambi and tell her to hold Plaintiff accountable. CP 1122-23. When asked how he knew that Murinko was not lying, he claimed Nnambi said Plaintiff's schedule was variable. *Id.*

In contrast, Nnambi testified that Mendoza de Sugiyama was competent and a good performer in all ways. CP 934-35. Nnambi also stated that Reinmuth was difficult to work for, undermined her, and met with her staff without consulting her. CP 947-952. Nnambi testified that after she expressed her support for Plaintiff, Reinmuth began giving her less favorable and negative performance evaluations. CP 978, 984-87. After terminating her, Reinmuth told staff in an ICRB meeting that Mendoza de Sugiyama was a "bad manager." CP 976-77.

Reinmuth further testified that he hired at least nine employees while serving as Chief of Staff, but eight of the hires into high-level management positions were Caucasian and only one was a person of color. CP 1057-60. He admitted that the agency had an affirmative action plan, yet was not meeting its diversity goals. CP 1061-62, 1392. There was an

"underutilization"[4] of Latinos/Hispanics in management positions, and Plaintiff was the highest-ranking Hispanic employee at WSDOT. CP 1234. An underutilization could affect federal funding, and after WSDOT terminated Plaintiff, HR took over that analysis. CP 942-43, 1234.

Reinmuth criticized Plaintiff for stating she was unavailable to meet with him on a day she planned to attend a large Hispanic conference. CP 1090-91. He also told Nnambi that Plaintiff had a "chip on her shoulder" and was abrupt with her subordinates. CP 1232. By the fall of 2009, the increasing number of these accusations by Reinmuth against OEO, ICRB, and plaintiff, created a hostile, stressful, and fearful work environment for Mendoza de Sugiyama. CP 1232. Each time Reinmuth leveled an accusation, Plaintiff had to gather information and documentation to refute it, exacerbating her already heavy workload. *Id.*

In November 2009, Reinmuth reported to Nnambi that another employee, Jonte Sulton, wanted to relocate away from WSDOT headquarters in order to avoid working for Mendoza de Sugiyama. CP 1231. That was false. Sulton later explained in writing that she did not wish to relocate, enjoyed working for appellant, and was "a little disappointed that someone would start such a rumor." CP 1389.

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[4] An underutilization occurs where the percentage of persons of color in a particular job description is less than the percentage of persons of color in the local community. CP 939-43.

ER 404(b) witness Colleen Jollie also felt Reinmuth created a hostile work environment for her. CP 908-10. Jollie, a Native American woman, served as the WSDOT Tribal Liaison. *Id.* Shortly after Reinmuth became the Interim Director of Government Relations, Reinmuth sought to subordinate Jollie and weaken the power of Native Americans in terms of their role in working with WSDOT. *Id.* Reinmuth openly expressed frustration with the tribes, and, as Assistant Attorney General, stated that WSDOT needed to be able to say "no" to the tribes and "make it stick." *Id.* Reinmuth reduced Jollie's authority and autonomy and denied her attendance at important tribal conferences. *Id.* The stress of the hostile work environment negatively affected Jollie's health and she decided to retire rather than fight or seek legal representation. *Id.*

Over Nnambi 's and Plaintiff's objections, and with knowledge of the hostile work environment created by Wooden, Reinmuth proposed and pursued the move of ICBR to the HR department. CP 924-26.

F. Mendoza de Sugiyama Approved All of Murinko's Accommodation Requests and Did Not Retaliate Against Him

1. Plaintiff Supported Murinko's Hiring and Requested Accommodations

In April 2007, Mendoza de Sugiyama supported Murinko's hiring as the ADA Coordinator/Affirmative Action Coordinator, and, following his probationary period, she supported his reclassification and promotion

to a management position. CP 1222. Plaintiff approved and supported all of Murinko's requested accommodations, including the purchase of an ADA accessible van and accommodations made to his office. CP 1223.

2. Murinko Wanted Appellant's Job When She Retired

In 2009, Mendoza de Sugiyama announced that she would retire in October 2010. CP 1235. She wanted to allow OEO to find and train a replacement and so that any staff members who were interested in applying for the position could gain the skills necessary to be competitive. *Id.* Murinko expressed interest in taking over Mendoza de Sugiyama's position. CP 970-71, 1190, 1195, 1235. However, by December 2009, the economy and plaintiff's financial situation had changed so that she no longer planned to retire in October 2010. CP 1235. Plaintiff communicated this to OEO staff by email on December 22, 2009. *Id.*

G. Appellant Supported Murinko's Move to the First Floor and Did Not Retaliate Against Him

In August 2009, the WSDOT Administration Division decided to move Murinko to the HR office on the first floor in an effort to address accessibility and egress issues in case of a fire. CP 1235. Following an initial meeting with Nnambi, an interactive process began with Murinko to move him to the first floor. CP 1235-36. When Murinko stated he would feel safer being able to evacuate in an emergency, Nnambi, with Plaintiff's support, made the decision to move Murinko. CP 1236.

After his move, Murinko's his job title and reporting structure remained the same. Shortly thereafter, however, in December 2009, he began to complain to Todorovich and Reinmuth that Plaintiff was retaliating against him for moving to the first floor. CP 1184-85, 1199. He complained that Mendoza de Sugiyama asked him to put a note outside his door when he used the restroom. CP 1177-79. He complained that she questioned why he was eating lunch on the second floor on the day of his move, and that she accused him of not copying a necessary employee on a work-related email, though he noted that she apologized later. CP 1175, 1180-81.

The practice of putting a "Service Level" magnet on the OEO sign-out board to indicate that Murinko was using the accessible bathroom was not a new practice. CP 1179, 1236. The magnet was necessary because of the extended time needed: Murinko needed to close the accessible restroom for his exclusive use at times in excess of 30 minutes, which meant sometimes waiting for it to be vacated, and moving a large mechanical lift into the restroom needed for assistance by his caregiver. CP 1236. When Murinko moved to the first floor, Mendoza de Sugiyama asked that he continue the practice of signing out on the board outside his office, including using "Service Level" as a code to indicate his location in the accessible restroom. *Id.* Murinko did not object or express concern at

the time at all. CP 1181-82, 1236.

In January 2010, Murinko complained about Plaintiff to Reinmuth, claiming she was "micromanaging" him and that she had retaliated against him after he moved his office to the first floor. CP 1225.

Effective February 1, 2010, HR announced that Murinko would work *for HR* under the supervision of Kathy Dawley. CP 1202. Unfortunately, because of this Plaintiff lost the benefit of casual office conversation to hear about his anticipated meetings away from headquarters or unanticipated work activities related to his duties with the Human Rights Commission. CP 1236-37. In addition, after his move, Plaintiff was frequently unable to reach Murinko by phone. CP 1237.

H. The State Hired Attorney Claire Cordon to Conduct a Dual Investigation

As a result of the issues Plaintiff raised to the Governor and the FWHA, and Murinko's complaints against her, WSDOT hired outside investigator Claire Cordon to conduct an investigation, which concluded in July 2010. CP 1229-30. During that investigation, WSDOT Secretary Paula Hammond admitted that she terminated Mendoza de Sugiyama *on the recommendation of Reinmuth in part because she had gone outside the agency* by contacting the Governor's Office and the FHWA, and in essence, tried to put her or her agency, WSDOT, "on report." CP 1042-43, 1125-26. Reinmuth later explained that he could not have rejected

Cordon's findings because "[i]t would have been a waste of money that the agency had spent regarding the investigation that occurred." CP 1152.

I. Mendoza de Sugiyama Did Not Interfere With the Cordon Investigation

Within weeks of Murinko's complaints about Plaintiff, Reinmuth hired Cordon to look into the matter. In contrast, Mendoza de Sugiyama had complained for years about Wooden, but Reinmuth failed to investigate. CP 1091-92, 1229-30.

Even before the Cordon investigation, Reinmuth had secretly met with one of Plaintiff's Caucasian subordinates, Eileen Oliver. Oliver complained to Reinmuth that she was being mistreated by Mendoza de Sugiyama. So, Reinmuth hired an investigator, an administrative law judge, who exonerated Mendoza de Sugiyama. CP 1071-72.

The next time an allegation arose regarding Plaintiff, WSDOT hired attorney Claire Cordon instead of the ALJ. CP 1206. Cordon admits she interviewed Hammond and Reinmuth, but did not tape record or obtain written statements. CP 1207-08, 1212-1214. She knew what they thought of Plaintiff, and shaped her report accordingly. *Id.* Cordon did not investigate whether Hammond retaliated against Mendoza de Sugiyama for complaining to the governor or to the federal government about improper governmental action, and she refused to opine. CP 1208-12. And, Cordon did not interview all of the witnesses listed by Mendoza

de Sugiyama. CP 1215-19. This was a biased investigation.

Then, at summary judgment, the State accused Plaintiff of interfering with Cordon's investigation by "pumping" witnesses for information. CP 412. But Plaintiff did not contact potential witnesses to obtain or provide information. CP 1238-39. Rather, appellant received a distressed email from Lea Schmidt asking for help and asking to meet to discuss *possibly filing an OEO claim against Wooden.* CP 1238-39, 1397. This is the context in which appellant had contact with Schmidt and the Ferries co-workers. CP 1239.

J. Reinmuth Informed Appellant of Her Termination; Nnambi Was Not Consulted

On August 13, 2010, Reinmuth called Plaintiff and ECRB Manager Greg Bell into a meeting, but did not inform them of the subject matter of the meeting. CP 1239-40. After asking Bell to leave, Reinmuth handed Mendoza de Sugiyama copy of the Cordon report, a 10-page pre-disciplinary letter, and a letter placing her on administrative reassignment requiring her to work from home during business hours. CP 1240, 1399. Reinmuth and Hammond did not consult with Nnambi prior to issuing the pre-disciplinary letter or reassignment. CP 982-84. Indeed, Reinmuth delivered the pre-disciplinary letter while Nnambi was out of town. CP 1241. Reinmuth and Hammond also did not consult with Nnambi with regard to the level of discipline, i.e. termination, to impose. CP 984.

Appellant responded in writing to the pre-disciplinary letter on August 27, 2010. CP 1423. No Loudermill hearing took place; Hammond simply met with Mendoza de Sugiyama to tell her why she was being fired. CP 1044-46. At the meeting, Hammond admitted the primary reason for appellant's termination *was going to the federal agency* because it undermined Hammond's credibility. CP 1047. Hammond had no recollection of terminating Mendoza de Sugiyama because she inappropriately released confidential information, as was later claimed by the State. CP 1048.

K. Mendoza de Sugiyama Sought Emails in Discovery Exchanged Between the Main Participants in the Case, During the Relevant Time Frame, But Judge McPhee Denied the Request as Overbroad

In discovery, plaintiff asked for all documents, including emails, correspondence, and notes, between or among specific individuals and "defendant relating to the issues identified in plaintiff's Complaint." CP 90-94. After the State objected, Mendoza de Sugiyama agreed to narrow the scope of her requests to emails exchanged between twelve key individuals in the case. CP 47-48.

On February 14, 2012, plaintiff conducted the deposition of WSDOT's CR 30(b)(6) designee, Joanna K. Jones, who was employed by WSDOT in the Information Technology field. CP 289, CP 292. She testified that she was asked to find emails exchanged between the

individuals identified in Mendoza de Sugiyama's discovery dating back from January 1, 2007 to the date of the request. CP 294. Jones stated that she had already completed the email searches for ten identified individuals. CP 298-300, 302. She further testified that the emails were ready to be produced on an external hard drive, which would take up to one hour. CP 308, CP 316. The emails, however, had not been reviewed for privilege. CP 317.

Following the CR 30(b)(6) deposition, on February 16, 2012, plaintiff proposed providing the State with an external hard drive for copying the emails and offered to convert the documents at plaintiff's expense so that it would not cost the State any money to provide these documents. CP 281. In response, the State persisted that it was unduly burdensome for the State to review 174,000 emails for privilege. CP 27. The parties filed corresponding motions to compel and for a protective order on March 9, 2012. CP 23, 45.

The trial court denied plaintiff's motion to compel regarding the emails, finding that the requests for production were overbroad and unduly burdensome, and that plaintiff should employ key-word searches for the emails. RP 4/27/13 at 33-36, CP 397-98. Plaintiff then requested the emails under the Public Records Act, as described above. *See* Court of Appeals, Case No. 43859-3-II.

IV. ARGUMENT

A. Standard of Review

An appellate court reviews "a summary judgment order de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party." *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008). A *de novo* standard of review applies to "all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (noting that "[a]n appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court...").

Summary judgment is only appropriate where "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) (emphasis added). If there is a dispute as to any material fact, summary judgment is improper. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).

"Summary judgment in favor of the employer in a discrimination case is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and

nondiscrimination." *Davis v. West One Automotive Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007). A "plaintiff alleging employment discrimination 'need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a factfinder, upon a full record.'" *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (quoting *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000)).

Further, the WLAD "mandates liberal construction." *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999), RCW 49.60.020 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof"). Thus, the protections afforded by the WLAD are broader than those provided by the federal employment discrimination statute, Title VII, which includes no mandate for liberal construction. *See Martini*, 137 Wn.2d at 372-73, *Marquis v. City of Spokane*, 130 Wn.2d 97, 108-10, 922 P.2d 43 (1996).

The standard of review for pretrial discovery orders is abuse of discretion. *Gillett v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Id.*

B. The Trial Court Erred When It Found that the State's "Independent" Investigation Overcame Appellant's Evidence

at Summary Judgment Because the Investigator Relied on Information from the Biased Supervisors and Subordinate

The trial court improperly found:

> The State has also established to this Court's satisfaction that there were a number of reasons that Ms. Sugiyama was terminated that were non-discriminatory. While this Court will not consider the specific findings of the investigation by Independent Investigator Claire Cordon in this context for the truth of the matters asserted [Plaintiff argues that those findings are hearsay],the court will, rather, consider the fact that the investigation made recommendations regarding misconduct by Plaintiff to WSDOT as a basis for WSDOT taking action. The Plaintiff has failed to establish by any evidence that her termination was for discriminatory reasons or that the reasons stated for the termination were a pretext. The Plaintiff has failed to establish any retaliation by the State.

CP 1533.

First, the State's primary stated reason for terminating Mendoza de Sugiyama was her alleged retaliation of Murinko after his move to the first floor. Plaintiff rebutted this pretextual reason with ample evidence that she did *not* retaliate against Murinko before her termination and again at summary judgment. CP 1399, 1423. Another reason the State gave for her termination was Plaintiff's alleged interference with the Cordon investigation by talking to other employees, and appellant's letters to the governor and the FHWA. Plaintiff rebutted this too, and her rebuttal must be accepted as true on summary judgment. CP 1238-39. Yet most importantly, the State's primary reason of terminating appellant because

she went outside the agency to complain is classic evidence of retaliation, which the trial court simply ignored. The court improperly weighed the evidence, failed to view the facts in the light most favorable to Plaintiff, the non-moving party, and erred in finding she "failed to establish any evidence that her termination was for discriminatory reasons or that the reasons stated for the termination were a pretext." CR 56. CP 1533.

Second, the trial court should not have insulated the State from liability simply because the State conducted a so-called "independent" investigation. *See Staub v. Proctor Hosp.*, 131 S.Ct. 1186, 1193 (2011). Indeed, the investigator relied upon information fed to her from biased supervisors Reinmuth and Wooden and biased subordinate Murinko. In *Staub*, the U.S. Supreme Court wrote:

> We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of 'fault.' The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.
>
> . . . if the independent investigation relies on facts provided by the biased supervisor—as is necessary in any case of cat's paw liability—then the employer (either directly or through the ultimate decisionmaker) will have effectively delegated the factfinding portion of the investigation to the biased supervisor.

Id. That is precisely the case here.

Cordon relied on information obtained from Wooden and Reinmuth in reaching her conclusions. Not only were they biased, they were the focus of Mendoza de Sugiyama's discrimination and whistleblower complaints, giving them every reason to be less than truthful, and to retaliate against her. Furthermore, Hammond, again on Reinmuth's recommendation, terminated Wooden weeks after she terminated appellant. At the time she terminated Plaintiff, Hammond was aware of numerous sexual harassment and gender discrimination complaints against Wooden, yet she ignored these facts and blindly adopted Cordon's biased and inaccurate findings to justify firing Plaintiff. Under *Staub*, the trial court erred in relying on Cordon's investigation to absolve the State of liability because Cordon's findings were based on information given to her from Wooden, Reinmuth, and Murinko.

C. The Trial Court Erred in Holding Mendoza de Sugiyama to a Higher Standard Because of Her Work in the Affirmative Action and Discrimination Fields

The trial court held Mendoza de Sugiyama to an improper and factually incorrect heightened standard resulting in procedural default when it found that "as a result of her job position and her training and experience" she would have been "aware of how to file a whistleblower complaint if that had been her intention." CP 1533. In doing so, the trial court improperly drew inferences against the Plaintiff on summary

judgment, and wrongly found what Plaintiff "would have known." Plaintiff worked exclusively in the field of civil rights and discrimination investigations. She did not work for the State Auditor's Office, which directly handles whistleblower complaints and investigations. In an analogous retaliation case under the WLAD, Division I in *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 848-49, 292 P.3d 779 (2013), recently found that RCW 49.60.210(1) "unambiguously protects *any person* who opposes unlawful discrimination in the workplace," noting that employees cannot be treated differently under the statute based on their job duties.

Most importantly, though, the trial court ignored the fact that Plaintiff *did* file her whistleblower complaint with the proper public officials. A whistleblower is entitled to make his or her complaint to "the auditor or other public official, as defined in subsection (7)" of the statute.

> (7) "Public official" means the attorney general's designee or designees; the director, or equivalent thereof in the agency where the employee works; an appropriate number of individuals designated to receive whistleblower reports by the head of each agency; or the executive ethics board.

RCW 42.40.020(7). Plaintiff set forth the core of her whistleblower complaints in her letters to the governor and the FHWA—that moving internal OEO to HR was a violation of the CFRs and a conflict of interest. She copied the Attorney General on this letter. The Governor and Attorney General are proper public officials to receive Plaintiff's complaints. RCW

42.40.020(7). Hammond also received and read both letters. Nnambi is a director, and she received and read both letters. Plaintiff complained to the governor *six months* before WSDOT terminated her.

D. The Trial Court Improperly Analyzed Mendoza de Sugiyama's Whistleblower Complaints When It Found They Did Not Appropriately Allege Improper Governmental Action, Were Without Merit, and that the Auditor Complaint Was Untimely

1. The Trial Court Erred In Finding that Appellant's Letter to the Governor and the Attorney General Did Not Concern "Improper Governmental Action"

The trial court misapplied RCW 42.40 when it found that appellant did not report "improper governmental action." CP 1533. RCW 42.40.020 defines "improper governmental action," in relevant part, as:

> ...any action by an employee undertaken in the performance of the employee's official duties:
> (i) Which is a gross waste of public funds or resources as defined in this section;
> (ii) Which is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature;
> (iii) Which is of substantial and specific danger to the public health or safety;
> (iv) Which is gross mismanagement;.....

RCW 42.40.020(6)(a). Plaintiff's letter to the governor asserted a violation of federal law – that the proposed move of the ICBR to HR was a violation of federal regulations. OEO Director Nnambi agreed that the move was a violation of federal law. Plaintiff also believed the proposed move was in violation the 1991 agreement to have a separate, independent civil rights

branch outside of HR. Plaintiff reported "improper governmental action."

2. Appellant's Whistleblower Complaints Were Made in Good Faith

The trial court placed improper importance on the fact that "an investigation was conducted" and Plaintiff's "accusations were found without merit." CP 1533. Plaintiff asserts that the proposed move violated federal regulations. However, even if she was incorrect, Mendoza de Sugiyama need only have a "good faith" basis for making her compliant. Good faith "means the individual providing the information or report of improper governmental activity has a reasonable basis in fact for reporting or providing the information." RCW 42.40.020(3), *Ellis v. City of Seattle,* 142 Wn.2d 450, 461-62, 13 P.3d 1065 (2000) (citing RCW 42.40.020's good faith requirement). Even the State does not suggest that Plaintiff acted in anything other than good faith.

Whether an investigation eventually confirmed Mendoza de Sugiyama's whistleblower complaints is not the relevant inquiry under the law, especially on summary judgment. Also, to the extent any findings in the State's investigation contradicted facts offered by appellant, that is simply an issue of material fact to be resolved by the jury.

3. The Trial Court Erred in Finding That Mendoza De Sugiyama Filed Her Whistleblower Complaint With the Auditor's Office *After* Her Termination

The trial court improperly found that Mendoza de Sugiyama filed

her whistleblower complaint with the State Auditor "*after* her termination." CP 1532-33. This finding is simply wrong. Mendoza de Sugiyama filed her whistleblower complaint with the auditor on September 23, 2010; WSDOT terminated her on September 24, 2010. At that moment, she perfected her claim under any legal theory, but she had already reported improper government action months before. *See supra.*

4. The Trial Court Erred In Finding That Mendoza De Sugiyama Was Bound by Her Interrogatory Responses at Summary Judgment

The trial court improperly found that appellant was bound by her interrogatory response and response to RFP "R" at summary judgment, which identified the online complaint to the State Auditor's Office as her "whistleblower" complaint. CP 1533. RFP R specifically requested the "whistleblower" complaint by date – September 23, 2010, therefore plaintiff's response to that RFP concerned her September 23, 2010 complaint. CP 861. Additionally, Interrogatory No. 17 identified her letter to the governor as concerning: "complaint of hostile work environment, bullying, harassment, false accusations, Code of Federal Regulations non-compliance, and wrongful actions by managers." CP 856-57. A violation of the CFRs is a whistleblower complaint of improper governmental action. As noted in Tegland, 3A Wash. Prac., Rules Practice CR 33 (6th ed.):

> Answers to interrogatories are not ordinarily binding and do not limit a party's proof in the way that pleadings or

> admissions do. Thus, an answer to an interrogatory may be contradicted or rebutted by other evidence introduced at trial. *See, e.g., Freed v. Erie Lackawanna Ry. Co.*, 445 F.2d 619 (6th Cir. 1971). A party will not generally be precluded from taking a contrary position to that set forth in an interrogatory, unless the change in position would unfairly prejudice another party. *See Seals v. Seals*, 22 Wash. App. 652, 590 P.2d 1301 (Div. 3 1979) (where party to dissolution action asserts in answers to interrogatories the nonexistence of assets of which that party has or should have knowledge, the requesting party may rely on such statements).

Here, discovery had just begun when Mendoza de Sugiyama, who filed her complaint in June 2011, responded to the State's discovery requests in October 2011. Plaintiff was not bound by these responses and though she may not have specifically labeled her letter to the governor as a "whistleblower" complaint, it concerned improper governmental actions. Plaintiff's letter to the governor and attorney general reported improper governmental actions; WSDOT terminated her shortly thereafter, and Hammond admits she did it because Plaintiff went outside the agency. This is whistleblower retaliation. The State would be free at trial to confront Mendoza de Sugiyama with her discovery responses and the jury would decide whether she properly filed her whistleblower complaint.

E. The Trial Court Improperly Analyzed Appellant's Whistleblower Retaliation Claims by Failing to Apply the Rebuttal Presumption

RCW 42.40, the State Employee Whistleblower Protection Act, sets forth the standard for the Court to apply in determining whether a

State employee was subject to whistleblower retaliation. RCW 42.40.050 states, in relevant part (emphasis added):

> (1)(a) **Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW.**
> (b) For the purpose of this section, "reprisal or retaliatory action" means, but is not limited to, any of the following:...(x) **Dismissal**;....
> (2) **The agency presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor.**

Under this standard, there is a "presumption" of retaliation and the State must prove by a preponderance of the evidence that a series of personnel problems, or a single, egregious event, caused Plaintiff's termination. The State is not able to meet this standard. Hammond admitted that she terminated appellant in part because appellant went outside the agency and tried to put WSDOT on report. Plaintiff's letter to the governor and her complaint to the FHWA were good faith reports of improper governmental actions. She believed the proposed move of the ICBR to HR would violate federal regulations. She also believed that, given Wooden and Ford's prior sexual harassment claims, and the hostile work environment Wooden created for appellant and other women, that it would have been an improper governmental action to put the internal civil

rights investigations under Wooden and Ford's authority.

The State claimed it terminated Mendoza de Sugiyama for disclosing confidential information about the Wooden and Ford sexual harassment charges in her letter to the FHWA and for criticizing Murinko's lack of qualifications for the position in which WSDOT planned to promote him. Ford and Wooden's substantiated misconduct is a matter of public record and would be subject to a public records request. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 206, 189 P.3d 139 (2008), *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993). Hammond openly discussed Wooden's 2005 lawsuit in her declaration submitted in Wooden's employment discrimination lawsuit against the State. CP 1022. The State cannot be justified in terminating Plaintiff for disclosing information that is a matter of public record, information that Hammond herself disclosed. This was a question for the jury. In her deposition, Hammond could not even remember this as a basis for terminating Plaintiff. Finally, Plaintiff expressed her good faith concerns that Murinko was not qualified to perform the duties of his new position. She believed the public would suffer because of his lack of qualifications and that Wooden's decision was improper governmental action and a gross waste of public funds.

The State also claimed that Plaintiff's retaliation of Murinko led to her termination. After Murinko moved to the first floor, the practice of putting a sign outside Murinko's office to indicate "Service Level" did not change from the previous practice. Murinko never complained about this

practice before his move. It was also increasingly difficult for Plaintiff to reach Murinko after his move even when his calendar showed he was available. She no longer had the opportunity to observe his whereabouts after his move or to determine his schedule through passing interactions. The State cannot show by a preponderance of the evidence that Plaintiff's treatment of Murinko constituted "a series of documented personnel problems or a single, egregious event" justifying her termination. RCW 42.40.050(2). This is particularly true given the treatment of comparators Ford and Wooden. Subordinates accused both Ford and Wooden of sexual harassment and filed lawsuits against them. WSDOT did not terminate or demote Ford and Wooden after these lawsuits. In contrast, the State terminated Plaintiff for allegedly monitoring Murinko more closely after his move to the first floor.

F. The Trial Court Erred in Finding that Appellant Could Not Establish a *Prima Facie* Case for Gender or Race Discrimination and in Finding that Direct, Rather than Circumstantial, Evidence Was Necessary

Without elaborating on its reasons, the trial court found that Mendoza de Sugiyama could not even show a *prima facie* case for gender or race discrimination "that any such misconduct by WSDOT occurred." CP 1534. Plaintiff need not show direct evidence of discrimination in the form of written or verbal comments regarding her race or gender. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001) (noting that "[d]irect, 'smoking gun' evidence of discriminatory animus is rare"

and "it would be improper to require every plaintiff to produce 'direct evidence'").

Under the shifting burden analysis, "[t]o establish a prima facie case of racial [or gender] discrimination based on disparate treatment, an employee must show that (1) the employee belongs to a protected class and that (2) the employer treated the employee less favorably in the terms or conditions of employment (3) than a similarly situated, nonprotected employee (4) who does substantially the same work." *Davis v. West One Automotive Group*, 140 Wn. App. 449, 166 P.3d 807 (2007) (citing *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000)).

As a Mexican-American woman, appellant is a member of a protected class. She was treated less favorably than male employee Murinko by Wooden when Wooden spoke to her in a demeaning way, cancelled meetings with her and, when he did attend meetings, he refused to interact with her. Numerous other woman have alleged that Wooden treated them differently based on their gender, including McGuire, Emanuel, Johnson, Townsend, and Schmidt.

Reinmuth also treated Plaintiff differently as a woman of color. Caucasian employees had direct access to Reinmuth and he acted upon their concerns. He was quick to criticize Plaintiff when Caucasian employees allegedly complained about her. Yet Reinmuth failed to act

when she informed him of the hostile work environment created by Wooden. Wooden and Ford had previously engaged in sexual harassment and were not demoted or terminated. Reinmuth was aware of this fact, but he treated appellant differently when he recommended her termination after Murinko complained that she retaliated against him after moving to the first floor. Comparators Nnambi and Jollie, both women of color, were also treated differently by Reinmuth when he undermined their work and reduced their responsibilities.

Prior to appellant's termination, on September 3, 2010, three female HR managers presented Reinmuth with a two-page memorandum outlining Wooden's misconduct and harassment. Reinmuth and Hammond were on notice of additional misconduct and harassment issues related to Wooden, yet they still terminated Mendoza de Sugiyama even though she complained of the same misconduct.

Reinmuth also testified that he hired at least nine employees while serving as Chief of Staff; eight of the hires into high-level management positions were Caucasian; only one of whom was a person of color. He testified that the agency had an affirmative action plan and was not meeting its diversity goals. There was an underutilization of Latinos/Hispanics in management positions and plaintiff was the highest-ranking Hispanic employee at WSDOT. Reinmuth's hiring decisions,

knowing that affirmative action goals were not met, again is circumstantial evidence of race discrimination.

In the light most favorable to appellant, the evidence demonstrates that Wooden, Reinmuth, and Hammond treated appellant differently than Caucasian or male employees, and that her race and/or gender was a substantial factor in her termination.

G. The Trial Court Erred When It Determined that Appellant Failed to Establish Her WLAD Retaliation Claims

Hammond testified that she terminated Mendoza de Sugiyama in part because she went outside the agency to complain to the governor, the attorney general, and the FHWA. Hammond stated that Plaintiff tried to put her and her agency (WSDOT) on report. This is classic retaliation, and the trial court erred in finding that Plaintiff failed to raise a genuine issue of material fact at summary judgment as to whether she was terminated in retaliation for raising her whistleblower issues (that the move of ICBR to HR was a violation of federal regulations) or for opposing her own discrimination, retaliation, and hostile work environment and that of other women. "Questions of fact can be determined as a matter of law only where reasonable minds can reach but one conclusion." *Davis v. West One Automotive Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007). This is clearly not the case here since Hammond admits that she terminated appellant for going outside the agency.

In order for Mendoza de Sugiyama to establish a *prima facie* case of retaliation under the WLAD, she must show that: (1) she engaged in a statutorily protected activity, (2) her employer took an adverse employment action, and (3) there was a causal link between the employee's activity and the employer's adverse action. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 846-47, 292 P.3d 779 (2013), *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). "If the employee establishes that he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged, then a rebuttable presumption is created in favor of the employee that precludes [the court] from dismissing the employee's case." *Kahn v. Salerno*, 90 Wn. App. 110, 131, 951 P.2d 321 (1998).

Plaintiff engaged in protected activity when she complained to Nnambi and Reinmuth about the impropriety of moving the ICRB to HR under the direction of Wooden, who had engaged in gender discrimination. She engaged in protected activity when she brought these concerns in writing to the governor and the FHWA, and again in her SAO complaint. Appellant complained verbally and in writing about her own gender and race discrimination by Reinmuth and Wooden. Mendoza de Sugiyama satisfies the second element of her *prima facie* case because the State terminated her after engaging in this statutorily protected activity.

Under *Kahn*, the trial court erred in dismissing appellant's case.

H. The Trial Court Applied an Improper Legal Standard to Plaintiff's Hostile Work Environment Claim

The trial court erred when it found that Plaintiff could not establish a claim for hostile work environment based on race or gender at summary judgment. The Supreme Court recently held that "[t]he standard for linking discriminatory acts together in the hostile work environment context is not high." *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 276, 285 P.3d 854 (2012). In *Loeffelholz*, the Court held that the statements of a manager to a group, which included the gay plaintiff, that he was going to come back from his service in Iraq as a "very angry man" was sufficient to overcome summary judgment on that plaintiff's hostile work environment claim. *Id.* at 277-278.

The elements of a *prima facie* hostile work environment claim are (1) the harassment was unwelcome, (2) the harassment was because of sex [or race/national origin], (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer. *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). "The third element requires that the harassment be 'sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment[,] . . . to be determined with regard to the totality of the circumstances.'" *Id.* (quoting *Glasgow v. Ga.-Pac. Corp.*,

103 Wn.2d 401, 406-07, 693 P.2d 708 (1985)). "Gender-based harassment, which need not be sexual in nature, is actionable as discrimination under this statute." *Kahn v. Salerno*, 90 Wn. App. 110, 118, 951 P.2d 321 (1998).

Reinmuth admitted in his deposition that he understood Plaintiff believed Wooden was a "sexual predator" and that "moving the internal civil rights branch to a sexual predator would be problem." He knew that Wooden frequently cancelled meetings with her and that when he did attend, he had little interest in participating. Plaintiff also complained to Nnambi about Wooden's demeaning treatment of her and persistent refusal to meet with her. Wooden's refusal to meet with Mendoza de Sugiyama, and his demeaning treatment of her, affected the terms and conditions of her employment. His misconduct is imputable to the State because Wooden was the Director of HR, a position superior to appellant, and Wooden was in a position where appellant was required to have frequent collaboration and interaction. Hammond terminated Wooden several weeks after she terminated Mendoza de Sugiyama when three female HR managers complained to Hammond and Reinmuth about the hostile work environment Wooden created. She refused to acknowledge that Wooden created a hostile work environment even though Plaintiff complained of the same type of harassment as the three female managers.

Reinmuth also created a hostile work environment for Plaintiff based on gender and race. He refused to meet with Mendoza de Sugiyama individually, requiring her supervisor, Nnambi, to attend meetings. Reinmuth repeatedly criticized appellant's performance and her supervision of her direct reports. After knowing that Mendoza de Sugiyama complained about the hostile work environment created by Wooden, he sought to move the ICRB to HR, which also ignored the historical reasons for the structure of OEO. Reinmuth failed to address appellant's complaints *about Wooden* until after Murinko complained *about appellant*. He contributed his opinions about Mendoza de Sugiyama to Cordon and then recommended appellant's termination after Cordon agreed with Reinmuth's belief that Mendoza de Sugiyama had retaliated against Murinko. Reinmuth's conduct is imputable to the State because he served as the Chief of Staff of WSDOT and was appellant's superior during the relevant timeframe.

I. The Trial Court Erred When It Improperly Struck Entire Paragraphs of Appellant's Declaration

The trial court committed reversible error when it struck a number of entire paragraphs of appellant's summary judgment declaration, including paragraphs containing her letter to the governor as an exhibit (par. 20), her letter to the governor's chief of staff (par. 32), and her letter to the FHWA (par. 30). CP 1220, 1534. "Supporting and opposing

affidavits must (1) be made on personal knowledge; (2) set forth facts as would be admissible in evidence; and (3) show that the affiant is competent to testify on the matters contained therein." *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998), ER 601, ER 602. A document can be authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* (*quoting* ER 901(a)). Appellant's letter to the governor, her letter to the governor's chief of staff, and her letter to the FWHA would all be admissible at trial. As the author, Mendoza de Sugiyama can properly authenticate them, as she did in her summary judgment declaration. These three documents are business records and/or public records, and appellant laid the proper foundation for their admission as such. *See* ER 803(a)(8), ER 803(a)(8). Moreover, even if the Court were to find they are not business records or public records, they are properly admitted to show that Plaintiff gave notice to various persons of her whistleblower and discrimination claims. Thus, they are not offered for the truth of the matter asserted. As such, the documents are not hearsay—they have an independent legal significance— because they provided notice to the State of improper governmental action under RCW 42.40 and of her efforts to oppose discrimination under RCW 49.60.210. Compare ER 801(c).

J. The Trial Court Abused Its Discretion When It Refused to Allow Production of Emails Already Compiled by the State

CR 26(b)(1) allows a party to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." Discovery in Washington is broad and the "trial court must manage the discovery process in a fashion that promotes 'full disclosure of relevant information while protecting against harmful side effects.'" *Gillett v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006) (quoting *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 556, 815 P.2d 798 (1991)). Here, after the State objected, appellant worked with the State to limit her discovery requests to emails to and from twelve key witnesses in the case. The State continued to assert that a review of the emails was too costly and too time consuming and demanded that Mendoza de Sugiyama employ key-word searches. Appellant refused to limit her discovery requests to key-word searches because doing so could result in relevant, responsive documents being excluded because they did not contain the designated key-words. After taking a CR 30(b)(6) deposition, appellant learned that the State could easily and cheaply provide the emails to appellant on an external hard drive, which would take under one hour to complete. The State's designee already compiled the emails requested. The State then refused to conduct a privilege review, claiming it was too costly, and refused to employ its own key-word searches to conduct a privilege review. The trial court abused its

discretion in denying Mendoza de Sugiyama's motion to compel because the discovery requests were not overbroad or unduly burdensome – the emails could quickly and cheaply be produced to appellant on external hard drive. Plaintiff was significantly prejudiced by the trial court's ruling because she would have used the emails to refute summary judgment.

V. ATTORNEY FEES AND COSTS

Recognizing that the case will have to be tried assuming remand, appellant respectfully requests that attorney fees for this appeal be awarded at that time, and that costs of this appeal be awarded in accordance with the Rules of Appellate Procedure.

VI. CONCLUSION

Margarita Mendoza de Sugiyama respectfully requests that this Court reverse the trial court's judgment for the State on all of appellant's claims, and that the trial court abused its discretion when it refused to compel production of emails to and from key witnesses.

RESPECTFULLY SUBMITTED this 12th day of December, 2013.

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DECLARATION OF SERVICE

Windy Walker states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by MacDonald Hoague & Bayless, and I make this declaration based on my personal knowledge and belief.

2. On December 12, 2013, I caused to be delivered via email addressed to:

Richard Fraser, III
Washington State Attorney General's Office
Torts Division
800 5th Avenue, Ste. 2100
Seattle, WA 98104

a copy of BRIEF OF APPELLANT.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of December, 2013 at Seattle, King County, Washington.

s/Windy Walker
Windy Walker
Legal Assistant