No. 98362-3

THE SUPREME COURT
OF THE STATE OF WASHINGTON

LORI MACKEY,

Plaintiff-Appellant

v.

HOME DEPOT USA, INC., dba THE HOME DEPOT STORE #4718, JAMIE KRALL and JENNIFER ISLES,

Defendants-Respondents

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review should be denied. The Court of Appeals opinion (the "Opinion") was correct, follows well-established Washington employment law, and does not raise an issue of substantial public interest.

II. COUNTERSTATEMENT OF THE CASE

This is an employment case. Defendant Home Depot USA, Inc. ("Home Depot") hired Lori Mackey ("Mackey") as a sales associate in February 2006. Home Depot accommodated every mental and physical condition that Mackey brought to Home Depot's attention. In October 2013, Home Depot discovered that Mackey had violated Home Depot's discounting policies. Home Depot conducted investigations into Mackey's policy violations and ultimately ended Mackey's employment based upon the results of those investigations.

A. Mackey Was Granted Several Accommodations.

From 2010 to 2013 Home Depot provided reasonable accommodations to Mackey—for both mental and physical conditions—and Mackey never informed Home Depot that the accommodations were insufficient. Mackey admits that Home Depot was "very supportive" of her requests for accommodation and accommodated her disabilities in a variety of ways, including granting her: **(1)** preferential hour scheduling; **(2)** preferential work day scheduling; **(3)** multiple leaves of absence;

(4) reduced hours/part-time; and **(5)** restricted lifting accommodations for her position. CP 52, 65.

One of the accommodations sought by Mackey was for reported physical problems with her shoulder that limited her ability to lift heavier items. CP 52. Mackey admits Home Depot accommodated her claimed lifting limitation. She testified that Home Depot accommodated her shoulder problem by making arrangements allowing her to team-up with a co-worker so she would not have to lift beyond her ability. CP 99. Mackey was allowed "to find another employee to help perform these tasks[]" and actually received "help from other employees to perform the lifting tasks I was assigned." CP 98, 99. Mackey confirmed this in her deposition:

> Q: Is it your understanding that Home Depot did allow you to have others do the lifting for some assignments that you may have had as part of your duties?
> A: **Correct**.
> […]
> Q: Was there any time that you complained because you didn't have someone to lift for you?
> A: **No**.

CP 52-3 (emphasis added).

Home Depot granted Mackey a leave of absence due to medical issues through January 24, 2013. CP 76. When Mackey failed to return to work as scheduled at the end of her leave of absence, Home Depot contacted Mackey on January 25, 2013, to determine her employment

status. CP 76. Mackey responded on February 4, 2013, that she planned to return to work without restrictions, and provided Home Depot with a doctor's note confirming she could return to work "*without restrictions*." CP 49, 78 (emphasis added). After Mackey's return to work, there is no record of her submitting any further medical documentation or indicating any further restrictions, limitations, or disabilities affecting her ability to work. *Id.*

B. Mackey Was Terminated After Investigations Found That She Had Violated Home Depot's Discounting Policies.

On October 2, 2014, Home Depot Operations Manager Santo Lupica observed Mackey carrying a bundle of cash "wrapped in a piece of white paper" to the manager's office. CP 80, 82-83. Mackey stated that the bundle of cash was "change due to a customer." CP 80. The expectation is that any refund would be given directly to the customer. *Id.* Consequently, this "bundle of cash" triggered further review by Lupica of the customer's order. Lupica discovered that Mackey had engaged in a number of policy violations. CP 80.

First, Mackey improperly used another employee's identification, which violated Home Depot policy. CP 80; CP 44, 48 (Mackey admits it is improper to use another employee's identification as it violates Home Depot's till policy). **Second,** Lupica discovered, and Mackey admits, she

improperly applied Home Depot's Volume Bid discount after a customer "decided not to purchase one of the items." CP 80 (Lupica discovers double discounting); CP 101 (Mackey admits giving volume discount even after customer chose not to purchase volume of appliances). **Third,** Lupica discovered, and Mackey admits, she improperly provided, "double discounts" by simultaneously applying various different discounts to the same purchase. CP 82 (Lupica observes double discounts); CP 47 and 105 (Mackey admits giving double discounts). Mackey concedes that the act of granting double discounts is a justifiable basis for termination. CP 45.

Based on these transgressions, Home Depot arranged for a second investigation to be performed into Mackey's apparently improper discount practices. CP 82. That second investigation was conducted by Asset Protection Manager Mik Weaver, whom Mackey testified always treated her fairly. CP 57.

The second investigation revealed that Mackey had provided improper volume bids and double discounts. In total, Mackey had processed 25 orders in which "additional price markdowns [were made] beyond her authorization." CP 82. The investigation uncovered Mackey's scheme, which involved submitting an order for multiple appliances that would qualify for a volume bid discount. Then, after receiving approval for a volume bid discount, Mackey would routinely remove items from the

customer's ticket before sale, rendering the order ineligible for the volume discount threshold of $2,500. Yet, Mackey still applied the volume discount even though the transaction did not qualify for it. CP 82-83.

The Weaver investigation also confirmed that Mackey had improperly and routinely extended "double dip" and "triple dip" discounts, prohibited by Home Depot policies. *Id.* Home Depot calculated that Mackey had extended at least $17,000 in prohibited discounts. CP 82-83, 87.

Mackey knew this sort of discount abuse could result in discipline up to and including termination:

> Q. Would you agree that improperly discounting sales at Home Depot would be a reason why someone could be terminated?
> A. **Yes**.
> Q. Would you agree that an employer should expect the employee to make true statements?
> A. **Yes**.
> Q. And if they make untrue statements, that would be a reason why an employee might get terminated?
> A. **Yes**.
> Q. Would you agree that if you gave a discount on the sale of an item where there wasn't manager approval, that that would be a reason why the employer might want to terminate you?
> A. **Yes**.
> Q. And that would be a fair reason?
> A. **Yes**.

CP 45 (emphases added).

On October 8, 2014, Asset Protection Manager Weaver met with Mackey and Store Manager Robert Tilton to discuss the investigation

results. CP 50-51, 82-83, 85. During the meeting, Mackey admitted applying "double dipping" discounts on certain orders and extending Volume Bid discounts even after removing items from their ticket which would thereby disqualify the order for the discount. CP 103, 105. The same day, Mackey submitted a written Associate Statement confirming the admissions during the meeting, stating:

> Mick [sic] Weaver and Jamie Risner [now Krall] called me back to the office to discuss proper usage of Volume Bid – no D dise [sic], no inflation of quotes. Going forward, partner with manager to submit to Volume.

CP 85.

Based on the Weaver investigation, and reports that Mackey admitted to the improper discounts, District Human Resources Manager Robert Beaubian recommended Mackey's termination. CP 56-57. Mackey concedes that Beaubian relied solely on the investigation in making the decision and recommendation that Mackey be terminated. CP 56. Mackey's employment was terminated on or about October 10, 2014. CP 4.

Mackey admits she "*was terminated for conflict of interest and failure to act with honesty and integrity*." CP 45 (emphasis added). Nevertheless, she asserted claims against Home Depot and individual employees Jamie Krall (then known as Risner) and Jennifer Isles, for

disability discrimination, failure to accommodate disability, and retaliation under RCW 49.60, and a claim for wrongful discharge in violation of public policy.

The trial court properly dismissed her claims as a matter of law on summary judgment and Division II affirmed that dismissal because the undisputed evidence shows that: **(1)** Home Depot's investigations create an independent basis to affirm summary judgment where they revealed improper discounting and other policy violations, including an admission by Mackey that she "double discounted" merchandise, thereby establishing a legitimate, non-discriminatory business reason for her termination; and **(2)** the results of the investigations establish a good faith basis for Mackey's termination of employment. There was no discrimination, retaliation, failure to accommodate, or wrongful discharge. The Opinion affirming summary judgment was proper.

III. ARGUMENT WHY THE PETITION SHOULD BE DENIED

The Opinion does not conflict with any Washington case law, nor does it raise an issue of substantial public interest. RAP 13.4(b). The Petition gives lip service to RAP 13.4(b)'s criteria for review, hardly discusses the decision below, and fails to identify any conflicting decisions or substantial public interest. The Petition should be denied.

A. Mackey Failed to Present Evidence of Pretext or Lack of Good Faith Regarding Home Depot's Legitimate Decision to Terminate Her Employment Based on Its Investigation.

Both the trial court and the Court of Appeals properly decided that Home Depot articulated a legitimate, nondiscriminatory reason for terminating Mackey's employment. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). It is undisputed that the decision to terminate Mackey relied upon the Weaver investigation. CP 56-57. Mackey conceded that "improperly discounting sales at Home Depot would be a reason why someone could be terminated." CP 45. As a result, Mackey was required to provide evidence of pretext. She failed to do so.

A plaintiff can demonstrate pretext by showing that the employer's articulated reasons for the adverse employment action against her: (1) had no basis in fact; (2) were not really the motivating factors for the employer's decision adversely affecting his/her employment; (3) lacked temporal connection to the employer's decision; or (4) were not used by the employer as motivating factors in its employment decisions affecting other similarly-situated employees. *Kuyper v. State,* 79 Wn. App. 732, 738, 904 P.2d 793 (1995). In other words, to prove pretext Mackey must do more than merely question Home Depot's justification. She must affirmatively prove that her disability "was at the heart of [its] termination decision." *St. Mary's Hnr. Ctr. v. Hicks,* 509 U.S. 502, 540-41 (1993).

Mackey did not address any of the above-mentioned factors at the trial court, at the Court of Appeals, or in her Petition. Mackey's failure to establish pretext is fatal to her claim. There is simply no evidence that her disability "was at the heart of" Beaubian's termination decision—or played any role in it whatsoever. Where, as here, an employee's "evidence of pretext is weak or the employer's nonretaliatory evidence is strong, summary judgment is appropriate." *Milligan v. Thompson,* 110 Wn. App. 628, 638 (2002). The Court of Appeals' Opinion was therefore entirely consistent with established case law. Mackey does not argue otherwise.

Moreover, there are several reasons why Mackey could never establish pretext. **First,** Mackey conceded to violations of store policy by admitting that her accounts showed "double dipping" discounts. CP 105 (admitting during investigation "that there was accidental 'double dipping [discounts]' on some of my sold quotes…."). **Second,** Mackey admitted that she had no evidence that the decision-maker, Beaubian, discriminated against her, or was motivated by anything other than the investigation which found she had improperly discounted. **Third,** Mackey offered no evidence whatsoever to rebut either (a) the good faith nature of the investigation into her discount practices, or (b) the suspicious violations of store policy that triggered investigations in the first place.

Indeed, Mackey did not dispute that she was caught carrying a large wrapped bundle of cash in the manager's office (in violation of company policy), or that she improperly entered a transaction under another employee's identification number (another violation of company policy). CP 80. These obvious violations of company policy triggered a preliminary investigation by Mackey's manager, and a second investigation by Weaver. CP 80, CP 82. By failing to rebut the legitimate and undisputed causes of Home Depot's investigations, Mackey failed to establish pretext.

In addition, and in any event, even if Home Depot incorrectly concluded that Mackey violated Home Depot policy by giving double discounts, the Opinion is still entirely consistent with well-settled Washington law. Courts will not second guess the wisdom of the decision-maker. *Wash. Fed. of St. Employees v. St. Personnel Bd.,* 29 Wn. App. 818, 820, 630 P.2d 951 (1981) (recognizing "the courts are ill-equipped to act as super personnel agencies"). Thus, the question was "not whether the employer's reasons for a decision [were] right," but whether Mackey offered facts disputing Home Depot's showing that it honestly believed the reason for its actions. *Domingo v. Boeing Empl. Cred. Un.,* 124 Wn. App. 71, 84 n.26, 98 P.3d 1222 (2004).

Even if Mackey had been able to create a question of fact on the accuracy of the Weaver investigation, her claims would fail anyway because it is equally undisputed that Home Depot relied exclusively upon that investigation for its termination decision. The investigation established a good faith basis, and honest belief by Home Depot, that Mackey had given improper double discounts violating company policy—whether she did or not. Here, too, there is no evidence that the investigators had prior knowledge of Mackey's allegations, proving without dispute the good-faith basis of the investigation. Mackey has no evidence the investigation could have been tainted.

Mackey's *post hac* attempt to dispute the investigation and its conclusions does not render the investigation a bad-faith exercise, nor does it color the ultimate decision-makers' reliance on it when they terminated Mackey's employment. As already discussed, Mackey admitted to double-dipping. CP 47, 82. Mackey also admitted that Weaver treated her fairly and that the decision-makers who fired her treated her fairly as well. CP 51, 56-57. Thus, by Mackey's own admissions, there was no genuine issue of material fact regarding whether Home Depot's investigation, and therefore its reasons for termination, was performed in good faith. This is dispositive of her case.

Not surprisingly, Mackey fails to cite any contrary Washington case law. *See* RAP 13.4(b)(1) and (2). Even if they mattered, and they don't, the federal cases Mackey cites do not help her either. Four of the cases—*Hubbell v. FedEx SmartPost, Inc., Stallings v. Hussman Corp., Yazdian v. ConMed Endoscopic Techs. Inc., and Daoud v. Avamere Staffing, LLC*—are easily distinguishable because none of them involved undisputed facts establishing that the employer had a good faith basis or an honest belief that the employees had violated company policies.

Three others—*Toppert v. Northwest Mechanical, Inc., Mastro v. Potomac Elec. Power Co.,* and *Trujillo v. Pacificorp*—are equally inapposite because each involved evidence that the employer's investigation was highly irregular, flawed, or tainted, thereby raising questions regarding the credibility of the employer's good faith belief. But there is no similar evidence of a flawed investigation in this record. In fact, Mackey's testimony shows exactly the opposite: she admitted that the investigator, Weaver, always treated her fairly. CP 57.

Finally, Mackey argues that she had a positive employment history at Home Depot, and her history should have created an issue of fact on pretext. As with the other federal cases, Mackey's reliance on *Ridout v. JBS USA, LLC*, 716 F.3d 1079 (8th Cir. 2013), is misguided. In finding a genuine issue of fact on the question of pretext, the *Ridout* court noted

that, in contrast to the plaintiff's evidence of having received satisfactory reviews for over forty years, the employer could "offer no specific examples and no contemporaneous evidence" of declining job performance. *Id.* at 1084. Unlike *Ridout,* Home Depot produced substantial contemporaneous evidence supporting the reasons for Mackey's termination, and she concedes that she "was terminated for conflict of interest and failure to act with honesty and integrity." CP 45.

In sum, Mackey fails to find any conflict between the Opinion and any Washington (or federal) precedent, nor does she explain how her case raises any issue of substantial public importance. RAP 13.4(b). She cannot. The Court of Appeals correctly affirmed the trial court's dismissal of Mackey's pretext and common law wrongful discharge claims under Washington law because undisputed evidence shows that Home Depot had a non-discriminatory and good faith basis for Mackey's termination.

B. Mackey Failed to Present Evidence that Home Depot Did Not Reasonably Accommodate Her Lifting Restriction.

The Court of Appeals' rejection of Mackey's failure to accommodate claim was likewise entirely consistent with established Washington law and undisputed facts. Employers have an affirmative duty to accommodate an employee's disability. RCW 49.60.180(2); *LaRose v. King County*, 8 Wn. App. 2d 90, 125, 437 P.3d 701 (2019). "A reasonable accommodation must allow the employee to work in the environment and

perform the essential functions of her job without substantially limiting symptoms." *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 777-78, 249 P.3d 1044 (2011). Where multiple potential methods of accommodation exist, the employer is entitled to select the appropriate method. *Id.* at 779.

An employer "must be able to ascertain whether its efforts at accommodation have been effective," and therefore an employee "has a duty to communicate to the employer whether the accommodation was effective." *Id.* at 783. If the employee does not communicate to the employer that an accommodation was not effective, he or she cannot maintain a failure to accommodate claim. *See id.*; *see also Gamble v. City of Seattle*, 6 Wn. App. 2d 883, 891-92, 431 P.3d 1091 (2018), *review denied*, 193 Wn.2d 1006 (2019) (framing the issue as to whether the employer was on notice that its previous accommodations were no longer reasonably accommodating the employee's disability and noting the employee's duty to inform the employer that the accommodations were lacking).

No authority supports Mackey's suggestion that Home Depot failed to accommodate her because it could have provided additional staff to assist her. "The [WLAD] does not require an employer to offer the employee the precise accommodation he or she requests." *Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993).[1] Moreover, Mackey admitted

[1] Mackey's citation to *Kermani v. International Health Care Props. XXIII Ltd Pshp.*, 94 Wn. App. 1060 (1999) (unpublished), for this proposition can be rejected on both

that Home Depot allowed her to assign her lifting duties to her co-workers, and that she never told anyone that she was unable to find another employee to help. CP 52-53, 98, 99. Thus, it is undisputed that Home Depot did reasonably accommodate Mackey and was never notified that she wanted or needed any other form of accommodation. *See, e.g.*, *Harrell v. Wash. St. ex rel. Dep't of Soc. Health Servs.*, 170 Wn. App. 386, 410, 285 P.3d 159 (2012) (no liability where employee fails to take advantage of reasonable accommodation). For this reason too, the Opinion is entirely correct and satisfies no basis for this Court's review.

IV. CONCLUSION

The Opinion is neither novel nor unprecedented. It will have no impact on other proceedings or the development of Washington employment law generally. On the contrary, the Opinion follows well-established law of this state, and raises no issue of substantial public interest. RAP 13.4(b). At best, Mackey simply argues that the trial court and Court of Appeals misapplied established law in her case. But they didn't. The undisputed facts demonstrate that Home Depot was justified in

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procedural and substantive grounds. As an unpublished opinion, it has no precedential value and cannot serve as source of conflict between the Opinion and a "published decision." RAP 13.4(b)(2). Indeed, it is improper for Mackey to cite the case at all. *See* GR 14.1(a). In any event, this case is nothing like *Kermani*, in which the defendant employer was chronically understaffed and an issue of fact existed regarding the feasibility of hiring staff to appropriately accommodate the plaintiff's disability.

terminating Mackey's employment for non-discriminatory and non-pretextual violations of company policy. The Petition should be denied.

RESPECTFULLY SUBMITTED this 4th day of May, 2020.

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