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COURT OF APPEALS
DIVISION ONE

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No. 74367-8-I

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

DEBI O'BRIEN,
SANDRA FERGUSON
MARGARET BOYLE,

Appellants,

v.

ABM INDUSTRIES, INC.
ABM PARKING SERVICES, INC.
LEONARD CARDER AND JANE DOE CARDER and the
marital community thereof,

Respondents.

APPEAL FROM THE KING COUNTY SUPERIOR COURT
AT SEATTLE

The Honorable William Downing

OPENING BRIEF OF APPELLANTS

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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STATUTES

RCW 49.60.210	49
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I. INTRODUCTION

This case is on appeal for two reasons: (1) because the trial court erred when it granted the three defendants' motions for summary judgment and dismissed the plaintiff Debi O'Brien's causes of action for employment discrimination, unlawful retaliation, and wrongful termination; and (2) because the trial court erred when it granted the defendants' motion for CR 11 sanctions and imposed monetary sanctions of \$6,500 against the plaintiff, Debi O'Brien, and her two attorneys—Sandra Ferguson and Margaret Boyle. With respect to the first issue, Debi O'Brien is the aggrieved party and appellant. With respect to second issue, Debi O'Brien, Sandra Ferguson and Margaret Boyle are the aggrieved parties and appellants.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered its first order granting the defendants' motion for CR 11 sanctions.
2. The trial court erred when it denied Plaintiff's motion for reconsideration of its first order imposing CR 11 sanctions.
3. The trial court erred when it entered its second order granting CR 11 sanctions, and imposing CR 11 sanctions of \$6,500 on Plaintiff and her two attorneys.
4. The trial court erred when it made a finding of fact that the pleadings were filed by Plaintiff and Plaintiff's counsel "in service of a concerted effort at forum shopping and therefore, for an 'improper purpose'".

5. The trial court erred when it failed to consider the least severe sanction adequate to achieve the goals of CR 11, and failed to explain with reasonable precision how the attorneys' fees it awarded to the defendants were calculated, or how the type of sanctions it imposed, corresponded to the conduct being sanctioned.
6. The trial court erred when it concluded that there was no legal basis for including two of the individual defendants—Hugh Koskinen and Dan Lawson—in the pleadings and that this warranted CR 11 sanctions.
7. The trial court erred when it imposed CR 11 sanctions on Plaintiff and Plaintiff's counsel for alleging a breach of contract claim in the pleadings.
8. The trial court erred when it denied Plaintiff's request for a continuance of the summary judgment hearing, pursuant to CR 56(f).
9. The trial court erred when it granted the defendants' motion for summary judgment and dismissed all of Plaintiff's claims with prejudice.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court deny Plaintiff and her attorneys their right to due process by imposing CR 11 sanctions of \$6,500 based on an unsupported conclusion about their improper motives, without affording the opportunity for oral argument or testimony?
(Assignment of Error Nos. 1-7)
2. Does a trial court have authority to impose CR 11 sanctions based on a finding of "improper purpose" alone, if the pleadings are well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law? (Assignment of Error Nos. 1-7)
3. Will the trial court's imposition of CR 11 sanctions have the potential effect of deterring litigants (and their attorneys) from dismissing parties or claims for legitimate or salutary purposes — such as reducing costs, simplifying the proceedings, streamlining

presentation of evidence and issues—because of fear that the act of voluntary dismissal may be construed by a trial court judge as evidence that the pleadings were filed for an “improper purpose” in violation of CR 11? (Assignment of Error No. 1-7)

5. Was the trial court’s decision to impose CR 11 sanctions manifestly unreasonable and based on untenable grounds? (Assignment of Error Nos. 1-7)
6. Does the Supreme Court’s opinion in *Antonius* provide a legal basis for Plaintiff’s hostile work environment/retaliation claims against Hugh Koskinen and Dan Lawson because their acts contributed to one unitary, indivisible hostile environment claim? (Assignments of Error Nos. 1-7)
7. Assuming *arguendo*, that the 3-year statute of limitations is a bar to Plaintiff’s claims against two of the individual defendants—Koskinen and Lawson—is the plaintiff’s argument to the contrary based on *Antonius*, a frivolous argument, or is this an issue of first impression that presents debatable issues of substantial public importance, and therefore, joinder of these defendants was not frivolous and did not violate Rule 11? (Assignments of Error Nos. 1-7).
8. Will the trial court’s CR 11 sanctions in this case have a chilling effect on the appellants’ and on other future litigants’ willingness to zealously (assertively and creatively) advocate for their clients by asserting legal theories that are based on good faith arguments for the extension, modification or reversal of existing law? (Assignments of Error Nos. 1-7)
9. If the Court does not reverse the trial court’s sanctions order, should the Court remand to the trial court with instructions to articulate on the record, the factual or evidentiary basis for imposing CR 11 sanctions, and to quantify the amount awarded with reasonable precision, and to explain how the type and amount of sanctions correspond to the conduct at issue? (Assignment of Error Nos. 1-7).

10. If the Court does not reverse the trial court's sanctions order, should the Court remand to the trial court, to consider on the record, the least severe type of sanction which would adequately serve the purposes of CR 11 under the circumstances presented by this case (i.e., deterrence, punishment, and compensation)? (Assignment of Error Nos. 1-7)

11. Did the trial court abuse its discretion when it denied Plaintiff's motion for a continuance under CR56(f), since Plaintiff was not allowed adequate time to conduct discovery in this case against Leonard Carder, due to the defendants' improper removal to federal court and the sanctions motion and sanctions litigation which followed remand? (Assignment of Error Nos. 8,9)

12. Did the record which was before the trial court below, show the existence of genuine disputes of material fact which precluded the summary judgment dismissal of Plaintiff's disability discrimination claim for failure to accommodate in violation of RCW §49.60? (Assignments of Error Nos. 8,9)

13. Did the record before the trial court below, show the existence of genuine disputes of material fact which precluded the summary judgment dismissal of Plaintiff's claim that the defendants retaliated against her for engaging in opposition activity protected under RCW §49.60? (Assignment of Error No. 8,9)

14. Did the record before the trial court below, show the existence of genuine disputes of material fact which precluded the summary judgment dismissal of the Plaintiff's claim for breach of contract or promissory estoppel, based on the terms and conditions set forth in the ABM Employee Handbook and the ABM Code of Business Conduct? (Assignment of Error No. 8,9)

15. Did the record before the trial court below, show the existence of genuine disputes of material fact which precluded the summary judgment dismissal of the Plaintiff's claim for age discrimination, in violation of RCW §49.60? (Assignment of Error Nos. 8,9)

16. Was the evidence of the defendants' conduct from 2009 to 2013, legally sufficient to support Plaintiff's claim of severe and pervasive hostile work environment which altered the terms and conditions of her employment? (Assignment of Error No. 9)

17. Did the trial court abuse its discretion when it denied Plaintiff's motion under CR 56(f) for a continuance to allow amendment of the Complaint to include a wrongful termination in violation of public policy claim based on a recent change in the law which abrogated *Cudney*? (Assignment of Error No. 8)

IV. STATEMENT OF THE CASE

A. Procedural Facts— Federal Court

O'Brien's Lawsuit Filed in State Court—Removed. Plaintiff's lawsuit was originally filed in State court in October 2014, against ABM Parking and ABM Industries ("ABMI"). The defendants timely removed the case to federal court based on complete diversity and that is where a substantial portion of this litigation took place, until the action was voluntarily dismissed without prejudice by Judge Coughenour. Soon after the defendants removed the case, Plaintiff amended the complaint to join Plaintiff's former boss, Leonard Carder, as an individual defendant.

Carder and O'Brien both reside in Washington and no federal-law claims were being asserted, therefore, Plaintiff filed a motion for remand to State Court. CP 95-108¹, 326-331.²

ABM's Motion to Drop Carder—Granted February 21, 2014. In order to avoid the State-court forum, the defendants filed a motion to sever or drop Carder from the case, arguing that: (1) Carder was a sham defendant, joined for the sole purpose of defeating diversity jurisdiction; and (2) Carder was not an indispensable party under FRCP 19(a), and therefore, the Court should exercise its discretion under FRCP 21, and drop Carder from the case in order to preserve federal-court jurisdiction. CP 503-511. The District Court granted Defendants' motion to drop Carder. CP 516-520.³ The Court implicitly rejected Defendants' claim that Carder was a "sham" defendant, but dismissed Carder anyway, based on its finding that Carder was not an indispensable party under FRCP 19(b). The Court's rationale is set forth in its Order as follows:

“[A]s the case against Mr. Carder will be dismissed without prejudice, *Plaintiff will not be prevented from filing a suit against Mr. Carder in state court*, meaning that any prejudice accruing to her is minimal. The Court gives little weight to Plaintiff's sole argument for why the Court should not drop Mr. Carder.”

¹ Docket from USDC, *O'Brien v. ABM, et al.*

² Obrien Decl. ISO of Remand.

³ See Appendix, Ex. 1 (CP 516-520, ORDER, entered February 21, 2014).

“All claims against Mr. Carder are DISMISSED without prejudice to Plaintiff filing claims against him in state court...”

Id. [Emphasis added.]

Thus, in order for O’Brien to exercise her right to hold Carder liable as an “employer” under RCW §49.60, she would have to bring two separate lawsuits on the same subject matter—one in Federal court against the ABM corporations, and one in State court against Leonard Carder. Rather than immediately filing a lawsuit against Carder, Plaintiff proceeded to take discovery in District Court. The discovery obtained advanced her claims against ABM, but also against Carder.

Plaintiff’s Motions to Compel and for Sanctions Under CR 26(g). The discovery process became extremely contentious and costly, due to the defendants’ discovery abuse. Their misconduct was egregious, it was proven, and it was prejudicial to Plaintiff. Most prejudicial of all, was the defendants’ failure to produce comparator information responsive to Plaintiff’s first written discovery requests which were served when the lawsuit was originally filed in October 2013. After 13 months, Plaintiff’s counsel learned about the existence of at least two important comparators that the defendants had improperly withheld throughout the litigation,

causing substantial prejudice. CP 335-339⁴, CP 340-343⁵. Plaintiff moved to compel production of documents related to the comparators, and sought discovery sanctions under FRCP 26(g). CP 264-292, 293-301, 332-333, 302-310⁶, 293-301⁷, CP 302-318⁸, CP 244-48⁹, CP 249-263¹⁰. The District Court denied the motions to compel and for sanctions. CP 394-395, CP 397-400.¹¹

Plaintiff's Motions for Continuance—Granted in Part. The District Court did grant two motions for a continuance. A request for 90 days was granted. CP 110-112. And a second request for a 90-day continuance was partially granted, but partially denied (i.e., an additional 21 days was granted). CP 117-118. But the continuances did not address the problem, which was Defendants' discovery abuse. Continuances of the trial date did not punish or deter the defendants, as FRCP 26(g) sanctions would have done. Therefore, Defendants continued to engage in the abusive

⁴ Declaration of Melody Dillon obtained by Plaintiff's counsel and filed in support of Plaintiff's motions to compel and for sanctions.

⁵ Declaration of Jason Reidt, obtained by Plaintiff's counsel and filed in support of Plaintiff's motions to compel and for sanctions.

⁶ Decl. of Sandra Ferguson in support of Sanctions.

⁷ Decl. of Sandra Ferguson in support of sanctions.

⁸ Decl. of Sandra Ferguson and exhibits thereto in support of Plaintiff's Second Motion to Continue Trial Date.

⁹ Decl. of SLF In Support of Motion to Continue.

¹⁰ Decl. of SLF in Support of Joint Motion.

¹¹ District Court's Orders Denying First and Second Motion for Sanctions and to Compel.

tactics which had profited them. As a result, Plaintiff was not able to complete discovery. CP 113-116.¹²

Depositions of Kwan, Purvis, Koskinen. In the final weeks before the discovery deadline under the second continuance order, Plaintiff's counsel did manage to depose the following witnesses: (1) Madeline Kwan—HR Director for ABM Parking (CP 1519-1579), (2) Matt Purvis—Branch Manager, ABM Parking (CP 1459-1516), and (3) Hugh Koskinen—former Branch Manager, ABM Parking (CP 1583-1611). These depositions resulted in the discovery of additional evidence supporting O'Brien's allegation that Leonard Carder was responsible for the hostile work environment she experienced over several years, and also for her unlawful termination from ABM Parking on February 6, 2013.

Depositions Scheduled, But Prevented by Protective Orders.

Other depositions were scheduled by mutual agreement to take place during the final days before the discovery cut-off date. However, defendants refused to cooperate when the time came, then sought protective orders—which the District Court granted. This prevented O'Brien's attorneys from taking CR 30(b)(6) depositions of the ABM corporations, and from deposing Rod Howery—who Defendants claim

¹² See App., EX 2 (CP 113-116, Order Granting Motion for Vol. Dismissal, entered April 23, 2015).

was the decision-maker in the termination of Plaintiff. It also prevented the deposition of Vivian Smith, VP of Human Resources for *ABM Industries* who it is not disputed, gave final written approval for Plaintiff's termination from *ABM Parking*. Leonard Carder's deposition was neither scheduled, nor taken for lack of time. CP 356-357¹³, CP 360-361¹⁴, CP 362-364¹⁵, CP 358-359¹⁶, CP 355-356¹⁷.

Voluntary Dismissal Pursuant to FRCP 41(a)(2)—Granted April 23, 2015.

On March 19, 2015, O'Brien provided notice of her intention to voluntarily dismiss the federal-court case under FRCP 41(a)(2). Within a few hours of receiving this notice, *ABM Industries* filed a motion for summary judgment. Two weeks later, *ABM Parking* filed its motion for summary judgment. CP The ABM defendants opposed voluntary dismissal and alternatively, asked the Court to impose conditions on the dismissal. CP 95-108. The District Court granted leave to dismiss the case with prejudice, and refused to impose conditions. CP 113-116.¹⁸

¹³ District Court's Order Granting Protective Order to Defendants.

¹⁴ District Court's Order Granting Defs' Motion to Re-schedule Depositions.

¹⁵ Letter from Sandra Ferguson to District Court, dated March 13, 2015, opposing protective order.

¹⁶ Letter from Sandra Ferguson to District Court, dated 2/24/15.

¹⁷ District Court's Minute Order.

¹⁸ App., Ex. 2 (CP 113-116, Order Granting Motion for Vol. Dismissal, entered 4/23/15).

Defendants argued that the voluntary dismissal was in bad faith or for an improper motive, but the District Court disagreed, stating:

“Plaintiff completed some depositions after the second continuance was granted, but also cancelled five scheduled depositions, *apparently after concluding that there was insufficient time to complete necessary discovery.*”

Id. [Emphasis added]

Defendants argued that the motion to dismiss should be denied because they would be prejudiced by being “deprived of a federal forum”. The Court rejected this argument, stating that “*while loss of a federal forum can be a factor in determining legal prejudice, it does not by itself constitute prejudice.*” Id. [Emphasis added]

Defendants claimed that they incurred fees and costs of more than \$250,000, and asked the Court to award fees and costs if the motion for voluntary dismissal without prejudice was granted. The Court denied the request, finding that “*such an award is unwarranted.*” Id. [Emphasis added]

Finally, Defendants asked the District Court to consider their summary judgment motions before dismissing the case, but the District Court denied their request, stating:

“Most notably, Defendants ask the Court to rule on the pending motions for summary judgment because it would ‘be unjust for

Plaintiff to escape ruling on the merits of these motions.’ *This ‘presumes a favorable result’ for Defendants.* The Court declines to impose the requested conditions.”

Id. [Emphasis added] Thus, the Court dismissed the case without prejudice, leaving Plaintiff free to re-file the case—which she did.

Plaintiff’s Notice of Appeal to Ninth Circuit. O’Brien filed a notice of appeal, seeking reversal of the District Court’s discovery rulings denying motions to compel and for sanctions. CP 414-415. O’Brien also sought reversal of the District Court’s order granting ABM’s motion for judgment on the pleadings and dismissing Plaintiff’s common law claim for wrongful termination in violation of public policy. CP 119-125.¹⁹ The Court’s decision was based on the “adequacy” test established in *Cudney v. ALSCO, Inc.*, 172 Wash.2d 524, 537, 259 P.3d 244, 250 (2011). Id. However, the Washington Supreme Court soon decided a trio of cases which abrogated *Cudney*. Thus, O’Brien dismissed the appeal because it was moot, but intended to file claim in the State-court action, based on the change in the law. However, it was not possible to add the claim, due to the defendants’ improper removal of the case to federal court for 2.5 months, and on remand, the trial court’s denial of O’Brien’s 56(f) motion and the granting of summary judgment. (see Part B., *infra*).

¹⁹ App., Ex. 3 (CP 119-125, Order Granting Motion for Judgment on the Pleadings, entered February 18, 2015).

B. Procedural Facts—State Court.

Original Complaint—Filed March 20, 2015. Plaintiff filed a lawsuit against Carder after discovery obtained in the case against ABM led to evidence supporting the WLAD claims against Carder, and the other individual managers who reported to Carder, including Hugh Koskinen, Matt Purvis, and Paulette Ketzka.

Amended Complaint—Filed April 6, 2015. An amended complaint was filed to add Vivian Smith and Rod Howery as individual defendants. These defendants were never served.

Defendants’ Written “Notice of Rule 11 Violations”—March 30, 2015. Defendants sent a “Notice of Rule 11 Violations”, demanding that Koskinen and Lawson be dismissed from the lawsuit. CP 594-95. They argued that because Koskinen and Lawson left the company in April 2010 and October 2010 (respectively), the 3-year statute of limitations barred a WLAD claim against them for conduct they engaged in while employed by ABM Parking, even though these acts contributed to, and were part of the hostile work environment which continued after they left their employment in 2010. Plaintiff’s counsel disagreed with this assertion, based on the *Antonius* opinion, which held that all acts that contribute to a

hostile work environment are considered as one unlawful act for purposes of determining whether the limitations period has expired. CP 597-98.

Second Amended Complaint—Leave Granted May 13, 2015. After the District Court granted leave for voluntary dismissal of the case against the ABM defendants without prejudice, O'Brien moved in State court to amend the complaint to add the ABM companies to the action she had recently filed in State court. The trial court granted the motion to file a second amended complaint. CP 422-23.²⁰ However, the following commentary was appended to the Order:

“Permission to amend does not mean the Court may not later dismiss some or all of these claims on the bases argued—and the Court may, in fact, even ask itself “**What Would Judge Coughenour do?**”

Id. [Emphasis in the original].

Second Amended Complaint—Filed June 3, 2015. Plaintiff's Second Amended Complaint was filed, and it contained 77 separate paragraphs of factual allegations. CP 1265-1286.²¹ The facts alleged were supported in substantial part, by the evidence obtained from depositions of witnesses taken during federal proceedings, including

²⁰ See, App., Ex. 5 (CP 422-23, Order Granting Plaintiff's Motion for Leave to Amend the Compl., entered May 13, 2015).

²¹ See, App., Ex. 6 (CP 1265-1286, marked up and filed as exhibit in support of Plaintiff's and Plaintiff's counsel's motion for reconsideration of Order granting CR 11 sanctions).

Kwan (CP 1518-1580), Purvis (CP 1449-1516), Koskinen (1582-1611), O'Brien (CP 183-227), Bernadette Stickle (CP 1759-1841), Melody Dillon (CP 1612-1750), and Jason Reidt (1752-55).²²

Stipulation Dismissing Defendants Without Prejudice—June 8, 2015.

Plaintiff agreed to dismiss six of the individual managers without prejudice and they were dismissed pursuant to a stipulation and agreed order, which left only Leonard Carder and the ABM companies as defendants in the state-court action. CP 446-48.²³

Defendant's Removal of Case to Federal Court—June 11, 2015. Defense counsel removed the case to Federal court, although there was no basis for federal jurisdiction. CP 449-50. Plaintiff's counsel moved for remand, but it took 2.5 months for the case to be remanded. No progress was possible on in the trial court below, during this interval.

Judge Zilly Orders Remand—August 25, 2015. Defendants opposed Plaintiff's motion for remand even though their removal was baseless, arguing that Carder was a sham defendant and asking the District Court to exercise its discretion under FRCP 21, and dismiss Carder from the case

²² This citation (RP 1752-55) is to the Declaration of Jason Reidt, filed by O'Brien during federal case in support of motions to compel and for sanctions. RP 1756-57 is Exhibits from Reidt's deposition taken by Defense counsel.

²³ App., Ex. 6 (CP 446-448, Stip. And Order of Dismissal Without Prejudice, entered June 8, 2015).

as not indispensable under FRCP 19(b). Thus, the case had come full circle, hearkening back to defendants' first removal of the plaintiff's case from State court, the joinder of Carder and the defendants' motion to drop Carder, Judge Coughenour's order dismissing Carder from the federal case without prejudice. This second time around however, there was not diversity jurisdiction to justify Defendants' removal. And this time around, Judge Zilly declined to exercise the District Court's discretion under Rule 21. Like Judge Coughenour before him, Judge Zilly rejected the defendants' claim that Carder was a sham defendant. But Judge Zilly made this finding expressly on the record, stating:

“The Court... finds that Mr. Carder is not a sham defendant as plaintiff has stated a theoretically plausible claim against him. See *Brown v. Scott Paper Worldwide Co.*, 143 Was.2d 349, 353 (2001) (stating that supervisors may be held liable under Washington law for their discriminatory acts.)”

CP 459-460.²⁴

Defendants' Motion for CR 11 sanctions—Granted September 14, 2015.

On August 25, 2015, the case was returned to State court. Before Plaintiff could proceed, Defendants filed a motion for CR 11 sanctions and this issue had to be litigated, preventing progress on the case. The trial court

²⁴ App., Ex. 7 (CP 459-60, Minute Order of USDC, Judge Zilly, entered August 4, 2015).

granted the motion for CR 11 sanctions. CP 2161-2163.²⁵ The trial court's Order states:

“[T]he bringing of claims against these four individual defendants (Koskinen, Lawson, Purvis and Ketzka and their marital communities) was in clear violation of CR 11.”

“Once leave was granted in May to add plaintiff's former [corporate] employer[s] to this lawsuit...these four individuals were promptly dropped from the suit. That their involvement was so quickly proclaimed to be unnecessary is a compelling demonstration that it had *always* been unnecessary.”

“[There was] no defensible reason for treating these individuals in the manner they were.”

The Order further states that the Court will require “plaintiff or plaintiff's counsel to pay for all legal costs attributable to inclusion of these four individuals in the state court action...includ[ing] costs of research and writing on the subject of these four individuals' defendants.”
Id.

Plaintiff's Motion for Reconsideration—Denied October 22, 2015. The trial court denied Plaintiff's motion to reconsider its decision to impose CR 11 sanctions. CP 2159.²⁶

2nd Order Imposing Sanctions of \$6,500—November 16, 2015. This

²⁵ App., Ex. 8 (CP 2161-2163, Order on Defs' Motion for Sanctions, entered September 14, 2015).

²⁶ See, App., Ex. 9 (CP 2159, Order Denying Plaintiff's Motion for Reconsideration, entered October 23, 2015).

Order imposed monetary sanctions of \$6,500 on O'Brien and her two attorneys, jointly and severally. CP 2157-2158.²⁷ The Order states as follows:

- a. Many of the claims against these individuals were not well-grounded in fact or warranted by existing law and a reasonable inquiry would have made this clear; there has not been offered any way in which these *individuals* could have been found liable under the plaintiff's *contract with her employer* nor has there been any explanation of why *the statute of limitations would not bar a 2015 lawsuit based on action taken no later than 2010*.
- b. By its previous reference to the 'procedural machinations in which these four individuals were ill-used as unwilling and unfortunate pawns,' *the Court meant to indicate that their inclusion in the lawsuit was in service of a concerted effort at forum shopping and, therefore, was "for an improper purpose."*

"These are the specific findings upon which the conclusion of a CR 11 violation is based."

Id. [Emphasis added].

Motions for Summary Judgment—Granted November 16, 2015. The summary judgment hearing on Defendants' dispositive motions took place on November 13, 2015. CP 2152-2156. RP 11/13/2015. The trial court below granted all three motions. CP 2154-2156.²⁸ This appeal followed.

²⁷ See, App., Ex. 10 (CP 2157-2158, 2nd Order On Defs' Motion for Sanctions, entered November 16, 2015).

²⁸ See, App., Ex. 11 (CP 2152-2156, Order On Defs' Motion for Summary Judgment).

Plaintiffs' CR 56(f) Motion —Denied November 16, 2015. O'Brien's motion for a continuance to take the defendants' depositions was denied. CP 2153.

Judgment for Defendants and Sanctions—December 15, 2015. This Order states that "oral argument was presented and considered by the Court". But the trial court did not allow oral argument on the question of CR 11 sanctions CP 2172-2176.²⁹ See RP 11/13/2015.

C. Facts Supporting Claims of Discrimination, Retaliation, Unlawful Discharge, Breach of Contract/Promissory Estoppel.

Plaintiff's Second Amended Complaint. Plaintiff's Second Amended Complaint contains 77 separate paragraphs of factual allegations. CP 1265-1286 (Ex. 4 to App.), supported by deposition testimony of Kwan, Purvis, Koskinen, O'Brien, Dillon, and Reidt. (CP 1459-1518, 1519-1579, 1583-1611, 1612-1724, 183-227, 1752-55.)

ABM Janitorial Employed O'Brien. Debi O'Brien was hired by ABM Janitorial in June 2000. During the hiring process, she informed her prospective employer of a physical disability. CP 1853. O'Brien's performance after she was hired was satisfactory. She was given additional responsibilities and in 2003, she earned a Human Resources

²⁹ See, App., Ex. 12 (CP 2172-2176, Judgment For Defs on Defs' Motions For Summary Judgment, entered December 15, 2015).

Certification. CP 1848. In 2007, Kwan (HR Director for ABM Parking) suggested to O'Brien that she apply for a newly-created HR position at ABM Parking. CP 1848. Kwan interviewed O'Brien, recommended her for the position, and Carder approved the decision to hire O'Brien. CP 1519-1524.

HR Coordinator/Operations Manager—ABM Parking. O'Brien's position at ABM Parking was created by Leonard Carder, in consultation with the HR Director, Madeline Kwan. CP 1519-1521, CP 1522-23. The salary for the position was came from the Operations budget for the Northwest Region, which Carder controlled. CP 1524. At some point, Carder would be promoted to Executive VP ("EVP"). Defendants claim that at that time, Rod Howery assumed some additional responsibilities. However, there is no dispute that Carder remained in the Seattle office where O'Brien worked, Howery remained in California, and Howery was "accountable" to Carder, while Carder remained in control the budget for the region. CP 1524-1527, CP 1562. Plaintiff's job title of "HR Coordinator/Operations Manager" was indicative of the hybrid or dual nature of her position. CP 1522-23. Madeline Kwan and Kwan's boss, Vivian Smith, supervised O'Brien in the performance of her HR duties. CP 1851-52. However, on the Operations side, O'Brien reported to Carder, and to the Operations branch managers who reported to Carder.

Initially, this was Hugh Koskinen and Dan Lawson; later, it was Matt Purvis. CP 1848-1852.

ABM Employee Handbook and Code of Business Conduct. O'Brien was allowed to retain her seniority for purposes of certain fringe benefits that she had earned while employed at ABM Janitorial. CP 1848. The written personnel policies which governed the terms and conditions of O'Brien's employment did not change as a result of the move. Every year, O'Brien continued to receive a copy of the "ABM Employee Handbook" and the "ABM Code of Business Conduct", which she was required to review and acknowledge in writing. CP 1843.

Conflict Inherent in Dual Role of HR/Operations Manager. As an HR manager, O'Brien was responsible for ensuring ABM Parking's compliance with Federal and State anti-discrimination laws, workplace safety laws and regulations, and other compliance issues related to labor relations. She answered to, and received instructions from Madeline Kwan and Vivian Smith. CP 1849-50. As an Operations Manager, O'Brien reported to Leonard Carder and his assembled team, and the goal of Operations was to increase profits and reduce costs. CP 1524-25. As noted, her salary was funded by the Operations budget which Carder controlled. CP 1524-27. O'Brien and the other Operations managers—

Koskinen, Lawson, and Purvis—served at Carder’s pleasure. CP 1562.

There was an inherent conflict in the dual roles and functions which O’Brien was expected to perform. Very soon, this was to her detriment, when O’Brien’s good faith performance of her duties as an HR manager were inconsistent with Carder’s prerogatives and goals for Operations. CP 1855-57. (See discussion of Melody Dillon and Jason Reidt, *infra*.)

Melody Dillon—Comparator for Retaliation. In March 2009, O’Brien was required to assist HR with handling a sexual harassment complaint of a female employee named Melody Dillon. Dillon was a bookkeeper who worked at the Expedia Garage. Dillon’s immediate supervisor was the location manager, Becky Livermore, who reported to Hugh Koskinen, the Branch Manager. Koskinen reported to Leonard Carder. Soon after she began working at the Expedia Garage, Dillon reported that two male co-workers (valets) were passing around a sexually explicit photograph on a cell phone, and it was shown to her. Dillon found this conduct unwelcome, and she reported it to her manager, Livermore. HR became involved. Dillon testified that after she complained, she was subject to retaliation by the two male co-workers, and that she reported the retaliation. CP 1612-1696. She testified that her supervisors (Livermore and Koskinen) also retaliated against her after she complained about the valets. For example, she was required to spend even *more* time with the

valets (although her position was “bookkeeper”). CP 1654-55, 1682. In a write-up which was placed in Dillon’s personnel file, Livermore indicated that Dillon needed to spend more time working with the valets in order to *gain their respect*. Before she made the complaint, Dillon received a very positive performance evaluation from Livermore. After she made the complaint, Livermore gave Dillon a series of unwarranted write-ups and a “final warning”. CP 1710-1723. Also, Hugh Koskinen gave Dillon a new assignment which was to inspect the Expedia Garage on a regular basis. Dillon testified about being frightened about being attacked or assaulted in the garage, and she was supposed to walk all ten stories of the garage, alone, and frequently. Then, she was criticized for not being fast enough at these “walk throughs”. CP 1631-34. Dillon and one of the valets who was harassing her (Danny Hernandez) were required by Koskinen and Livermore, to sign some type of document, agreeing to get along in the future. Hernandez was eventually moved, while the other male valet continued to work at the same location as Dillon, and continued to retaliate against Dillon for having caused Hernandez’ to be transferred. CP 1661-62.

The “Fancy Man”—Leonard Carder? Dillon testified about an incident which occurred not long before she left ABM Parking, where she was summoned to the corporate office in downtown Seattle, to meet with an

executive she had never met before, in a well-appointed office. It was obvious to her that she was meeting with someone who was very important in the company, and this seemed incongruous to her, given that she was a bookkeeper in a garage and she did not know the purpose of the meeting. Dillon could not recall this man's name, but described him as the "fancy man" (CP 1616-17), and she vividly recalled that during her interaction with this person, she was "highly intimidated" and stressed (CP 1616-19), and she "disassociate[ed]" from what was happening. CP 1643-49. Although Dillon could not identify this person by name during her deposition, the circumstantial evidence strongly suggests that it was Leonard Carder. For example, Hugh Koskinen testified during his deposition that Carder had a "standard" way of dealing with employees' complaints, which was to meet with the aggrieved employee, personally, and Koskinen further testified that these meetings would somehow "de-escalate" the situation, and resolve the employees' complaints. Koskinen stated that he observed this type of intervention by Carder "multiple times", and that this was "just [Carder's] standard form of leadership." CP 1584. Koskinen also testified to his admiration for Carder as a mentor and a leader, stated that he kept Carder informed about all "sensitive" issues when he worked at ABM Parking, including employee complaints, and *especially* sexual harassment complaints. CP 1583-88.

O'Brien's Protected "Opposition" Activity. After O'Brien wrote up the male valets in response to Dillon's complaint, Koskinen angrily criticized O'Brien for forwarding an e-mail to Melody Dillon's manager, Becky Livermore, advising Livermore not to question Dillon about confidential and personal medical issues. CP 1602-03, 1606, 1608, 1610-11. It appears that O'Brien was unwittingly interfering with Koskinen's and Livermore's efforts to force Dillon to quit by creating a hostile work environment. After O'Brien disciplined the valets, Koskinen also instigated a confrontation with O'Brien by asking O'Brien about her relationship with Dillon's mother, during which Koskinen yelled at O'Brien and then wrote her up, supposedly, for insubordination. CP 1602. Koskinen informed O'Brien that Melody Dillon was about to be fired. But as it turned out, Dillon resigned before she was fired. Dillon testified that she was forced to resign, that she looked for new employment because of the retaliation. CP 1639-41. She was asked whether she was aware that she was slated for termination anyway, and her answer was that she was not aware of that the decision had already been made. CP 1719-23. Also, after assisting HR with responding to Dillon's sexual harassment complaint, O'Brien stopped being invited to company-sponsored events. She came under increased scrutiny, Koskinen and Lawson became increasingly critical of her, she was stripped of her job title as HR

Coordinator, she was falsely accused of malingering. CP 1602-08. While on vacation, she was required by Koskinen to report to work. CP 202-216. Koskinen recorded a private telephone conversation between O'Brien and her sister, and played it for the amusement of co-workers, telling them it was a conversation between O'Brien and her psychiatrist. O'Brien learned about this from an employee who was present when Koskinen played the recording, and she complained to Vivian Smith. Smith took no corrective action, and O'Brien testified that the retaliation escalated. CP 195. CP 1824-1920.

Jason Reidt—Comparator for Retaliation. In March 2010, O'Brien was consulted by Koskinen (due to her HR role) about an employee named Jason Reidt. Koskinen became frustrated and angry with O'Brien when she did not rubber-stamp his plan to terminate Reidt, and this is apparent from an e-mail communication between them, in which he peevishly informs her that her services are no longer required on the matter. CP 1595-97. Although O'Brien's recommendation saved Jason Reidt from being immediately terminated, Reidt was transferred to a different building as a sort of punishment (for doing what O'Brien deemed was appropriate and not blameworthy under the circumstances), and then fired after he called the police to report a customer who was threatening him. CP 1752-55. O'Brien testified about being aware during her employment,

about an unwritten rule at ABM companies, which forbids employees from calling the police for any reason. CP 220-21.

O'Brien's Request for Reasonable Accommodation in 2009. In late 2009, Koskinen informed O'Brien that she would be required to work the Spokane Fair that year, which he told her would involve work days from 6am to midnight. Plaintiff reminded her HR managers about her disability and physical limitations. As a result, O'Brien was not required to work the Fair that year; in other words, she was accommodated. CP 183-227.

Additional Duties Assigned in Operations. In 2010, a number of additional responsibilities were added to O'Brien's position as Operations manager, including acting as a valet, parking cars evenings and weekends, and performing walking inspections of all of the garages and surface lots in the Seattle/Bellevue area. CP 183-227. Carder personally made O'Brien responsible for inspecting the parking garages in the Seattle/Bellevue branch. O'Brien was supposed to walk through each floor of each garage, take photographs and note the conditions in each one, then submit a report for each one (known as "CSI Reports"). Carder, Koskinen, and Purvis reviewed the CSI reports she submitted. CP 219-220. The conditions she encountered in some of these garages were frightening and the CSI reports O'Brien submitted placed her managers on

notice of the hazardous conditions. CP 217-220. When she did the job without complaint, she was told that she would have to perform 10 inspections per week. When she could not achieve this goal, she was repeatedly written up and criticized by Koskinen and Lawson, and then, Purvis. CP 1602-1603, CP 1468-1474. Koskinen testified in his deposition that the “*mandate that came down from Leonard*” that O’Brien needed to perform 10 inspections per week, and he also testified that “[*t*]he whole idea of the CSI program was Leonard’s idea.” Koskinen further testified that the CSI Program was a high priority for Carder. CP 1589-1591. Koskinen also testified to Carder’s animus toward O’Brien, when he stated that he had to “*defend [O’Brien] routinely*” to Carder. CP 1592. The evidence showed that Carder and the other managers knew, or should have known about the dangerous conditions O’Brien encountered in some of the garages. CP 217-18, CP 1468-74, CP 1508. Purvis even testified that he was in frequent communication with the Seattle Police Department about one or two of the downtown garages O’Brien regularly inspected due to the activities there. CP 1475-80. Notably, Purvis also testified that the CSI program was abolished after O’Brien was terminated from ABM Parking. CP 1603, 1604, 1608.

Tim O’Brien’s Letter to Carder. O’Brien’s husband began to accompany O’Brien on these CSI inspections. Tim O’Brien wrote Leonard Carder a

letter describing the dangerous conditions he had personally witnessed on these inspections. Debi O'Brien testified about how she "begged" her husband Tim, not to send the letter, because she wanted work to be a "happy place" and did not want to make waves by complaining. CP 214-15. He sent the letter anyway. CP 1918. It is not disputed that Leonard Carder received Tim O'Brien's letter and so did Madeline Kwan. CP 1920. But no one responded to it, and no action was taken to make O'Brien safe when she performed the CSI inspections.

Pacific Place Garage Assigned by Carder. In 2011, Leonard Carder gave O'Brien another new assignment to resolve accounts receivables problems at the Pacific Place Garage. CP 329. Although at summary judgment, the defendants denied that Carder supervised O'Brien, Matt Purvis testified that it was Leonard Carder who decided to give the Pacific Place Garage assignment to O'Brien. CP 1459-63. The Pacific Place Garage is owned by the City of Seattle. ABM Parking had been managing it and operating it under a contract with the City since approximately 2000. It was viewed as an important or high-profile account of ABM Parking, but it was also known that there were serious problems at that location. After she went there, O'Brien reported evidence of mismanagement and/or possible fraud or theft to her managers, Matt Purvis directly, and Leonard Carder, indirectly. CP 1486-1500. When O'Brien tried to put protocols in place

to address these issues, her efforts were undermined by the employees at that location, and she also reported this to Matt Purvis. She did not receive the support or backing she expected from him. Thus, she began to suspect that the assignment might be another way to set her up for failure. CP 1847.

Request for Reasonable Accommodation Denied in 2012. In August 2012, O'Brien was again informed that she would have to work the Spokane Fair for five days. O'Brien sent an e-mail to her managers reminding them of her physical limitations. O'Brien also proposed a reasonable accommodation, which was that she be allowed to drive the bus for ABM at the Spokane Fair, but she was told that another (younger, non-disabled) employee would be doing that job. Paulette Ketzka wrote her an e-mail which implied that she would be accommodated during the fair, although she was not told how. CP 1916. But there was no accommodation. On the contrary, O'Brien worked 12-hour days standing in the hot sun and waving to direct traffic, except for one day when she worked eight hours in the hot sun. CP 183-227.

At summary judgment, Defendants claimed that they had no notice of a medically cognizable disability. O'Brien disputes this, and claims that ABM was advised about her disability when she began her employment at

ABM Janitorial, and again in 2009 when she worked at ABM Parking and requested and received a reasonable accommodation by being excused from working the Spokane Fair. CP 202, 223. In 2012, when she mentioned her physical restrictions, no one asked O'Brien for medical documentation, no one asked her what her limitations were. O'Brien was told she would be accommodated, but received no accommodation. Instead, she was forced to perform duties at the Fair which could aggravate her condition. CP 183-227.

Media Coverage of Fraud at Pacific Place Garage. Plaintiff was told that she was supposed to fix the problems at the Pacific Place Garage, but she could not succeed without the support of her managers, and this support was not forthcoming. O'Brien reported her findings indicative of fraud, theft or mismanagement of taxpayer parking revenues, but no action was taken by Purvis or Carder. CP 223-26, CP 1459-14-63, CP 1486-1516. In October 2012, ABM lost its contract with the City to manage the garage, and the contract was awarded to ABM's competitor, "Impark". In the process of transitioning, the successor contractor, Impark, discovered that approximately \$30,000 per month of unexplained revenue losses was occurring under ABM's management of the garage. This revenue should have been paid to the City, and a portion of the taxes on this revenue would have gone to a state fund for roads and transportation. CP 229-31,

CP 233-34, CP 235-37.³⁰ In addition, the Pacific Place Garage was touted as a boondoggle for the taxpayers and was about to be sold, based on an appraisal which did not take the lost revenue into account. The Seattle Times covered these facts in several stories about the Pacific Place Garage. CP 239-240, CP 242-243. At the time this information became public, the City was poised to sell the garage to a group of developers (The Pine Street Group) without opening up it up to public bid. CP 223-243. The imminent sale of the garage was highly controversial and the news reports about possible fraud added to the controversy. CP 229-243.

Police Report Suggests ABM's Obstruction of Investigation. Impark reported its findings to its new customer, the City of Seattle. The Seattle Police Department assigned a detective (Det. Thompson) to investigate the missing money from the Pacific Place Garage. An investigation report was produced in response to Plaintiff's Public Records Act request, and it contained an entry about a telephone interview with Matt Purvis.

Detective Thompson stated in the report that he contacted Matt Purvis and interviewed him, using a phone number for the San Francisco offices of ABM Parking. However, when Matt Purvis was deposed during the federal court case against ABM, he denied he was ever contacted by

³⁰ Seattle Municipal Code Parking Tax, RCW 82.80,070 (providing for set aside to State transportation fund,, and City memo clarifying commercial parking tax.

anyone in connection with the investigation of the Pacific Place Garage matter. Purvis testified at his deposition that he expected to be contacted by someone as part of the Pacific Place Garage investigation, and was surprised because he never was. CP 1464-66.

O'Brien is Terminated Within Hours of Receiving Call from Seattle Times

Reporter. On February 6, 2013, Debi O'Brien was at work at ABM Parking, when she received an e-mail with instructions from Leonard Carder (originally sent out in July) about how employees should handle inquiries from the media. CP 1480-84. Later that day, O'Brien received a call from a Seattle Times reporter, asking her to comment on the *fraud at the Pacific Place Garage*. O'Brien referred the reporter to the media relations people. Then, she reported the call to Matt Purvis. Purvis testified that he promptly informed Carder about the call O'Brien had received. CP 1480-84, CP 1509-10. One or two hours later, O'Brien was fired. Madeline Kwan notified O'Brien of the termination, and informed O'Brien that her position was being eliminated due to budgetary reasons and a corporate reorganization. Kwan testified during her deposition that Vivian Smith, Vice President of HR for Corporate (ABMI) gave the final approval for O'Brien's termination, as was standard practice. CP 1564, 1570, 1573-74. Smith's signature on the termination paperwork is dated February 7, 2013 (the day *after* the termination occurred).

Valid Comparators on Age Discrimination Claim. Ken Eichner, an accountant in his 70s, was also terminated around the same time as O'Brien. According to Kwan, a third employee—Rafael Cruz—was slated for termination, but was not terminated. Like O'Brien and Eichner, Cruz was also over 40 years of age. CP 1575. In the final analysis, the alleged "reorganization" impacted only two employees (both within the protected class).

Inconsistencies in Defendants' Testimony. O'Brien was aware of a reduction-in-force which occurred in October 2012, and did not affect her job. She was not laid off, but others were. Madeline Kwan testified that the decision to terminate O'Brien was originally made in October or before October. Kwan was asked why it took 5 months for ABM to act on the decision to terminate O'Brien, and she claimed this delay was because she needed to come to Seattle to notify O'Brien, personally. In a follow-up question, Kwan was asked whether she came to Seattle at all during that 5-month period, her answer was that she could not recall, one way or the other. CP 1559. Kwan testified that before employees were terminated from ABM Parking, it was standard practice for Vivian Smith to consider the proposed termination and give final written approval for it. However, the date of Smith's signature on the termination paperwork

produced in discovery is *February 7, 2015*—one day *after* O’Brien was terminated by Kwan. CP 1564, CP 1570, 1573-74.

Credibility Issues with ABM Witnesses. By the time Kwan was deposed in the federal case, she was no longer employed by ABM Parking. Kwan testified that she voluntarily resigned from ABM Parking to accept another opportunity, but when she was asked if she tendered a letter of resignation, she answered that she did not. CP 1529. Kwan had been with ABM for over two decades, but denied that her departure from ABM was in any way connected to O’Brien’s lawsuit, or to Plaintiff’s counsel’s discovery that ABM failed to disclose comparator discovery for 13 months, or the motions to compel and for sanctions which were brought after this was discovered. Kwan admitted that her new job paid a substantially lower salary than what she had been earning at ABM Parking. Kwan also admitted that she was being paid by ABM for her “cooperation” in this litigation. CP 1571.

Proof of Causation. ABM’s written policies (ABM Code of Business Conduct) required employees to report the accounting irregularities. The accounting irregularities O’Brien reported to her employer were on a matter of public interest and importance, which is why The Seattle Times ran several stories (between February 4, 2013 and April 3, 2013) about the

fraud, and the impending sale of the Pacific Place Garage. CP 239-43. Furthermore, O'Brien was contacted by the news media and Carder knew about that. The very same day Carder learned about this call from the media, O'Brien was suddenly terminated (5 months after the actual reduction in force at ABM Parking).

V. ARGUMENT

A. Standard of Review.

The standard of review for the imposition of CR 11 sanctions is, the abuse of discretion standard.³¹ The standard requires that the trial court's decision be founded on principle and reason.

“The judge, even when he is free, is still not wholly free. He is not to innovate at this pleasure. He is not a knight-errant roaming at will in pursuit of this own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in social life’. Wide enough in all conscience is the field of discretion that remains.”

Thus, “[t]he proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, *considering the purposes of*

³¹ *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338-39, 858 P.2d 1054 (1993).

the trial court's discretion."³² The primary consideration of the trial court should be justice.³³

B. CR 11 sanctions may not be imposed based on a finding of "improper purpose"—alone.

The trial court below, in its first sanctions order, concluded that CR 11 sanctions were warranted because the four defendants were not *necessary* to the lawsuit— as evidenced by Plaintiff's subsequent agreement to dismiss them without prejudice. This is an erroneous view of the law. The Washington courts have never held that joining parties who are not necessary (without more) is sanctionable conduct under CR 11; not if the pleadings are grounded in fact and warranted by law, as they were in this case.³⁴ Again, Plaintiff's Amended Complaint (filed on April 6, 2015) contains no less than 77 factual allegations, supported by deposition transcripts and other evidence which was obtained in the federal court case. And Washington law on this issue is clear. Individual managers may be held liable for their own unfair employment practices under the WLAD. This question was settled in *Brown v. Scott Worldwide Paper*³⁵. Furthermore, Judge Zilly acknowledged this rule of law in the

³² *Coggle v. Snow*, 56 Wn.App. 499, 503-509. 784 P.2d 554 (1990) (emphasis added).

³³ *Id.*

³⁴ *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (2001).

³⁵ *Brown*, 143 Wash.2d 353 (2001).

Order of remand. CP 461-67, 459-60. Judge Coughenour implicitly acknowledged this rule when he severed Carder as a defendant, *because* O'Brien was free to file a separate lawsuit against Carder in State court. CP 130-134³⁶. Yet, the trial court ignored the law of *Brown v. Scott Paper*.

In the second sanctions order, the trial court found that O'Brien and her counsel (appellants herein) included the four individual defendants in the pleadings for the improper purpose of "forum shopping". CP 2157-2160. However, this finding by the trial court is actually a conclusion that is unsupported by any facts. As the records shows, O'Brien made a good faith effort to sue Leonard Carder in the same lawsuit as the ABM companies, but was prevented from doing so by the *defendants*, who brought a motion to sever Carder from the lawsuit pending in federal court. CP 130-134.³⁷ Because the District Court granted the motion to sever Carder, Plaintiff could either sue Carder in state court, or she could not sue Carder at all. Plaintiff did not exercise her right to sue Carder immediately, but instead, conducted a thorough investigation into the facts by proceeding with discovery in District Court. This is not sanctionable conduct. Contrary to the trial court's conclusion, Plaintiff had no motive

³⁶ App., Ex. 1.

³⁷ Id.

(i.e., no forum-shopping motive) to add the four individual managers (Koskinen, Lawson, Purvis, Ketzka). Assuming arguendo, that Plaintiff's preferred forum was State court, the inclusion of these managers did not advance the cause. Plaintiff had no reason to fear that the case would be successfully removed from State court, even if Carder was the only defendant, since his presence in the case defeated diversity jurisdiction, even if there were no other individual defendants. The trial court's conclusion that forum-shopping was the improper motive for including the four individual defendants, is simply illogical.

C. Koskinen and Lawson were joined in the pleadings based on the law established by *Antonius*.

In its second order granting CR 11 sanctions, the trial court concluded that O'Brien's claims against Koskinen and Lawson for retaliation under the WLAD, were legally baseless and therefore violated CR 11, because these two managers left their employment at ABM Parking in April, 2010 and October, 2010—respectively; and since their alleged acts that contributed to the hostile work environment took place outside the statute of limitations period, these individuals could not conceivably be held legally liable for those acts. CP 2157-2158. There are two problems with this conclusion. First, whether the statute of limitations bars a plaintiff's claims, is generally a question of fact for a

jury, unless it is beyond dispute that the limitations period has expired.

Second, even assuming arguendo, that the acts of Koskinen and Lawson took place outside the limitations period, Plaintiff has asserted a good faith legal argument that the two managers may be found liable for their personal conduct which occurred outside the limitations period. Plaintiff cited *Antonius v. King County*³⁸ as authority for this position. In *Antonius*, the Washington Supreme Court abandoned the use of the “continuing violation” doctrine as an equitable exception to the statute of limitations in hostile environment cases under the WLAD. Instead, the Court adopted the approach carved out by the U.S. Supreme Court in *National Railroad Passenger Corp. v. Morgan*³⁹, a Title VII race discrimination and harassment case in which the hostile work environment was alleged by the plaintiff to have extended over a period of six years. The *Morgan* Court decided that in cases where some acts that contribute to a hostile work environment fall outside the statute of limitations period, they are actionable if one or more acts occur inside the limitations period, because a hostile work environment is, by its very nature, one unitary indivisible act (or unlawful employment practice).

³⁸ *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729, 735 (2004).

³⁹ *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2001).

The *Antonius* Court states:

“We conclude that *Morgan* provides a logical analysis for determining liability under WLAD for a hostile work environment claim. The rule of liberal construction and the purposes of the statutes prohibiting sex discrimination in the workplace will be served by adopting *Morgan’s* analysis, permitting suits based on acts that individually may not be actionable, but together constitute part of a unified whole comprising a hostile work environment.”⁴⁰

Thus, Plaintiff’s argument for holding Koskinen and Lawson liable—even if their conduct was outside the limitations period—is a logical extension of the approach which was announced in *Antonius*. Koskinen’s and Lawson’s actions were part of one unitary, indivisible hostile work environment. Their acts are alleged to have been committed in furtherance of Carder’s plan or scheme to create a hostile work environment which would force O’Brien to quit. These two managers (before they left ABM Parking) assisted, aided or abetted Carder and the other managers, to create a hostile work environment in retaliation for O’Brien’s legally-protected opposition activity. Together, the seven managers (including Carder) engaged in “a series of separate acts that collectively constitute one ‘unlawful employment practice’”.⁴¹

Therefore, Koskinen and Lawson can and should be subject to liability if a jury finds that either or both of these individuals intentionally joined in

⁴⁰ *Antonius*, at 268.

⁴¹ *Id.*, at 264 (quoting *Morgan*).

conduct with other managers which was in furtherance of a common plan or scheme to create a hostile work environment and a hostile work environment resulted. The question presented appears to be one of first impression, but is by no means a frivolous argument by O'Brien and her counsel, for the extension or modification of existing law enunciated by the Washington Supreme Court in *Antonius*. The trial court ignored the argument altogether, did not discuss *Antonius* in any of its sanctions orders, and imposed CR 11 sanctions of \$6,500 on Plaintiff and her attorneys. This was error.

D. Inclusion of Contract Claims in the Pleadings Does Not Warrant Sanctions Under CR 11.

The trial court erroneously concluded that CR 11 sanctions were warranted in part; because the pleadings allege a breach of contract claim and the trial court concludes that, as a matter of law, the four individual defendants cannot be liable for a breach of the employment contract; only the corporations can be liable for that claim. However, the breach of contract claims alleged in the Complaint were against the ABM companies, and any individual managers who might turn out (after discovery is obtained) to be speaking agents or alter egos of the ABM corporations. Plaintiff's speaking agent (or alter ego) theory is by no means a frivolous argument. Furthermore, the harm to the individual

defendants resulting from this claim being alleged, was *de minimus*, since the four individual defendants could be held liable for tortious interference with contract, and for the hostile work environment alleged under the WLAD. They would have been proper defendants in the lawsuit, regardless of the breach of contract claim.

E. The trial court did not satisfy the requirements necessary for imposing CR 11 Sanctions.

The trial court awarded \$6,500 to the defendants without explaining how these sanctions corresponded to the conduct being sanctioned or the harm resulting to the defendants. As the Supreme Court teaches in *Biggs v. Vail* (“Biggs II”):

“An order imposing CR 11 sanctions must specify the offending conduct, explain the basis for the sanction imposed, and quantify any amounts awarded with reasonable precision. With respect to each violation, the trial court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law and facts, or the paper was filed for an improper purpose.”⁴²

In *McDonald v. Korum Ford*, the court cautioned:

“If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous. Such sanctions must be quantifiable with some precision. Therefore, justification for a Rule 11 decision on the record must correspond to the amount, type, and effect of the sanction to the specific violations at issue.”⁴³

⁴² *Biggs*, 124 Wash.2d 193, 876 P.2d 448 (1994).

⁴³ *Korum v. Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (Div. 2 1996).

The trial court abused its discretion by failing to consider the other goals which CR 11 is intended to promote (such as deterrence, education or punishment), and by failing to consider how the monetary sanction of \$6,500 corresponds with these goals. Furthermore, the trial court does not explain how the attorneys' fees were calculated, making only a passing reference to the fact that the court reviewed the billing records submitted by defendants. And there is no consideration of lesser sanctions.

F. Trial Court's Denial of CR 56(f) Continuance Was Abuse of Discretion because justice should have been the trial court's primary concern.

The trial court's ruling on a motion for a continuance under CR 56(f) is reversible by an appellate court only for a manifest abuse of discretion. The trend of modern law is to find an abuse of discretion when the trial court does not allow a decision on the merits, particularly where the non-moving party cannot show prejudice would result from a continuance. In *Coggle v. Snow*, this Court stated, "We fail to see how justice is served by a draconian application of time limitations here."⁴⁴

Leonard Carder. Plaintiff's case was dismissed on summary judgment before she could depose Leonard Carder, or ask him (inter alia) if he was the person who summoned Melody Dillon to his office and if so,

⁴⁴ *Coggle v. Snow*, at 507.

why, and before she could ask him how he could deny that he supervised O'Brien (as stated in his sworn declaration), in the face of the evidence which suggests otherwise.

Vivian Smith. Smith worked for ABM Industries when she approved O'Brien's termination. Yet, ABMI maintained in its summary judgment motion that ABMI was not O'Brien's employer. Plaintiff testified in her deposition that the harassment got worse after she complained to Smith about Hugh Koskinen's harassment. CP 195. Plaintiff did not have the opportunity to depose Smith about ABMI or her failure to respond to O'Brien's complaint.

Rod Howery. ABM Parking claims that Howery is executive that made the decision to eliminate O'Brien's position (instead of Leonard Carder, as Plaintiff alleges). Plaintiff did not have an opportunity to depose Howery about the reasons for his alleged decision.

Plaintiff's counsel was diligent. Plaintiff submitted portions of the record from the federal case to the trial court below, which showed that Plaintiff's counsel was diligent during the federal court proceedings, and that lack of diligence was not the reason that these witness' depositions had not been taken. CP 76-364. Even assuming arguendo, that Plaintiff's counsel was dilatory, this does not justify imposing the ultimate sanction

on the plaintiff, Debi O'Brien. Defendants would not have been substantially prejudiced by a continuance under CR 56(f). Justice should have been the primary concern of the trial court in deciding the motion for continuance, and it clearly was not.⁴⁵

G. Summary Judgment Dismissal of O'Brien's Case Was Error Because of the Existence of Genuine Disputes of Material Fact on all claims.

1. Standard of Review.

Summary judgment orders are reviewed de novo.⁴⁶ Summary judgment is proper only where there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are to be viewed in the light most favorable to the nonmoving party.⁴⁷

2. The trial court erred when it ruled—as a matter of law—that there was not a hostile work environment.

To make out a hostile work environment claim, the defendant's conduct must be sufficiently severe or pervasive to alter the terms and conditions of employment.⁴⁸ A hostile environment must be both objectively and subjectively offensive, such that a reasonable person

⁴⁵ Coggle, at 508.

⁴⁶ Camicia v. Howard S. Wright Const. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014).

⁴⁷ Young v. Key Pharm., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

⁴⁸ Glasgow v. Georgia Pacific, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985).

would find it hostile or abusive, and one that the victim in fact did perceive as hostile or abusive.⁴⁹ The objective test of the severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position considering all of the circumstances, which requires "careful consideration of the social context in which particular behavior occurs and is experienced by its target."⁵⁰ A "totality of the circumstances test is used to determine whether an environment is objectively hostile or abusive."⁵¹

The trial court's Order granting summary judgment states as follows:

"Certainly termination of employment is an adverse employment action but the asserted hostility does not seem sufficiently 'severe or pervasive' to meet the requirements of the law. The purported 'ostracism' and being 'glared at' are uncorroborated, purely subjective and insufficient; the parking lot inspections do not seem to be outside the scope of anticipatable duties."

However, the trial court overlooks a number of Plaintiff's factual allegations of adverse actions, such as the unwarranted write-ups she received, being ordered to report to work while on vacation, being assigned dangerous new duties, having a private phone conversation recorded and played to her co-workers, being forced to work without

⁴⁹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S.Ct. 2275 (1998); See also, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, 14 S.Ct. 367 (1993).

⁵⁰ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998 (1998).

⁵¹ *Glasgow*, at 406-07.

reasonable accommodation at the Spokane Fair. CP 183-230. This evidence which was before the trial court at summary judgment went well beyond Plaintiff's own testimony about her subjective experience. Had these factual allegations and the supporting evidence been properly considered, the trial court should have concluded that a reasonable *jury* could find for Plaintiff on the hostile work environment claim—thus, precluding summary judgment dismissal of the claim.

3. Retaliation for “opposition” activity under the WLAD—genuine disputes of material fact precluded summary judgment.

RCW 49.60.210 provides:

It is an unfair employment practice for any employer, employment agency, labor union, or other person to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.⁵²

To establish a *prima facie* case of retaliation under the WLAD, the employee must show that: (1) she engaged in statutorily protected activity; (2) the employer took some adverse employment action against the employee; and (3) there is a causal link between the protected activity and the adverse action.⁵³ The statute provides protection in two circumstances: (1) when an employee opposes forbidden practices and (2)

⁵² RCW 49.60.210(1).

⁵³ *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn.App. 356, 374, 112 P.3d 522 (2005).

when an employee files a charge, testifies, or assists in a proceeding.⁵⁴

The first is known as the “opposition clause” and the second as the “participation clause.”

a. O’Brien’s activity as HR manager is “protected activity” under the WLAD’s “opposition clause”.

The opposition clause is at issue in this case. In *Lodis v. Corbis*⁵⁵, the Supreme Court held that the opposition clause protects HR employees, management employees, and legal employees, from retaliation for performing their ordinary job duties, because “these employees are often the best situated to oppose an employer’s discriminatory practices.”⁵⁶ O’Brien engaged in protected activity when she assisted with ABM Parking’s response to Melody Dillon’s sexual harassment complaint, and when she was consulted by Koskinen on the Jason Reidt matter. Plaintiff was also performing her ordinary duties as an HR consultant when she forwarded Madeline Kwan’s e-mail to Becky Livermore, advising her not to inquire into Dillon’s personal and confidential medical information, and

⁵⁴ *Lodis v. Corbis Holdings*, 172 Wn.App. 835, 292 P.3d 779 (finding that HR duties are opposition activities and declining to read into the WLAD, a requirement that an HR employee must step outside his ordinary job duties, reversing summary judgment for employer, and remanding to trial court).

⁵⁵ *Lodis v. Corbis Holdings, Inc.*, 172 Wn.App. 835, 852, 292 P.3d 779 (2013).

⁵⁶ *Id.*

thereby angering her Operations boss, Hugh Koskinen. For these reasons, this first element of the prima facie case is satisfied.

b. Causal link was shown because O'Brien received satisfactory performance evaluations prior to protected activity, and was subjected to adverse employment actions immediately after handling Dillon's complaint.

“Proximity in time between the protected activity and the discharge, as well as satisfactory work performance and evaluations before the discharge, are both factors suggesting retaliation. And if an employee establishes that he or she participated in statutorily protected opposition activity, the employer knew about the opposition activity, and the employee was then discharged, a rebuttable presumption of retaliation arises that precludes summary dismissal of the case.”⁵⁷

To prove a causal link, O'Brien must provide evidence that retaliation for protected activity was a “substantial factor” that motivated the harassment; not that it was the only reason, or even the “main reason”, just that it “tip[ped] the scales’ toward termination.”⁵⁸ O'Brien has shown proximity in time between her involvement in handling Dillon's sexual harassment complaint, and the adverse employment actions against her. CP 1602. Indeed, some of the unwarranted write-ups O'Brien received were *on their face*, connected to her “opposition” activities. CP 1591-1608. But Plaintiff was also written up for expressing the view that

⁵⁷ *Currier v. Northland Services*, 182 Wn.App. 733, 747, 332 P.3d 1006 (Div. 1 2014) (trial court's findings and conclusions were affirmed based on circumstantial evidence that motive of retaliation for opposition activity was a “substantial factor” in the termination, and that employer was liable for retaliation under the WLAD).

⁵⁸ *Id.*

Koskinen “does not like HR” (a sentiment which incidentally, Koskinen expressed during his deposition). Like Melody Dillon, O’Brien was assigned to perform garage inspections, and then she was written up for not doing these inspections quickly enough. She was also unfairly written up for a scheduling mistake at the Sunset. CP 1597, 1602, 1603, 1604, 1605, 1606, 1608, 1609, 1610-11. She was ordered to report to work while on vacation. CP 202. She was given a job to do at a problem location (Pacific Place Garage) but was not given the support to be successful. O’Brien was fired by ABM within hours of her bosses learning that she had been contacted by the reporter for the Seattle Times about fraud at the Pacific Place Garage. Based on this circumstantial evidence, as a whole, the second element of the WLAD retaliation claim (causal link) is satisfied. Furthermore, the circumstantial evidence simultaneously supports the causal link between O’Brien’s protected activities under the ABM Code of Business Conduct, and the termination (i.e., her contract-related claims).

c. The trial court erred when it required O’Brien to disprove ABM Parking’s stated reason for the termination in order to survive summary judgment.

The Court concludes in its summary judgment order: “*The defendants put forth a plausible explanation for the elimination of plaintiff’s position.*” CP 2154. (emphasis added) This is not the correct

standard for summary judgment. Summary judgment for the employer is seldom appropriate in WLAD cases because of the difficulty of proving a discriminatory motive.⁵⁹

In *Scrivener v. Clark College*⁶⁰, the Washington Supreme Court clarified the standard that plaintiffs in employment cases must meet to overcome summary judgment. *Scrivener* held that a plaintiff may satisfy its burden under the McDonnell-Douglas framework by offering sufficient evidence to create a genuine issue of material fact *either* (1) that the employer's articulated reason for its action is pretextual *or* (2) that, although the employer's stated reason is legitimate, discrimination was nevertheless, a substantial factor motivating the employer. Thus, O'Brien did not have to disprove ABM Parking's assertion that it terminated her as part of a corporate re-organization. The trial court had it wrong.

4. The trial court usurped the role of the jury.

The Court concluded in its summary judgment order that "*the parking lost inspections do not seem to be outside the scope of anticipatable duties.*" Based on the evidence, a reasonable jury could conclude otherwise. Another example of the trial court invading the

⁵⁹ *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144, 94 P.3d 930 (2004).

⁶⁰ *Scrivener*, 181 Wn.2d 439, 334 P.3d 541 (2014).

province of the jury is found in the Report of Proceedings from November 13, 2015, which contains the following statement by the trial court judge:

“Well, let me just ask, what sense would that make? I mean if she...gets a call from the press and does exactly what she’s supposed to do—...which is refer them on to somebody else, it seems to me that human nature, you talk about reality and real life, the employer would want to keep her close to the bosom of the company, rather than to fire her.”

RP (11/13/2015), p. 26, lines 21-25, p. 27 lines 2-10.

Based on the facts and circumstances in this case, a reasonable jury could reach a different conclusion than the trial court judge did. For example, a reasonable jury could conclude that Carder decided to fire O’Brien to ensure that she would not be around or accessible to the press, and would be prevented from disclosing to the media the accounting irregularities which she had already reported to Purvis and Carder while she was working at the Pacific Place Garage.

5. The trial court improperly resolved genuine disputes of fact when it concluded that ABMI was not Plaintiff’s employer.

The trial court’s order states:

“There is no evidence that employees, officers or agents of ABMI were responsible for any adverse employment action against the plaintiff and no basis for any inference that ABMI acted with any discriminatory motivation.”

However, the trial court certainly overlooked the following evidence which precluded summary judgment: (1) Vivian Smith was employed by ABM Industries in February 2013—undisputed fact. (2)

Vivian Smith gave written approval for the termination of Plaintiff from ABM Parking in February 2013—undisputed fact. (3) The same ABM Handbook and ABM Code of Business Conduct governed the terms and conditions of Plaintiff’s employment at ABM Parking, and at ABM Janitorial—undisputed fact. (4) O’Brien retained her seniority when she moved from ABM Janitorial to ABM Parking—undisputed fact.

6. Age Discrimination—Genuine Disputes of Material Fact Precluded Summary Judgment Dismissal of this Claim.

The elements necessary to establish a prima facie case of age discrimination are essentially the same under federal and state law.⁶¹ Plaintiff must establish that: (1) She is over 40; (2) Was performing satisfactorily; and (3) Suffered an adverse employment action. The WLAD requires proof that age was a “substantial factor”, not the only factor in the adverse employment action.⁶² This is a lesser causation standard than the federal ADEA, which is “but for” test. In this case, the trial court did not make separate findings of fact and conclusions of law. But the trial court’s order granting summary judgment states that there was no “valid comparator”. This is not accurate. There were two valid comparators—Ken Eichner and Rafael Cruz—who ABM selected to be

⁶¹ *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112-13 (9th Cir. 2003).

⁶² *Mackay v. Acorn Custom Cabinetry, Inc*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995).

terminated as part of the alleged corporate reorganization.⁶³ Thus, 100% of the employees to be adversely impacted by the “reorganization” were in the protected class (over 40). In addition, a genuine dispute of material fact exists as to whether a “reorganization” which eliminates the positions of only two employees, is pretext for discrimination. Replacement by a younger person, in and of itself, is not required to prove pretext.

Washington law follows federal law, emphasizing that the prima facie elements in a discrimination case are not intended “to be either rigid, mechanized or ritualistic, or the exclusive method of proving a claim.”⁶⁴ Furthermore, if plaintiff’s termination was part of an alleged reduction in force, replacement is not a required element.⁶⁵ The ultimate question remains whether age was a reason for the termination even if it was in the context of a reduction in force.⁶⁶ Evidence is sufficient to overcome summary judgment if it creates a genuine issue of material fact that the employer’s articulated reason was a pretext for a discriminatory purpose. If the plaintiff satisfies the McDonnell Douglas burden of production requirements, the case proceeds to trial, unless the judge determines that

⁶³ CP 1575 (Kwan testifies that Rafael Cruz was slated for termination, and within protected class of over 40).

⁶⁴ *Hatfield v. Columbia Fed. Sav. Bank*, 57 Wn.App. 876, 882, 790 P.2d 1258 (Div. III, 1990) (citing *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 362, 753 P.2d 517 (1988) (stating that elements are not absolutes).

⁶⁵ *Cluff v. CMX Corp., Inc.*, 84 Wn.App. 634, 639, 929 P.2d 1136 (Div. II 1997).

⁶⁶ *Pena v. Brattleboro Retreat*, 702 F.2d 322, 324 (2d Cir. 1983).

no rational trier of fact could conclude that the action was discriminatory.⁶⁷

Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose. Proximity in time between the protected activity and the discharge, as well as satisfactory work performance and evaluations before the discharge, are both factors suggesting retaliation. And if an employee establishes that he or she participated in statutorily protected opposition activity, the employer knew about the opposition activity, and the employee was then discharged, a rebuttable presumption of retaliation arises that precludes summary dismissal of the case.⁶⁸

7. The trial court erroneously dismissed Plaintiff's failure to accommodate claim although ABM failed to engage in the interactive process and denied O'Brien's request for reasonable accommodation.

Under the WLAD, an employee is not required to formally request any form of accommodation.⁶⁹ Notice of an employee's disability alone "triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations."⁷⁰ See *Dean v. Metro*,⁷¹ (employer failed to make reasonable accommodations by not determining the extent of the employee's disability, not calling him into the office to assist him in applying for other positions, not giving special attention from the personnel office, taking no affirmative steps to help find another position,

⁶⁷ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186, 188-89, 23 P.3d 440 (2001), overruled on other grounds by *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006).

⁶⁸ *Currier*, at 746-47.

⁶⁹ *Downey v. Crowley Marine Servs.*, 236 F.3d 1019, 1022-24 (9th Cir. 2001).

⁷⁰ *Dean v. METRO*, 104 Wn.2d 627, 638-39, 708 P.2d 393 (1985).

⁷¹ *Goodman v. Boeing*, 127 Wn.2d 401, 405-6, 899 P.2d 1265 (1995).

not informing him of all job openings, and treating him as any other applicant). In *Sommer v. DSHS*⁷², the Court held that the employer must take “positive steps” to determine the nature and extent of the condition, and may not leave the initiative up to the employee, must engage in an interactive process, assist the employee, and work to determine whether and what accommodation may be necessary. “Reasonable accommodation...envisions an exchange between employer and employee where each seeks and shares information...” The interactive process is generally viewed as a mandatory duty on the part of an employer and may be an independent basis for liability for failing to engage in good faith in this step.⁷³ The duty to reasonably accommodate a disability extends to measures which will avoid aggravating a disability.⁷⁴

8. The evidence precluded dismissal of Plaintiff’s contract claim based on ABM’s Code of Business Conduct.

In *Korslund v. DynCorp Tri-Cities Services, Inc.*,⁷⁵ the Washington Supreme Court decided that the employee had a breach of contract claim against the employer, where there was an employer publication,

⁷² *Sommer*, 104, Wn. App. 160, 172, 15 P.3d 160, 173 (2001), rev. den’d, 144 Wn.2d 1007, 29 P.3d 719 (2001).

⁷³ *Humphrey v. Mem’l Hosp. Assoc.*, 239 P.3d 1128, 1139 (9th Cir. 2001); *Barnett v. U.S. Air., Inc.*, 228 F.3d 1105, 1117 (9th Cir. 2000); vacated on other grounds, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516 (2002).

⁷⁴ *Goodman*, at 405-6; *Martini v. Boeing*, 88 Wn.App. 442, 454-55, 945 P.2d 248 (Div. I 1997), aff’d on different grounds, 137 Wn.2d 357, 971 P.2d 45 (1999).

⁷⁵ *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wash.2d 168, 125 P.3d 119 (2005).

distributed to every employee which stated that “[d]isciplinary action will be taken” when there is retaliation by “any supervisor” with respect to reports of violations of the company code of ethics. *Id.* The *Korlund* Court found that this was a mandatory, rather than a discretionary duty, on the part of the employer. *Id.*, at 190. Therefore, if the trial court erred in dismissing the hostile work environment claim as legally insufficient, then O’Brien’s contract-related claims, which are based on the same facts, should also be remanded for trial.

VI. CONCLUSION

The Court should reverse the CR 11 sanctions, and reverse the summary judgment order, and remand Plaintiff’s claims for discrimination, retaliation, and unlawful termination for trial on the merits.

DATED THIS 25th day of August, 2018.

Respectfully submitted,

By: /s//Sandra L. Ferguson

Sandra L. Ferguson

Attorney for Appellants, WSBA 27472

DECLARATION OF SERVICE

On said day below, I caused to be served on the following, a true and accurate copy of the Appellants' Opening Brief, in Court of Appeals Cause No. for service on the following individuals in the manner set forth below:

Counsel for Respondents, Shannon Phillips
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Seattle, WA 98104-2682
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Method of Delivery

via Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington and the United States that the forgoing is true and correct.

Executed this 25th day of August at Seattle, WA

/s/ Sandra L. Ferguson

Sandra L. Ferguson

APPENDIX

EXHIBIT 1

THE HONORABLE JOHN C. COUGHENOUR

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6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DEBI O'BRIEN,

11 Plaintiff,

12 v.

13 ABM INDUSTRIES INC., et al.,

14 Defendants.

CASE NO. C13-2023-JCC

ORDER

15 This matter comes before the Court on Plaintiff's motion to remand the case to state
16 court, (Dkt. No. 17), and Defendants' motion to drop defendant Leonard Carder. (Dkt. No. 20.)
17 Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral
18 argument unnecessary and hereby DENIES the motion to remand and GRANTS the motion to
19 drop Mr. Carder as a defendant for the reasons explained herein.

20 **I. BACKGROUND**

21 This is a wrongful termination suit, arising out of Defendants' alleged termination of
22 Plaintiff's employment for retaliatory purposes. (See Dkt. No. 4, Ex. A at 9-10.) Plaintiff is a
23 Washington resident. (Dkt. No. 12 at 1.) On November 8, 2013, Defendants removed the action
24 to this Court on the grounds of diversity of citizenship. (Dkt. No. 1.) On November 18, 2013,
25 Plaintiff filed an amended complaint, joining Leonard Carder, a Washington resident, as a
26 defendant in this action. (Dkt. No. 12.)

1 On December 18, 2013, Plaintiff filed a motion to remand, arguing that, as both she and
2 Defendant Leonard Carder are Washington citizens, there is no longer complete diversity of
3 citizenship and the case should be remanded. (Dkt. No. 17.) On December 24, 2013, Defendants
4 filed a motion to drop Defendant Leonard Carder from the lawsuit. (Dkt. No. 20.) On January 6,
5 2014, Defendants filed a response to Plaintiff's motion to remand. (Dkt. No. 22.) Plaintiff filed a
6 consolidated reply to Defendants' response to Plaintiff's motion to remand, and response to
7 Defendants' motion to drop Mr. Carder. (Dkt. Nos. 22 & 24.) Defendants filed a reply to
8 Plaintiff's response to the motion to drop Mr. Carder. (Dkt. No. 30.)

9 II. DISCUSSION

10 A defendant may remove a case filed in state court to federal court based on diversity
11 jurisdiction. 28 U.S.C. § 1441. The current general diversity statute for federal courts "applies
12 only to cases in which the citizenship of each plaintiff is diverse from the citizenship of each
13 defendant." *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996). Here, at the time the original
14 action was removed, there was complete diversity of citizenship. However, Plaintiff
15 subsequently amended her complaint to include a non-diverse defendant. Thus, the Court must
16 analyze whether Mr. Carder should be dropped from the lawsuit because his inclusion as a
17 defendant destroys complete diversity: if he should, then diversity jurisdiction exists and a
18 remand would be inappropriate.

19 "Federal Rule of Civil Procedure 21 allows a court to drop a nondiverse party at any
20 time to preserve diversity, provided the nondiverse party is not indispensable under Rule 19(b)."
21 *Call Ctr. Techs., Inc. v. Grand Adventures Tour & Travel Pub. Corp.*, 635 F.3d 48, 51 (2d. Cir.
22 2011) (quoting *CP Solutions PTE, Ltd. V. Gen. Elec. Co.*, 553 F.3d 156, 159 (2d. Cir. 2009)).
23 "[I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable
24 nondiverse party to be dropped at any time." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S.
25 826, 832 (1989). *See also Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980)
26 ("[T]he district court should have determined whether the administratrix was a nondispensable

1 party under Rule 19(b) who could be dismissed from the action pursuant to Rule 21 to perfect its
2 jurisdiction.”); *Ross v. Int’l Bhd. Of Elec. Workers*, 634 F.2d 453, 456 (9th Cir. 1980) (district
3 court should have dismissed non-diverse, non-indispensable party under Rule 21 to perfect
4 diversity jurisdiction); *Fid. & Cas. Co. v. Reserve Ins. Co.*, 596 F.2d 914, 918 (9th Cir. 1979)
5 (dismissing party who was not indispensable to preserve diversity jurisdiction); *Anrig v. Ringsby*
6 *United*, 591 F.2d 485, 491 (9th Cir. 1978) (before dismissing action for lack of diversity, district
7 court should have first determined whether certain parties were indispensable under Rule 19(b)
8 and could be dismissed under Rule 21).

9 Plaintiff argues that even if Mr. Carder is not indispensable, Plaintiff should be allowed
10 to proceed because she has stated a claim for relief against him. Indeed, Plaintiff claims that
11 whether Mr. Carder is an indispensable party or not is “beside the point.” (Dkt. No. 24 at 9.)
12 However, Plaintiff cites no authority supporting her arguments, and does not address the
13 authority discussed above. Accordingly, the Court will determine whether Mr. Carder is
14 indispensable¹ under Rule 19(b).

15 The Court looks to the factors laid out in Rule 19(b) to determine whether the action may
16 proceed against all other parties if the non-diverse party is dismissed. *See Sams*, 625 F.2d at 278
17 & n.7. The factors that a Court should consider under Rule 19(b) are the extent to which a
18 judgment rendered in the person’s absence might prejudice that person or the existing parties,
19 Fed. R. Civ. P. 19(b)(1); the extent to which any prejudice might be lessened or avoided by
20 protective provisions in the judgment, shaping the relief, or other measures, Fed. R. Civ. P.
21 19(b)(2); whether a judgment rendered in the person’s absence would be adequate, Fed. R. Civ.
22 P. 19(b)(3); and whether the Plaintiff would have an adequate remedy if the Plaintiff were ruled
23

24
25 ¹ In 2007, Rule 19 was amended, and the word “indispensable” was wholly expunged
26 from the rule. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 856 (2008) (the word
“indispensable” was altogether deleted from Rule 19 in the 2007 amendments). Nonetheless, the
Court will refer to “indispensable” parties, because it is a useful term of art.

1 against Fed. R. Civ. P. 19(b)(4).

2 Here, the Court can award complete relief to Plaintiff, assuming Defendants are found
3 liable, even if Mr. Carder is dropped from the suit. Moreover, by dropping Mr. Carder, the Court
4 will not prevent Plaintiff from achieving an adequate remedy. The only argument Plaintiff
5 advances for why Mr. Carder is indispensable is that Plaintiff has stated a claim for relief against
6 Mr. Carder, and "it is possible that a jury could find Mr. Carder liable under WLAD, but not the
7 companies." (Dkt. No. 24 at 9.) However, that concern cannot be dispositive, as it would bar a
8 Defendant from being dropped under Rule 21 because it is not indispensable under Rule 19(b)
9 under nearly any circumstances, even though such a procedure is allowed under the rules. *See,*
10 *e.g., Sams*, 625 F.2d at 277. Moreover, as the case against Mr. Carder will be dismissed without
11 prejudice, Plaintiff will not be prevented from filing a suit against Mr. Carder in state court,
12 meaning that any prejudice accruing to her is minimal. The Court gives little weight to Plaintiff's
13 sole argument for why the Court should not drop Mr. Carder.

14 Accordingly, the Court hereby drops Defendant Leonard Carder as a defendant. As Mr.
15 Carder was the sole non-diverse defendant in this action,² there is complete diversity, and
16 Defendant has met its burden regarding the amount of controversy. Accordingly, Plaintiff's
17 motion to remand is DENIED.

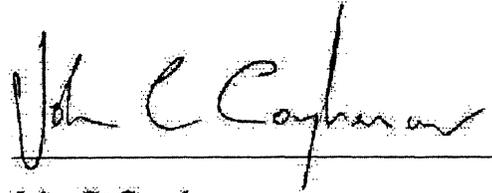
18 **III. CONCLUSION**

19 For the foregoing reasons, Defendants' motion to drop Leonard Carder as a defendant,
20 (Dkt. No. 20), is GRANTED. All claims against Mr. Carder are DISMISSED without prejudice
21 to Plaintiff filing claims against him in state court. Plaintiff's motion to remand, (Dkt. No. 17), is
22 DENIED.

23 _____

24 ² As noted by Defendant in its removal petition, and supported by evidence, Defendant
25 ABM Industries, Inc. is a corporation organized under the laws of Delaware with its principal
26 place of business in New York. (Dkt. No. 1 at 2.) Defendant ABM Parking Services, Inc. is a
corporation organized under the laws of California, with its principal place of business in Ohio.
(*Id.*)

DATED this 21st day of February 2014.



John C. Coughenour
UNITED STATES DISTRICT JUDGE

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EXHIBIT 2

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEBI O'BRIEN,

Plaintiff,

v.

ABM INDUSTRIES, INC. d/b/a ABM
PARKING SERVICES, aka AMPCO
SYSTEM PARKING,

Defendant.

CASE NO. 13-2023

ORDER GRANTING MOTION FOR
VOLUNTARY DISMISSAL

This matter comes before the Court on Plaintiff's Motion for voluntary dismissal without prejudice. (Dkt. No. 119.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion.

I. BACKGROUND

Plaintiff Debi O'Brien sues Defendants for actions stemming from her employment with and termination from ABM Parking. The factual and procedural background has been addressed in previous Orders in this case. (See Dkt. Nos. 78, 87, 96.) The Court will now only provide a brief recitation of key points in the procedural history. The matter was originally filed in King County Superior Court on October 10, 2013, and was removed to federal court based on diversity jurisdiction on November 8, 2013. (Dkt. No. 1.) On November 18, 2013, Plaintiff filed an Amended Complaint and joined her former manager, Leonard Carder, as an individual

1 defendant. (Dkt. No. 12.) Plaintiff then moved to remand to state court on the basis that Mr.
2 Carder is a resident of Washington State and diversity jurisdiction no longer existed. (Dkt. No.
3 17.) Defendants moved to drop Mr. Carder as a defendant, arguing that he is not a necessary
4 party within the meaning of Fed. R. Civ. P. 19. (Dkt. No. 20.) The Court granted Defendants'
5 motion and denied the motion to remand on February 21, 2014. (Dkt. No. 31.) The Court noted
6 that "Plaintiff will not be prevented from filing a suit against Mr. Carder in State court, meaning
7 that any prejudice accruing to her is minimal." (Id. at 4.)

8 The discovery disputes in this matter have been especially heated. The Court has
9 repeatedly denied Plaintiff's requests for sanctions and requests to compel discovery, and has
10 granted requests by Defendants for protective orders. (Dkt. Nos. 78, 96, 99, 112.) The Court has
11 granted two continuances in this case, and trial is currently scheduled for July 27, 2015. (Dkt.
12 No. 108.) The second continuance was for only three weeks, instead of the ninety days requested
13 by Plaintiff. (Id.) Plaintiff completed some depositions after the second continuance was granted,
14 but also cancelled five scheduled depositions, apparently after concluding that there was
15 insufficient time to complete necessary discovery. (See Dkt. No. 119 at 6-7; Dkt. No. 126 at 6.)

16 On March 19, 2015, Defendant ABM Industries Inc. ("ABMI") filed a motion for
17 summary judgment. (Dkt. No. 114.) Plaintiff filed a "notice of voluntary dismissal" on the same
18 day. (Dkt. No. 113.) The Court ordered the notice stricken because it did not comply with the
19 requirements of Fed. R. Civ. P. 41. (Dkt. No. 118.) Plaintiff then filed the instant motion to
20 dismiss without prejudice. (Dkt. No. 119.) On March 20, 2015, Plaintiff filed a "Complaint for
21 Damages" in King County Superior Court against current ABM Parking employees Leonard
22 Carder, Paulette Keiza, Matt Purvis, and former ABM Parking Employees Dan Lawson and
23 Hugh Koskinen and their spouses. (Ex. 6, Dkt. No. 126.) On April 2, 2015, Defendants moved
24 for summary judgment in the case before this Court. (Dkt. No. 121.) Defendant ABMI asked to
25 join the motion if it is not dismissed pursuant to the motion for summary judgment it filed on its
26 own behalf. Id at 2 n.2. Defendants have also filed a cross motion to stay the state court action.

1 (Dkt. No. 126.)

2 **II. DISCUSSION**

3 **A. Rule 41(a)(2) Motion for Voluntary Dismissal**

4 After a defendant serves an answer or a motion for summary judgment, and absent a
5 stipulation by all parties who have appeared, "an action may be dismissed at the plaintiff's
6 request, only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).
7 The Court has considerable discretion as to whether to grant a motion for voluntary dismissal.
8 *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982). However, "[a]
9 district court should grant a motion for voluntary dismissal under Rule 41(a)(2)4 unless a
10 defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*,
11 263 F.3d 972, 975 (9th Cir. 2001) (citing *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th
12 Cir. 1987)). "Legal prejudice" is "prejudice to some legal interest, some legal claim, some legal
13 argument." *Id.* at 976. Legal prejudice "does not result merely because the defendant will be
14 inconvenienced by having to defend in another forum or where a plaintiff would gain a tactical
15 advantage by that dismissal." *Id.* Defendants argue that they will be prejudiced in two ways.

16 **B. Legal Prejudice**

17 Defendants argue that they have already invested more than \$250,000 in legal fees and
18 costs defending against Plaintiff's claims, and that permitting Plaintiff to dismiss the case and
19 proceed with her state law case will leave defendants "with little to show" from their investment.
20 (Dkt. No. 126 at 13-14.) However, "the expense incurred in defending against a lawsuit does not
21 amount to legal prejudice." *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir.
22 1996). In the event that the Court grants the motion for voluntary dismissal, Defendants ask for
23 an award of costs and fees. The Court finds that such an award is unwarranted. *Id.* ("Imposition
24 of costs and fees as a condition for dismissing without prejudice is not mandatory.") (citing
25 *Stevedoring Servs. of Am. v. Armilla Int'l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989)).

26 Defendants also argue that voluntary dismissal will cause them plain legal prejudice

1 because they will be deprived of a federal forum. (Dkt. No. 126 at 14.) However, while loss of a
2 federal forum can be a factor in determining legal prejudice, it does not by itself constitute legal
3 prejudice. Gunderson 2007 WL 4246176, at *3 (citing Westlands, 100 F.3d at 96; Smith, 263
4 F.3d at 976). Without more, Defendants are unable to establish legal prejudice.

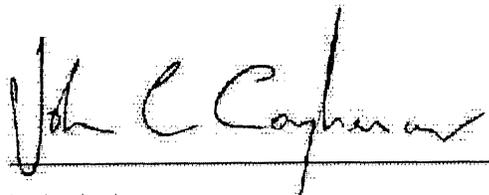
5 **C. Other Conditions**

6 Defendants request the imposition of a series of additional conditions, should the Court
7 grant the motion for voluntary dismissal. Most notably, Defendants ask the Court to rule on the
8 pending motions for summary judgment because it would "be unjust for Plaintiff to escape a
9 ruling on the merits of these motions." (Dkt. No. 126 at 16.) This "presumes a favorable result"
10 for Defendants. Mitchell-Jones v. Menzies Aviation, Inc., No. C10-1190JLR, 2011 WL 3273221,
11 at *3 (W.D. Wash. July 28, 2011). The Court declines to impose the requested conditions.

12 **CONCLUSION**

13 For the foregoing reasons, the Court GRANTS Plaintiff's motion for voluntary dismissal
14 (Dkt. No. 119). The case is DISMISSED without prejudice.

15 DATED this 23rd day of April 2015.

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22 John C. Coughenour
23 UNITED STATES DISTRICT JUDGE
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EXHIBIT 3

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEBI O'BRIEN,

Plaintiff,

v.

ABM INDUSTRIES, INC., et al.,

Defendants.

CASE NO. C13-2023-JCC

ORDER GRANTING MOTION FOR
JUDGMENT ON THE PLEADINGS

This matter comes before the Court on Defendants' motion for judgment on the pleadings (Dkt. No. 79). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

Plaintiff Debi O'Brien sues Defendants for actions stemming from her employment with and termination from ABM Parking. Defendants, who anticipate bringing a motion for summary judgment, now move for judgment on the pleadings pursuant to Rule 12(c) for three of Plaintiff's claims. Specifically, Defendants ask the Court to dismiss the following claims: (1) that Defendants retaliated against Plaintiff in violation of the anti-retaliation provisions of the Washington Law Against Discrimination ("WLAD," RCW 49.60.210) and the Washington

1 Family Leave Act ("WFLA," RCW 49.78.300)¹; (2) that Defendants engaged in associational
2 discrimination under the WLAD; and (3) that Defendants terminated Plaintiff from her job in
3 violation of public policy.

4 **II. DISCUSSION**

5 **A. Legal standard**

6 Federal Rule 12(c) "faces the same test as a motion under Rule 12(b)(6)." *McGlinchy v.*
7 *Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Therefore, "a motion for judgment on the
8 pleadings may be granted only if the moving party clearly establishes that no material issue of
9 fact remains to be resolved and that he or she is entitled to judgment as a matter of law." *Nat'l*
10 *Fid. Life Ins. Co. v. Karaganis*, 811 F.2d 357, 358 (7th Cir. 1987) (citing *Flora v. Home Fed.*
11 *Sav. & Loan Ass'n*, 685 F.2d 209, 211 (7th Cir. 1982). Where the complaint fails to plead
12 sufficient facts "to state a claim of relief that is plausible on its face," the complaint must be
13 dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550
14 U.S. 544, 570 (2007)). "The court may consider only matters presented in the pleadings and must
15 view the facts in the light most favorable to the nonmoving party." *Karaganis*, 811 F.2d at 358,
16 (citing *Republic Steel Corp. v. Pa. Eng'g Corp.*, 785 F.2d 174, 178 (7th Cir. 1986)). Because
17 12(b)(6) and 12(c) "motions are analyzed under the same standard, a court considering a motion
18 for judgment on the pleadings may give leave to amend and 'may dismiss causes of action rather
19 than grant judgment.'" *Sprint Tel. PCS, L.P. v. Cnty. of San Diego*, 311 F.Supp.2d 898, 903
20 (S.D. CA. Jan 5, 2004) (citation omitted). Regarding partial judgment, Rule 12(c) "does not
21 expressly authorize 'partial' judgment[s], neither does it bar them, and it is common practice to
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23
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26 ¹ Plaintiff did not address the Washington Family Leave Act in the Complaint. Instead, this Act is addressed for the first time in Plaintiff's Response to the instant motion.

1 apply Rule 12(c) to individual causes of action." *Moran v. Peralta Cmty. Coll. Dist.*, 825 F.Supp.
2 891, 893 (N.D. Cal. Jan. 22, 1993).

3 **B. Choice of Law**

4 "In diversity cases, a federal court must conform to state law to the extent mandated by
5 the principles" of *Erie R.R. Co. v. Tompkins* and apply "state substantive law and federal
6 procedural law." *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003) (citing
7 generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). "[P]rimary rights and obligations of
8 parties in a diversity suit arising from state law, including the elements of a plaintiff's cause of
9 action," are matters of substantive law. *Neely v. St. Paul Fire and Marine Ins. Co.*, 584 F.2d 341,
10 345 (9th Cir. 1978) (citing *Erie*, 304 U.S. at 64). However, "Federal Rules of Civil Procedure
11 apply irrespective of the source of subject matter jurisdiction, and irrespective of whether the
12 substantive law at issue is state or federal." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102
13 (9th Cir. 2003).

14
15 **C. Retaliation**

16
17 Plaintiff alleges "that she was subject to unlawful retaliation for her co-worker's
18 protected activity under RCW 49.60 (WLAD) and under RCW 49.78 (WFLA)." (Dkt. No. 80 at
19 7.) The co-worker at issue is Plaintiff's daughter, Bernadette Stickle, whose protected activity
20 involved opposition to ABM's violations of the WLAD and the WFLA. (Id.) Defendants move
21 to dismiss because "Washington law does not recognize a cause of action for unlawful retaliation
22 based on the allegedly protected actions of a person other than the plaintiff" and because
23 Plaintiff's retaliation claim "rests solely on alleged actions by her daughter." (Dkt. No. 83 at 3.)
24 Defendant's analysis of Washington law is correct.
25

26 The anti-retaliation provision of the WLAD states that

1 It is an unfair practice for any employer, employment agency, labor union, or other
2 person to discharge, expel, or otherwise discriminate against any person because he or
3 she has opposed any practices forbidden by this chapter, or because he or she has filed a
4 charge, testified, or assisted in any proceeding under this chapter.

5 RCW 49.60.210(1) (emphasis added). The clear language of the statute indicates that a
6 plaintiff claiming retaliation under the WLAD must establish that he or she personally engaged
7 in protected activity. There is no provision under the WLAD allowing for a retaliation claim
8 based on the protected activities of a co-worker. See *Ellorin v. Applied Finishing, Inc.*, 996 F.
9 Supp. 2d 1070, 1089 (W.D. Wash. 2014) (plaintiff claiming retaliation under Title VII and the
10 WLAD must show that she engaged in protected activity). Similarly, the WFLA provides that
11 “[i]t is unlawful for any person to discharge or in any other manner discriminate against any
12 individual because the individual has” engaged in protected activity. RCW 49.78.300(2)
13 (emphasis added). Plaintiff makes no allegation that she was retaliated against because of her
14 own protected activities. Her allegations are therefore distinguishable from those in the cases
15 cited in Plaintiff’s response, where there were allegations that plaintiffs were retaliated against
16 for their own participation or cooperation with internal or police investigations. See *Bilaka v.*
17 *Washington State Bar Ass’n*, 109 Wash. App. 575, 583, 36 P.3d 1094, 1098 (2001); *Gaspar v.*
18 *Peshastin Hi-Up Growers*, 131 Wash. App. 630, 128 P.3d 627 (2006). Plaintiff is therefore
19 unable to state a claim for retaliation under the WLAD or the WFLA.
20

21 **D. Associational Discrimination**

22 Plaintiff’s Complaint includes a claim of “associational discrimination in violation of
23 RCW 49.60.” (Dkt. No. 44 at 12, ¶ 5.5.) A claim for associational discrimination is not
24 recognized under the WLAD. RCW 49.60.180; see *Sedlacek v. Hillis*, 145 Wn.2d 379, 390-91,
25 36 P.3d 1014 (2001). In her response to the instant motion, Plaintiff says she “is not alleging
26

1 associational discrimination.” (Dkt. No. 80 at 7, emphasis in original.) Plaintiff therefore appears
2 to concede that she has no associational discrimination claim.

3 **E. Wrongful Discharge Tort**

4 Plaintiff alleges that she can establish wrongful discharge in violation of public policy
5 because she was “terminated in retaliation for her discovery and reporting of financial
6 irregularities in ABM’s Accounts Receivables at the Pacific Place Garage.” (Dkt. No. 44 at 10, ¶
7 4.28.) Plaintiff argues that her actions were intended to protect the public interest and promote
8 the public policy of taxing local parking businesses, as enunciated in Seattle Municipal Code,
9 Chapter 5.35, and in RCW 82.80.070. (Id.)

10
11 In order to prevail on a claim of wrongful discharge in violation of public policy, Plaintiff
12 must “prove (1) the existence of a clear public policy (clarity element); (2) that discouraging the
13 conduct in which [she] engaged would jeopardize the public policy (jeopardy element); and (3)
14 that the public-policy-linked conduct caused the dismissal (causation element).” *Korslund v.*
15 *DynCorp Tri-Cities Servs., Inc.*, 156 Wash. 2d 168, 178, 125 P.3d 119, 125 (2005) (citations and
16 internal quotation marks omitted). Defendants argue that, even assuming that Plaintiff can
17 establish the existence of clarity and causation, she cannot establish the jeopardy element of the
18 claim.
19

20
21 Proving the jeopardy element requires a plaintiff to show that “he or she engaged in
22 particular conduct, and the conduct directly relates to the public policy, or was necessary for the
23 effective enforcement of the public policy.” *Id.* at 181 (citations and internal quotation marks
24 omitted). In order to establish this, a plaintiff must “show that other means of promoting the
25 policy are inadequate.” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wash. 2d 200, 222, 193 P.3d
26 128, 139 (2008). Here, Plaintiff would need to show that her actions were “the only available

1 adequate means” to protect the public interest and promote the public policy of taxing local
2 parking businesses. *Id.* In order for this to be true, “the criminal laws, enforcement mechanism,
3 and penalties all have to be inadequate to protect the public.” *Cudney v. ALSCO, Inc.*, 172 Wash.
4 2d 524, 537, 259 P.3d 244, 250 (2011).

5
6 In *Cudney*, the Plaintiff alleged retaliatory termination based, in part, on having reported
7 that a managerial employee had driven a company vehicle while intoxicated. *Id.* at 527. The
8 Supreme Court of Washington found that there was “a huge legal and police machinery . . .
9 designed to address” the problem of drunk driving. *Id.* at 537. The court found that reporting the
10 problem to an employment supervisor with no law enforcement capability was “a roundabout
11 remedy that [was] highly unlikely to protect the public from the immediate problem of a drunk
12 driver on its roads.” *Id.* Thus, the court found both that reporting the problem to the plaintiff’s
13 employer was not likely to solve the problem, and that the plaintiff could not establish that
14 simply allowing “law enforcement do its job and enforce DUI laws [was] an inadequate means
15 of promoting the public policy.” *Id.*

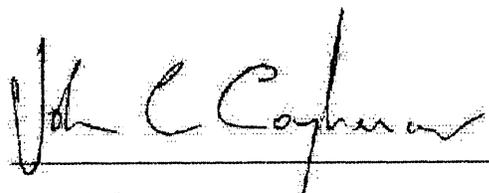
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18 Defendants argue that Ms. O’Brien, like the plaintiff in *Cudney*, is unable to “show that
19 having law enforcement do its job . . . is not an adequate way to protect the public from the
20 impact of” the alleged unlawful activity. (Dkt. No. 79 at 12.) Plaintiff counters by noting that
21 “Defendants point to no administrative scheme or remedy pursuant to which Plaintiff could have
22 acted differently than she did, to promote the clear public policy mandated by the municipal code
23 and the statute.” (Dkt. No. 80 at 12.) It is, however, Plaintiff who bears the burden of
24 demonstrating that there were no other adequate means of promoting the public policy that she
25 was concerned with. Because the Seattle Municipal Code includes a robust scheme for
26

1 enforcement of parking revenue taxation requirements, Plaintiff must demonstrate that this
2 scheme was in some manner incapable of providing necessary protection for the taxation policies
3 at issue. See SEATTLE, WA Municipal Code §§ 5.55.220, .230, .260. Plaintiff alleges no facts
4 indicating this is the case, or even that it might be. Because Plaintiff cannot establish that the
5 existing enforcement scheme was inadequate, she cannot prove that her actions were necessary
6 to promote the public policy at issue. She therefore cannot establish the jeopardy element, and
7 cannot state a claim for wrongful discharge in violation of public policy.
8

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendants' motion for judgment on the pleadings (Dkt. No.
11 79) is GRANTED. It is hereby ORDERED that Plaintiff's claims of retaliation under RCW
12 49.60.210 and RCW 49.78.300, associational discrimination under RCW 49.60, and wrongful
13 termination in violation of public policy, are DISMISSED with prejudice.
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15 DATED this 18th day of February 2015.
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21 John C. Coughenour
22 UNITED STATES DISTRICT JUDGE
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EXHIBIT 4

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DEBI O'BRIEN, a married woman,

Plaintiff,

v.

LEONARD CARDER AND JANE DOE
CARDER, and the marital community
thereof, HUGH KOSKINEN, a single
man, MATT PURVIS AND JANE DOE
PURVIS and the marital community
thereof, DAN LAWSON AND JANE
DOE LAWSON, and the marital
community thereof, PAULETTE KETZA
AND JOHN DOE KETZA, and the
marital community thereof, ROD
HOWREY AND JANE DOE HOWREY
and the marital community thereof, and
VIVIAN SMITH AND JOHN DOE
SMITH and the marital community
thereof, and the corporations doing ABM
Industries ("ABMI") and ABM Parking
Services (d/b/a "Ampco" and ABM
Onsite Services West),

Defendants.

NO: 15-2-06791-5 SEA

SECOND AMENDED COMPLAINT
FOR DAMAGES

Plaintiff, by and through the undersigned counsel of record, alleges as follows:

I. PLAINTIFF

SECOND AMENDED COMPLAINT- 1

The Ferguson Firm, PLLC
200 W. Thomas Street, Suite 420
Seattle, WA 98119
Tel: 206-624-5696 Fax: 206-770-7340
sandra@slfergusonlaw.com

1 1.1. Plaintiff, Debi O'Brien, is a married woman who resides in King County,
2 Washington. At all times relevant to this lawsuit, Plaintiff was an employee of Ampco
3 Systems Parking (also doing business as "ABM Parking Services, Inc.", currently doing
4 business as "ABM Onsite West, Inc.") which was under the umbrella of "ABM
5 Industries" (hereinafter referred to collectively as "The Company").

6 At all times relevant to this lawsuit, The Company was located in King County,
7 Washington, with more than 8 employees, and the individual defendants were Plaintiff's
8 supervisors or managers while she was employed by the Company.
9

10 II. DEFENDANTS

11 2.1 The individual defendant, **Leonard Carder**, is a person who acted in the
12 interests, directly or indirectly, of The Company, which employs eight or more
13 persons.

14 2.2 The individual defendant, **Hugh Koskinen**, is a person who acted in the interests,
15 directly or indirectly, of The Company, which employs eight or more persons.

16 2.3 The individual defendant, **Dan Lawson**, is a person who acted in the interests,
17 directly or indirectly, of The Company, which employs eight or more persons.

18 2.4 The individual defendant, **Matt Purvis** is a person who acted in the interests,
19 directly or indirectly, of The Company, which employs eight or more persons.

20 2.5 The individual defendant, **Paulette Ketza** is a person who acted in the interests,
21 directly or indirectly, of The Company, which employs eight or more persons.
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1 2.6 The individual defendant, **Rod Howery**, is a person who acted in the interests,
2 directly or indirectly, of The Company, which employs eight or more persons.

3 2.7 The individual defendant, **Vivian Smith**, is a person who acted in the interests,
4 directly or indirectly, of The Company, which employs eight or more persons.

5 2.8 The corporation, **ABM Parking Services** (d/b/a "Ampco", d/b/a "ABM Onsite
6 Services West") is a wholly owned subsidiary of ABM Industries, doing business
7 in the State of Washington, with 8 or more employees at locations throughout
8 Washington, and employed the plaintiff, Debi O'Brien from October 2007 to
9 February 2013.
10

11 2.9 The corporation, **ABM Industries** ("ABMI"), is a publicly traded corporation
12 which is the parent corporation of ABM Janitorial and ABM Parking Services
13 ("ABM Parking") which are employers in the State of Washington, with 8 or
14 more employees and which employed the plaintiff, Debi O'Brien from
15 approximately June 2000 to February 2013. On information and belief, ABM
16 Industries was, at times relevant to this lawsuit, the employer of individual
17 managers who are defendants in this lawsuit, and was the employer of the
18 plaintiff, Debi O'Brien, as that term is defined under the Washington Law
19 Against Discrimination, RCW 49.60 ("WLAD").
20

21 **III. JURISDICTION AND VENUE**
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24

1 3.1 The Company employs more than eight (8) employees at locations throughout the
2 State of Washington and is an "employer" under the Washington Law Against
3 Discrimination ("WLAD"), RCW § 49.60.

4 3.2 At all times relevant to this lawsuit, the individual defendants were supervisors
5 and/or managers and/or agents of The Company which employed Plaintiff in
6 King County, Washington.

7 3.3 The events, acts and omissions giving rise to Plaintiff's claims alleged herein,
8 occurred in King County, Washington.

9 3.4 Jurisdiction is proper in King County, Washington pursuant to RCW § 2.08.010.

10 3.5 Venue is proper in King County, Washington pursuant to RCW § 4.12.025.

11
12 **IV. FACTS**

13 4.1 Plaintiff was hired by The Company in June 2000. Plaintiff worked in the
14 Accounts Receivable Department of ABM's Janitorial company ("Janitorial").

15 4.2 Plaintiff's performance was satisfactory. Plaintiff was progressively assigned
16 greater responsibilities.

17
18 4.3 Plaintiff earned a Human Resources Certification in June 2003. She was
19 assigned "HR" responsibilities, such as monitoring sexual harassment training,
20 maintaining motor vehicle renewals for employees in driving positions, serving
21 on panels for union grievances, and performing other tasks assigned to her. Her
22 manager for these HR functions was Charlie Jones.
23
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1 4.4 On October 22, 2007, Plaintiff was promoted to Human Resources Coordinator/
2 Operations Manager in The Company's Parking line of business (d/b/a as
3 "Ampco", then "ABM Parking Services", then "ABM Onsite West, Inc.")
4 (hereinafter referred to as "The Company" or "ABM Parking").

5 4.5 Plaintiff's job title or position (HR Coordinator/Operations Manager) was
6 created at the initiative and discretion of the individual defendant, Leonard
7 Carder. Leonard Carder was Vice President of the Northwest Region at the
8 time the position was created. On information and belief, he was promoted to
9 the position of Executive Vice President of The Company during the time
10 Plaintiff was employed with ABM Parking Services.
11

12 4.6 Leonard Carder was responsible for the operations budget for the Northwest
13 Region of ABM Parking. Mr. Carder decided to create Plaintiff's local HR
14 position in order to meet the needs of the Northwest Region.
15

16 4.7 In consultation with Madeline Kwan, HR Director, Mr. Carder determined the
17 job functions to be performed by the local HR position which was to serve his
18 region. Madeline Kwan interviewed Ms. O'Brien for the new position, and
19 recommended that she be hired. Leonard Carder approved the hiring of Ms.
20 O'Brien.

21 4.8 Madeline Kwan was the HR Director for ABM Parking. She worked in the San
22 Francisco office. Ms. Kwan was responsible for the HR services provided to
23 the Northern California and Northwest regions.
24

1 4.9 Ms. Kwan reported to the defendant, Vivian Smith—Vice President of Human
2 Resources for “Corporate”. On information and belief, Vivian Smith was
3 responsible for Human Resources functions for “ABM Industries”, which
4 included (inter alia) the business lines of Parking, Security, and Janitorial.

5 4.10 Plaintiff’s date of hire at ABM Parking was October 22, 2007. She retained her
6 seniority (for purposes of accrued vacation and other benefits) when she moved
7 from ABM Janitorial to ABM Parking. Plaintiff was eventually terminated
8 from her employment at ABM Parking, on February 6, 2013.

9
10 4.11 During her employment as an HR Coordinator/Operations Manager at ABM
11 Parking, Plaintiff initially reported to Leonard Carder, Hugh Koskinen and Dan
12 Lawson. In 2010, Mr. Koskinen and Mr. Lawson left ABM Parking. Matt
13 Purvis became the Branch Manager and someone to whom Plaintiff reported.
14 Mr. Purvis reported directly to Leonard Carder.

15
16 4.12 Plaintiff had reporting relationships with all of the defendants, including
17 Leonard Carder (Regional Vice President), Hugh Koskinen (Senior Operations
18 Manager), Dan Lawson (Assistant Branch Manager), Matt Purvis (Branch
19 Manager), Rod Howery (Regional VP), and Paulette Ketzka (Special Projects).
20 Leonard Carder had authority over all of these other managers.

21 4.13 All of the individual defendants (including but not limited to Leonard Carder)
22 acted directly or indirectly, in the interests of their employer, The Company.
23
24

1 4.14 Leonard Carder gave Hugh Koskinen disciplinary authority over Plaintiff after
2 she was hired by ABM Parking, and until Mr. Koskinen left ABM Parking on
3 April 23, 2010.

4 4.15 Dan Lawson had disciplinary authority over Plaintiff until he left ABM Parking
5 in October 2010.

6 4.16 Leonard Carder gave Matt Purvis supervisory authority over Plaintiff between
7 2010 and the date of Plaintiff's termination on February 6, 2013.

8
9 4.17 At some point, Leonard Carder was promoted to Executive Vice President. The
10 defendant, Rod Howery (a Vice President in California) assumed some
11 additional responsibilities for the Northwest Region and continued to work in
12 the San Francisco office. Mr. Howery was Leonard Carder's subordinate.

13 4.18 The defendant, Paulette Ketza, was a manager for The Company in Spokane,
14 Washington. She had supervisory authority over Plaintiff for the purposes of
15 special projects which were part of her responsibilities. This included the
16 services provided by ABM Parking at the annual Spokane Fair.

17
18 4.19 Hugh Koskinen has testified that Leonard Carder was his "mentor, coach and
19 leader" when he was employed at ABM Parking between 2006 and 2010. He
20 also testified that Mr. Carder was someone he held "in very high regard".

21 4.20 Mr. Koskinen had the opportunity to observe and learn from Mr. Carder's
22 handling of employee relations or personnel matters (specifically, employee
23 complaints). For example, Mr. Koskinen testified that Mr. Carder had a
24

1 practice of meeting personally, with employees who made complaints. Mr.
2 Koskinen referred to this practice as “escalation”. However, he testified that
3 this practice of Mr. Carder’s to meet and talk to the employees who made
4 complaints, served to “de-escalate” these situations or the employees’
5 grievances. According to Hugh Koskinen, Leonard Carder was included in all
6 “sensitive” matters involving employee relations; particularly, sexual
7 harassment complaints. Mr. Koskinen testified that he kept Mr. Carder in “the
8 loop.”

9
10 4.21 Hugh Koskinen testified that he did not regard or treat Debi O’Brien as a part of
11 Human Resources, although he did acknowledge that her job title was HR
12 Coordinator. In fact, Mr. Koskinen testified that he did refer employee
13 complaints to Ms. O’Brien due to her role as an HR representative. In these
14 matters, Ms. O’Brien’s practice was to consult and seek guidance from her HR
15 managers. On occasions when Mr. Koskinen did not agree with decisions or
16 actions taken by Ms. O’Brien with regard to HR matters, this would anger and
17 frustrate him and he would become hostile toward her and sometimes, would
18 discipline her.

19
20 4.22 Mr. Koskinen’s testimony in his deposition, taken in March 2015, revealed a
21 deeply-held resentment of Ms. O’Brien due to her HR role in the Northwest
22 Region, and her communications and reporting relationships with Human
23 Resources managers at higher levels in The Company.
24

1 4.23 In approximately March or April, 2009, Plaintiff became responsible (in her
2 capacity as an HR representative) for addressing a sexual harassment complaint
3 which had been lodged by a female employee named Melody Dillon. Ms.
4 Dillon reported an incident in which two male valets passed around and
5 presented to her a sexually explicit text. Ms. Dillon found this conduct
6 unwelcome and she reported it to her supervisor. Ms. Dillon's supervisor
7 reported the complaint to Hugh Koskinen and the HR Department had
8 knowledge of Ms. Dillon's complaint.

10 4.24 Debi O'Brien was instructed to write up the two male valets, which she did.
11 After Ms. Dillon made her complaint, the male valets subjected Ms. Dillon to a
12 hostile work environment which she also complained about.

13 4.25 Hugh Koskinen intimidated and harassed Melody Dillon after she lodged her
14 complaint. Becky Livermore, who was Ms. Dillon's direct supervisor and was
15 under Hugh Koskinen's authority and direction, also engaged in retaliation
16 against Melody Dillon after Ms. Dillon made her complaints. For example,
17 after Ms. Dillon complained about sexual harassment and retaliation, she
18 received several unwarranted write-ups within a short period of time. The
19 Company formed an intention to fire Melody Dillon.

21 4.26 After Ms. Dillon complained about sexual harassment and retaliation, she was
22 required to perform "walk through" inspections of the Expedia Garage where
23 she held the position of bookkeeper. The Expedia Garage had 10 stories or
24

1 floors. Ms. Dillon was frightened when she did these inspections. Hugh
2 Koskinen testified in his deposition that he was the person who imposed this
3 requirement.

4 4.27 Melody Dillon also testified that, close to the time she left The Company, she
5 was summoned to the office of a high-level executive at the corporate offices in
6 Seattle. She could not recall the name of this person with whom she met.
7 However, she vividly recalled that the effect of this meeting on her was that she
8 was "highly intimidated" and it caused her to "dissociate". On information and
9 belief, Leonard Carder is the person who summoned Ms. Dillon to his office
10 and intimidated her.

12 4.28 When Debi O'Brien, in her capacity as an HR manager, investigated and took
13 steps to remedy Melody Dillon's complaint, Hugh Koskinen angrily criticized
14 Ms. O'Brien in an e-mail which he fashioned as a disciplinary warning.

16 4.29 On another occasion, Hugh Koskinen came to Plaintiff and questioned Plaintiff
17 in an accusatory manner about her relationship to Melody Dillon's mother
18 (whom Plaintiff had previously indicated she had gone to high school with).
19 On this occasion, he yelled at Plaintiff and became very angry and
20 confrontational, then wrote her up for being insubordinate.

21 4.30 Mr. Koskinen informed Plaintiff that Melody Dillon was about to be fired.
22 Shortly thereafter, Ms. Dillon was forced to resign due to the hostile work
23 environment.
24

1 4.31 Around the time that Plaintiff handled Ms. Dillon's sexual harassment
2 complaint, she began to experience a hostile work environment. For example,
3 she was not invited to company-sponsored parties or events, she received a
4 series of unwarranted write-ups from the defendants, Dan Lawson and Hugh
5 Koskinen. Mr. Carder, Mr. Koskinen and Mr. Lawson became increasingly
6 confrontational and critical of Plaintiff, she was stripped of her job title as HR
7 Coordinator, and she was falsely accused of malingering. She was forced to
8 come in to work while she was on a vacation, even though Mr. Koskinen had
9 previously approved her request for a vacation day.

10
11 4.32 In late 2009, Hugh Koskinen informed Plaintiff that she would be required to
12 work the Spokane Fair in 2009 (despite a known disability), and that the work
13 hours would be from 6:00 A.M. to midnight. Plaintiff expressed concern about
14 this assignment due to her medical condition. For reasons unknown to Plaintiff,
15 she was not required to work the Spokane Fair that year. She was excused from
16 the assignment within a few days of the Fair. No one explained the reason.

17
18 4.33 In 2010, a number of additional responsibilities were added to Plaintiff's job
19 description. These additional responsibilities included working as a valet,
20 parking cars in the evenings and on weekends. Also, Leonard Carder
21 personally established a program called "Customer Service Initiatives" and
22 assigned to Plaintiff the responsibility of performing walk-through inspections
23 of approximately 26 garages and 10 surface lots in the Seattle/Bellevue area.
24

1 Mr. Carder told Plaintiff it was her job to ensure that the garages were so clean
2 and pleasant that a family could have a picnic there.

3 4.34 As the CSI Program was further developed by Mr. Carder, Ms. O'Brien was
4 required—in addition to her pre-existing duties—to travel to the parking
5 garages for site visits and inspections, walk through the garages, floor by floor,
6 photograph and take notes of each location, then submit her reports known as
7 Customer Service Initiatives (“CSI Reports”) to Leonard Carder, Hugh
8 Koskinen, Matt Purvis and later, Dan Lawson. Mr. Carder would review her
9 reports and make comments and changes which would be returned to her.
10

11 4.35 At some point, Mr. Carder increased Plaintiff's responsibilities by setting a
12 minimum requirement that she perform at least 10 garage inspections per week.
13 This requirement was not reasonable. She was rarely, if ever, able to meet the
14 requirement. Therefore, she was repeatedly written up by Hugh Koskinen and
15 Dan Lawson, and was criticized by Matt Purvis in her annual performance
16 evaluations.
17

18 4.36 A number of the garages Plaintiff was required to inspect were dangerous and
19 the defendants knew or had reason to know of the danger to which Plaintiff was
20 being exposed on a regular basis. The dangerous conditions were described in
21 her CSI reports which were submitted to Mr. Carder and her other managers. In
22 addition, she described feeling very afraid when she performed these
23 inspections. For example, in order to discharge her responsibilities, Plaintiff
24

1 was required to walk into stairwells alone. In these stairwells, she came upon
2 drug deals and other criminal activities in progress. Plaintiff was knocked into
3 bushes, she stumbled on human waste and drug paraphernalia. These hazardous
4 conditions were described in her CSI reports which were regularly submitted to
5 Mr. Carder and Mr. Koskinen.

6 4.37 Plaintiff's husband, Tim O'Brien, began to accompany her on these CSI
7 inspections for certain of the most dangerous garages because he was concerned
8 for his wife's safety. This required that the inspections be done by the two of
9 them on weekends or in the evenings, at times that Plaintiff's husband was not
10 working at his own job and could go with her. The defendants were aware of
11 the fact that Plaintiff's husband was accompanying her due to safety concerns.

12
13 4.38 Tim O'Brien's concerns for his wife's safety eventually caused him to write a
14 letter to Leonard Carder notifying him of the dangers, and requesting that he
15 provide personnel from "ABM Security" to accompany Ms. O'Brien when she
16 did these CSI inspections.

17
18 4.39 Leonard Carder never responded to Tim O'Brien's letter. The HR Director,
19 Madeline Kwan, received a copy of Mr. O'Brien's letter. However, no one
20 from HR ever responded or took any affirmative steps to ensure Ms. O'Brien's
21 safety in the workplace. Instead, Leonard Carder and his subordinates
22 continued to insist that Plaintiff perform a minimum of 10 inspections per week.
23
24 When Ms. O'Brien could not meet the requirement, she was written up on two

1 occasions by the defendants Hugh Koskinen and Dan Lawson, and she was
2 repeatedly criticized by the defendant Matt Purvis, in her written performance
3 evaluations.

4 4.40 In approximately November or December 2011, Plaintiff was given yet another
5 new job assignment. She was assigned to investigate Accounts Receivable
6 problems and other problems at one of Defendant's locations, the Pacific Place
7 Parking Garage. Pacific Place Garage is owned by the City of Seattle. It was
8 viewed as an important and/or high-profile account of The Company. Plaintiff
9 was told that The Company wanted a management presence there.
10

11 4.41 Plaintiff discharged the responsibilities assigned to her at the Pacific Place
12 Parking Garage. She investigated the Accounts Receivables problems and
13 found accounting problems or irregularities which she duly reported to her
14 manager, Matt Purvis. Mr. Purvis discussed these issues with Leonard Carder.
15

16 4.42 Plaintiff established protocols or Standard Operating Procedures at the Pacific
17 Place Garage so that the problems would not continue. The employees at that
18 location did not cooperate or follow the procedures she put in place. She
19 reported this to the defendant, Matt Purvis, who reported to Leonard Carder.
20 However, she did not receive the support which she expected and needed. No
21 corrective action was taken against the manager at the Pacific Place Garage.
22 Plaintiff recommended replacing the location manager (Ja Ja Drew) with a more
23 successful manager. Her recommendation was not followed.
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4.43 In approximately August 2012, Plaintiff was again informed that she would be required to work five consecutive days at a fair in Spokane Washington, requiring potentially long hours of standing on her feet in the summer heat. Matt Purvis expressly recommended that Plaintiff should be required to work the Fair and not be asked whether this was something she could do

4.44 Plaintiff reminded the defendants of her disability and requested a reasonable accommodation for working the Spokane Fair. The defendant in charge of the Spokane Fair was Paulette Ketza. Matt Purvis, Rod Howery, and Paulette Ketza were on notice of Plaintiff's disability and request for reasonable accommodation. They did not engage in the interactive process. However, they assured her that she would not be require to work long hours.

4.45 Plaintiff was required to work three days at the Spokane Fair in September 2012, without a reasonable accommodation. She worked two 12-hour days and one 8-hour day. She was given the job of directing traffic. This required standing all day, waving her arms. These physical activities were the type of activities she was to avoid because they would exacerbate her physical condition.

4.46 In October 2012, The Company lost its contract with the City of Seattle to operate and manage the Pacific Place Garage. The Company had had this contract with the City for approximately 10 years (since 2000).

1 4.47 A competitor of ABM, "Impark", was awarded the contract for the Pacific Place
2 Garage. By this time, Plaintiff's daughter, Bernadette Stickle, was an employee
3 of Impark.

4 4.48 Ms. Stickle was a former employee of The Company. The defendants were
5 aware that Ms. Stickle went to work at Impark after she was terminated from
6 The Company in approximately 2009.

7 4.49 As an Impark employee, Ms. Stickle was required to set up new customer
8 accounts. This involved an audit of the Pacific Place Garage for a period of
9 time the Garage was managed and operated by The Company. As a result, Ms.
10 Stickle discovered revenue losses of at least \$30,000.00 per month for the time
11 period under review.
12

13 4.50 Impark notified the City of Seattle, which was poised to sell the Pacific Place
14 Garage to a group of investors or developers without opening the sale up to
15 public bid.
16

17 4.51 The Seattle Police Department did a limited "investigation" into Impark's (i.e.,
18 Ms. Stickle's) discovery of lost or missing taxpayer revenue. The investigator
19 falsely or incorrectly stated in his report that he interviewed Matt Purvis. Mr.
20 Purvis testified that he was never interviewed by anyone as part of the
21 investigation, although he expected that he would be interviewed and was
22 surprised when no one contacted him.
23
24

1 4.52 In addition to the “investigation” into missing revenue which Plaintiff and her
2 daughter both reported to their respective employers, the local media became
3 aware of the situation and began making inquiries. On information and belief,
4 this was embarrassing to ABM Parking and to City officials.

5 4.53 On February 6, 2012, Plaintiff and other managers at The Company received an
6 e-mail directive from Leonard Carder, that any calls from the media should be
7 referred to two specific employees responsible for media relations.
8

9 4.54 One or two hours after Plaintiff received the e-mail directive, she was contacted
10 by a reporter from the Seattle Times who asked her to comment on “fraud at the
11 Pacific Place Garage.”

12 4.55 Plaintiff followed Leonard Carder’s instructions and referred the reporter to the
13 individuals who had been identified in the e-mail directive. She promptly
14 reported the fact of the reporter’s call to her manager, Matt Purvis. He asked
15 her: “Why are they calling you?” Mr. Purvis immediately went and discussed
16 the matter with Leonard Carder.
17

18 4.56 Within hours of receiving the call from the media and reporting it to Mr. Purvis,
19 Plaintiff was terminated from her employment. She was told that the reason for
20 the termination was *budgetary* and that her position was being *eliminated* as
21 part of a corporate *reorganization*.
22

23 4.57 The stated reasons for Plaintiff’s termination were pretext for unlawful reasons.
24

1 4.58 Plaintiff was 58 years old on the date she was terminated. The only other
2 employee whose position was eliminated as part of the reorganization, was Ken
3 Eichner. Mr. Eichner was in his 70s and was a part-time auditor. Although
4 another employee (who was also in the protected class) was slated for
5 termination at the same time, this did not occur. The third employee was
6 retained by ABM Parking.

7
8 4.59 On information and belief, Plaintiff was treated unfavorably in the terms and
9 conditions of her employment, subjected to retaliation and a hostile work
10 environment, and terminated from her employment because in her role as an
11 HR manager, she handled discrimination complaints and disciplined two male
12 employees for sexual harassment in response to a complaint by Melody Dillon.

13 4.60 On information and belief, Plaintiff was terminated, in part, because of her age
14 (40 or over) and/or her disability.

15
16 4.61 On information and belief, Plaintiff was terminated in retaliation for her
17 discovery and reporting of fraud and/or mismanagement of government funds in
18 the course of performing her job duties under her "contract" with The
19 Company.

20 4.62 Plaintiff read and acknowledged receipt of ABM's Code of Business Conduct
21 and Employee Handbook. ABM's Code of Business Conduct requires its
22 employees to report illegal or unethical conduct "in connection with the
23 Company's government contracting activities" or to report "any activity that
24

1 could damage ABM's reputation", and further admonishes that "a failure to
2 report a violation is itself a violation of this Code."

3 4.63 The ABM Code of Business Conduct also states: "We do not tolerate
4 retaliation against anyone who, in good faith, reports a possible violation of any
5 law or Company policy. Any employee or manager who attempts to retaliate
6 against an individual who has reported a violation or possible violation of this
7 Code will face serious disciplinary action, up to and including termination."
8

9
10 4.64 The language contained in ABM's Code of Conduct and ABM's Employee
11 Handbook constitutes an enforceable promise of continued employment absent
12 good cause for termination. Ms. O'Brien performed her obligations under the
13 agreement with her employer. ABM breached the employment contract with
14 Ms. O'Brien when it retaliated against her for complying with The Company's
15 written policies.
16

17 4.65 The Company's written policies forbid harassment. The Employee Handbook
18 and the ABM Code of Business Conduct, promise fair and equitable treatment
19 and specific treatment in specific situations. Plaintiff reasonably relied on this
20 promise when she remained employed at The Company and did not seek
21 employment elsewhere.

22 4.66 The defendants' acts and conduct from approximately March 2009 to February
23 6, 2013, created a hostile work environment for Plaintiff.
24

1 4.67 In addition, the individual managers and defendants aided, abetted and/or
2 incited unlawful and unfair employment practices which created a hostile work
3 environment and harmed Plaintiff.

4 4.68 The individual defendants acted in furtherance of a common plan or scheme to
5 harass Plaintiff and create a hostile work environment for her, and to cause her
6 to be discharged from her employment at ABM Parking.

7 4.69 On information and belief, Leonard Carder was the decision-maker or
8 substantially influenced the decision to terminate Plaintiff. Mr. Carder's
9 discriminatory and retaliatory animus toward Plaintiff was a substantial factor
10 in the termination of her employment.

11
12 4.70 Plaintiff was subjected to a hostile work environment for approximately 3 years,
13 and was terminated from her employment at ABM Parking due, in substantial
14 part, to her membership in a protected class of employees over 40; in retaliation
15 for her legally protected activities under the WLAD; and in retaliation for
16 reporting accounting irregularities in the performance of her duties as an
17 employee under ABM's Code of Business Conduct and Ethics.
18

19 **V. CLAIMS**

20 5.1 Plaintiff re-alleges and incorporates herein, paragraphs 1.1 through 4.70.

21 5.2 The above-stated facts give rise to a claim of age discrimination in violation
22 of RCW 849.60.180.
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costs and expenses of litigation and an award in the amount of additional taxes resulting from the payment to Plaintiff of the award for damages.

6.3 For such other relief as the Court deems just and equitable.

DATED this 4th day of May, 2015.

By /s/Sandra L. Ferguson
Sandra L. Ferguson WSBA No. 27472
The Ferguson Firm, PLLC
Attorney for Plaintiff

By /s/Margaret Boyle
Margaret Boyle, WSBA No. 17089
Boyle Martin, PLLC
Attorney for Plaintiff

EXHIBIT 5

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FILED
THE HONORABLE WILLIAM L. DOWNING

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY
MAY 13 2015

DEBI O'BRIEN, a married woman,
Plaintiff,

SUPERIOR COURT CLERK
BY DEBRA BAILEY TRAIL
DEPUTY

NO: 15-2-06791-5 SEA

v.

ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
COMPLAINT

ABM INDUSTRIES, INC, d/b/a ABM
PARKING SERVICES, aka AMPCO
SYSTEM PARKING, a corporation doing
business in Washington State.
Defendant.

THIS MATTER, having come before the undersigned judge of the above-entitled court, upon Plaintiff's Motion for Leave to Amend the Complaint, and the Court having reviewed the following documents:

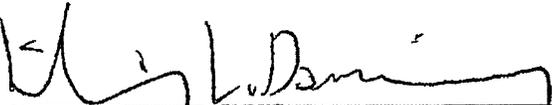
1. Plaintiff's Motion and the Declaration of Sandra L. Ferguson with attached exhibits A-H;
2. Plaintiff's Proposed Second Amended Complaint;
3. Defendants' Opposition to Plaintiff's Motion and supporting declarations and exhibits thereto;
4. Plaintiff's Reply and supporting declarations and exhibits thereto.

ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
COMPLAINT- 1

The Ferguson Firm, PLLC
200 West Thomas Street, Suite 420
Seattle, WA 98121
Tel: 206-624-5696 Fax: 206-770-7340
sandra@sifergusonlaw.com

1 It is HEREBY ORDERED that Plaintiff's Motion for Leave to Amend the Complaint
2 is GRANTED. (X)

3
4 DATED this 13 day of May, 2015.

5
6 
7 Honorable William L. Downing

8
9
10 Presented By:

11 THE FERGUSON FIRM, PLLC

12 /s/Sandra L. Ferguson
13 Sandra L. Ferguson, WSBA #27472
Attorney for Plaintiff

14 BOYLE, MARTIN, PLLC

15 /s/Margaret M. Boyle
16 Margaret M. Boyle, WSBA #17089
17 Boyle, Martin, PLLC
Attorney for Plaintiff

(X) Permission to amend does not mean
the Court may not later dismiss some
or all of these claims on the bases
argued – and the Court may, in fact,
even ask itself "What Would Judge
Coughenour Do?"

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ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
COMPLAINT- 2

The Ferguson Firm, PLLC
200 West Thomas Street, Suite 420
Seattle, WA 98121
Tel: 206-624-5696 Fax: 206-770-7340
sandra@sifergusonlaw.com

EXHIBIT 6

JUN 08 2015

HONORABLE JUDGE BAILEY TRAIL
BY DEBRA M. L. DOWNING
CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBI O'BRIEN, a married woman,

Plaintiff,

v.

LEONARD CARDER AND JANE DOE CARDER,
and the marital community thereof, HUGH
KOSKINEN, a single man, MATT PURVIS AND
JANE DOE PURVIS and the marital community
thereof, DAN LAWSON AND JANE DOE
LAWSON, and the marital community thereof,
PAULETTE KETZA AND JOHN DOE KETZA,
and the marital community thereof, ROD HOWREY
AND JANE DOE HOWREY and the marital
community thereof, and VIVIAN SMITH AND
JOHN DOE SMITH and the marital community
thereof, and the corporations ABM Industries
("ABMI") and ABM Parking Services (d/b/a
"Ampco" and "ABM Onsite Services West"),

Defendants.

NO. 15-2-06791-5 SEA

STIPULATION AND ORDER
OF DISMISSAL WITHOUT
PREJUDICE

CLERK'S ACTION REQUIRED

STIPULATION

It is stipulated between all parties that the following individual defendants are dismissed from this proceeding without prejudice: Hugh Koskinen, Dan Lawson and Jane Doc Lawson, Matt Purvis and Jane Doe Purvis, Rod Howery and Jane Doe Howery, Vivian Smith and John Doe Smith, Paulette Ketza and John Doe Ketza, and that the names of the foregoing individuals will be deleted and will not appear in the caption of the parties' future filings in this case.

1 DATED this 5TH day of June, 2015.

2 THE FERGUSON FIRM, PLLC

3 /s/Sandra L. Ferguson
4 Sandra L. Ferguson, WSBA #27472

5 BOYLE • MARTIN, PLLC

6 /s/Margaret M. Boyle
7 Margaret M. Boyle, WSBA No. 17089
8 Attorneys for Plaintiff

9 SUMMIT LAW GROUP, PLLC

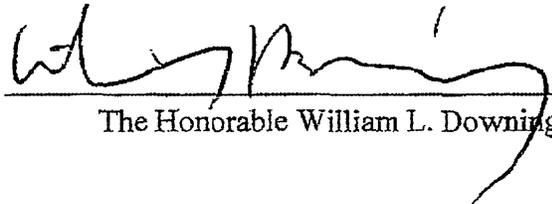
10 /s/Shannon E. Phillips
11 Shannon E. Phillips, WSBA #25631

12 /s/Molly A. Terwilliger
13 Molly Terwilliger, WSBA #28449

14 ORDER

15 Based upon the foregoing Stipulation, it is hereby ordered that the above-named
16 individual defendants are dismissed without prejudice.

17 Done this 8 day of June, 2015.

18 
19 _____
20 The Honorable William L. Downing

21 Presented by:

22 THE FERGUSON FIRM, PLLC

23 /s/Sandra L. Ferguson
24 Sandra L. Ferguson, WSBA # 27472
25 Attorneys for Plaintiff

26 SUMMIT LAW GROUP, PLLC

27 /s/Shannon E. Phillips
Shannon E. Phillips, WSBA #25631
Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused the foregoing to be served, as indicated, upon the following:

Sandra L. Ferguson
The Ferguson Firm PLLC
200 W. Thomas Street, Suite 420
Seattle, WA 98119
Sandra@slfergusonlaw.com
(Attorneys for Plaintiff)
(Via Email and U.S. Mail)

Margaret Boyle
Boyle Martin, PLLC
200 W. Thomas St., Suite. 420
Seattle, WA 98119-4215
margaret@boylemartin.com
(Attorneys for Plaintiff)
(Via Email and U.S. Mail)

DATED this 5th day of June, 2015.

Kimberly Welsh, Legal Assistant

FILED IN PROVISION
JUN 5 2015 12:53
SUMMIT LAW GROUP PLLC

EXHIBIT 7

~~FILED~~

~~15 AUG 25 PM 3:01~~

~~KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA~~

CERTIFIED TRUE COPY
ATTEST: WILLIAM M. McCOOL
Clerk, U.S. District Court
Western District of Washington

By Paula McRabb
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEBI O'BRIEN,

Plaintiff,

v.

LEONARD CARDER, et al.,

Defendants.

✓
#15-2-06791-5 Den

C15-920 TSZ

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Defendants' Motion to Strike Argument from Ferguson Declaration, docket no. 16, is GRANTED.

(2) Defendants' Motion to Drop Defendant Leonard Carder and Sever Claim Against Him, docket no. 1, is DENIED. The Court declines to exercise its discretion to drop defendant Carder under Federal Rule of Civil Procedure 21. *See Echols v. OMNI Med. Grp., Inc.*, 751 F. Supp. 2d 1214, 1217 (N.D. Okla. 2010) ("Rule 21 grants the power to sever, but leaves discretion over when to exercise that power to the district court."). The Court also finds that Mr. Carder is not a sham defendant as plaintiff has stated a theoretically plausible claim against him. *See Brown v. Scott Paper Worldwide Co.*, 143 Wash. 2d 349, 353 (2001) (stating that supervisors may be held liable under Washington law for their discriminatory acts).

(3) As the Court lacks subject matter jurisdiction over this matter, it is REMANDED to King County Superior Court. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

(4) Plaintiff's request for costs and attorney's fees related to seeking remand in this matter, docket no. 14, is DENIED.

1 (5) The Clerk is directed to send a copy of this Minute Order to all counsel of
2 record.

3 Dated this 4th day of August, 2015.

4 William M. McCool
Clerk

5 s/Karen Dews
6 Deputy Clerk
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EXHIBIT 8

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEBI O'BRIEN, a married woman,)	
)	
Plaintiff,	)	NO. 15-2-06791-5 SEA
)	
v.	)	ORDER ON
	)	DEFENDANTS'
	)	MOTION FOR
	)	SANCTIONS
LEONARD CARDER, HUGH KOSKINEN,)	
MATT PURVIS, DAN LAWSON,)	
PAULETTE KETZA, ROD HOWREY,)	
VIVIAN SMITH, ABMI,)	
ABM PARKING SERVICES; et al.,)	
)	
Defendants.)	
)	

To its May 13, 2015 Order, this Court appended language cautioning that although a motion to amend a complaint may be viewed liberally, such an attitude would not prevail when the anticipated subsequent motions were brought asking the Court to more closely scrutinize the bases for the plaintiff's claims. That foreshadowed day has arrived.

This is an employment law case. It was brought by a plaintiff who had worked in Washington for a corporation headquartered in New York. Her action

ORDER ON DEFENDANTS'
MOTION FOR SANCTIONS

1

HON. WILLIAM L. DOWNING
King County Superior Court
516 Third Avenue
Seattle, WA 98104

was pending in federal court and getting close to trial, when, in March of this year, Hugh Koskinen, Dan Lawson, Matt Purvis and Paulette Ketza (and their respective spouses as applicable) were formally served with a state court civil complaint informing them they were defendants against whom plaintiff was seeking a monetary judgment. It was alleged that they aided, abetted, encouraged and incited discriminatory acts and, perhaps, had breached a contract as well. For a couple of months, then, these individuals lived with the unease that comes with the status of having claims against their assets (and their virtue) and may even have had to inform lending institutions of this fact. If the decision to subject them to this fate was consistent with the requirements of Civil Rule 11 (i.e., a complaint well-grounded in fact, warranted by existing law and not interposed for any improper purpose), then so be it. On the other hand, if the decision was not made in conformance with that rule, then by application of the rule, these individuals should be compensated.

A review of the history of this litigation in both state and federal court, leaves it readily apparent that there was no defensible reason for treating these individuals in the manner they were. It is particularly noteworthy that no facts or legal theory have even been put forth in response to this motion. There is no hint of any cognizable theory of contractual or quasi-contractual liability for these individuals nor is there any suggestion of how the statute of limitations would not bar all claims against Mr. Koskinen and Mr. Lawson who were off the scene some five years before they were sued.

Whatever that might be, a just resolution of the dispute between plaintiff and the employer should have been reached by now in federal court. Any such resolution was prevented by the procedural machinations in which these four individuals were ill-used as unwilling and unfortunate pawns. Once leave was granted in May to add plaintiff's former employer to this lawsuit (accomplishing the desired – but previously thwarted – result of a transfer of the primary case against the corporate defendants from federal to state court), these four individuals (as well as Howrey and Smith who were never served) were promptly dropped from the suit. That their involvement was so quickly proclaimed to be unnecessary is a compelling demonstration that it had *always* been unnecessary.

This Court concludes that the bringing of claims against these four individual defendants (Koskinen, Lawson, Purvis and Ketza and their marital communities) was in clear violation of CR 11. These defendants' motions for sanctions are hereby GRANTED.

As a sanction, the Court would require plaintiff or plaintiff's counsel to pay for all legal costs attributable to inclusion of these four individuals in the state court action. (To be clear, this would exclude any costs incurred in defending either the corporate defendants or Mr. Carder and any costs associated with the federal proceeding; it would include costs of research and writing on the subject of these four individuals' defenses.) The Court will issue a further Order upon written submissions.

DATED this 14th day of September, 2015.


HON. WILLIAM L. DOWNING

3

HON. WILLIAM L. DOWNING
King County Superior Court
516 Third Avenue
Seattle, WA 98104

ORDER ON DEFENDANTS'
MOTION FOR SANCTIONS

EXHIBIT 9

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The Honorable William Downing

FILED
KING COUNTY, WASHINGTON
OCT 23 2015
SUPERIOR COURT CLERK
DEBRA BAILEY TRAIL
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBI O'BRIEN, a married woman,

Plaintiff,

v.

LEONARD CARDER AND JANE DOE
CARDER, and the marital community
thereof, and the corporations ABM
INDUSTRIES ("ABMI") and ABM
PARKING SERVICES (d/b/a "Ampco" and
"ABM Onsite Services West"),

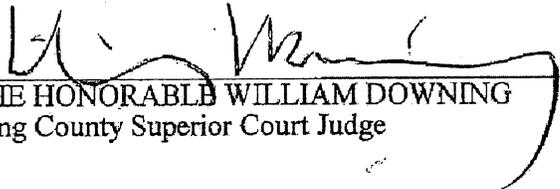
Defendants.

CASE NO. 15-2-06791-5SEA

~~PROPOSED~~ ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION

This matter came before the Court on Plaintiff's Motion for Reconsideration. Having reviewed the evidence at issue, as well as all materials submitted in support of and in opposition to the Motion, this Court finds that Plaintiff has failed to demonstrate that reconsideration is appropriate under CR 59. Plaintiff's Motion for Reconsideration is therefore DENIED.

DONE IN OPEN COURT this 22 day of October, 2015.


THE HONORABLE WILLIAM DOWNING
King County Superior Court Judge

~~PROPOSED~~ ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION - 1

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Telephone: (206) 676-7000
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Presented by:

SUMMIT LAW GROUP PLLC
Attorneys for Defendants

By: s/Shannon E. Phillips
Shannon E. Phillips, WSBA #25631
shannonp@summitlaw.com

By: s/Molly A. Terwilliger
Molly A. Terwilliger, WSBA #28449
mollyt@summitlaw.com

~~PROPOSED~~ ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION - 2

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EXHIBIT 10

FILED
KING COUNTY, WASHINGTON
NOV 16 2015
SUPERIOR COURT CLERK
DEBRA BAILEY TRAIL
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEBI O'BRIEN, a married woman,

Plaintiff,

v.

LEONARD CARDER, HUGH KOSKINEN,
MATT PURVIS, DAN LAWSON,
PAULETTE KETZA, ROD HOWREY,
VIVIAN SMITH, ABMI,
ABM PARKING SERVICES; et al.,

Defendants.

NO. 15-2-06791-5 SEA

2nd ORDER ON
DEFENDANTS'
MOTION FOR
SANCTIONS

By entry of an Order dated September 14, 2015, this Court has previously found that plaintiff's counsel violated CR 11 in bringing claims against four individual defendants in this cause – Koskinen, Purvis, Lawson and Ketza – and then dismissing them. To be abundantly clear, the Court should now indicate its specific findings in this regard:

- a. Many of the claims against these individuals were not well-grounded in fact or warranted by existing law and a reasonable inquiry would have made this clear; there has not been offered any way in which these

2nd ORDER ON DEFENDANTS'
MOTION FOR SANCTIONS

1

HON. WILLIAM L. DOWNING
King County Superior Court
516 Third Avenue
Seattle, WA 98104

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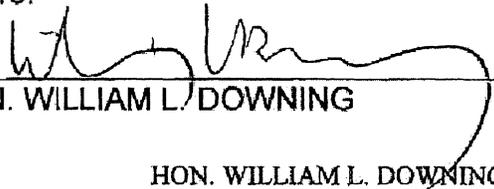
individuals could have been found liable under the plaintiff's contract with her employer nor has there been any explanation of why the statute of limitations would not bar a 2015 lawsuit based upon actions taken no later than 2010.

- b. By its previous reference to the "procedural machinations in which these four individuals were ill-used as unwilling and unfortunate pawns," the Court meant to indicate that their inclusion in the lawsuit was in service of a concerted effort at forum shopping and, therefore, was "for an improper purpose."

These are the specific findings upon which the conclusion of a CR 11 violation is based.

In its previous Order, the Court stated that a sanction would include payment "for all legal costs attributable to inclusion of these four individuals in the state court action." That Order would now be modified to the extent that it suggested rigid adherence to the measure of "all" legal costs. The Court has now had a chance to review defense counsel's billing records and to give further consideration to the purposes to be served by a CR 11 sanction. See, Biggs v. Vail, 124 Wn. 2d 193, 876 P. 2d 448 (1994). The defendants have requested an award in the amount of \$38,237.50 and if this award were being made pursuant to a fee-shifting provision, that number appears to be well supported. As a CR 11 sanction, the Court would now direct that the defendants be awarded the sum of \$6500.00.

DATED this 16th day of November, 2015.


HON. WILLIAM L. DOWNING

2nd ORDER ON DEFENDANTS'
MOTION FOR SANCTIONS

2

HON. WILLIAM L. DOWNING
King County Superior Court
516 Third Avenue
Seattle, WA 98104

EXHIBIT 11

FILED
KING COUNTY, WASHINGTON
NOV 16 2015
SUPERIOR COURT CLERK
DEBRA BAILEY TRAIL
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEBI O'BRIEN, a married woman,)	
)	
Plaintiff,	)	NO. 15-2-06791-5 SEA
)	
v.	)	ORDER ON
	)	DEFENDANTS'
	)	MOTIONS FOR
	)	SUMMARY JUDGMENT
LEONARD CARDER, HUGH KOSKINEN,)	
MATT PURVIS, DAN LAWSON,)	
PAULETTE KETZA, ROD HOWREY,)	
VIVIAN SMITH, ABMI,)	
ABM PARKING SERVICES; et al.,)	
)	
Defendants.)	
_____)	

The three remaining defendants in this case have each brought a Motion for Summary Judgment seeking dismissal of the employment-related claims the plaintiff has brought in this lawsuit. Those defendants are ABM Industries ("ABMI"), ABM Parking Services ("ABM Parking") and Leonard Carder (and his marital community). The Court has considered all of the written submissions in connection with the present motions. If there is a perceived need to more precisely catalogue those submissions, this may be accomplished by entry of an

agreed order supplementing this order. The Court has also heard oral argument of counsel and reviewed their evidentiary submissions. Having considered all of the foregoing, the Court would now rule as follows:

There are two preliminary matters. First, the defendants filed a Motion to Strike directed at the Declaration of Debi O'Brien. As the Court observed at the hearing, much in that 34 page document is accurately characterized as "conclusory" and "speculative" and "lacking in foundation." Without going through the declaration line-by-line, portions falling into those categories have been disregarded by the Court. To that extent, the Motion to Strike is GRANTED.

Second, the plaintiff, along with her arguments against entry of summary judgment, has asked that the motions be continued pursuant to CR 56(f) so that more discovery could be conducted. However, the case has been pending for over two years, there has been active discovery and motions practice with certain things left undone seemingly by choice (such as a deposition of Leonard Carder). In those matters not diligently pursued, there is no indication of specific evidence that is likely to be found and likely to create material issues of fact. The Motion for Continuance is DENIED.

ABMI's Motion for Summary Judgment is premised on the circumstance that it was never the employer of the plaintiff who worked for its wholly owned subsidiary ABM Parking at the relevant times. There is no evidence that employees, officers or agents of ABMI were responsible for any adverse employment action against the plaintiff and no basis for any inference that ABMI

acted with any discriminatory motivation. ABMI's Motion for Summary Judgment is GRANTED.

The various claims against Leonard Carder and ABM Parking must be examined by considering whether there is available evidence in support of each of the requisite elements of each claim. Some elements are common to multiple claims and others are more limited. For each discrimination claim, the plaintiff must have evidence that an adverse employment action was taken against her. She asserts two such actions: her termination in February of 2013 and her being subjected to a work environment that was purportedly hostile. Certainly termination of employment is an adverse employment action but the asserted hostility does not seem sufficiently "severe and pervasive" to meet the requirements of the law. The purported "ostracism" and being "glared at" are uncorroborated, purely subjective and insufficient; the parking lot inspections do not seem to be outside the scope of anticipatable duties.

Next, plaintiff must produce evidence that would at least support a reasonable inference that a discriminatory intent (based on age or a disability or in retaliation for some WLAD protected activity) was a substantial motivating factor in the decision to take the adverse employment action. At this time, the plaintiff gives voice to suspicions about the motivation for her termination but there exists a striking absence of evidence to support the posited inference. The defendants have put forth an entirely plausible explanation for the elimination of plaintiff's position (loss of business revenues leading to the necessity for cutbacks) as well as evidence of how, when, why and by whom the decision was

made. The plaintiff has not met her burden of showing there is admissible evidence which, if believed, would establish the employer's explanation as a pretext for discrimination.

As to the age discrimination claim, there is an absence of evidence that the plaintiff was treated in a disparate manner from younger employees, similarly situated to her. There is no valid "comparator;" she was not replaced with a younger person; and her duties were reassigned to existing personnel. As to the disability claim, there is an absence of evidence that the plaintiff suffered from a cognizable disability, that she had made the employer aware of it, and had requested, but not received, a reasonable accommodation. Finally, as to the retaliation claim, there is an absence of evidence that the decision-makers were aware of (much less motivated by) the plaintiff's having engaged in any WLAD protected activity sometime in the past.

Often a contract claim based on terms contained in an employee handbook will be asserted by an at-will employee (like the plaintiff) with respect to the way in which disciplinary matters will be handled. This is not a discipline case. The ABM "Code of Business Conduct" evidently contains an anti-retaliation policy and it is this provision that the plaintiff claims was breached. However, this Court has concluded she lacks sufficient evidence to go forward on her retaliation claim. In addition, this document contained an express disclaimer that it was not to be considered as creating any contractual rights.

The plaintiff has brought claims for the intentional and negligent infliction of emotional distress. These claims are really subsumed in her discrimination

claims rather than existing independently. Clearly the allegations in this case fall far short of what could be considered the "extreme and outrageous" conduct required for an outrage claim. In addition, it must be noted that the plaintiff has no evidence that her understandable emotional distress at the elimination of her job resulted in the necessary "objective symptomology" susceptible to a medical diagnosis. Both the tort of outrage and NIED claims must be dismissed.

Each of the remaining defendants' Motions for Summary Judgment will be GRANTED and all of the plaintiff's claims DISMISSED WITH PREJUDICE.

DATED this 16th day of November, 2015.

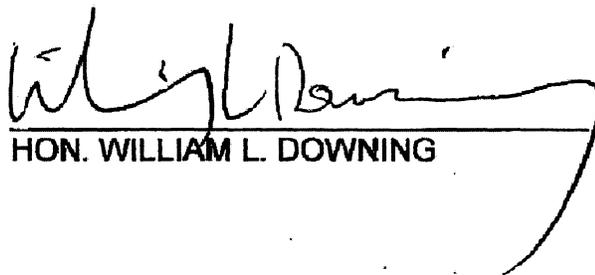

HON. WILLIAM L. DOWNING

EXHIBIT 12

The Honorable William Downing

FILED
KING COUNTY, WASHINGTON
DEC 15 2015
SUPERIOR COURT CLERK
DEBRA BAILEY TRAIL
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEBI O'BRIEN, a married woman,

Plaintiff,

v.

LEONARD CARDER AND JANE DOE
CARDER, and the marital community
thereof, and the corporations ABM
INDUSTRIES ("ABMI") and ABM
PARKING SERVICES (d/b/a "Ampco" and
"ABM Onsite Services West"),

Defendants.

CASE NO. 15-2-06791-5 SEA

~~REVISED~~ JUDGMENT FOR
DEFENDANTS ON DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT
AND DEFENDANTS' MOTION FOR
SANCTIONS

This matter came before the Court on Defendants' presentation of a judgment on the Court's November 16, 2015 order granting summary judgment in favor of Defendants Leonard Carder and Jane Doe Carder, ABM Industries Incorporated, and ABM Parking Services; the Court's November 16, 2015 2nd Order on Defendants' Motion for Sanctions; and the Court's September 14, 2015 Order on Defendants' Motion for Sanctions. The Court heard the oral argument of counsel for Defendants Leonard Carder and Jane Doe Carder, ABM Industries Incorporated, and ABM Parking Service, and counsel for the Plaintiff, Debi O'Brien.

The Court considered the pleadings filed in the action, and its orders of November 16, 2015 and September 14, 2015, as well as the following evidence:

~~REVISED~~ JUDGMENT FOR DEFENDANTS ON
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
AND DEFENDANTS' MOTION FOR SANCTIONS - I

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1. Defendant ABM Parking Services' Motion for Summary Judgment;
2. Declaration of Shannon E. Phillips in Support of ABM Parking Services' Motion
for Summary Judgment;
3. Declaration of Vivian Smith;
4. Declaration of Nedy Warren;
5. Defendant ABM Industries Incorporated Motion for Summary Judgment;
6. Declaration of Molly A. Terwilliger in Support of ABM Industries Incorporated's
Motion for Summary Judgment;
7. Defendant Leonard Carder's Motion for Summary Judgment;
8. Declaration of Shannon E. Phillips in Support of Leonard Carder's Motion for
Summary Judgment;
9. Declaration of Leonard Carder in Support of Leonard Carder's Motion for
Summary Judgment;
10. Plaintiff's Response in Opposition to Defendants' Motions for Summary
Judgment;
11. Declaration of Sandra L. Ferguson in Support of Plaintiff's Opposition to
Defendants' Motions for Summary Judgment and/or Plaintiff's Requests for Continuance
Pursuant to CR 56(f);
12. Declaration of Debi O'Brien in Support of Plaintiff's Opposition to Defendants'
Motions for Summary Judgment;
13. Defendant ABM Parking Services' Reply in Support of Its Motion for Summary
Judgment;
14. Defendant ABM Industries Incorporated's Reply in Support of Its Motion for
Summary Judgment;
15. Defendant Leonard Carder's Reply in Support of Motion for Summary Judgment;

1 16. Supplemental Declaration of Molly A. Terwilliger in Support of Defendants'
2 Motions for Summary Judgment;

3 17. Defendants' Motion to Strike;

4 18. Declaration of Molly A. Terwilliger in Support of Defendants' Motion to Strike;

5 19. Defendants' Reply in Support of Motion to Strike;

6 20. Defendants' Motion for Sanctions;

7 21. Declaration of Molly A. Terwilliger in Support of Defendants' Motion for
8 Sanctions;

9 22. Plaintiff's Opposition to Defendants' Motion for CR 11 Sanctions;

10 23. Declaration of Sandra L. Ferguson in Support of Plaintiff's Opposition to
11 Defendants' Motion for Sanctions;

12 24. Defendants' Reply in Support of Motion for Sanctions;

13 25. Defendants Hugh Koskinen, Matt Purvis, Dan Lawson and Paulette Ketzka's
14 Motion for Determination of Fees Pursuant to Court's September 14, 2015 Order;

15 26. Declaration of Shannon E. Phillips in Support of Defendants Hugh Koskinen,
16 Matt Purvis, Dan Lawson and Paulette Ketzka's Motion for Determination of Fees Pursuant to
17 Court's September 14, 2015 Order;

18 27. Plaintiff's Response in Opposition to Defendants' Motion for Determination of
19 Fees as CR 11 Sanctions;

20 28. Defendants Hugh Koskinen, Matt Purvis, Dan Lawson and Paulette Ketzka's Reply
21 in Support of Motion for Determination of Fees Pursuant to Court's September 14, 2015 Order;

22 29. Declaration of Molly A. Terwilliger in Support of Defendants Hugh Koskinen,
23 Matt Purvis, Dan Lawson and Paulette Ketzka's Motion for Determination of Fees Pursuant to
24 Court's September 14, 2015 Order;

25 30. Plaintiff's Motion for Reconsideration Pursuant to CR 59;
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~~REVISED~~ JUDGMENT FOR DEFENDANTS ON
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
AND DEFENDANTS' MOTION FOR SANCTIONS - 3

4852-7929-7067.v1

002174

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1 31. Declaration of Sandra L. Ferguson in Support of Plaintiff's Motion for
2 Reconsideration;

3 32. Defendants' Response to Plaintiff's Motion for Reconsideration Pursuant to CR
4 59;

5 33. Plaintiff's Reply on Motion for Reconsideration Pursuant to CR 59;

6 34. Declaration of Sandra L. Ferguson in Support of Plaintiff's Reply on Motion for
7 Reconsideration re Sanctions.

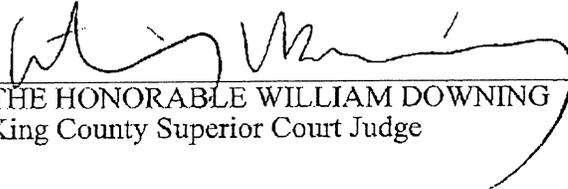
8 Based on the argument of counsel, the pleadings, order and evidence, the Court hereby
9 orders as follows:

10 1. Judgment is entered in favor of Defendants.

11 2. Plaintiff Debi O'Brien, and Counsel Sandra Ferguson and Margaret Boyle are
12 jointly and severally liable for the amount of \$6500, to be paid to Summit Law Group PLLC, in
13 trust for Defendants, within ⁶⁰60 days of entry of Judgment. WD

14 3. Defendants shall file a cost bill within 10 days of entry of Judgment.
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16
17 DONE IN OPEN COURT this 15 day of December, 2015.

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20 THE HONORABLE WILLIAM DOWNING
21 King County Superior Court Judge
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~~REVISED~~ JUDGMENT FOR DEFENDANTS ON
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
AND DEFENDANTS' MOTION FOR SANCTIONS - 4

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1 Presented by:

2 SUMMIT LAW GROUP PLLC
3 Attorneys for Defendants

4 By: s/Shannon E. Phillips
5 Shannon E. Phillips, WSBA #25631
6 shannonp@summitlaw.com

7 By: s/Molly A. Terwilliger
8 Molly A. Terwilliger, WSBA #28449
9 mollyt@summitlaw.com

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~~REVISED~~ JUDGMENT FOR DEFENDANTS ON
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
AND DEFENDANTS' MOTION FOR SANCTIONS - 5

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