

NO. 36413-1-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KARI LEE VENNES,

Appellant,

v.

ACE PAVING CO., INC., a Washington State Corporation; and JACK
CAMPBELL; JANE DOE CAMPBELL,

Respondents.

BRIEF OF RESPONDENT ACE PAVING CO., INC.

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FILED
COURT OF APPEALS
DIVISION II
03 APR 24 PM 4:29
STATE OF WASHINGTON
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I. SUMMARY

Kari Lee Vennes claims that her Ace Paving Company supervisor raped her orally during work hours on November 12, 2002, three days before she ceased to be an Ace Paving employee. Ms. Vennes claims the same man came to her home and raped her orally a second time on December 5, 2002. Under various legal theories, she seeks to have Ace Paving held liable in damages for the supervisor's conduct and for its own response to complaints she eventually made. The Superior Court summarily dismissed all of Ms. Vennes' claims. She timely appealed. Her opening brief seeks reinstatement of some but not all of the claims she pleaded below. Ms. Vennes neglects, however, to mention important facts that were established by uncontroverted testimony and that refute her allegations, and fails to acknowledge or distinguish controlling case authority that required dismissal of her claims. This Court should affirm.

II. COUNTERSTATEMENT OF ISSUES PRESENTED ON REVIEW

1. Is it well settled that an employer cannot be held liable, vicariously, to the victim of a sexual assault committed by its employee?

2. Under the common law of Washington, may a claim for wrongful discharge in violation of public policy be predicated on an alleged refusal of the defendant to hire the plaintiff?

3. Did Ms. Vennes fail to offer admissible evidence that, between November 15, 2002, and the times in 2006 when Ace Paving's dispositive motions were heard, Ace Paving had a journeyman laborer position available; that she was available to be hired, able to work, and willing to work; that Ace knew she was able to work and available; and that Ace decided not to hire her for the position?

4. Did Ms. Vennes fail to offer admissible evidence, beyond her own belief and speculation, that Ace Paving not only decided not to rehire her after she complained in January 2003 that she had been raped while on the job in 2002, but made the decision not to rehire her because she had made the rape complaint, such that the company's stated reasons for not rehiring her could be found "pretextual"?

5. Did Ms. Vennes offer admissible evidence that was insufficient to create a triable issue of fact as to whether Ace Paving behaved outrageously toward her in response to the rape complaint that she made in January 2003?

III. COUNTERSTATEMENT OF THE CASE

A. The Two Rapes that Ms. Vennes Alleges Occurred in 2002.

On November 12, 2002, Ms. Vennes claims, Jack Campbell, her Ace Paving Company supervisor raped her orally while he drove a manual-transmission company truck over four-plus miles of public road during work hours. CP 238-244; 315; App. Br. at 2-3. Mr. Vennes reported no rape to the company for two months and did not otherwise make the company aware for two months that she was aggrieved by anything that she had experienced in the workplace.¹

November 15, 2002 – the third day after the alleged rape – was Ms. Vennes’ last day of employment with Ace Paving. CP 228, 314, 358 (Question 25). Ms. Vennes does not claim that she was wrongfully terminated in November 2002, or that she was laid off by Campbell or because of the rape or because she complained about it. As Ms. Vennes’ opening brief admits, she was “well aware” that the paving business slowed during the winter and, in effect, that she had expected the company not to have any work for her at least for several months. App. Br. at 4.

¹ Ms. Vennes has alleged, CP 43-44 (¶ 4.5), and has argued, App. Br. at 4, that she remained silent because she was shocked and afraid. Because the summary judgment record also includes admissible testimony to that effect, CP 315, this Court may presume that to be true. However, it is immaterial why Ms. Vennes did not immediately or promptly report the matter. See pages 12-15 below. Ms. Vennes has never testified or argued that the supervisor demanded sex under threat of adverse employment action or threatened her with such action if she complained about being raped. Nor has Ms. Vennes testified or argued that the supervisor was responsible for her ceasing to work for Ace Paving after November 15, 2002.

At no time since November 15, 2002, has Ms. Vennes been an Ace Paving employee. CP 228. What that means, of course, is that the company has not fired (or discharged, or terminated) her since November 15, 2002. Ms. Vennes does raise an issue as to whether Ace Paving refused to re-hire her for an unlawful reason, but that is getting ahead of the story.

On December 5, 2002, Ms. Vennes claims, Campbell showed up at her house driving an Ace Paving truck, worked his way past her into her house and, after she followed him inside, forcibly raped her orally again. CP 249-258, 315.

B. What Happened After Ms. Vennes Complained in January 2003.

Ms. Vennes does not claim to have done anything to inform Ace Paving, directly or indirectly, of her rape complaints until January 7, 2003, when at a friend's urging she made a complaint to the Sheriff, prompting a deputy to contact Ace Paving as part of his investigation. CP 259-262, 315. On January 27, Ms. Vennes mailed a letter to Ace Paving telling it about the two incidents when she claims Campbell raped her. CP , 263, 315.² Ms. Vennes claims Ace Paving's owner did not return three calls she made to a phone number the company had given her, CP 266, 315-316, and then asked her to come to a meeting on notice that her brief

² The letter is not of record.

characterizes as too short to enable her to prepare emotionally for the encounter, App. Br. at 8 (compare her testimony at CP 266 and 316), at which meeting, Ms. Vennes' brief says, company representatives were "extremely uncomfortable," and "obviously wary of liability," and told her they would await the result of the sheriff's investigation before deciding what action, if any, the company would take, App. Br. at 8 (compare her testimony at CP 268 and 316).

Ms. Vennes claims she was "never kept informed" of the company's investigation, and was not "called back" to work for Ace Paving even though, according to her, "it was customary for Ace to call her back to work in the spring months . . . and she had always been called back to work in previous years," App. Br. at 8-9, and was on what she refers to as "the A-list" to be called back when work was available, App. Br. at 9. According to her brief, "Ms. Vennes personally saw other individuals, who should have been lower on the re-call list, working on Ace crews at a time when she was available and capable of working [and] after she had made her complaint about [being raped]." App. Br. at 9.

C. Facts Established by the Record About Which One Would Not Learn From Reading Ms. Vennes' Brief.

Ms. Vennes leaves out certain facts established by evidence that she did not attempt to controvert in the Superior Court. Although Ms.

Vennes' brief makes vague complaints about the quality of the company's in-house investigation of her accusations against Campbell, App. Br. at 8-9 and 16, she neglects to mention that no witnesses corroborated any of her rape allegations and that the former supervisor was not prosecuted as a result of the Sheriff's investigation. CP 62, 66, 154.

The Superior Court was presented with uncontroverted testimony by Ace Paving's owner, Richard Christopherson, that the company reduced its workforce by 36% (from 202 employees to 128) between September 2002 and January 2003, and that its reduction in force continued thereafter until, by January 2006, it employed 49 people. CP 62.³

Ms. Vennes never offered any testimony of union personnel to show that Ace had job openings after 2002 for which she was qualified and for which she was entitled to be recalled to work. Ms. Vennes asserted in her deposition testimony that Ace had an "A" list of workers who had journeyman-class certificates as laborers,⁴ CP 284 (Dep. 236-237), but she did not claim that she had any form of union- and/or company-recognized seniority or that Ace had a "hiring hall" arrangement

³ By March 3, 2003, Campbell was no longer working for Ace. CP 156.

⁴ Ms. Vennes obtained her journeyman laborer card in 2002 after being sponsored in the union's apprenticeship program by Mr. Christopherson, Ace Paving's owner. CP 229 (Dep. 14-15).

with her union that was not honored but under which she would have been rehired.⁵ Ms. Vennes' testimony was that she doesn't know how many people are on what she calls the "A" list, and that her belief is that people on that list are called back according to a system under which "the first person" is called and, if he or she does not answer, the second is called, "and so on and so on." CP 284.⁶

Ms. Vennes did not attempt to controvert testimony by Ron Yingling, Ace's general manager, that Ace does not keep a list of laid off employees for work callbacks, and that people seeking work at Ace have to rely on phone calls to the company's office in order to find out about available work. CP 66. Ms. Vennes offered no testimony that she had made any calls to Ace after 2002 to ask whether it was hiring laborers or expected to do so and to apprise the company that she was available and willing to work.

Although Ms. Vennes' brief asserts that she "personally saw other individuals [plural], who should have been lower on the re-call list, working with Ace crews . . . after she had made her complaint about [rape]," App. Br. at 9, she cites to no page in the Clerk's Papers that

⁵ It does not.

⁶ Ms. Vennes testified that she received at least two phone calls from the union after November 2002, but wasn't at home to take the calls and thus "missed out." CP 285-286 (Dep. 238-242). Ace does not contend that those calls would have been for the purpose of calling Ms. Vennes to offer work at Ace.

provides evidentiary support for such an assertion. There is some vague testimony in the record to such effect in one of Ms. Vennes' declarations, CP 316, but it provides no names. The only person who Ms. Vennes ever identified as someone Ace had hired after her rape complaint who was less entitled than she was to be "called back" was Woody Russell, a laborer she thinks was hired in August 2003. CP 270 (her deposition, at 179-180).

However, Ms. Vennes did not controvert Ace general manager Ron Yingling's testimony and supporting documentation showing that, in fact, Ace hired Woody Russell in July 2004 because it needed a temporary experienced laborer on short notice for a different kind of work (paving crew) than Ms. Vennes had done (pipe-laying crew) and because an Ace employee who is Mr. Russell's cousin recommended him. CP 66, 163-168.

Most starkly at odds with the record is the assertion in Ms. Vennes' brief (page 9) that "she was available and capable of working after she had made her complaint about [the former supervisor's] outrageous behavior." What cannot be ignored is the fact that on August 23, 2003, Ms. Vennes certified in an application for industrial insurance benefits that she had been *unable to work* since November 16, 2002. CP 356. A physician provided support for a claim of disability due to rape-induced post-traumatic stress disorder based on an evaluation made on

January 15, 2003, CP 356, and certified that the condition would cause Ms. Vennes to miss work permanently, CP 358. Ms. Vennes' application for benefits was granted and she was being paid time-loss benefits in 2004, when she claims Ace hired Mr. Russell instead of her. CP 173-176. Ace Paving received copies of the time-loss payment orders, which would hardly have indicated that Ms. Vennes considered herself as someone waiting to be "called back" to work. Id.⁷

Although Ms. Vennes implies that Ace Paving was deliberately callous in asking her to come meet with its officials on short notice, App. Br. at 9, she has never claimed that her alleged rapist was present at the meeting, or that she was made to think he would be, and has never testified that she told Ace Paving that she needed or wanted more time to compose herself before meeting. In fact, she was asked about that at her deposition:

Q: Did you indicate that you would cooperate under some form of protest because of the insufficient notice? Did you tell Angela Rossi anything like that?

A: No.

Q: Did you indicate to Angela Rossi that you were upset that she was calling you two hours before this meeting was supposed to occur?

⁷ Industrial insurance benefits are awarded, of course, for injuries that occur at work without any determination by the Department of Labor & Industries that the employer was in any way at fault. RCW 51.04.010.

A: No.

Q: When you got to the meeting with Mr. Christopherson and Mr. Yingling, did you tell them you were concerned about the short notice?

A: No.

CP 266 (Dep. 165).

D. Proceedings Below.

Ms. Vennes filed suit against Ace Paving and the former supervisor in October 2004. CP 3. Her complaint, as amended in August 2005, CP 42-47, made allegations of sexual harassment, sexual discrimination, hostile work environment, wrongful termination in contravention of public policy, and intentional or outrageous behavior resulting in severe emotional distress. CP 46-47 (¶¶ § 5.2, 5.3, 5.5). Ms. Vennes alleged that Campbell had assaulted her “while working as an agent or employee” of Ace Paving. CP 46 (¶ 5.1).

In July, 2005, the Superior Court granted Ace’s CR 12(b)(6) motion and dismissed Ms. Vennes’ claim that Ace could be held vicariously liable if Mr. Campbell raped her. CP 40-41. At the same time, Ms. Vennes was granted leave to amend her complaint to assert claims for sexual harassment, sexual discrimination, and hostile work environment. CP 59; see CP 48, and compare CP 7 (¶¶ 5.1-5.4) with CP 57-58 (¶¶ 51.-5.5).

In April 2006, Ace moved for summary judgment as to Ms. Vennes' remaining claims. CP 200-221 (Motion), CP 61-199 (supporting declarations). Ms. Vennes filed an opposing memorandum, CP 387-397, and declarations, CP 222-318, to which Ace replied, CP 398-402. After initially denying the motion, the Superior Court, on motion by Ace, CP 319-350, reconsidered and asked for more briefing and the substance of jury instructions the parties believed would be appropriate on the claims at issue, CP 351-352. Following a second round of briefing, CP 404-481; 319-434, the court granted Ace's motion and dismissed all of Ms. Vennes' remaining causes of action, including those addressed in her opening brief on appeal. CP 435-437. After final judgment was entered as to Ms. Vennes' claims against her former supervisor in his individual capacity, CP 380-381, she timely appealed from the dismissal of her claims against Ace Paving. CP 382.

Ms. Vennes assigns error on appeal to the dismissal of her claims against Ace Paving based on vicarious liability (Assign. of Error A); wrongful discharge in violation of public policy (Assign. of Error B); discriminatory refusal to "return [her] to work" because of her rape complaint, in alleged violation of RCW Chapter 49.60 and "Title VII" (42 U.S.C. § 2000e et seq.) (Assign. of Error C). She does not assign error to the dismissal of her claim of outrage/intentional infliction of emotional

distress, but offers argument that it was error to dismiss that claim. App. Br. at 15-17. Ms. Vennes neither assigns error to, nor offers argument about, the dismissal of any separate claims of sexual harassment, sexual discrimination, or hostile work environment.

IV. ARGUMENT

A. Ms. Vennes' Claim that Ace Paving Is Liable Vicariously for the Rape(s) that She Contends Her Supervisor Committed Was Correctly Dismissed Because Employers Cannot be Held Liable Vicariously for Their Employees' Sexual Misconduct.

Appellant asserts that the issue of Ace Paving's vicarious liability "depends upon whether the tort was committed in the scope or course of the employee's employment [underscoring by appellant]." App. Br. at 11. That states the proper test inaccurately. What Ms. Vennes alleged in this case is two intentional tort – rapes – at the hands of an Ace Paving employee, Campbell, who also was her supervisor at the time of the first rape. Sexual assault is an intentional tort for which an employer can never be held liable *vicariously* under Washington law.

In order to hold an employer vicariously liable for the tortious acts of its employees, it must be established that the employee was acting *in furtherance of the employer's business* and that he or she was acting within the course and scope of employment when the tortious act was committed. Henderson v. Pennwalt Corp., 41 Wn. App. 547, 552, 704 P.2d 1256 (1985). [Italics added.]

In particular, where an employee commits an assault in order to effect a purpose of his or her own, the employer is not liable. Kyreacos v. Smith, 89 Wn.2d [425] at 429, 572

P.2d 723 [(1977)]; Blenheim v. Dawson & Hall, Ltd., 35 Wn. App. 435, 440, 667 P.2d 125, rev. denied, 100 Wn.2d 1025 (1983).

Thompson v. Everett Clinic, 71 Wn. App. 548, 551, 860 P.2d 1054 (1993), rev. denied, 123 Wn.2d 1027 (1994). The test for determining whether the employee was “within the course of his/her employment” is stated as whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment; or by specific direction of his employer; or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer’s interest. Thompson, 17 Wn. App. at 552.

Where the servant’s intentionally tortious or criminal acts are not performed in furtherance of the master’s business, the master will not be held liable as a matter of law even though the employment situation provided the opportunity for the servant’s wrongful acts or the means for carrying them out.

Thompson, 71 Wn. App. at 553.

In the Thompson case, a doctor, while working at the defendant clinic as its employee, sexually assaulted his patient. The Court of Appeals affirmed the dismissal of the patient’s claim against the clinic based on vicarious liability, concluding (among other things) that, because the doctor had acted wholly for his own personal sexual gratification, “[t]here is no reason the assaultive act can be considered to have been

done in furtherance of the Clinic's business . . ." Id. at 554. That continues to be the law:

[N]aturally, [Washington appellate] courts have held that the sexual acts of employees are not within the scope of employment. See C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999) (holding that diocese could not be held vicariously liable for sexual abuse by priests); Niece [v. Elmview Group Home], 131 Wn.2d 39, 929 P.2d 420 [(1997)] (holding that group home was not vicariously liable for the rape of a disabled resident by an employee); Blenheim v. Dawson & Hall, Ltd., 35 Wn. App. 435, 667 P.2d 125 (1983) (holding that employer could not be held vicariously liable where employees acted for their own purposes by assaulting and raping a dancer at a company Christmas party).

Robel v. Roundup Corp., 148 Wn.2d 35, 54 n.9, 59 P.3d 611 (2002).⁸

⁸ There are exceptions to the general rule that an employer cannot be held liable under any theory for sexual misconduct by an employee, even while the employee is working on company premises; no such exception applies to this case, however, both because the facts would not support application and because Ms. Vennes did not argue that any such exception applies. For example, if it is shown that the employer knew or should have known, at the time of hiring the offending employee or before the victim was attacked, that the offending employee had a propensity for assaultive conduct, a theory of "negligent hiring" or "negligent supervision" might be viable. See Thompson, 71 Wn. App. at 555. Ms. Vennes has never argued or offered evidence to support a claim against Ace Paving for negligent hiring or supervision. When the victim is a profoundly disabled and thus helpless person for whose well-being the employer has assumed responsibility, such as a developmentally disabled resident of a group home with cerebral palsy and the mental age of a young child, the victim *may* be able to pursue a negligence claim based on intentional sexual abuse by a group home employee even though there had been no reason to believe the employee presented a risk to home residents. Niece v. Elmview Group Home, 131 Wn.2d 39, 929 P.2d 420 (1999). But, even then, liability is not *vicarious*, see Niece, 131 Wn.2d at 47 and 52-59; it is based on negligence in failing to take reasonable steps to protect the victim, which is a theory Ms. Vennes did not assert below and does not argue on appeal. And, of course, she has never sought to compare her vulnerabilities to those of the victim in Niece or to liken Ace's responsibilities as her employer to those of the group home to its developmentally disabled resident.

Based on the holding in Thompson and the authorities cited in the above-quoted excerpt from Robel, the Superior Court had to dismiss Ms. Vennes' claim that Ace Paving is vicariously liable for the alleged rape by Campbell in the company truck on November 22, 2002, or for the alleged rape at her home on December 5, 2002. Neither rape could be found to have been committed in furtherance of Ace Paving's business; both could only be found to have been committed wholly for Campbell's personal gratification.⁹

B. Ms. Vennes' Claim Against Ace Paving for Wrongful Discharge in Violation of Public Policy Was Correctly Dismissed Because What She Complains of Is Not a Discharge But Rather a Non-Rehire.

Ms. Vennes' employment with Ace Paving was episodic and had ended in November 2002, before the company learned she was accusing

⁹ Although the decisions here discussed involved claims by third parties (rather than co-employees or supervisees) against the employers of intentional tortfeasors, and Ms. Vennes claims that one of the rapes by Mr. Campbell occurred while they were co-employees and he was her supervisor, the Industrial Insurance Act would not have dictated a different result had Ms. Vennes made and preserved for review any arguments based on it. The Act provides an employee's exclusive remedy against her employer for on-the-job injury, RCW 51.04.010, except that an employee is authorized to sue her employer for damages in excess of compensation and benefits payable under the Act "[if] injury results to [her] from the deliberate intention of . . . her employer to produce such injury." RCW 51.24.020. Ms. Vennes never alleged that Ace Paving ever intended to rape or inflict rape trauma upon her. The Act does not purport to make an employer liable vicariously for an injury inflicted deliberately by a co-employee. For purposes of RCW 51.24.020, an employer is not responsible for such an injury "when [the supervisor] steps aside from the master's business in order to effect some purpose of his or her own . . ." Mason v. Kenyon Zero Storage, 71 Wn. App. 5, 13, 856 P.2d 410 (1993) (employer's immunity from suit under Industrial Insurance Act not lost under "deliberate intention to injure" statute where plaintiff's supervisor drove forklift into plaintiff, pinning him against drum he was cleaning and inflicting permanent back injuries). Thus, Ace would be no more liable for the alleged November 12 rape under RCW 51.24.020 than it is under the general common law rule discussed in this section of Ace's brief.

Campbell of raping her on November 12 and on December 5, 2002. She does not allege or argue that the end of her employment in November 2002 constituted a discharge, or a discharge in violation of public policy, because she does not allege the company knew about her charges and does not allege that Campbell himself caused her employment to end following and because of the first alleged rape. Her theory, evidently, is that Ace Paving *constructively* discharged her by not *rehiring* her, and did so in violation of public policy because its decision was due to her having complained to the sheriff's office in early January 2003 that she had been raped. See App. Br. at 13. However, Ms. Vennes cites no case authority for the proposition that a decision not to hire is, or can amount to, a decision to discharge from employment. This Court should decline to consider the argument. RAP 10.3(a)(6) (formerly (a)(5)); Johnson v. Department of Licensing, 71 Wn. App. 326, 332-333, 858 P.2d 1112 (1993) (“We will not consider an issue that is not supported by argument and citation of authority”).

If the Court chooses to consider the argument on its merits despite Ms. Vennes' failure to cite any authority, it should follow Warnek v. ABB Combustion Eng'g Svcs., Inc., 137 Wn.2d 450, 458, 972 P.2d 453 (1999), and affirm. Warnek answered in the negative the following question,

certified to it by the U.S. District Court for the Eastern District of Washington:

Whether the cause[] of action described Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wn.2d 46, 821 P.2d 18 (1991), encompass[es] a former employee who is not rehired because the former employee filed a workers' compensation grievance during the course of previous employment with the employer?

Wilmot had held that the previously recognized common law cause of action for wrongful discharge in violation of public policy included claims based on an employee having made an industrial insurance claim. In explaining its decision, the Warnek court wrote that

The causes of action articulated in [Washington employment decisions] require that an actual employee be discharged from employment in order to establish an action for wrongful discharge . . . There is a distinction between *discharge or other discrimination during the course of employment* and *not being rehired for new employment*.

Warnek, 137 Wn.2d at 458 (italics by the Supreme Court). Ms. Vennes' allegations of wrongful discharge based on not having been rehired did not state a cause of action that is legally viable under Washington common law.

C. The Superior Court Correctly Dismissed the Civil Rights Claims that Ms. Vennes Asserted Against Ace Paving Under RCW Chapter 49.60 and Title VII.

Although not clearly articulated, Ms. Vennes' civil rights claims are discriminatory *retaliation* claims. She contends that Ace Paving took

an “adverse employment action” against her – did not rehire her after 2002 – and that she was in a protected class as someone who had complained of being raped on the job. App. Br. at 15. She offers citation to federal case authority relating to claims under “Title VII,” 42 U.S.C. § 2000e et seq., but no Washington or foreign case authority relating to claims under the “WLAD,” RCW Ch. 49.60. App. Br. at 14-15.

The defective premise in Ms. Vennes’ “retaliatory non-rehire” argument is that “a reasonable jury could decide [infer] that there was a causal connection between [her rape] complaint and Ace’s decision not to call her [back] or work [after she complained in January 2003].” App. Br. at 15.

For reasons that have mostly already been covered, a reasonable jury could not so infer or find.

Ms. Vennes made no showing that she sought or informed Ace Paving that she was available for employment by it after November 2002, or that the single named person whom she claims was working for the company in the summer of 2004 was doing work for the company for which she was more (or as) qualified or had more entitlement. Woody Russell was hired for temporary work in July 2004 because he was available and had experience at least equal to hers in terms of years and in paving work, which was not the kind of work in which she was most

experienced. During 2004, Ms. Vennes was receiving time-loss benefits from the State based on her certification in August 2003, CP 356, 358, that she had been permanently disabled and unable to work since November 15, 2002.

To make out a triable claim that an unlawful discriminatory motive is what explains a defendant employer's adverse employment action for which the defendant has offered a lawful reason – as Ace Paving did here, CP – a plaintiff such as Ms. Vennes must present admissible evidence that the defendant's reason is "pretextual." Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 182, 23 P.3d 440 (2001). To prove that the employer's stated reason for its action is a pretext, the plaintiff has to produce "evidence that the reason is unworthy of belief." Hines v. Todd Pacific Shipyards Corp., 127 Wn. App. 356, 372, 112 P.3d 522 (2005) (citing Kuyper v. State, 79 Wn. App. 732, 738, 904 P.2d 793 (1995), rev. denied, 129 Wn.2d 1011 (1996)). The key word is *evidence*: "[s]peculation and belief are insufficient to create a fact issue as to pretext. Nor can pretext be established by mere conclusory statements of a plaintiff who feels that he has been discriminated against." Hines, 127 Wn. App. at 372 (quoting McKey v. Occidental Chem Corp., 956 F. Supp. 1313, 1319 (S.D. Tex. 1997)). If the employee does not present admissible evidence to establish

pretext, the employer is entitled to dismissal. Hill, 144 Wn.2d at 182; Hines, 127 Wn. App. at 372.

The evidence that Ms. Vennes offered below was wholly insufficient to show or create an inference that Ms. Vennes' January 2003 rape complaint explains why she had not worked for Ace Paving since November 2002. All she asserted was a *post hoc ergo propter hoc* argument (a causal connection exists simply because she was not "called back" to work after she complained of rape, and she had been "called back" in prior springs in years before she complained of rape). But the uncontroverted evidence established that the true reasons Ms. Vennes did not return to work after 2002 were (1) that the company was in the midst of a drastic and long-term reduction in force and (2) she was collecting time-loss payments from the State based on her claim that she was too disabled to work, and (3) the company, aside from the lack of openings, therefore had no reason to think she had lied to the State and was willing and able to work.

D. The Superior Court Correctly Dismissed Ms. Vennes' Claim Against Ace Paving for Outrage/Intentional Infliction of Emotional Distress.

Liability for the tort of outrage is not lightly imposed. Washington case law establishes several hurdles in the way of recovery for the tort of outrage, in order that a defendant will not have "potentially unlimited

liability for every type of mental disturbance.” Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

First, the emotional distress must be inflicted *intentionally or recklessly*; mere negligence is not enough. Second, the conduct of the defendant must be *outrageous and extreme* . . . [I]t is not enough that a ‘defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.’ Liability exists ‘only where the conduct has been *so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*’ (Italics ours.) . . . [L]iability in the tort of outrage ‘does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ In this area plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration. Clearly a case by case approach will be necessary to define the precise limits of such conduct. Nevertheless, among the factors a jury or court should consider are the position occupied by the defendant . . . , whether plaintiff was peculiarly susceptible to emotional distress and defendant's knowledge of this fact . . . , and whether defendant’s conduct may have been privileged under the circumstances . . . [citations omitted.]

Id. What the Grimsby court wrote continues to be the law. Kloepfel v. Bokor, 149 Wn.2d 192, 196, 66 P.3d 630 (2003); and see Robel v. Roundup Corp., 148 Wn.2d at 51 (“the conduct supporting the claim must be appallingly low”). In other words, for a defendant’s conduct to qualify as outrageous, it must exceed indignities, unkindness and lack of consideration, and must cross over into the realm of the barbaric.

According to her opening brief, Ms. Vennes maintains that Ace Paving committed outrage/intentional infliction of emotional distress not because it was responsible for the alleged rape by Campbell, but rather because the company (a) “took no action [on her] complaint about being raped”; (b) accused [her] of lying” about the rape(s); (c) “accused [her] of having consensual sex with [the former supervisor] during work hours”; (d) was “unhappy” with her complaints to the sheriff and “ensured that [she] would never work again” for it; and (e) and “dismissed” her complaint without discussing “the situation” with the supervisor despite knowing of her “physical and emotional condition at the time” the company’s owner discussed “the situation” with her. App. Br. at 16.

Ms. Vennes’s statement of facts (but not her argument) suggests that she may also be claiming outrage/intentional infliction of emotional distress because Ace Paving did not promptly take or return her phone calls on some unspecified date(s) in late January or early February 2003, and/or because the company asked her to come to a meeting on short notice, allowing her “no time to emotionally prepare for such an encounter.” Br. at 8. But, as noted at page 9 above, Ms. Vennes admitted that she expressed no concern about being asked to meet on short notice, and failing to return three phone calls cannot possibly be found utterly uncivilized or appallingly low.

The assertions that Ace accused Ms. Vennes of lying about being raped and of having consensual sex with Campbell during work hours are unsupported by citations to the record. No such assertion was made in Ms. Vennes' Amended Complaint, CP 42-47, in her declaration dated April 20, 2005, CP 314-317, or in the excerpts of her deposition testimony that her counsel submitted in opposition to Ace's motion for summary judgment, CP 226-298.

Company actions or failures to act for which Ms. Vennes actually offered testimony do not approach the level of barbarity necessary for a finding that it committed an outrage or intentionally inflicted emotional distress upon her in responding to her rape complaint. Essentially, Ace Paving chose to let the Sheriff's office investigate, CP 65, and, by March 2003, the supervisor was no longer its employee whom it could interrogate or discipline, CP 156. It is not intolerable in a civilized community to let law enforcement officers handle interviews of victim and suspect in the case of an unwitnessed alleged rape.

E. The Dismissal of Ms. Vennes' Claims of Sexual Harassment, Sexual Discrimination, and/or Hostile Work Environment Is Not Presented for Review.

Ms. Vennes has neither assigned error to nor offered argument about the dismissal of any separate claims of sexual harassment, sexual discrimination, or hostile work environment, see CP 46 (¶¶ 5.2). She has

therefore waived review of the dismissal of those claims. See RAP 10.3(a); Luxon v. Caviezel, 42 Wn. App. 261, 267, 710 P.2d 809 (1985) (appellate courts will only review a claimed error if it is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto) (citing Bender v. Seattle, 99 Wn.2d 582, 599, 664 P.2d 492 (1983)); Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (A party abandons assignments of error to findings of fact if it fails to argue them in its brief).

V. CONCLUSION

Ace Paving did Ms. Vennes no wrong. An employer cannot be held liable vicariously for sexual assault committed by its employee. Ms. Vennes does not accuse Ace Paving of laying her off because she was raped, and the record establishes that the rape complaint did not prompt her layoff because she did not say anything about being raped to anyone until several weeks after the rape allegedly happened and after her layoff. Her layoff occurred at the time of year when Ace's work usually slows down and during the course of a reduction in force that saw the company steadily lay off 75% of its workforce between September 2002 and January, 2006.

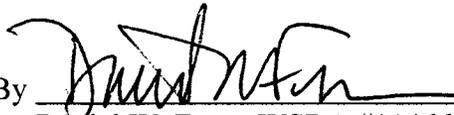
Ms. Vennes does claim that Ace refused to *rehire* her, but that not only is without a basis in fact; it is contradicted by all of the pertinent and

admissible evidence, including Ms. Vennes' own admissions. Refusal to rehire would not support a claim of wrongful discharge in violation of public policy. Nor did it support a retaliatory discrimination claim under RCW Chapter 49.60 and Title VII, because Ms. Vennes offered no admissible evidence that Ace's stated reasons for not hiring her or for hiring Woody Russell in July 2004 are unworthy of belief and therefore pretextual.

The Court of Appeals should affirm the dismissal of Ms. Vennes' lawsuit against Ace Paving Co.

RESPECTFULLY SUBMITTED this 24th day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 24th day of April, 2008, I caused a true and correct copy of the foregoing document, "Brief of Respondent Ace Paving Co., Inc.," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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DATED this 24th day of April, 2008, at Seattle, Washington.


Danna Hutchings