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STATE OF WASHINGTON

BY
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IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

Leanna Shipp,
Appellant,

v.

Mason General Hospital Foundation, et al.,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Carol Murphy

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignment of Error #1. The trial court erred in granting the Respondent's Motion for Summary Judgment as to the Appellant's claims for retaliation for pursuing a workers' compensation claim, and for outrage. CP. 14-16.

Assignment of Error #2: The trial court erred in finding that there was no genuine dispute as to any material fact and that the Respondents were entitled to judgment as a matter of law on the workers' compensation retaliation claim and the claim for outrage. CP. 14-16.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in granting the Respondents' Motions for Summary Judgment.
2. Whether the trial court erred in finding no dispute as to any material fact.

III. STATEMENT OF THE CASE

Leanna Shipp began working as the General Manager of the "Treasures" thrift store operations in January 2001, and by 2003, she was responsible for two "Treasures" stores, four paid employees, an unspecified number of volunteers and court-appointed community service workers, and approximately \$325,000 in annual revenue. CP. 69-70. According to Ms. Shipp, between 2001 and December 2002, she reported "pains in my wrists" numerous times to her supervisors, and contacted her employer's

human resources department to determine if her employer's insurance covered anything that might alleviate the pain, and the employer responded that acupuncture was covered. CP. 71.

In December 2003, Ms. Shipp's doctor sent her to a specialist to perform a "nerve conduction study." CP. 71. On Friday, January 16, 2004, Ms. Shipp met with Sara Watkins and Beth Johnston, and learned that Beth was taking over for Sara as her supervisor. CP. 73. During the meeting, according to Ms. Shipp, she discussed the upcoming results of the nerve conduction study, and Beth Johnston told her "they did not want me to file an L&I claim" and Ms. Johnston asked "if I realized that by filing a claim, I was making my fellow employees pay for my surgery and that would hurt Treasures." CP. 73. Ms. Shipp also testified that Ms. Johnston: a) wanted Ms. Shipp to sign a medical release, b) suggested that if the results showed that Ms. Shipp had carpal tunnel, then it could be partially blamed on a former employer, and c) directed Ms. Shipp to immediately contact Ms. Johnston on Monday, January 19th, immediately after her doctor's appointment. CP. 73. Ms. Shipp characterized the conversation as one in which "I was threatened by Ms. Johnston not to [file the workers' compensation

claim].” CP. 77. In an “Employment Timeline” the complete copy of which was attached as an exhibit to Leanna Shipp’s declaration (CP. 82-84), which was also filed in part by the employer (CP. 152), Ms. Shipp explained that on January 16, 2004 she met to discuss the change in her supervision because Sara Watkins was resigning, in addition:

BETH ASKED ME IF I HAD TOLD ANYONE I WAS BEING FIRED TODAY. I HAD TOLD HER I HAD NOT SAID I WAS BEING FIRED.

...

WE DISCUSSED A LETTER WRITTEN BY A VOLUNTEER ADDRESSED TO GUIDING COUNCIL (GOVERNING BOARD OF VOLUNTEERS)

...

WAS TOLD BY BETH TO MAKE SURE THAT YVONNES (MY ASSISTANT) EVALUATION HAD SOMETHING IN IT ABOUT HER GOSSIPING

...

DISCUSSED MY CURRENT L&I CLAIM. WAS TOLD AT THAT TIME THAT THE FOUNDATION DID NOT WANT ME TO FILE A CLAIM, AND DID I REALIZE THAT BY FILING A CLAIM MY STAFF WAS PAYING FOR MY SURGERY.

CP. 84.

:

The facts in Ms. Shipp’s testimony and “timeline” concerning the January 16th and subsequent meetings are clear and convincing, and bolstered by multiple witnesses. As explained in Ms. Shipp’s declaration, the meeting on Friday, January 16th

occurred at the Respondent's store, and involved Sara Watkins, Leanna Shipp, Leigh Bacharach and Beth Johnston, and included the announcement to Shipp that Shipp's current supervisor (Sara) was going on a leave of absence, and Beth Johnston would take on that role. CP. 73. Leanna Shipp testified that she received a "positive evaluation" from Johnston (CP. 74), and she told Johnston that she had not talked about the being fired at the January 16th meeting (CP. 84); rather, the three of them discussed a known gossiping problem with an employee (Yvonne Stedman, Ms. Shipp's assistant, CP. 74 and CP. 84), who was caught gossiping about a letter Gail Johnston had written to the Governing Council (see Declaration of Gail Johnston (CP. 62) and Declaration of Shipp (CP. 74). As Shipp explained, Beth Johnston said she learned from Sara Watkins, who said she learned from Sue Patterson who learned from Yvonne Steadman, that a letter from Gail Johnston was going to be presented by Shipp to the Guiding Counsel. According to the evidence, Ms. Shipp's departing supervisor, Sara Watkins, explained that Yvonne Stedman had contacted her "almost daily with gossip." CP. 74. According to Ms. Shipp's notes from the meeting, offered into evidence by both

parties, Beth Johnston said that a 3-person team was going to be created to stop the gossip, and never during the meeting was there any discussion of Ms. Shipp gossiping "because I was not the source." CP. 74, CP. 84. According to Ms. Shipp, Beth Johnston directed Shipp to include something in Yvonne Stedman's evaluation about her gossiping. CP. 84.

On Monday, January 19, Leanna Shipp called Beth Johnston and let her know that the study concluded she had moderate to severe carpal tunnel in both hands, and so Leanna and her doctor had filled out the required paperwork for her workers' compensation claim. CP. 74.

On Wednesday, January 21, 2004, Leanna Shipp responded to a request by Beth Johnston to meet with her at Leigh Bacharach's office. Leanna Shipp handed Ms. Johnston copies of employee evaluations Ms. Shipp had prepared along with the documents from her visit on Monday with her doctor. CP. 75. Beth Johnston accused Ms. Shipp of lying at the meeting the preceding Friday about being fired at a Board meeting that day, and instead Ms. Johnston accused Ms. Shipp of gossiping, based upon an unconfirmed rumor Ms. Johnston refused to investigate after Shipp

denied the rumor, and Ms. Johnston replied that she “didn’t care.”

CP. 84. Ms. Johnston told Leanna Shipp that she was terminated from employment, effective immediately. CP. 75. At that point:

[Leanna Shipp said] I denied the reason [Beth Johnston] was giving for my termination and asked to have Jayne brought in because I had not gossiped. Beth told me she would not do that, and that I was fired and would have to leave immediately. Beth and Leigh followed me to the store, escorted me through the store in front of other employees to my office, escorted me back out the back door, and slammed the door while telling me that I was never to come back to the store.

CP. 75.

To date, the Respondent has filed no credible evidence to support Ms. Johnston’s unsubstantiated accusation that Ms. Shipp was the source of any gossip, and has not challenged the series of events transpiring as stated above.

Leanna Shipp filed suit against her employer in January 2007, claiming outrage, non-payment of earned leave, and retaliation in violation of Washington’s workers’ compensation statute, RCW 51.48.025. The employer initially moved to dismiss the case, claiming that Leigh Bacharach was not an “assistant” to the registered agent, an accountant who worked in the Foundation’s office, and therefore not qualified to receive the lawsuit, the Court of Appeals reversed, concluding upon reviewing

all the facts under RCW 4.28.080(9), that Bacharach performed the role of the managing agent for the Foundation at the time the lawsuit was initiated. No. 36727-1-II (2008) at 7 (CP. 191).

Notably, Ms. Shipp's evidence on summary judgment included the fact that Leigh Bacharach (the Respondent's "managing agent") was a gossip, which Ms. Shipp recorded in her "timeline," and in a "Memo to File" she turned in to management regarding numerous confidentiality breaches by Ms. Bacharach two years earlier. CP. 93-96.

Upon remand, the employer moved for summary judgment, claiming that Leanna Shipp was an "at will" employee, she was paid all her "earned" leave, she was not subjected to the tort of outrage and the motion alleged that Ms. Shipp was terminated on January 21, 2004 "because she disobeyed her supervisor [by gossiping] and lied about a fellow employee [as being the gossip]." CP. 172. The employer offered no evidence to the trial court from any actual witness who allegedly heard any gossip from Ms. Shipp, nor any evidence of what the actual gossip entailed (just Beth Johnston's unsubstantiated claim), and simply relied upon a brief statement in the declaration of Beth Johnston. Attached to the declaration is an

unsworn document that supposedly supports the claim that Beth Johnston learned from (apparently, another gossip, Jayne Hoyos) that Ms. Shipp gossiped on Thursday, January 15, about her fear of losing her job at an alleged Board meeting on Friday, January 16, and then gossiped again with Jayne Hoyos on January 20, 2010.

Ms. Shipp opposed the motion, filing her own declaration establishing the true reason for her termination, which included a threat from her supervisor on Friday, January 16, 2004, not to file a workers' compensation claim, her notification to her supervisor on Monday, January 19, that she and her doctor had completed the claim paperwork, and her "immediate" termination by that same supervisor because of that claim on January 21, 2004. CP. 69-96. Ms. Shipp contradicted Beth Johnston's story that Ms. Shipp was a gossip, instead pointing out in her declaration, the declaration of Ron Pennell and that of Gail Johnston, and the attachments to Ms. Shipp's declaration, that Ms. Shipp had a strong reputation and history as not being a gossip, she had been an advocate against gossip problems at Treasures since 2002, and it was actually Ms. Shipp **and supervisor Sara Watkins** who discussed and were

directly familiar with the source of the gossip that was discussed on January 16, 2004 (from Yvonne Stedman), involving a letter Ms. Shipp was taking as a part of her job responsibility to the "Guiding Council" (see CP. 86) – which was witnessed by Gail Johnston who was the author of the letter (see CP. 61-62). Notably, it is undisputed that the decision by ^{Beth}~~Gail~~ Johnston at the time she initially heard about STEDMAN gossiping, according to Leanna Shipp and departing supervisor, Sara Watkins, was to simply put a comment against gossip in the written evaluation of Ms. Stedman, not to terminate Stedman, and Beth Johnston confirmed that a gossip committee was going to be created by the Board in the future.

Ms. Shipp filed a declaration from Gail Johnston (CP. 60-64), a volunteer employee who continued to work at Treasures, and the actual author of the letter Ms. Shipp discussed with supervisors Watkins and Johnston on January 16, 2004 that Shipp was going to present to the Board -- Gail Johnston re-affirmed her first-hand account of Stedman as the source of the gossip issue, which was associated with the letter, and that Gail Johnston also overheard Ms. Shipp's conversation with Jayne Hoyos on January 20th, and

that no gossip from Ms. Shipp occurred during that conversation, either. CP. 61-62. Finally, Gail Johnston testified that she later spoke with Karen Hilburn, a member of the Respondent's governing Board, who claimed that Leanna Shipp was not fired because of gossip or dishonesty, instead the Board member claimed Shipp was given a list of jobs to perform, and she was unable to perform them. CP. 62.

Gail Johnston, also testified that she overheard the Respondent's only witness, Beth Johnston, express her own gossip about the store Shipp used to manage. According to Gail, Beth said: "I can't prove it, but I believe Leanna Shipp is responsible for the sales of Treasures dropping since she was fired." CP. 63.

Ron Pennell also testified against the Respondent, confirming the accuracy of facts he wrote in a letter back in 2004, soon after Shipp's termination, stating that he worked with Leanna Shipp for 50 hours per week during the time Shipp was the manager of the store, and that the accusation that Shipp would breach confidentiality was ridiculous, because he had personally encountered Shipp's dedication and to maintaining confidentiality on numerous occasions.

Dawn Pannell, a Shelton City Commissioner, also testified against the Respondent. Ms. Pannell testified that she met with

Beth Johnston “shortly after I learned that Leanna Shipp had been fired” to discuss the Kiwanis Club taking over the store’s operation. According to Dawn Pannell, Beth Johnston told Ms. Pannell that the reason Leanna Shipp was fired was because the store was not making any money. CP. 68. Ms. Pannell testified that the accusation that Shipp was fired for breaching confidentiality and lying by denying it was “not the excuse that Beth Johnston gave me.” CP. 68.

Finally, Leanna Shipp identified in her declaration multiple contradictory statements about the alleged gossip which were made by Respondent Beth Johnston, unsuccessfully, in Leanna Shipp’s presence, under oath. See CP. 77 (regarding an accusation that the gossiping involved a conversation Shipp supposedly had with a “law judge who sat on the [Respondent’s] board”).

The declaration and the attachment to Beth Johnston’s inaccurate hearsay declaration, supposedly typed and signed by Johnston the same day as Ms. Shipp’s termination, doesn’t reference the law judge at all. CP. 146. The attachment references gossip Shipp supposedly denied making about Shipp

“meeting with the Board on Friday [January 16] and you were probably going to be fired.” CP. 146.

Contrary to the overwhelming evidence in support of the Appellant, the Respondent’s motion was only supported by one self-serving declaration of Beth Johnston, whose 3-page declaration includes a 5-page “CV” purportedly listing Johnston’s own employment history in nursing positions and some “community positions,” none of which actually reference her serving the “oversight role” of the Respondent that she claims in her declaration. CP. 141. Similarly, her actual sworn testimony concerning the termination of Ms. Shipp is extremely vague, and non-descript. She claimed that “in the course of working with [Leanna], I counseled her, among other things, to refrain from gossiping within the community about Treasures’ internal matters.” CP. 139. Beth Johnston claimed that she “learned that Ms. Shipp had gossiped about Treasures matters after being told by me not to do so.” According to Beth Johnston, Leanna Ship “wrongly blamed another employee” and “disobeyed my direct instructions and had lied to me about her compliance with those instructions.” CP. 139. In an attachment, which Ms. Johnston did not swear was accurate,

she quotes two different accounts of what Shipp allegedly said to Jayne Hoyos. CP. 146.

Beth Johnston and the Respondent's attorney devote most of the declarations in opposition to the merits of Ms. Shipp's actual workers' compensation claim, which "went on for many months" although it was allegedly "not well grounded in the facts" and that Leanna Shipp "wrongly blamed Treasures for her [carpal tunnel] condition." CP. 139-140. At the conclusion of the declaration, Beth Johnston claims that she "sincerely wanted Ms. Shipp to become a better manager and was willing to spend my time (I was a volunteer) to help her succeed" but Ms. Shipp's "own actions" led to her dismissal. CP. 140. The Respondents' attorney, in a declaration, contradicts the Respondent's own witness Beth Johnston's declaration about helping Ms. Shipp succeed, by arguing that Ms. Shipp was actually on "thin ice" for months before her termination for different reasons (See CP. 147, CP. 82-84, CP. 152), and erroneously claiming that "Ms. Shipp filed an L&I claim *after* her termination." (emphasis in original, Declaration of Respondent's Counsel, at CP. 148). Such an error by the Respondent's counsel is problematic. This court must review CP.

154, which correctly shows that Ms. Shipp signed the initial “claim” pursuant to “RCW 51.48” (see section above physician’s signature), on January 19, 2004, and her physician signed it and “SENT” it to “MASON GENERAL HOSPITAL FOUNDATION”’s Post Office Box on January 20, 2003 at 12:52 hrs. CP. 154. Moreover, Respondent’s counsel filed a page from a deposition in which the attorney had already verified that the claim was initiated on January 19, 2004 (Cp. 162, line 11) and that it was a “statement that this patient is making to [Dr. Margaret St. Louis] and to the Department of Labor and Industries.” CP. 162, line 23-25.

While the declaration of the Respondent’s counsel focuses on the clearly erroneous assertion that Ms. Shipp’s workers’ compensation claim occurred after her termination, the Respondent’s only direct witness does not refute the Appellant’s account of being threatened if she initiated a workers’ compensation claim on January 16, and that the Appellant reported the need to initiate a workers’ compensation claim to her supervisor on January 19, 2004, two days before the Appellant was terminated and physically removed from the workplace.

As Ms. Shipp explained,

"I have always wanted Treasures to be successful. After I was fired, I had to spend months pursuing unemployment until I was granted a hearing where I could present witnesses in front of a judge. I had to spend years waiting for medical treatment because [Respondent] fought the claim, until the claim was eventually allowed, but the Department of Labor and Industries gave up trying to collect any co-payments from Treasures. The Respondents argue in the declarations that my claims for unemployment and workers compensation were somehow delayed and did not occur until the month after I was fired. I was financially, emotionally and medically devastated by the wrongful termination due to my workers comp claim. Treasures fired me, leaving me with severe carpal tunnel, no job, no medical benefits, multiple false excuses for firing me, and orders never to return to Treasures. I could no longer pay for my home, and I went into a deep depression. ... My workers' compensation claim was not prepared a month after my employment termination, it was prepared and signed on the 19th [of January], and I called Beth Johnston as instructed and told her so over the telephone. The initial paperwork on the claim was prepared two days before I was fired.

CP 80-81.

As noted above, the trial court granted summary judgment, finding no disputed issues of fact and that the Respondent was therefore entitled to judgment as a matter of law. CP. 14-16.

The Appellant now seeks review in this court.

IV. ARGUMENT

#1. The trial court erred in granting the Respondent's Motion for Summary Judgment as to the Appellant's claims for retaliation for pursuing a workers' compensation claim, and for outrage.

#2: The trial court erred in finding that there was no genuine dispute as to any material fact and that the Respondents were entitled to judgment as a matter of law on the workers' compensation retaliation claim and the claim for outrage.

Summary judgment motions shall be granted only if the pleadings, affidavits, depositions or admissions show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56. The court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party, and, when so considered, if reasonable persons might reach different conclusions the motion should be denied. Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issues or genuine issues of credibility. Balise, 62 Wn.2d at 199. The appellate court must consider all reasonable inferences in the light most favorable to the nonmoving party. Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). A defendant moving for summary judgment bears the burden of showing the absence of an issue of material fact. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Here, the trial court erred in rejecting the Appellant's outrage and workers compensation retaliation claims. For a history of such

claims in the employment context, see Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 821 P.2d 18. (1991)(answering certified questions from federal court, recognizing such employment-related causes of action, without ruling on the merits).

OUTRAGE

With regard to the Appellant's outrage claim, the elements require extreme and outrageous conduct, intentional or reckless infliction of emotional distress, and resulting severe emotional distress. Robel v. Roundup Corporation, 148 Wn.2d 35, 51, 59 P.3d 611 (2002). The conduct should involve a recitation of the facts that would arouse resentment from an average member of the community and lead him or her to exclaim "Outrageous!" Reid v. Pierce County, 136 Wn.2d 195, 201-202, 961 P.2d 333 (1998). There is no requirement for a Plaintiff to establish medically-diagnosed objective symptomatology in order to prevail on an outrage claim. Kloepfel v. Bokor, 144 Wn.2d 192, 194, 66 P.3d 630 (2003), Robel v. Roundup Corp., 148 Wn.2d 35, 51, 59 P.3d 611 (2002). Although the three elements are fact questions for the jury, the court should first 'determine{s} if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.'

Robel v. Roundup, quoting Dicomes v. State, 113 Wash.2d 612, 630, 782 P.2d 1002 (1989). The relationship between the parties, such as master and servant, is a significant factor in determining whether liability should be imposed. Contreras v. Zellerbach, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977)(probative where supervisory personnel were aware of but failed to stop racist and other comments in the workplace).

Generally, the act of terminating a person from employment is not outrageous conduct in itself, but the manner in which a termination is accomplished may constitute outrageous conduct. Corey v. Pierce County, 154 Wn.App. 752, 225 P.3d 367 (2010)(citing Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)). In Corey, the court contrasted the outrage claim from the typical sort of “insults and indignities, such as causing embarrassment or humiliation” that usually go with being fired from the job. The court in Corey identified evidence of outrageous behavior by the employer, included the employer leaking to the media that the employee was under investigation associated with the disappearance of money (but apparently the employer did not

explain it was over a trivial matter of a collection envelope in the employee's desk), creating the allegedly outrageous and harmful innuendo of criminal behavior for a person in Plaintiff's position as a public figure.

Here, the Appellant has demonstrated a substantially greater totality of facts than the Corey case, to support her outrage claim, along with her workers compensation retaliation claim. In addition to demonstrating that the employer itself was openly hostile to the Appellant's report of "severe" physical injury and to the Appellant seeking workers compensation (as in Robel, supra), the Respondent does not dispute the fact that, prior to her termination, the Appellant had a reputation of opposing gossip. In addition the Respondent does not dispute the extraordinary manner in which the employer immediately removed the Appellant from the workplace, terminated her medical benefits, and escorted Leanna Shipp in front of employees she previously supervised out the back door of the facility, publicly banned her from ever returning to the store, and slammed the door behind her. The Respondent then commenced a series of conflicting, false claims, that the Appellant was fired for gossiping, she was fired for not completing a list of

tasks she was given, and she was fired for not causing the store to earn enough money. In sum, there are enough facts concerning the manner in which the termination was accomplished, to permit the Appellant's outrage claim to go forward.

RETALIATION

The Appellant in this case alleged a wrongful termination in violation of public policy and Washington's Industrial Insurance Act (CP. 201). The statute provides that '{n}o employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title.' RCW 51.48.025(1). As the court explained in Wilmot v. Kaiser Aluminum & Chemical Corp., 118 Wn.2d 46, 68, 821 P.2d 18 (1991), the language of the legislative anti-retaliation provision constitutes a clear mandate of public policy against workers' compensation discrimination. In fact, similar language appears and is cited for unlawful retaliatory conduct under Washington's laws against race, gender and disability discrimination. See RCW 49.60.210(1)(making it unlawful "to discharge, expel, or otherwise

discriminate against any person because he or she has opposed any practices forbidden by this chapter.”); Galbraith v. Tapco Credit Union, 89 Wn. App. 939, 946 P.2d 1242 (1997).

In the present retaliation claim, the Appellant has the initial burden of showing “(1) that he or she exercised the statutory right to pursue workers’ benefits under RCW Title 51 or communicated to the employer an intent to do so or exercised any other right under RCW Title 51; (2) that he or she was discharged; and (3) that there is a causal connection between the exercise of the legal right and the discharge, *i.e.*, that the employer’s motivation for the discharge was the employee’s exercise of or intent to exercise the statutory.” Wilmot, at 68.

A retaliatory motive need not be the employer’s sole or principal reason for the discharge so long as the employee establishes that retaliation was a substantial factor. Renz v. Spokane Eye Clinic, 114 Wn.App. 611, 623-624, 60 P.3d 106 (2002)(citing Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, at 68-69, 821 P.2d 18 (1991); Kahn v. Salerno, 90 Wn.App. 110, 128-29, 951 P.2d 321 (1998)).

With regard to the retaliatory motive (the third element), the court in Wilmot, agreed in general that a “rebuttable presumption” exists in favor of the former employee if there is evidence of a claim being filed, the employer’s knowledge of the claim, and the employee’s termination from employment. Wilmot, at 69.

As stated in Wilmot, supra, Washington courts have uniformly recognized that “direct, ‘smoking gun’ evidence of discriminatory animus is rare, since ‘there will seldom be ‘eyewitness’ testimony as to the employer’s mental processes,’ and ‘employers infrequently announce their bad motives orally or in writing,’ . . . ‘[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff’s burden.’” Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001) (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983); deLisle v. FMC Corp., 57 Wn. App. 79, 83 (1990); and Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 860 (1993)) (internal citations omitted).

Proximity in time between the protected activity and the adverse employment action is a factor that suggests retaliation. Burchfiel v. Boeing Corp., 149 Wn.App. 468, 205 P.3d 145 (2009),

review denied, 166 Wn.2d 1038 (2009)(two weeks from protected activity, notice of possible job elimination, and demotion to “less than equivalent position”), Wilmot, at 69. In addition, a retaliatory act short of discharge will still comprise a cause of action. Robel, 148 Wn. 2d at 50 (citing with approval trial court fact finding: “[the employer’s] actions and/or inactions in regard to the verbal and non-verbal harassment of Robel in the work setting . . . was an unlawful act of retaliation in response to her filing and/or pursuing an industrial insurance claim under RCW 51, et seq., a statutorily protected activity . . .”). Moreover, evidence rebutting the accuracy or believability of an employer’s stated reasons for adverse employment action are sufficient to create competing inferences for the jury. Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 624, 60 P.3d 106 (2002)(sending facts to jury due to “cumulative” evidence, including employer’s multiple conflicting claims of its reason for termination, such as bad customer service, poor soldering skills, and a seminar report by Renz that supposedly upset manager, which were challenged by evidence from Plaintiff’s co-worker of observing Renz’ good customer service skills, the Plaintiff’s claim she was not trained to solder, and lack of

documentation of the reasons for termination until the post-complaint decision to discharge Renz). Accord, Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 148, 94 P.3d 930 (2004)(factually debatable issue created over employer's reason that it had to downsize because plaintiff was terminated in a profitable year; employer's lack of documentation that a non-terminated employee had performed better; and stray comments that could be construed to be discriminatory can create issues of pretext.) See also Burchfiel, supra (inference of retaliation bolstered by evidence that punishment (corrective action memo in file for printing inappropriate document) was more severe than what normally would be imposed for the conduct at issue (counseling)).

Here, as in 1) Robel, 2) Burchfiel, 3) Renz, 4) Riehl and 5) Burchfiel again, there is 1) direct evidence of workers compensation harassment/discriminatory comments from the supervisor herself when discussing the claim, which the Plaintiff described as intimidating, 2) extraordinarily close temporal proximity, 3) multiple witnesses challenging the accuracy and credibility of the employer's excuses for terminating the employee, 4) evidence that the supervisor and even a Board Member offered

contradictory excuses for the termination; 5) evidence that other employees gossip did not result in any terminations in 2002, or for Yvonne Stedman in 2004 despite multiple confirmations by Watkins, Shipp and Gail Johnston, that Stedman gossiped, which simply merited a mention of it in her employee evaluation.

Here, the employer simply argues without evidentiary support, the hearsay claim that the Appellant gossiped and lied about it. It does not appear that the Respondent in this case even articulated a "legitimate" reason for discharge. In any event, if Respondent's bald assertion is sufficient, the record contains ample support for a jury to conclude that Appellant has shown that the Respondent's gossip claims are a pretext for retaliation, and that the workers compensation claim was a substantial factor in the Appellant's discharge.

This court should conclude as the court concluded in Burchfiel:

[I]t is the jury's job to choose between inferences when the record contains reasonable but competing inferences of both discriminatory and nondiscriminatory actions. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 186, 23 P.3d 440 (2001). Mr. Burchfiel provided sufficient evidence that retaliation was a factor in Boeing's decisions to demote him and to file the corrective action memo. He met his burden of production. Wilmot, 118 Wn.2d at 70; Allison, [v.

Housing Auth., 118 Wn.2d 79, 96 821 P.2d 34 (1991)]; Renz v. Spokane Eye Clinic, PS, 114 Wn. App. 611, 623, 60 P.3d 106 (2002). The trial court, then, erred in deciding this question as a matter of law.

Finally, apparently because the Respondent in this case could not produce any documentary evidence or ear-witness statements to support the accusations that Leanna Shipp breached confidentiality by gossiping or lying about gossiping, the Respondent devoted extraordinary portions of the declarations and argument on summary judgment to the issue of whether or not the Appellant's carpal tunnel syndrome started with another employer, before she worked for the Respondent, and therefore whether or not the Department of Labor and Industries ultimately assessed the Respondent for payment of the Respondent's share of the Appellant's workers compensation claim, after an extended period of battling that issue with the State of Washington and with the Appellant. Clearly, the trial court erred in considering that evidence. There is no support in RCW 51.48.025 or Wilmot v. Kaiser Aluminum, 118 Wn.2d 46, 821 P.2d 18 (1991), for the contention that a victim of retaliation is precluded as a matter of law from pursuing a retaliation claim on the basis of whether or not the

underlying workers' compensation claim is ultimately granted by the Department of Labor and Industries. To the contrary, the court in Wilmot explained that the relevant concern in the anti-retaliation statute is the workers' "the pursuit of a claim" or "exercise of rights under the IIA [industrial insurance act]" not the agency's "administration of the worker's claim under the IIA." Wilmot, at 60. See also Benoit and Nagle, Retaliation Claims, Vol. 29, No. 3, Employee Relations Law Journal 13, at page 16 (Winter 2003)("The employee need not prevail on the underlying discrimination claim as a prerequisite for the participation to be protected."); Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000)("Ellis is not required to prove an actual WISHA violation. All he has to do is prove the City terminated him for making a WISHA complaint.").

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CONCLUSION

The decision awarding summary judgment to the

Respondent should be reversed.

Respectfully submitted January 5, 2010

Respectfully submitted,



Christopher W. Bawn, #13417, Attorney for Appellant

CERTIFICATE OF SERVICE

On this date, I delivered the Brief of Appellant to the Court of Appeals, and I personally submitted the Brief of Appellant to the Respondent's counsel



CHRISTOPHER W. BAWN, WSBA #13417