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COA Case No. 51962-3-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

FELICIA WILSON;

Plaintiff/Appellant,

vs.

TIMBERLAND REGIONAL LIBRARY

Defendant/Respondent,

RESPONDENT TIMBERLAND REGIONAL LIBRARY'S
ANSWERING BRIEF

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I. INTRODUCTION

Plaintiff/Appellant Felicia Wilson (Ms. Wilson) is a former employee of Defendant/Respondent, Timberland Regional Library. This appeal is based upon the trial court's order granting Timberland Regional Library's motion for summary judgment.

II. ASSIGNMENTS OF ERROR

The Appellant claims the trial court error in granting the Appellee's Motion for Summary Judgment. The following issues are raised

1. Did the court error in deciding that there were no material issues of fact when the facts were reviewed in light favorable to the nonmoving party?

2. Did the court error in deciding there was no admissible evidence of discrimination?

III. STATEMENT OF THE CASE

Plaintiff, Felicia Wilson, was hired by Defendant, Timberland Regional Library, as the Collection Services Manager in October of 2011. (CP 22, 23) Her primary interest in the job was that she already owned a home in Washington. (CP 22) Her last day of work at Timberland was January 24th, 2017, although she remained on the payroll until February

28th, 2017. (CP 299) She left Timberland to take a job at a library in Nashville, Tennessee. (CP 21) Starting in 2012, while an employee of Timberland, she applied for around fifty-one positions around the country. (CP 35)

Ms. Wilson has brought suit against Timberland for the following causes of action: 1) Hostile Work environment due to her race; 2) Disparate treatment due to her race; 3) Constructive discharge; and, 4) Unlawful retaliation. (CP 3-9)

Ms. Wilson alleges the following concerning her time at Timberland:

In October 2011, the former IT manager stated that Plaintiff was hired to take her job, and continued to be hostile until her retirement. (CP 4) The former IT manager retired in November of 2016. (CP 24) Plaintiff says she did not know why the statement was made. (*Id.*)

In May of 2012, Plaintiff alleges that, according to various sources, the former HR Director expressed surprise that so little had changed in her department. (CP 4) This caused Ms. Wilson to write a statement of accomplishments which she gave to the interim director, Gwen Culp. (CP 25-26)

In August of 2012, she claims to have had her language corrected three times by the interim Director, Gwen Culp, for using the word

"y'all". (CP 4, 26-27) Cheryl Heywood, the current Library Director, was at the meeting and says that the objection to Ms. Wilson's use of the word "y'all" was due to her attempting to suggest she was not part of the group, and that Ms. Wilson tried to distance herself from the rest of the team by referring to y'all and implying she didn't want anything to do with them. (CP 41)

Ms. Wilson claims that she was not allowed to be in charge of the library district when the director was gone. (CP 5) The library district policy was that when the Director was gone, members of the administrative team, of which Ms. Wilson was a member, would rotate being in charge. In fact, the complaint states that "efforts were made to ensure plaintiff was never in charge…" (*Id.*) In deposition, Ms. Wilson was asked, "were you ever left in charge?" (CP 28) Her answer was "More so after Walter, the new HR manager, arrived..." (*Id.*) She received training to be in charge in May of 2013. (*Id.*) After she was trained, she was in fact left in charge on occasions when the director was gone, just as other members of the administrative team.

Plaintiff next claims that in March of 2015 she was informed that staff had been assigned to observe and report everything she did because it was alleged that she was meandering. (CP 5) Her source of information was Jon Anson, the administrative Assistant. (CP 29) Mr. Anson did not

tell her that anyone else was asked to watch her. (*Id.*) In deposition, Mr. Anson stated that he was informed that Cheryl Heywood, the Director, might ask him to record the times Ms. Wilson would spend talking at his desk, but his direct supervisor, Brenda Lane, told him not to do it until Cheryl had a chance to talk to Ms. Wilson about allegedly wasting time. (CP 44-46) So, he didn't record Ms. Wilson's activities. (*Id.*) Brenda Lane, Mr. Anson's supervisor, states that Cheryl Heywood noticed Ms. Wilson at her desk often and had heard comments from others as to the time Ms. Wilson was spending talking to Ms. Lane. (CP 49-51) Ms. Heywood asked if this was a problem and wanted Ms. Lane to document the situation. Ms. Lane said she wouldn't document anything unless Ms. Heywood had a conversation with Ms. Wilson about it first, so Ms. Wilson would know to stop her conversations with Ms. Lane. (*Id.*) Ms. Lane did not document anything. (*Id.*) No action was ever taken against Ms. Wilson.

In paragraph 4.6 of the complaint, Plaintiff alleges that Ms. Heywood undermined her application for employment with the Pierce County Library System. In deposition, Ms. Wilson provides no actual evidence of this except a reference to having heard that she (Ms. Heywood) admitted it from Brenda Lane. (CP 30-31) Brenda Lane, in deposition, states that she did not think Cheryl had anything to do with

Ms. Wilson not getting the Pierce County job and that she told that to Ms. Wilson. (CP 52) Further, the Pierce County Library Director, Georgia Lomax, and Karim Adib, who was on the Pierce County hiring team, both testified under oath that they preferred a different candidate to Ms. Wilson and that Ms. Heywood said nothing negative about Ms. Wilson. (CP 6, 56, 57, 60-62)

Ms. Wilson was very angry about not getting the Pierce County position and was convinced Ms. Heywood was to blame so she went to Walter Bracy, the HR Director at Timberland. (CP 6-7, 31-33) She says she was angry and told Mr. Bracy that she was tired of the disparate treatment and hostile work environment. (*Id.*) She also admits that she told him to not do anything. (CP 33) Mr. Bracy recalls a very angry Ms. Wilson coming to his office to vent. (CP 65-66) Which is consistent with her statements that she was angry - had just got the notice from Pierce County about not receiving the job, and her misapprehension about Cheryl's involvement. Mr. Bracy does recall she asked him to not do anything because she was just venting. (*Id.*) He also indicated he took notes at the meeting and they reflect what was discussed, but he did not have them with him at the deposition. (CP 67)

Ms. Wilson also points to a meeting on February 23rd, 2016, where she alleges she was the only member of the admin team to not get notice

of a change in time for commencement of the meeting. (CP 7-8) Ms. Heywood explained in her deposition that meeting times are sent via email, to an email group that was programmed by the IT department. (CP 39-40) Her assistant would send an email to the group. There were no "personal invitations" given and Ms. Wilson would have received the same email as everyone else. (*Id.*)

Ms. Wilson did not like working for the Timberland Regional Library, however, she never thought about quitting. (CP 36) Ms. Lane summed up Ms. Wilson's tenure:

> *I mean, like I said, I - I like Felicia. I think she is a really great person, but I - I know that she was not happy at Timberland. And, I mean, I know that the entire five years that she was there, she was trying to get out. I mean, I know every job that she applied for. She talked to me about every interview she went on. You know, it just - it just seemed to not be a happy place for her. She didn't seem to really like the way Timberland ran. And so, I mean, it wasn't a surprise to me that she was looking because she made it very clear - especially after the previous director was fired and Cheryl came onboard - that she was not interested in staying at Timberland. That's it.*

(CP 53) Ms. Wilson did not like Ms. Heywood, but there is no evidence of any racially motivated animosity from Ms. Heywood or any racially motivated acts by Timberland.

IV. ARGUMENT

1. The Court did not error in dismissing this matter and finding there were no issues of material fact.

a. There is no evidence to substantiate Plaintiff's hostile work environment claim.

RCW 49.60.180(3) prohibits harassment based on a protected characteristic that rises to the level of a hostile work environment. An employee must demonstrate four elements for a hostile work environment claim: that the harassment (1) was unwelcome, (2) was because of a protected characteristic, (3) affected the terms or conditions of employment, and (4) is imputable to the employer. *Glasgow v. Ga.–Pac. Corp.*, 103 Wn.2d 401, 406–07, 693 P.2d 708 (1985); *see also Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn.App. 591, 595–96, 769 P.2d 318 (1989). Further, harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Blackburn v. State*, 186 Wn. 2d 250, 260–61, 375 P.3d 1076, 1081 (2016) citing *Glasgow*, 103 Wn.2d at 406, 693 P.2d 708. Harassing conduct has also been described as "severe and persistent," and it must be determined "with regard to the totality of the circumstances." *Blackburn v. State*, 186 Wn. 2d 250, 261, 375 P.3d 1076, 1081 (2016).

To determine whether the harassment is such that it affects the conditions of employment, courts consider: the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Washington v. Boeing Co.*, 105 Wn. App. 1, 10, 19 P.3d 1041, 1046–47 (2000). Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. (*Id.)* The plaintiff-employee's race must be the motivating factor for the discrimination so as to create a nexus between the specific harassing conduct and the plaintiff's race. *Robel v. Roundup Corp*., 148 Wn.2d 35, 46, 59 P.3d 611 (2002).

In the case at bar, Plaintiff alleges nothing that could not be termed as isolated, casual or a "mere offensive utterance." Further, there is no evidence of "race" based actions taken by the Defendant. Plaintiff cannot meet the second and third elements of the claim.

b. Plaintiff's Disparate treatment claim lacks evidence and should be dismissed.

To establish a prima facie case of racial discrimination based on disparate treatment, an employee must show that "(1) [she] belongs to a protected class, (2)[she] was treated less favorably in the terms or

conditions of [her] employment (3) than a similarly situated, nonprotected employee, and (4)[she] and the nonprotected 'comparator' were doing substantially the same work. *Washington v. Boeing Co.*, 105 Wn. App. at 13. There is no evidence of any disparate treatment. Plaintiff's alleged examples fall far short of being persuasive and the claim should be dismissed.

c. There is no evidence of retaliation of any sort.

Ms. Wilson next claims that the Timberland Regional Library retaliated against her. *RCW 49.60.210(1)* provides:

> It is an unfair practice for any employer... 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.

To establish a prima facie case of retaliatory conduct, Ms. Wilson must show that (1) she engaged in statutorily protected activity, (2) Timberland took some adverse employment action against her, and (3) retaliation was a substantial factor behind the adverse employment action. *Washington v. Boeing Co.,* 105 Wn. App. at 14. It is not apparent what adverse action Ms. Wilson alleges was taken against her. She was never demoted, disciplined or terminated. It is also not apparent what protected activity she engaged in. The claim should be dismissed.

d. Ms. Wilson was not constructively discharged.

To establish constructive discharge, the employee must show: (1) a deliberate act by the employer that made his working conditions so intolerable that a reasonable person would have felt compelled to resign; and (2) that he or she resigned because of the conditions and not for some other reason. *Washington v. Boeing Co.,* 105 Wn. App. at 15. The inquiry is whether "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Washington v. Boeing Co.,* 105 Wn. App. at 15-16. The "intolerable" element can be shown by aggravated circumstances or a continuous pattern of discriminatory treatment. (*Id.)* A resignation is presumed to be voluntary, and the employee must introduce evidence to rebut that presumption. (*Id*.)

In the case at bar, the Plaintiff quit to take another position. In fact, she had applied for around fifty-one positions since beginning her employment with Timberland in 2011. Clearly, she cannot show that she resigned due to the conditions and for no other reason, or that a reasonable person would have felt no choice but to resign. She had been seeking other jobs for years. There is no evidence of a deliberate act or intolerable conditions, aggravating circumstances or a pattern of discriminatory conduct.

There is no evidence she was constructively discharged.

2. Ms. Wilson presented no admissible evidence to support her claims but merely relied upon hearsay, speculation and misdirected anger.

A nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value. (CR 56) After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Meyer v. University of Washington,* 105 Wn.2d 847, 852, 719 P.2d 98 (1986). Ms. Wilson failed to do so. The Appellant's brief is full of speculation and statements that ignore the actual facts. For instance, Ms. Wilson was never disciplined in any way during her employment with the Timberland Regional Library District.

Also, she repeats the allegation that she was never left in charge of the office when the director was out, however, as pointed out in the Defense materials, she admitted in deposition that she was, in fact, left in charge after she received the requisite training.

In the case at bar, there are zero adverse actions taken against plaintiff. A reasonable jury could not conclude that race had anything to do with the sparse, innocuous complaints made in this matter. The case at

bar resembles the *Mikkelsen v. PUD No. 1 of Kittitas County,* wherein the Court upheld summary judgment dismissal of an employment discrimination case and said:

> *We affirm summary judgment dismissal of Mikkelsen's age discrimination claim because Mikkelsen presented almost no evidence of age discrimination. Mikkelsen testified that Ward once referred to long term employees as "old and stale" and that Ward had a "fixation" on a 72-year-old employee. CP at 90. But Mikkelsen's testimony suggests that Ward was simply marveling that some employees had worked for the same employer for so long. Mikkelsen presents no evidence that Ward treated older employees differently or that her age played a role in Ward's decision to fire her. The trial court properly concluded that age discrimination was not a substantial factor in Ward's decision to fire Mikkelsen.*

Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty., 189 Wn. 2d 516, 536, 404 P.3d 464, 475 (2017). There is no evidence of racial discrimination in the case at bar.

V. CONCLUSION

The trial court decision was proper and should be upheld. Plaintiff is relying upon speculation, hearsay and there are no issues of material fact.

RESPECTFULLY SUBMITTED November 20, 2018.

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the document to which this is affixed and an electronic copy of the document will be sent to:

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DATED December 20, 2018 at Ephrata, Washington.

JERRY MOBERG & ASSOCIATES, P.S.

RHIANNON C. FRONSMAN, PARALEGAL

JERRY MOBERG & ASSOCIATES, P.S.

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