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DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

LORI MACKEY,

Plaintiff-Appellant

v.

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

Defendants-Respondents

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. Bernard F. Veljacic)

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is an employment case. Defendant Home Depot USA, Inc. (“Home Depot”) hired Lori Mackey (“Mackey”) as a sales associate in February 2006. From 2010 to 2013 Home Depot provided reasonable accommodations to Mackey both for mental and physical conditions—and Mackey never informed Home Depot that the accommodations were insufficient. Mackey even admits that for years Home Depot was “*very supportive*” of her requests for accommodation and accommodated her disabilities in a variety of ways, including granting her: (1) preferential hour scheduling, (2) preferential work day scheduling, (3) multiple leaves of absence, (4) reduced hours/part-time, and (5) restricted lifting accommodations for her position. CP 52, 65. By February 2013 Mackey informed Home Depot by doctor’s note that she could work “*without restrictions.*” CP 49, 78 (emphasis added). During the next 20 months, Mackey never submitted any medical information documenting workplace restrictions. Mackey admits Home Depot accommodated a claimed lifting limitation by allowing her to request “help from other employees to perform the lifting tasks I was assigned.” CP 98, 99.

In October 2014, Home Depot’s Asset Protection department received a report from the Operations Manager that Mackey was observed on October 2 entering the managers’ office with a stack of “cash wrapped

in a white piece of paper”—not typical activity for someone in Mackey’s position. CP 80, 82. This report triggered investigations which revealed that Mackey had violated Home Depot policy by improperly giving “double discounts” and other unauthorized discounts amounting to at least \$17,000. Mackey also admitted to the veracity of the findings of the investigation: In Mackey’s deposition she fatally conceded that (1) “*provid[ing] double discounts... would... be a fair reason why someone would be terminated ...*”; and (2) she “*accidental[ly gave] ‘double dipping [discounts] on some of [her] sold quotes....’*” CP 47, 105 (emphases added).

On October 8, 2014, Home Depot presented the investigative findings to Mackey, and she acknowledged her actions. That same day, Home Depot’s District Human Resource Manager recommended termination. On October 10, 2014, Home Depot properly terminated Mackey’s employment for the legitimate business reason that she had violated Home Depot’s discount policy. The decision relied in good faith upon the investigation by the Asset Protection Manager.

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

under RCW 49.60, and a claim for wrongful discharge in violation of public policy.

The trial court properly dismissed her claims as a matter of law on summary judgment because undisputed evidence shows that: **(1)** Mackey cannot establish her *prima facie* case against Home Depot, Krall (formerly Risner), and Isles; **(2)** Home Depot reasonably accommodated Mackey; **(3)** Home Depot's investigations create an independent basis to affirm summary judgment where they revealed improper discounting and other policy violations, including an admission by Mackey that she "accidentally double discounted" merchandise, thereby establishing a legitimate, non-discriminatory business reason for her termination; and **(4)** the results of the investigations establish a good faith basis for Mackey's termination of employment. There was no retaliation. This Court should affirm.

II. COUNTERSTATEMENT OF FACTS

Home Depot does not accept Mackey's incomplete statement of facts, which contains editorial comments and conclusions.

A. Mackey was Trained on Home Depot's Policies Which Promote a Respectful and Discrimination-Free Workplace and Prohibit Retaliation.

Home Depot is an equal opportunity employer and is committed to providing a work environment of mutual respect free from discrimination, harassment, or retaliation. CP 46, 58, 70. Home Depot's written policies

expressly prohibit discrimination, harassment, or retaliation and confirm that violations of these policies will result in discipline up to and including termination. CP 46, 70. Home Depot's Open Door Complaint process encourages employees to raise complaints through a variety of ways. CP 70.

Home Depot hired Mackey as an at-will employee in February 2006. CP 45. Initially Mackey worked in Home Depot's Garden Department in 2006, and then from 2010-2011. CP 49. After 2011, Home Depot reassigned Mackey to work as a sales associate in Home Depot's Appliances Department. *Id.*

Home Depot trained Mackey on Home Depot policies. Mackey concedes she knew Home Depot's policies against discrimination, harassment, and retaliation, and knew Home Depot's Open Door complaint process. CP 46, 58. She admits she knew that Home Depot expected her to report discrimination, harassment, or retaliation to any one of "multiple avenues of reporting," including Human Resources, the Store Manager, or through an anonymous 800 number to a centralized complaint office operated by Home Depot in Atlanta. CP 46, 58.

B. Home Depot Trained Mackey on Home Depot's Merchandise Discount Policies.

In addition to the training Mackey received with regard to Home Depot's policies against discrimination, harassment, and retaliation,

Mackey also received specific training on Home Depot's policies and procedures for "discounting merchandise." CP 46. Mackey knew that the Home Depot merchandise discount policy: (1) set a maximum discount of \$50 without manager approval, CP 48, 50; (2) prohibited "double discounts" (applying two different discounts at the same time on the same sale), CP 47, 56, 135; (3) prohibited giving volume discounts unless the purchase satisfied the volume purchases requirements, CP 56, 80, 135; and (4) required Associates to enter their own employee ID, not another employee's ID, when granting discounts. CP 44, 48.

C. Home Depot Accommodated Mackey's Disabilities.

In 2010 Mackey provided Home Depot with notes from her doctors and mental health providers seeking various accommodations. CP 62 (schedule change accommodation allowing for Monday mornings off for physician appointments); CP 64 (schedule change accommodation so she did not have to work after psychiatric sessions); CP 52 (schedule change accommodation so she would not have to work over five days in a row); CP 52-53 (schedule change accommodation so she would not have to work "later than 7 pm"); *id.*, (scheduled Mackey for work only between "8 am to no later than 5 pm with two days off in a row"); CP 53 (extended medical leave of absence).

Mackey told her physician that Home Depot management was “*very supportive*” of her requests for accommodation. CP 65 (emphasis added). Mackey also testified in this case that Home Depot granted her requested disability accommodations:

Q: Can you think of any ways that Home Depot did try to accommodate your disability?

A: **My scheduling.**

Q: So how did they change your scheduling?

A: **It fell within the -- the time range which was 5:30 a.m. to no later than 5:30 p.m.**

Q: So one of the accommodations Home Depot gave you for your disability was that you wouldn't have to work outside of 5:30 a.m. to 5:30 p.m.?

A: **Right.**

[...]

Q: So then another accommodation is that they agreed, at your request, not to schedule you more than five days in a row?

A: **Right.**

CP 52 (emphases added.)

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

Q: Is it your understanding that Home Depot did allow you to have others do the lifting for some assignments that you may have had as part of your duties?

A: **Correct.**

[...]

Q: Was there any time that you complained because you didn't have someone to lift for you?

A: **No.**

CP 52-3 (emphasis added). Home Depot also granted another leave of absence due to medical issues through January 24, 2013. CP 76.

D. Mackey Returned to Work in February 2013 “Without Restrictions.”

When Mackey failed to return to work as scheduled at the end of her leave of absence, Home Depot contacted Mackey on January 25, 2013, to determine her employment status. CP 76. Mackey responded on February 4, 2013, that she planned to return to work without restrictions, and provided Home Depot with a doctor's note confirming she could return to work “*without restrictions.*” CP 49, 78 (emphasis added). After Mackey's return to work, there is no record of her submitting any further medical documentation indicating any restrictions, limitations, or disabilities affecting her ability to work. *Id.*

E. Home Depot Discovered Mackey's Violation of the Company's Discount Policies.

Almost two years later, on October 2, 2014, Home Depot Operations Manager Santo Lupica observed Mackey carrying a bundle of cash “wrapped in a piece of white paper” to the manager's office. CP 80, 82-83.

Mackey stated that the bundle of cash was “change due to a customer.” CP 80. The expectation is that any refund would be given directly to the customer. *Id.* Consequently, this “bundle of cash” triggered further review by Lupica of the customer’s order. Lupica discovered that Mackey had engaged in a number of policy violations. CP 80.

First, Mackey improperly used another employee’s identification, which violated Home Depot policy. CP 80; CP 44, 48 (Mackey admits it is improper to use another employee’s identification as it violates Home Depot’s till policy).¹ **Second**, Lupica discovered, and Mackey admits, she improperly applied Home Depot’s Volume Bid discount after a customer “decided not to purchase one of the items.” CP 80 (Lupica discovers double discounting); CP 101 (Mackey admits giving volume discount even after customer chose not to purchase volume of appliances). **Third**, Lupica discovered, and Mackey admits, she improperly provided, “double discounts” by simultaneously applying various different discounts to the same purchase. CP 82 (Lupica observes double discounts); CP 47 and 105 (Mackey admits giving double discounts). Mackey concedes that the

¹ Mackey acknowledges that using another associate’s identification number could result in disciplinary action up to and including termination. CP 44, 48.

singular act of granting double discounts is a justifiable basis in itself for termination. CP 45.

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

The second investigation revealed that Mackey had provided improper volume bids and double discounts. In total, Mackey had processed 25 orders in which "additional price markdowns [were made] beyond her authorization." CP 82. The investigation uncovered Mackey's scheme, which involved submitting an order for multiple appliances that would qualify for a volume bid discount. Then, after receiving approval for a volume bid discount, Mackey would routinely remove items from the customer's ticket before sale rendering the order ineligible for the volume discount threshold of \$2,500. Yet, Mackey still applied the volume discount even though the transaction did not qualify for it. CP 82-83.

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

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

Q. Would you agree that improperly discounting sales at Home Depot would be a reason why someone could be terminated?

A. **Yes.**

Q. Would you agree that an employer should expect the employee to make true statements?

A. **Yes.**

Q. And if they make untrue statements, that would be a reason why an employee might get terminated?

A. **Yes.**

Q. Would you agree that if you gave a discount on the sale of an item where there wasn't manager approval, that that would be a reason why the employer might want to terminate you?

A. **Yes.**

Q. And that would be a fair reason?

A. **Yes.**

CP 45 (emphases added.)

F. Home Depot Terminated Mackey's Employment Due to Violations of Home Depot's Discounting Policies.

On October 8, 2014, Asset Protection Manager Weaver met with Mackey and Store Manager Robert Tilton² to discuss the investigation results. CP 50-51, 82-83, 85. During the meeting Mackey admitted applying "double dipping" discounts on certain orders and extending Volume Bid discounts even after removing items from their ticket which would thereby disqualify the order for the discount. CP 103, 105. The same day, Mackey

² Mackey testified that Tilton always "treated her in a fair way." CP 51.

submitted a written Associate Statement confirming the admissions during the meeting, stating:

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

CP 85. Based on the Weaver investigation, and reports that Mackey admitted to the improper discounts, District Human Resources Manager Robert Beaubian³ recommended Mackey's termination. CP 56-57.⁴ Mackey concedes that Beaubian relied solely on the investigation in making the decision and recommendation that Mackey be terminated. CP 56. Mackey's employment was terminated on or about October 10, 2014. CP 4.

On October 27, 2014, Mackey faxed to Home Depot a written response that sought to explain or minimize her unauthorized discount practices. CP 103, 105 (Mackey admitted "accidental 'double dipping' on some of my sold quotes"). In that post-termination writing, Mackey for the first time mentioned an allegation about an interaction she allegedly had with Krall on September 26, 2014. Mackey speculated:

[Risner/Krall] told me that I was deflective, and confrontational and that's why management did not like me. This caused me to begin to cry and tell [Risner/Krall] that I felt

³ Mackey admits that Beaubian never treated her "differently" because of her claimed disabilities. CP 56-7.

⁴ Mackey admits that co-defendant Jen Isles was not the decision-maker with regard to her termination. CP 52.

I was being attacked, that due to my disabilities, I can't think when I am attacked and that she made me skittish.

CP 91. Mackey testified that, prior to submitting this post-termination statement, she had never complained about alleged disability discrimination. CP 53.

Mackey also called Home Depot after her termination and complained about the results of the Weaver investigation. Home Depot's Associate Advice and Counsel Group Manager, Shalonda Williamson, conducted an investigation which disproved Mackey's allegations and reconfirmed the results of the Weaver investigation. CP 73.

G. Procedural Posture.

On March 17, 2016 Mackey filed her Summons and Complaint. CP 1. The Court granted Home Depot's Motion for Summary Judgment on July 9, 2018. CP 162. Mackey timely appealed.

III. ISSUES PRESENTED

1. Did the Superior Court properly dismiss Mackey's discriminatory discharge claim on summary judgment: where she admitted to violating store policy and therefore to unsatisfactory performance; where an admittedly unbiased investigation which revealed violations of store policy provided Home Depot a good faith, legitimate business reason to terminate her; and where no evidence showed that the decision-maker

behind the termination had knowledge of the allegedly discriminatory conduct? **Yes.**

2. Did the Superior Court properly dismiss Mackey's failure to accommodate claim: where courts routinely state that the accommodation granted to Mackey is more than what is required as a matter of law; where Mackey admittedly never complained that the accommodation was insufficient; and where Mackey had a duty to notify Home Depot of any insufficiency and failed to do so? **Yes.**

3. Does Home Depot's good faith investigation, which concluded that Mackey violated store policy, provide an independent basis to affirm the grant of summary judgment where Mackey admitted the investigator treated her fairly and presented no evidence to contradict that the decision-maker relied solely on the investigation results, even if the results of the investigation were incorrect? **Yes.**

4. Did the Superior Court properly dismiss Mackey's disability retaliation claim: where she failed to establish a causal link between her alleged protected activity and her termination; where Mackey failed to rebut Home Depot's legitimate, non-retaliatory reasons for Mackey's termination as a mere pretext; and where an admittedly unbiased investigation revealed violations of store policy providing Home Depot with a good faith, legitimate, non-discriminatory business reason to terminate her? **Yes.**

5. Did the Superior Court properly dismiss Mackey’s wrongful discharge in violation of public policy claim where she failed to establish causation and pretext under both the *Thompson* test and the *Perritt* test; and where, again, an admittedly unbiased investigation revealed violations of store policy providing Home Depot with a good faith, legitimate, non-discriminatory business reason to terminate her? **Yes.**

IV. ARGUMENT

A. Standard of Review.

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Here the Superior Court correctly granted Home Depot’s Motion for Summary Judgment because Mackey raised no genuine issue on any material fact, and no fair-minded jury could return a verdict for Mackey on the evidence presented.

Summary judgment is appropriate where the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Where the moving party is a defendant and meets the initial burden by showing that there is an absence of evidence to support the plaintiff’s claim, the court should grant the motion for summary judgment if the plaintiff fails to present sufficient

proof on each essential element of his or her claim. *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 264, 93 P.3d 919 (2004).

“A party seeking to avoid summary judgment cannot simply rest upon the allegations of her pleadings; rather, the non-moving party must affirmatively present the admissible, factual evidence upon which she relies.” *Johnson v. Schafer*, 110 Wn.2d 546, 548 (1988) (quoting *Mackey v. Graham*, 99 Wn.2d 572, 576, 663 P.2d 490 (1983)).

“The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain.” *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944, 946 (2006). In the absence of a dispute regarding an issue of material fact, where a party shows it is entitled to judgment as a matter of law, summary judgment must be granted in its favor, even in the factually intensive context of employment cases. *Andu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2001) (“[T]he salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to ... other areas of litigation.”).

B. The Superior Court Properly Dismissed Mackey's Discriminatory Discharge Claim Where Mackey Left Uncontested Her Violations of Store Policy and the Good Faith Investigation.

Mackey failed to establish a *prima facie* case of discriminatory discharge: (1) that she was performing her job satisfactorily; (2) she was terminated; and (3) her disability or requests for accommodation were a substantial factor in her termination. Mackey was also required to show that similarly situated employees not in her protected class received more favorable treatment.” *Knight v. Brown*, 797 F. Supp. 2d 1107, 1125 (W.D. Wash. 2011), *aff'd*, 485 F. App'x 183 (9th Cir. 2012). Moreover, Home Depot established a legitimate business purpose for Mackey's termination. Mackey was therefore obligated to establish pretext. *Callahan v. Walla Walla Housing Auth.*, 126 Wn. App. 812, 818, 110 P.3d 782 (2005). She failed to do so.

1. Mackey Conceded Unsatisfactory Performance by Admitting That She Violated Home Depot's Discount Policy.

Mackey failed to establish an issue of fact regarding the first element of her discriminatory discharge claim: that she was performing satisfactory work. Mackey admitted in her declaration, and did not contest the finding in Home Depot's investigation,⁵ that she misapplied Home Depot's

⁵ Indeed Mackey only contests the frequency of her violations of store policy.

discounting policies. CP 105 (admission); 82-83 (investigation). An investigation by Home Depot's Asset Protection Manager, Mik Weaver, revealed that Mackey improperly gave double discounts and she admitted that "there was accidental 'double dipping [discounts]' on some of my sold quotes ..." CP 47, 105. Home Depot had a policy against this practice. CP 80, 82, 83. A violation of store policy indicates unsatisfactory performance and defeats a *prima facie* case. *See Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1208 (9th Cir. 2008).

In an attempt to argue "satisfactory" performance, Mackey relied upon her annual performance reviews dated before the investigation conducted by Weaver. Obviously, those prior performance reviews could not possibly capture Weaver's investigatory findings that Mackey violated Home Depot's discounting policy. Mackey conceded that "improperly discounting sales at Home Depot would be a reason why someone could be terminated." *Id.* at CP 45. By admitting that she improperly discounted products, Mackey conceded her discriminatory discharge claim.

Additionally, Mackey conceded she has no information that Weaver was ever unfair or discriminatory toward her in his investigation where he determined she improperly discounted products. CP 57. The undisputed evidence shows that Weaver's report was thorough and in good faith,

further supporting Mackey's concessions regarding his investigation. CP 57, 82-83.

Moreover, even if Weaver's investigation were somehow tainted, he was not a decision-maker when it came to Home Depot's termination of Mackey. District Human Resources Manager Robert Beaubian recommended the decision to terminate Mackey "relying upon" the Weaver investigation. CP 56-57. Mackey conceded that she had no evidence that Beaubian discriminated or retaliated against her in any way. CP 51 (Beaubian was fair). Accordingly, the undisputed facts confirm that Home Depot believed in good faith that Mackey was not performing her job in a satisfactory manner.

Mackey's concessions noted above and her inability to fault the investigation performed by Weaver support the Superior Court's determination that she failed to sustain her burden to create a genuine issue of fact regarding the first element of her discriminatory discharge claim, that she was performing her job satisfactorily. Therefore, the Superior Court properly dismissed the claim. *See Coyaso v. Bradley Pac. Aviation, Inc.*, 578 F. App'x 715, 717 (9th Cir. 2014) (dismissal proper where plaintiff presented no evidence that employer did not conduct investigation in good faith or did not honestly believe plaintiff committed misconduct).

2. Mackey Failed to Show a Causal Link Between Disability and Termination.

Mackey also failed to establish an issue of fact regarding the third element of her discriminatory discharge claim: that her disability or requests for accommodation were a substantial factor in her termination.

Mackey presented no evidence that the decision-maker for her termination—Beaubian—used Mackey’s disability as a substantial factor in his decision on her termination. Instead, Mackey offered a conclusory allegation that Krall, Mackey’s supervisor, criticized Mackey’s work and did not “change her behavior or tactics” after being informed of Mackey’s disabilities. Mackey’s Brief at 15 (citing CP 132). But Mackey left undisputed that Krall was not the decision-maker with regard to Mackey’s termination. Accordingly, Mackey’s claim fails because she cannot connect the alleged conduct from Krall to her termination. *See, e.g., Williams v. City of Bellevue*, No. 2:16-CV-01034-RAJ, 2017 WL 4387590, at *5 (W.D. Wash. Oct. 3, 2017), *aff’d*, 740 F. App’x 148 (9th Cir. 2018) (dismissing race discrimination claim where plaintiff did not connect unrelated discriminatory remarks from one employee to the decision-maker with regard to termination); *Vasquez v. Cty. of L.A.*, 349 F.3d 634, 640-41 (9th Cir. 2003) (court dismissed case because plaintiff failed to show nexus between discriminatory remarks and subsequent employment decision).

The Superior Court properly dismissed Mackey's claims because the actual decision-makers relied on a good faith, non-discriminatory reason, unconnected to Mackey's conclusory allegation regarding Krall.

3. Mackey Presented No Evidence That Decision-Makers Treated Similarly Situated Employees More Favorably.

Mackey baldly claimed in her declaration that Defendant Jennifer Isles "berated [Mackey] because [her] sales were not higher, but employees who ... did not have disabilities [] were encouraged to try harder to make sales." CP 98. Even putting aside that the fact that Appellant failed to substantiate this hearsay statement with evidence, she also failed to connect this alleged comment to the decision-maker. Mackey also fails to present any evidence that these allegedly similar-situated employees faced investigations into their violations of company policy. Thus these unnamed employees are not actually similarly-situated, and Mackey's bald declaration failed to create a genuine question of fact on the issue. *See Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 287, 227 P.3d 297 (2010) ("A plaintiff may not defeat summary judgment by relating conclusions, allegations, or speculations."). The Superior Court properly denied the claim.⁶

⁶ It is undisputed that Beaubian decided Mackey should be terminated. Mackey failed to present any evidence that Defendants Krall or Isles made the decision to terminate Mackey, or that they informed the decision-makers

4. Mackey Failed to Present Evidence of Pretext or Lack of Good Faith For Home Depot’s Legitimate Termination Based on Its Investigation.

Even if we assume *arguendo* that Mackey established the existence of issues of fact as to the elements of her *prima facie* claim, the Superior Court properly noted that Home Depot articulated a legitimate, nondiscriminatory reason for terminating Mackey’s employment. *McDonnell Douglas Corp.*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). It is undisputed that the decision to terminate Mackey relied upon the Weaver investigation. CP 56-57. Mackey conceded that “improperly discounting sales at Home Depot would be a reason why someone could be terminated.” CP 45. As a result, Mackey was required to provide evidence of pretext. She failed to do so.

A plaintiff can demonstrate pretext by showing that the employer's articulated reasons for the adverse employment action against her: (1) had

of protected activity. *See Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011) (affirming summary judgment dismissal of retaliation claim where it would “require undue speculation” to assume that co-worker with knowledge of activity “was involved in the decision or decision-making process”); *Michkowski v. Snohomish Cty.*, 185 Wn. App. 1057 (2015) (unpublished) (plaintiff “cannot rely on mere speculation or a hunch that ... a person having knowledge of an employee's protected activity actually told the decision-maker about the protected activity”). Accordingly, all claims for wrongful discharge against them should be dismissed.

no basis in fact; (2) were not really the motivating factors for the employer's decision adversely affecting his/her employment; (3) lacked temporal connection to the employer's decision; or (4) were not used by the employer as motivating factors in its employment decisions affecting other similarly-situated employees. *Kuyper v. State*, 79 Wn. App. 732, 738, 904 P.2d 793 (1995). In other words, to prove pretext Mackey must do more than merely disprove the defendant's justification. She must affirmatively prove that her disability "was at the heart of Defendant's termination decision." *St. Mary's Hnr. Ctr. v. Hicks*, 509 U.S. 502, 540-41, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). Mackey did not address any of the above-mentioned factors at the Superior Court. When an employee's "evidence of pretext is weak or the employer's nonretaliatory evidence is strong, summary judgment is appropriate." *Milligan v. Thompson*, 110 Wn. App. 628, 638 (2002). Accordingly, in this case, the Superior Court did not err when it summarily dismissed Mackey's discrimination claim. There is simply no evidence that her disability "was at the heart of" Beaubian's termination decision. Mackey's failure to establish pretext is fatal to her claim, and is another independent reason to dismiss the discrimination claim.

Moreover, there are several reasons why Mackey cannot establish pretext. **First**, Mackey conceded to violations of store policy by admitting that her accounts showed "double dipping" discounts. CP 105 (admitting

during investigation “that there was accidental ‘double dipping [discounts]’ on some of my sold quotes....”). **Second**, Mackey admitted that she had no evidence that the decision-maker, Beaubian, discriminated against her, or was motivated by anything other than the investigation which found she had improperly discounted. **Third**, though Mackey attempted to establish discriminatory intent by arguing that allegedly discriminatory remarks preceded the timing of her termination, she offered no evidence whatsoever to rebut either (a) the good faith nature of the investigation into her discount practices, or (b) the suspicious violations of store policy that triggered investigations *in the first place*. Mackey did not dispute that she was caught carrying a large wrapped bundle of cash in the manager’s office (ostensibly for a customer and in violation of company policy), or that she improperly entered a transaction under another employee’s identification number (another violation of company policy). CP 80. These unusual behaviors triggered a preliminary investigation by Mackey’s manager, and a second investigation by Weaver. CP 80, CP 82. By failing to rebut the legitimate and undisputed causes of Home Depot’s investigations, Mackey failed to establish pretext, and her claims fail.

5. Home Depot's Good Faith Basis for Termination Independently Justifies Affirming Summary Judgment.

Under well-settled precedent, even if Home Depot *incorrectly* concluded that Mackey violated Home Depot policy by giving double discounts, the Superior Court's grant of summary judgment should still be affirmed. (This defense is dispositive not only to the discriminatory discharge claim, but to the retaliation and wrongful discharge claims as well; *see infra*). That is because at a minimum the conclusions of Asset Protection Manager Mik Weaver's investigation (and Mackey's admitted double discounting) establish a good faith basis, and honest belief by Home Depot, that Mackey had given improper double discounts violating company policy.

Under these circumstances, courts will grant summary judgment "even if [the employer's] reason is foolish or trivial or even baseless." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). It is not the Court's place to second guess the wisdom of the decision-maker. *Wash. Fed. of St. Employees v. St. Personnel Bd.*, 29 Wn. App. 818, 820, 630 P.2d 951 (1981) (recognizing "the courts are ill-equipped to act as super personnel agencies."). The question before this Court "is not whether the employer's reasons for a decision are right" but whether the employer honestly believed the reason for its actions. *Domingo v. Boeing Empl. Cred.*

Un., 124 Wn. App. 71, 84 n.26 (2004). Even if Mackey created a question of fact on the accuracy of the Weaver investigation, her claims fail because there is no evidence that the investigator or decision-maker had prior knowledge of Mackey's allegations, proving without dispute the investigation's good-faith basis. Mackey has no evidence the investigation could have been tainted.

The case of *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 315 (4th Cir. 2001) (affirming summary judgment in favor of employer) is particularly applicable. There the employee sued the employer for wrongful termination, claiming discrimination. The employee complained that his employer mistakenly concluded that he had intentionally falsified his time cards and lied about taking a vacation day. *Id.* The court dismissed the claim and rejected this argument because the employee's disagreement with the employer's decision was immaterial. *Id.* at 315 (complaints about conduct and result of investigation insufficient to create a genuine issue of material fact as to whether investigation found actions were violations of store policy).

Mackey spends a great deal of time attacking the findings of Weaver's investigation based on post hoc "facts" generated during litigation. CP 97-103. That effort misses the point. Disputing the investigation and its conclusions does not render the investigation as a bad-

faith exercise, nor does it color the ultimate decision-makers' reliance on it when they terminated Mackey's employment. As already discussed, Mackey's sworn declaration admits to double dipping. CP 47, 82. Mackey also admitted that Weaver treated her fairly and that the decision-makers who fired her treated her fairly as well. CP 51, 56-57. Thus, by Mackey's own admissions, there was no genuine issue of material fact regarding whether Home Depot's investigation, and therefore its reasons for termination, was performed good faith. This is dispositive of her case.

C. The Superior Court Properly Dismissed Mackey's Failure to Accommodate Claim Where Home Depot's Accommodation was Reasonable as a Matter of Law.

The Superior Court properly decided that Home Depot satisfied the requirements of RCW 49.60 by offering an accommodation that enabled Mackey to perform her job, regardless of whether the employee would prefer a different accommodation. "The [WLAD] does not require an employer to offer the employee the precise accommodation he or she requests." *Doe v. Boeing Co.*, 121 Wn.2d 8, 20 (1993). This Court should affirm the Superior Court's ruling.

Mackey leaves uncontested that Home Depot accommodated her mental and physical disabilities at least five ways: (a) scheduling her work between 5:30 a.m. and 5:30 p.m. (CP 52); (b) scheduling her to work no more than five days in a row (CP 52); (c) scheduling her part-time due to

her physical restrictions (CP 53); (d) providing multiple medical leaves of absence (CP 53, 76); and (e) allowing Mackey to have co-workers assist with lifting duties. CP 52-53, 98, 99.

First, Mackey's sole allegation on her failure to accommodate claim relates to the reassignment of lifting duties, but her allegation is refuted by admissions in her own declaration and deposition. *See* CP 98 (Home Depot allowed Mackey to "find another employee to help perform these [lifting] tasks so I could do my job."); 52-53, 98, 99 (Home Depot accommodated her lifting restriction by allowing her to assign her lifting tasks to co-workers). Mackey admitted that she never notified Home Depot that she was unable to get someone to help her with her lifting duties. CP 53. *See Albertson v. Sisters of Providence Hosp., Inc.*, 161 F.3d 11, 1998 WL 560073, at *2 (9th Cir. 1998) (unpublished) (employee who fails to take advantage of reasonable accommodation is "not a qualified individual with a disability") (citing *Hankins v. The Gap, Inc.*, 84 F.3d 797, 798, 801 (6th Cir. 1996)); *Harrell v. Wash. St. ex rel. Dep't of Soc. Health Servs.*, 170 Wn. App. 386, 410, 285 P.3d 159 (2012) (evidence of failure to take advantage of reasonable accommodation contributed to finding of non-liability).

Second, Home Depot's lifting accommodation met its duty to accommodate Mackey's lifting restriction as a matter of law. Courts have concluded that Home Depot's accommodation is more accommodation than

required under the law because employers are *not* required to assign a helper to perform the disabled worker's lifting tasks. *See, e.g., Gilbert v. Frank*, 949 F.2d 637, 644 (2d Cir. 1991) (assigning helper to perform heavy lifting duties not a reasonable accommodation); *Howard v. U.S. Postal Serv.*, 118 Fed. Appx. 492, 494 (Fed. Cir. 2004) (affirming that post service was not required to assign helper to disabled employer as a reasonable accommodation); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 912 (7th Cir. 1996) (hiring a helper is not a reasonable accommodation). Mackey cites no authority otherwise. Accordingly, Home Depot's actions constitute a reasonable accommodation as a matter of law and the Superior Court's dismissal of this claim should be affirmed. *Doe*, 121 Wn.2d at 18-21 (“[S]cope of employer's duty to accommodate is limited to removing ... impediments to employee's ability to perform his or her job”).

Third, Mackey's assertion that she lifted items beyond her restrictions, despite Home Depot's accommodation of allowing co-workers to lift for her, is legally irrelevant. She admitted that she never informed Home Depot that she could not find a coworker to lift for her. CP 53. *See Arroyo v. Cont'l Airlines, Inc.*, 173 F. App'x 634, 635 (9th Cir. 2006) (upholding summary judgment dismissal where employee “testified that no one ever refused her informal requests for lifting assistance”).

Finally, Mackey had a duty to cooperate with Home Depot's reasonable accommodation efforts by accepting only that work she could reasonably perform. *Wurzbach v. City of Tacoma*, 104 Wn. App. 894, 898-99 (2001) (“[E]mployee has a duty ‘to cooperate with the employer in the hunt for other suitable work by ... accepting reasonably compensatory work he could perform.’”). Mackey breached this duty when she performed work outside of restrictions imposed by her health care provider, especially after Home Depot accommodated Mackey by allowing her to find other employees to do the lifting. Mackey should not recover for an alleged failure to accommodate where she failed to cooperate with Home Depot's efforts at accommodation. *Wurzbach*, at 899.

D. The Superior Court Properly Dismissed Mackey's Disability Retaliation Claim Because She Failed to Establish a *Prima Facie* Case.

The Superior Court properly dismissed Mackey's disability retaliation claim. To establish a *prima facie* case of disability retaliation under the WLAD, Mackey was required to establish that: (1) she engaged in a statutorily protected activity; (2) Home Depot took an adverse employment action against her; and (3) there was a causal link between the activity and adverse action. *Milligan*, 110 Wn. App. at 638.

Once an employee successfully establishes a *prima facie* case of retaliation, the burden then shifts to the employer to show that it acted on a

legitimate, nondiscriminatory basis: “[t]he burden-shifting scheme is the same as for discrimination claims.... [the employee] must make out a *prima facie* case, [the employer then] must present evidence of a non-retaliatory reason for its actions, and then [the employee] must present evidence that the reason is pretextual.” *Id.* Accordingly, “when [the employee’s] evidence of pretext is weak or the employer’s nonretaliatory evidence is strong, summary judgment is appropriate.” *Id.*

1. There is No Evidence Mackey Engaged in Protected Activity Prior to Her Termination.

The first element of her *prima facie* case required Mackey to provide evidence that she engaged in a protected activity. After she was terminated, Mackey claimed that: (1) she objected to Krall’s treatment of her and complained about Krall’s treatment of her based on her disabilities to the Home Depot Store manager; and (2) Home Depot, thereafter, launched an investigation into her conduct which culminated in a termination of her employment in retaliation for her having complained about her disabilities. Despite that, Appellant failed to offer any evidence to support these elements other than her own post-termination, self-serving statement regarding an alleged interaction with Krall. CP 91. In fact, Mackey testified that she did not complain about any alleged disability discrimination until she submitted her post-termination statement, and her statement from

October 8, 2018, makes no reference to her disabilities. CP 53, 85. *Doss v. City of Seattle*, 2013 WL 6199255, at *1 (2013) (unpublished) (plaintiff “cannot rely on a self-serving declaration contradicting his earlier unambiguous deposition testimony.”) (citing *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192, 951 P.2d 280 (1998)).

There is no other evidence that Mackey engaged in an allegedly protected activity apart from this post-termination statement which remains wholly unsubstantiated. Mackey propounded no discovery and took only two depositions—which did not include the deposition of the Home Depot Store Manager Robert Tilton, to whom Mackey claims she complained about Krall’s conduct. *See* VRP 34. *See also Michkowski v. Snohomish County*, 2015 WL 677397, at *5 n. 14 (2015) (unpublished) (citing *Mulhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2002) (“[W]here employee failed to take depositions to rebut denials of knowledge of employee’s protected activity, summary judgment was proper.”)). Thus, there is no way to corroborate Mackey’s after-the-fact, self-serving statement.

2. Mackey is Unable to Establish a Causal Link Between Her Alleged Protected Activity and her Termination Because She Cannot Establish that Home Depot Had Either “Actual Knowledge” or “Knew or Suspected” of Her Alleged Protected Activity.

Even assuming *arguendo* Mackey establishes that she engaged in protected activity, Mackey is unable to establish a causal link between the

alleged protected activity and her termination. A plaintiff proves causation by showing that retaliation was a substantial factor motivating the adverse employment action. *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 743, 332 P.3d 1006 (2014). In order to prove that retaliation was a substantially motivating factor, the employee may rely on the following facts to show this: (1) the employee engaged in a protected activity; (2) the employer had knowledge of the protected activity; and (3) the employee was subjected to an adverse employment action. *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 412-413, 430 P.3d 229 (2018). Mackey's inability to satisfy the first element was already discussed above, but Mackey's claim also fails because she has not presented evidence that Home Depot had knowledge of Mackey engaging in a protected activity.

In determining whether the employer had knowledge of the action, the court must evaluate whether the employer had "actual knowledge" of the protected activity, or whether the employer "knew or suspected" that the employee had engaged in a protected activity. *Id.* at 413. To establish that an employer had "actual knowledge," the employee must show that the decision-maker had actual knowledge that the employee engaged in a protected activity. *Id.* at 414. "Because retaliation is an intentional act, an employer cannot retaliate against an employee for an action of which the employer is unaware." *Id.* (internal citation omitted). Similarly, the "knew

or suspected” standard incorporates the actual knowledge standard with instances in which the employer suspects that an employee engaged in protected activity. *Id.* at 417. To show either, an employee must present sufficient evidence leading to a reasonable inference “both that [a supervisor] either knew or suspected” that an employee took a protected action “and that there was a causal connection between this knowledge or suspicion and [the employee’s] termination.” *Id.* (citing *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1113 (9th Cir. 2003)).

Contrary to Mackey’s belief, *Cornwell* is not analogous and is distinguishable under these set of facts. In *Cornwell*, the employee hired an attorney, settled sex discrimination and retaliation claims with her employer, and was re-assigned to a new manager. *Id.* at 406-407. Seven years later, the employee was asked by her new manager to mentor another employee who worked for her former manager, whom she was no longer working with. *Id.* at 407. After the employee told her new manager she could not mentor this other employee for confidential reasons as outlined in the settlement agreement, the new manager engaged human resources and sought more information about the settlement. *Id.* Nonetheless, shortly after the employee told her new manager about the suit, the employee’s new manager and human resources gave the employee poor performance ratings. *Id.* at 408. Eventually, the employee was laid off, and the employee did not

know about her poor performance rating until several years later when she was told she could not be re-hired due to her poor performance rating. *Id.* at 408-409.

The court in *Cornwell* concluded that the employee produced sufficient evidence showing that the employee's new manager and human resources both had actual knowledge of the employee's prior protected activity—her prior allegations of sex discrimination and retaliation. *Id.* The court concluded that this met the “knew or suspected standard” as well. *Id.* at 418. The court stressed that both standards require the production of evidence and that “mere speculation will not suffice to defeat summary judgment.” *Id.* at 420.

Here, again, the facts are different and *Cornwell* is distinguishable because there is no evidence the decision-maker had actual knowledge or suspected knowledge of protected activity. District Human Resources Manager Robert Beaubian, the decision-maker who recommended Mackey's termination, had **no knowledge** of Mackey's alleged protected activities, and Mackey has failed to present any evidence that would allow a reasonable jury to infer that Beaubian either knew or suspected of Mackey's alleged protected activities. Regardless of whether the Court utilizes the “actual knowledge” standard or the “knew or suspected”

standard, Mackey has failed to prove a causal link between any alleged protected activity and her termination.

The record clearly establishes the causal chain of events that led to Mackey's termination, and no evidence shows that any knowledge of Mackey's alleged protected activity tainted that decision. The event that triggered the revelation of Mackey's admitted violations of Home Depot's policies was Santo Lupica's observation of Mackey carrying a bundle of cash wrapped in white paper CP 80, 82-83. Lupica then discovered that Mackey had committed a number of policy violations.⁷ Mik Weaver, whom Mackey testified always treated her fairly, commenced a second investigation. CP 57. That new investigation revealed further policy violations, including **\$17,000.00** in prohibited discounts. CP 82-83, 87. On October 8, 2014, Weaver discussed the investigation results with Mackey and Store Manager Robert Tilton. Mackey then admitted to the prohibited practices in writing. CP 50-51, 82-83, 85, 103, 105.

⁷ Policy Violations: (1) Mackey improperly used another employee's identification and admitted to doing so (CP 80, CP 44, 48); (2) Mackey admitted that she improperly applied Home Depot's Volume Bid discount after a customer "decided not to purchase one of the items..." (CP 80); and (3) Mackey admitted to improperly providing "double discounts" by simultaneously applying various different discounts to the same purchase (CP 47, 82, 105). Mackey conceded these violations. CP 65.

The discovery of Mackey's prohibited conduct resulted in the termination recommendation by District Human Resources Manager Robert Beaubian (the decision-maker)—Lupica and Krall, were uninvolved. CP 56-57. Mackey never alleges that Beaubian had either actual knowledge of or knew or suspected Mackey's protected activities. CP 56. In fact, Mackey concedes that Beaubian relied solely on the investigation in making the decision and recommendation that Mackey be terminated. CP 56. Mackey also concedes that she has no evidence that Beaubian discriminated or retaliated against her in any way. CP 51.

In a fax to Home Depot on October 27, 2014, after she was terminated, Mackey for the first time raised an allegation about an interaction she allegedly had with Krall on September 26, 2014. CP 91. The fax does not mention Beaubian. In her deposition, Mackey testified that she had never complained about alleged disability discrimination prior to submitting this post-termination statement. CP 53. Even if one were to accept Mackey's unsubstantiated post-termination statement, no reasonable jury could infer from it that Beaubian—the decision-maker who recommended Mackey's termination—knew or suspected that Mackey had engaged in a protected activity.

Absent this knowledge under either the "actual knowledge" or "knew or suspected" tests, Mackey cannot establish that her engagement in

a protected activity was a substantial factor in her ultimate termination. The substantial factor in Mackey's termination was her own conduct in direct contravention of known policies that she conceded was a justifiable basis for termination. CP 45. Because Mackey failed to establish a causal link between her alleged protected activity and her termination, the Superior Court's grant of summary judgment was proper.

3. Mackey Cannot Establish that Home Depot's Legitimate, Nonretaliatory Reasons for Her Termination Were Pretextual.

Even if Mackey had established a *prima facie* claim of retaliation, Home Depot provided evidence of legitimate, nonretaliatory reasons justifying Mackey's termination as discussed above. She conceded that no one involved in either the investigations or the termination decision discriminated or retaliated against her in any way. CP 51, 57.

Moreover, Mackey failed to present any evidence or argument at summary judgment that the reasons for her termination were pretextual. In fact, Mackey's brief does not even argue pretext. One can establish pretext by showing that the employer's articulated reasons for the adverse employment action against him/her (1) had no basis in fact, (2) were not really the motivating factors for the employer's decision adversely affecting his/her employment, (3) lacked temporal connection to the employer's decision, or (4) were not used by the employer as motivating factors in its

employment decisions affecting other similarly-situated employees. *Kuyper*, 79 Wn. App. at 738. To prove pretext Mackey must do more than merely disprove Defendant’s justification. Mackey must affirmatively prove that her disability “was at the heart of Defendant’s termination decision.” *Hicks*, 509 U.S. at 540-41.

Mackey has not addressed any of the above-mentioned factors. Again, as the court in *Milligan* aptly put it, “when [the employee’s] evidence of pretext is weak or the employer’s nonretaliatory evidence is strong, summary judgment is appropriate.” 110 Wn. App. at 638. Accordingly, in this case, the Superior Court did not err when it summarily dismissed Mackey’s retaliation claim.

4. Nonetheless, Home Depot Had a Good Faith Basis for Termination Which Independently Justifies Summary Judgment.

For the reasons stated above, Home Depot had a good faith basis for terminating Mackey even if Home Depot *incorrectly* concluded that Mackey violated Home Depot policies. The question before this Court, again, “is not whether the employer’s reasons are right” but whether the employer honestly believed the reason for its action. *Domingo*, 124 Wn. App. at 84 n.26.

Home Depot’s two separate investigations presented significant evidence of misconduct justifying termination. Mackey improperly used

another employee's identification and admitted to doing so, improperly applied Home Depot's Volume Bid discounts using a scheme, improperly provided double discounts, routinely extended "double dip" and "triple dip" discounts prohibited by Home Depot policies, extended **\$17,000.00** in prohibited discounts, admitted to the prohibited practices she was being accused of, and submitted a written admission as to her acts. CP 44, 47, 48, 50-51, 57, 80, 82-83, 85, 87, 103, 105. Home Depot had a good faith basis to terminate Mackey's employment even if Home Depot somehow *incorrectly* concluded that Mackey violated Home Depot policies.

E. The Superior Court Properly Dismissed Mackey's Wrongful Discharge in Violation of Public Policy Claim Because She was Unable to Establish Causation or Pretext.

Washington courts have adopted the tort of wrongful discharge in violation of public policy as a "narrow exception to the at-will doctrine," and to prevail on this cause of action, an employee must demonstrate that his/her "discharge may have been motivated by reasons that contravene a clear mandate of public policy." *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 425 P.3d 837 (2018) (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). Nonetheless, courts have noted that this exception to the at-will doctrine balances the employee's interest in job security and the employer's interest in making personnel decisions

without fear of liability. *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 755, 257 P.3d 586 (2011).

There are two tests that a plaintiff can use to demonstrate that she is entitled to protection under this legal theory: the traditional test first enunciated by the Washington State Supreme Court in *Thompson v. St. Regis Paper Co.*; and the four-part *Perritt* test that was first applied by the Washington State Supreme Court in *Gardner v. Loomis Armored, Inc.* The former is used in cases where the plaintiff neatly falls into one of four traditional protected scenarios, while the latter is used in cases where the plaintiff does not fall into one of those scenarios. Mackey does not satisfy either test in this case.

1. Mackey Cannot Satisfy the *Thompson* Test Because She Was Not a Whistleblower, Did Not Establish Causation, and Made No Showing of Pretext.

As noted by the court in *Martin*, the traditional *Thompson* test is utilized when an employee falls under one of four scenarios: “(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing.” *Martin*, 191 Wn.2d at 723 (citing *Gardner v. Loomis*

Armored Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996)). Once the employee makes that showing, she must then establish that the public-policy-linked conduct was a “significant factor” in the decision to discharge. *Martin*, 191 Wn.2d at 725 (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 75, 821 P.2d 18 (1991)). Here, Mackey asserts that she was a whistle-blower, but she was not.

Whistleblowing occurs “when an employee reports employer misconduct in an attempt to remedy that misconduct.” *Karstetter v. King Cty. Corr. Guild*, 1 Wn. App. 2d 822, 832, 407 P.3d 384 (2017). As mentioned above, after she was terminated, Mackey, for the first time, raised an allegation about an interaction she allegedly had with Krall on September 26, 2014. CP 91. In her deposition, Mackey testified that she had never complained about alleged disability discrimination prior to submitting this post-termination statement. CP 53. Mackey now claims that Home Depot and her supervisors terminated her employment in retaliation for her complaining about her disabilities; however, to date, Mackey has only produced her self-serving, post-termination statement. There is no other evidence showing that Mackey engaged in a protected activity apart from this post-termination statement which remains unsubstantiated. Even so, regardless of whether Mackey can successfully claim she is a

whistleblower, she cannot establish that her alleged whistleblowing activities were a “significant factor” in the decision to discharge her.

In *Martin*, the employee claimed that he was terminated as a result of his whistleblowing activities while he was employed. 191 Wn.2d 712. Specifically, the employee claimed that he had complained about the lack of wall padding on the basketball courts and that his employer terminated his employment when he raised concerns about it. *Id.* 720-722. However, in an evaluation and a proposal he submitted to his employer, he did not mention his concerns regarding the lack of wall padding on the basketball courts. *Id.* at 717-719. During this time, the employee began engaging in insubordination by going above the chain of command, interrupting his superior in a meeting, leaving in the middle of his shift without receiving permission from his superior, yelling at another colleague, and telling another colleague that his superior was a “pushover.” *Id.* at 719. In addition to the employee’s insubordination along with his inadequate job performance from a recent evaluation, the employer made the decision to first place him on administrative leave, and when he violated the terms of his leave, ultimately terminate the employee. *Id.* at 719-721. After his termination, the employee claimed to have been terminated as a result of his voicing concerns about the lack of wall padding on the basketball court. *Id.* at 721.

The court in *Martin* concluded that the employee was not a whistleblower, but even if he was, he failed to show that the whistleblowing activity was a “significant factor” in the employer’s decision to terminate the employee. *Id.* at 725. The court concluded that the employer had met its initial burden in showing legitimate reasons for the employee’s dismissal: insubordination and inadequate job performance. *Id.* at 726. Specifically, the court stated that there was “ample evidence of [the employee’s] insubordination and disrespectful conduct in close proximity to his termination.” *Id.* However, the court concluded that the employee failed to show that despite the legitimate reasons for the termination offered by the employer, his whistleblowing was a significant factor in his termination. *Id.* at 727. Specifically, the court noted that the only evidence the employee had put forth about his whistleblowing activity was his own testimony, and “[t]he record does not support [the employee’s] claim that a significant factor in his termination was [his whistleblowing activity].” *Id.*

Here, like *Martin*, the “significant factor” in the decision to discharge Mackey was her own conduct in violation of known company policies: admittedly improper use of another employee’s identification; improper application of Home Depot’s Volume Bid discounts using a scheme; improper use of double discounts, routinely extending “double dip” and “triple dip” discounts prohibited by Home Depot policies; extending

\$17,000.00 in prohibited discounts; admission that she engaged in the prohibited practices she was accused of; and her submission of a written admission describing her acts. CP 44, 47, 48, 50-51, 57, 80, 82-83, 85, 87, 103, 105. These were the significant factors supporting Home Depot's decision to discharge Mackey—not her uncorroborated post-discharge facsimile.

Mackey's sole argument regarding causation is that her termination followed a complaint to her store manager about her interaction with Krall. This mere coincidence of timing is insufficient to satisfy the causation element of Mackey's claim as a matter of law. *Tyner v. State*, 137 Wn. App. 545, 565, 154 P.3d 920, 929 (2007) (assertion of temporal proximity insufficient to defeat summary judgment); *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 493, 84 P.3d 1231, 1239 (2004), as amended, (Feb. 24, 2004) (rejecting employee's argument that temporal proximity alone is sufficient to create an inference of pretext); *Zachry v. Pima Med. Inst.*, 5 Wn. App. 2d 1006, at *8 (Wash. Ct. App. Sept. 4, 2018) (unpublished) (“[W]e conclude that temporal proximity is insufficient” where adverse employment action accompanied by unsatisfactory performance). Put another way, Mackey must present admissible evidence of something more than mere timing in order to establish causation. She failed to do so here.

If the employee is able to establish that discharge may have been motivated by reasons that contravene public policy, then the burden then shifts to the employer to “articulate a legitimate, nonpretextual, nonretaliatory reason for the discharge.” *Martin*, 191 Wn.2d at 725 (internal citation omitted). Once the employer articulates such a reason, the burden shifts back to the plaintiff either to show “that the reason is pretextual, or by showing that although the employer’s stated reason is legitimate, the [public-policy-linked conduct] was nevertheless a substantial factor motivating the employer to discharge the worker.” *Id.* (internal citation omitted).

In this case, Home Depot provided multiple, legitimate, nondiscriminatory and nonretaliatory reasons for Mackey’s termination. In response, Mackey failed to present any evidence or argument at summary judgment that the reasons for her termination were pretextual or that her alleged protected activity was a nevertheless a substantial factor in her termination. Notably, Mackey’s brief to this Court does not even argue pretext.

Like *Martin*, the only evidence Mackey has put forth about her alleged whistleblowing activity is her unsubstantiated post-termination statement; the record does not support Mackey’s claim that a significant factor in her termination was her alleged whistleblowing. Absent Mackey

showing either pretext or that her alleged protected activity was a substantial factor in the decision to terminate her, Mackey fails to establish a claim for wrongful termination in violation of public policy under the traditional framework. Accordingly, the Superior Court’s dismissal of Mackey’s claim was proper.

2. Even Under the *Perritt* Test, Mackey Failed to Satisfy the Causation and the Absence of Justification Elements.

When a claim does not fall within one of the four traditional categories of wrongful discharge, the court engages in a more detailed analysis, known as the *Perritt* test, where the employee must establish: (1) the existence of a “clear public policy” (clarity element), (2) whether “discouraging the conduct in which [the employee] engaged would jeopardize the public policy” (jeopardy element), (3) whether the “public-policy-linked conduct caused the dismissal” (causation element), and (4) whether the employer is “able to offer an overriding justification for the dismissal” (absence of justification element). *Martin*, 191 Wn.2d at 722; *see also Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 277, 358 P.3d 1139 (2015) (citing *Gardner*, 128 Wn.2d at 941).

Even under the *Perritt* test, Mackey failed to establish a claim for wrongful discharge in violation of public policy. In order to satisfy the causation element of the *Perritt* test, an employee must show that the public

policy-linked conduct actually caused the termination of employment. *Trowbridge v. Nalco Co.*, No. C08-5137RJB, 2009 WL 799678, at *8 (W.D. Wash. Mar. 24, 2009) (citing *Gardner*, 128 Wn. 2d at 941). Other cases have articulated a similar test: “the employee must produce evidence that the actions in furtherance of public policy were ‘a cause of the firing, and [the employee] may do so by circumstantial evidence.’” *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015). In other words, this test asks “whether the employee’s conduct in furthering a public policy was a ‘substantial’ factor motivating the employer to discharge the employee.” *Id.*

Regardless of which test the Court utilizes, Mackey failed to establish causation. **First**, the coincidence of timing is insufficient to establish causation. **Second**, Mackey’s conduct in contravention of Home Depot policies was the actual and substantial factor motivating Home Depot to discharge her. **Third**, Mackey has only produced her self-serving, post-termination statement that she faxed to Home Depot on October 27, 2014, as her evidence. No reasonable jury could infer from Mackey’s self-serving statement that her alleged protected activity was a substantial factor in her termination. **Finally**, if that were not enough, Mackey willingly admitted that she has no evidence that Beaubian, the District Human Resources

Manager who recommended Mackey's termination, ever treated her unfairly based on her disability. CP 57.

Under the absence of justification element of the *Perritt* test, if “the employer has an overriding reason for terminating the employee despite the employee’s public-policy-linked conduct,” then it cannot be held liable. *Martin*, 191 Wn.2d at 728 (citing *Gardner*, 128 Wn.2d at 947). Once the employer provides an overriding justification for the dismissal, the burden then shifts back to the employee to “show that the employer’s justification was pretextual.” *Trowbridge*, 2009 WL 799678, at *8; *see also Williams*, 2017 WL 4387590 at *9 (“For the same reasons that Plaintiff failed to carry his burden to show pretext under his race discrimination claim, he failed to rebut Defendant’s overriding justification on this claim”).

Home Depot had several overriding justifications for the termination of Mackey, including her multiple violations of store policy. The Superior Court’s dismissal of Mackey’s wrongful termination in violation of public policy claim was proper as a result.

V. CONCLUSION

For the foregoing reasons, the Superior Court’s summary judgment dismissal of Mackey’s claims for disability discrimination, failure to accommodate, retaliation, and wrongful termination in violation of public

policy was proper as a matter of law. Home Depot respectfully requests this Court affirm the Superior Court's ruling.

RESPECTFULLY SUBMITTED this 4th day of March, 2019.

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I hereby certify that on March 4, 2019, I caused to be served a copy of the foregoing document to be delivered in the manner indicated below to the following person at the following address:

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DATED: March 4, 2019

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