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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RODDA PAINT CO.,

Respondent,

v.

MICHELLE CHAMBERS,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Michelle Chambers (“Chambers”) devoted seventeen years to Rodda Paint Company’s (“Rodda”) retail operations before her employment was terminated on June 6, 2017. Over seventeen years, Ms. Chambers advanced from entry-level product delivery driver to manager of Rodda’s Lacey Store (“Lacey”). Ten years managing Lacey produced a loyal customer base, progressively strong reviews, and financial bonuses for successful store audits and surpassing sales goals. Ms. Chambers also earned the loyalty and friendship of employees and fellow store managers.

District Manager Stan Osborne became Ms. Chambers’ supervisor in April 2015. Despite efforts to collaborate with Mr. Osborne, Ms. Chambers instead accommodated aggressive bullying behavior. Mr. Osborne’s visits to Lacey quickly became exercises in fear and intimidation for Ms. Chambers and her staff. Mr. Osborne’s leadership tools included inappropriate sarcasm, profanity, threats and gender- and racially-cased insults. By January 2016, when Mr. Osborne’s discriminatory comments demeaned one of her employees, Ms. Chambers filed a gender discrimination complaint with Rodda’s Human Resource [sic] department.

Rodda’s admitted response was limited to nothing more than asking Mr. Osborne whether he made the reported comment. Rodda was satisfied with Mr. Osborne’s denial. Mr. Osborne, however, was not satisfied. His

bullying increased as he made openly demeaning comments about women, African-Americans and indeed about Ms. Chambers herself. He threatened to punch a female clerk “in the face,” and later belittled the same clerk, driving her to tears. He assumed responsibilities formerly belonging exclusively to Ms. Chambers, and demanded that she include him in all store decisions.

According to Mr. Osborne, his district “had enough hormones.” By October of 2016 he had targeted Ms. Chambers for removal from Rodda, as he himself reported in a corporate sales meeting. Ms. Chambers loved her job and had no intent to leave Lacey, despite Mr. Osborne’s increasingly aggressive micro-management, diminishment of her authority. Even after Mr. Osborne began a habit of boasting to her employees and customers that he’d passed on Ms. Chambers when she interviewed with him years earlier, she stayed. Even after Mr. Osborne began sharing information about the store and joking about the purportedly tenuous status of her employment with her male subordinates, she stayed. Even when she was diagnosed with Essential Hypertension in December 2016, she stayed.

By February 2017, Mr. Osborne had initiated the process of removing Ms. Chambers from Rodda by procuring testimonials critical of Ms. Chambers from her staff members and sales people. Once he obtained an email from a sales representative that questioned Ms. Chambers’

willingness to work overtime, he notified Human Resource of his intent to “coach this one out” using the corporation’s ninety-day review procedure.

By March, as Mr. Osborne formally initiated Ms. Chambers’ review, Lacey’s leadership among Rodda’s Western District stores became apparent as Lacey posted some of its strongest sales numbers. Lacey’s year-over-year growth rate rated it among the top three retail stores in the District. Lacey’s employee turnover rate, attributed by Mr. Osborne to Ms. Chambers’ leadership despite being an issue throughout Rodda’s stores, dropped to a perfect 0%. Ms. Chambers was producing and exceeding the action items prescribed under her review.

With few remaining hooks upon which to hang termination, Mr. Osborne initiated an April 2017 store audit in which he failed Lacey. Mr. Osborne’s boss told customers that Lacey’s last two audit scores prompted Ms. Chambers’ termination. Conversely, Rodda corporate would produce a broad range of other reasons, *none of which* included audit scores.

Ms. Chambers brings claims of Hostile Work Environment and Gender Discrimination, Wrongful Termination in Violation of Public Policy, and Outrage. For the purposes of Summary Judgment, Rodda proffered the sales representative’s February email questioning Ms. Chambers’ work schedule and the failing audit score as facts supporting nondiscriminatory motive for Ms. Chambers’ termination. In so doing,

Rodda failed to admit that Mr. Osborne directly requested critical email of its author—and other Lacey staff members—and personally conducted the failing audit. Through this obfuscation, Rodda’s Motion for Summary Judgment itself evidences pretext, rather than arguing against pretext.

At oral argument, the trial court expressed frustration with plaintiff counsel’s briefing – repeatedly. The court expressed disappointment that counsel failed to organize plaintiff’s Response according to the *McDonnell Douglas* burden-shifting factors, and asked plaintiff counsel to explain the organization of Ms. Chambers’ brief. At summary judgment, movant bears the burden of showing that there is no genuine issue of material fact. Instead, Rodda omitted most material facts, then mislead the court by representing facts presented in plaintiff’s Response as “new.” For these reasons, Ms. Chambers’ Response emphasized material facts either omitted or disputed by Rodda, with an abundance of evidence supporting each.

The trial court expressed unwillingness to “search for truffles” in plaintiff’s brief. Plaintiff counsel acknowledges that some citations were imprecise, and the brief may have been unexpected or unconventional. Nevertheless, the court may have overlooked material facts, and may have *weighed* the facts (and weighed them in favor of *movant*), rather than evaluate the existence of genuine dispute, even where Rodda directly challenged Ms. Chambers’ facts. Moreover, the court may have applied the

same *McDonnell Douglas* factors to both the gender discrimination and wrongful termination analyses, thus imposing an additional burden on plaintiff. Accordingly, plaintiff respectfully seeks this court's review.

II. ASSIGNMENTS OF ERROR

The trial court erred when it granted Rodda's Motion for Summary Judgment on Ms. Chambers' claims of:

- A. Interference with Contract Based on Gender and Hostile Workplace,
- B. Wrongful Termination in Violation of Public Policy, and
- C. Outrage

The errors were filed in an Order Granting Summary Judgment dated February 1, 2019 (the "Order"). Clerk's Papers ("CP") at 498-99.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Whether Ms. Chambers presented evidence showing that gender discrimination was a factor in the decision to terminate her employment, and that Rodda's justifications were pretext.
- B. Whether Rodda met its burden by establishing a non-discriminatory motive for terminating Ms. Chambers' employment.

- C. Whether the record contains reasonable but competing inferences of both discrimination and nondiscrimination, directing the determination of true motivation to the trier of fact.
- D. Whether Ms. Chambers has presented sufficient evidence to create a genuine issue of material fact on the prima facie elements of her wrongful termination claim.
- E. Whether Ms. Chambers set forth specific facts showing that there is a genuine issue of material fact on the question of outrage.

IV. STATEMENT OF THE CASE

A. Ms. Chambers Memorialized Evidence of Escalating Hostility by Her District Manager After Reporting His Discriminatory Behavior to Rodda's Human Resource Department.

On or about January 13, 2016, Rodda Paint District Manager Stan Osborne (“Osborne”) forbade Lacey retail store (“Lacey”) manager Michelle Chambers (“Chambers”) from assigning paint deliveries to female staff members, due to a perceived deficiency in the female “build.” CP at 298, ¶ 1. The following day, on or about January 14, 2016, Ms. Chambers telephonically reported Mr. Osborne’s delivery prohibition to Rodda’s Human Resource department. *Id.* Ms. Chambers memorialized Mr.

Osborne's comment in a text message sent to herself and time-stamped by the text messaging program at 6:27 AM on January 14, 2016. CP at 255.

The next day, on or about January 15, 2016, Mr. Osborne appeared at Lacey, and instructed retail clerk Melanie Heatherington ("Heatherington") to prepare to replace Ms. Chambers as the new manager of Lacey. CP at 256. By October 2016, Mr. Osborne was openly advocating for Ms. Chambers' removal. CP at 386 (RP001079, "From: Osborne, Stan").

Ms. Chambers memorialized incidents of gender- and race-based hostility and intimidation, including Mr. Osborne's diminishment of Ms. Chambers' authority with her employees and assumption of her job responsibilities. Her notes include:

- Between January 13, 2016 and May 18, 2017, Mr. Osborne bragged to new hires and Ms. Chambers' fellow store managers that he had passed on hiring Ms. Chambers years earlier, when he worked for a competing retailer. CP at 255, ¶ 1; CP at 263, ¶ 2; CP 264, ¶ 3.
- Between February 12, 2016 and May 18, 2017, Mr. Osborne initiated private text and verbal communications with Ms. Chambers' employees, discussing business and personnel matters important and/or *confidential* to Ms. Chambers. CP at

256, ¶ 2; CP at 259, ¶ 2; CP at 262, ¶ 1; CP at 264, ¶ 2. Her employees reported Mr. Osborne's instruction *not* to share information with Ms. Chambers. CP at 259, ¶ 2.

- Barely one month after Ms. Chambers reported Mr. Osborne's discrimination against the female "build," on or about February 29, 2016, Mr. Osborne forbade Ms. Chambers from considering female applicants, "because he has enough hormones in this company." CP at 257.
- On or about March 10, 2016, Mr. Osborne expressed disappointment upon learning that an African-American applicant named Charles had successfully cleared all obstacles to employment, saying, "So 'Django' starts soon then, huh." CP at 257, ¶ 2.
- On or about February 17, 2017, Mr. Osborne issued the second threat to Ms. Chambers' job security within a year's time. CP at 258.
- On or about March 2, 2017, Mr. Osborne threatened physical violence against Ms. Heatherington, when she questioned one of his directions. CP at 260. Ms. Chambers memorialized the threat as, "I could just punch you in the face right now." *Id.*

Ms. Heatherington testified at deposition to this event, and others in which she was involved, in greater detail. CP at 351-58.

Ms. Chambers and Ms. Heatherington recalled a March 30, 2017 confrontation in which Mr. Osborne lost control of his temper and threatened Ms. Heatherington. CP at 262, ¶ 3; CP at 357:12 – 359:29. Ms. Heatherington recalled that Mr. Osborne, “Came in and the F word, ‘fuck this, fuck that’ was every other word out of his mouth.” CP at 357:14-15. After “cuss[ing] out” staff at another store, Mr. Osborne cornered Ms. Chambers and Ms. Heatherington in an office, to reprimand Ms. Heatherington for “mumbl[ing] something under [her] breath.” CP at 357:18 – 19; CP at 358: 19 – 25. To make his point, Mr. Osborne appealed to Ms. Heatherington’s motherhood and equated her with a child. *Id.*

Ms. Heatherington also recalled an additional reason given to Ms. Chambers for Mr. Osborne’s January prohibition on female staff executing product deliveries. CP at 354:22 – 356:8. After speaking with Mr. Osborne, Ms. Chambers had conveyed that Mr. Osborne felt Ms. Heatherington’s participation on a recent paint delivery was “‘demasculinating,’ whether that’s a word or not, to my co-worker Ryan.” CP at 354:22 – 25.

After putting Ms. Chambers under Review, Mr. Osborne spontaneously transferred Ms. Heatherington to another store, removing Lacey’s only other female employee and one of Ms. Chambers’ supporters.

CP at 352:3 – 21. Ms. Heatherington delayed in accepting the offer, despite Mr. Osborne’s offer of a pay raise, saying, “I felt it kind of shady.” CP at 352:7 – 9.

B. At an October 2016 Corporate Sales Meeting, Mr. Osborne Admitted to Targeting Ms. Chambers for Replacement.

At Rodda Paint’s October 2016 corporate sales and strategy meeting, Mr. Osborne “identified [store manager Michelle Chambers] for replacement.” CP at 386 (RP001079, “From: Osborne, Stan”). On February 3, 2017, Mr. Osborne communicated his plan to Rodda Human Resource Manager Jennie Wine, writing, “I’m afraid it’s time to coach this one out.” *Id.*

To “coach this one out,” Mr. Osborne would initiate a ninety-day review plan and evaluation (or “Review”) to effect termination. CP at 328-30. Prior to formally initiating the Review in March of 2017, Mr. Osborne began making casual references to the Review, and to his ability to terminate Ms. Chambers’ employment, directly and in front of her Lacey staff. CP at 258; CP at 261, ¶ 4. On December 15, 2016, Ms. Chambers was diagnosed with Essential Hypertension (high blood pressure), and prescribed blood pressure medication for the first time. CP at 279; CP at 299, ¶ 4 (“December 2016”).

Between Mr. Osborne’s February 3 commitment to “coach this one out” and the March 9 Review commencement, on or about February 17, 2017, Ms. Chambers discovered a \$5,000 freight charge discrepancy during her regular review of Lacey’s financial reports. CP at 258; CP at 299, ¶ 5 (“February 17, 2017”). Per Mr. Osborne’s direction, Ms. Chambers communicated the discovery and its correction to Mr. Osborne. CP at 258. Mr. Osborne responded with a veiled *threat to her job*. CP at 258; CP at 299, ¶ 5 Mr. Osborne told Ms. Chambers that he’d been *instructed* to initiate a termination-enabling Review, but that because she found the mistake, “he chose not to give it to [Ms. Chambers].” *Id.* On February 20, 2017, after a sleepless weekend, Ms. Chambers asked Mr. Osborne’s boss what she could do to avoid the Review, writing, “I want very much to be successful in my job here, I love my job and don’t want to [lose] it.” CP at 277-78 (“From: Chambers, Michelle”).

Three weeks later, on March 9, 2017, Mr. Osborne formally initiated Ms. Chambers’ Review. CP at 328-330; CP at 261, ¶ 2. As memorialized in a writing titled “90 Day Store Action Plan,” Mr. Osborne identified eight “action items” and a baseline goal: “Let’s... accomplish at a minimum your Net Income Budget, ...exceed the budget you committed to for 2017 and get [Lacey] in a profitable condition...” CP at 329; CP at 330, ¶ 4.

Mr. Osborne’s plan to “coach this one out” concludes by “looking forward to many more years of success with you being part of the World Class Organization we are building...” CP at 330, ¶ 5. Nevertheless, Mr. Osborne added that if he really wanted to fire Ms. Chambers he would “find a reason.” CP at 261, ¶ 4; CP at 300, ¶ 3 (“March 11, 2017”).

One month into Ms. Chambers’ Review, the April 4, 2017 Executive Company sales summary reported growth at Lacey by every metric. CP at 332-37. Lacey posted year-to-date numbers 32.7% higher than those of a year prior, *three times higher* than the District’s 11.6% average. CP at 335 (RP001118). Lacey’s year-to-date sales over the prior three years show improvement of 38.5%, one of the District’s *three top-performing stores*. CP at 336.

In the wake of Lacey’s financial success, Mr. Osborne executed a store audit on May 16, 2017. Intermittent records produced by Rodda suggest that over the course of ten years, Ms. Chambers regularly received audit scores of 4.0 (“Outstanding”), such that her 2011 auditor was compelled to comment, “Always great audit scores.” CP at 321, row 5; CP at 324, row 5. Rodda’s Audit Incentive Pay out records for 2013, 2014 and 2016 show that Lacey’s audits earned the highest payouts, even when as

many as half of the Western District stores failed to earn the bonus.¹ CP at 251 (\$500, the highest amount awarded); CP at 252 (\$1,000, the highest amount awarded); CP at 253 (\$500, the highest amount awarded). Lacey's Inventory Results during the immediate months in which Ms. Chambers' job was in jeopardy also boasted success, within / under the allowed .6% accrual margin. CP at 318-19.

In another success, the April year-to-date turnover rate had just been published, with Lacey showing the widest margin of improvement, from a turnover rate of 139.5% in 2016 to a perfect rate of 0%. CP at 341. As Ms. Chambers observed in an April email response to Mr. Osborne reacting to Lacey's successful financial reports, "Lacey is on a growth pattern, YA!" CP at 332, ¶ 1.

Emails from Ms. Chambers to Mr. Osborne in April 2017, demonstrate her successful adoption of the action items in her review, exemplified by an April 25 proposal by Ms. Chambers to solve concerns related to electronic documentation. CP at 345, ¶ 2. Mr. Osborne's response: "That a girl." *Id.*, 1.

On May 16, 2017, Mr. Osborne failed the Lacey store audit with a score of 43. CP at 265. Mr. Osborne informed Ms. Chambers (and her

¹ In 2013 and 2016, only half of the Western Region's eighteen stores (nine stores) received bonuses, including Lacey. CP at 251; CP at 253.

employees) that failure to meet the goals of the Review meant *demotion*, with salary reduction. CP at 264, ¶ 2; CP at 265.

C. Rodda Based Ms. Chambers' Termination on Financial Performance and Employee Turnover, After Lacey Posted Record Growth Percentages and a Turnover Rate of 0%.

On June 6, 2017, upon conclusion of the Review period, Ms. Chambers' employment was unexpectedly *terminated*, with no mention of demotion. CP at 301, ¶ 3 – 302, ¶ 1. According to Mr. Osborne and Rodda Human Resource Director Jennie Wine, Ms. Chambers' termination was prompted by failure upon two metrics: the financial performance of Lacey, and high employee turnover. *Id.*; CP at 343 (“The reason for your separation from Rodda Paint was cited as, ‘poor performance of store’s operations and financial outcome.’”).

1. Lacey’s growth during the period of Ms. Chambers’ Review was among the highest in the region. CP at 336, *supra*. On February 14, 2017, as Ms. Chambers was discovering the erroneous \$5,000 freight charge in Lacey’s books, Lacey’s January Operating Statement published, revealing a 32.05% gross profit increase over the prior year. CP at 305 (*see bottom line, final column*).
2. On March 6, 2017, Lacey’s February Operating Statement showed continuing growth in the store’s Net Income, year over

year, of 39.89%. CP at 310 (*bottom line, final column*). March showed continued year-over-year growth of 17.63% in Net Income. CP at 313 (*bottom line, final column*).

3. The aforementioned April 4, 2017 Executive Company sales summary reported growth at Lacey by every metric. CP at 112-117. Most relevant to direct concerns raised by Mr. Osborne in his Action Plan, Lacey's Year to Date sales as of March 2017 over the three prior years show an improvement of 38.5%. CP at 336, *supra*. Lacey was indeed one of the District's top-performing stores. *Id.*
4. An August 2016 Rodda memorandum published by Human Resource Manager Wine acknowledges "the high turnover rate in our stores." CP at 339. A May 2017 report confirms Lacey's staff turnover for the first four months of 2017 at a perfect 0%. CP at 341.
5. Mr. Osborne's 90-Day Action Plan acknowledges the store's "financial trend has been improving," and credits Ms. Chambers for "delivering over budget sales for the past two months." CP at 328. "We are pleased with the sales increases that are posting for the first two months of 2017." CP at 329.

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V. ARGUMENT

A. Review of These Matters Is *De Novo*.

Review of the trial court's grant of summary judgment as to each of these claims is *de novo*. *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011). Summary judgment is appropriate only where, viewing the evidence and available inferences in favor of the nonmoving party, no genuine issues as to any material fact exist, and the moving party is entitled to judgment as a matter of law. CR 56(c); *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006).

B. Under *McDonnell Douglas*, Ms. Chambers' Burdens of Proof Include a Prima Facie Case of Gender Discrimination-Hostile Work Environment, and That Rodda's Reasons for Termination Are Pretext.

Washington State applies the *McDonnell Douglas* burden-shifting framework when determining whether an employment discrimination claim shall go before the fact-finder at trial. *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); *Kastanis v. Educ. Employees Credit Union*, 122 Wash.2d 483, 490, 859 P.2d 26 (1993), 865 P.2d 507 (1994). Under this framework, Plaintiff bears the initial burden of establishing a *prima facie* case of unlawful discrimination. *Id.* Having so established, the burden shifts to the defendant to prove a non-discriminatory justification for

its actions “sufficient to raise a genuine issue of fact as to whether defendant discriminated against plaintiff.” *Id.*; *Texas Dept. of Commun. Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S.Ct. 1089 (1981); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wash.2d 46, 70, 821 P.2d 18 (1991). The burden then shifts back to the plaintiff to demonstrate that the defendant’s justification is pretext. *Id.* If plaintiff’s showing permits the fact finder to “infer that the employer's explanation is not only a mistaken one in terms of the facts, but a lie, that should provide even stronger evidence of discrimination.” *Hill v. BCTI Income Fund-I*, 144 Wash. 2d 172, 185, 23 P.3d 440, 445 (2001), as amended on denial of reconsideration (July 17, 2001), and abrogated on other grounds by *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wash. 2d 516, 404 P.3d 464 (2017) (citing *Etim U. Aka, Appellant, v. Washington Hospital Center, Appellee*, 156 F.3d 1284, 1293 (D.C. Cir. 1998); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511; 113 S.Ct. 2742 (1993)).

Because employers rarely memorialize direct evidence of bad motives, “[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden.” *Hill*, 144 Wash. 2d at 180 (quoting *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wash.App. 852, 860, 851 P.2d 716, review denied, 122 Wash.2d 1018, 863 P.2d 1352 (1993). “Indeed, in discrimination cases it will seldom be otherwise” *Id.* (quoting *deLisle v.*

FMC Corporation, 57 Wash.App. 79, 83, 786 P.2d 839 (1990)). When all three *McDonnell* burdens have been squarely met, “the case must be submitted to the jury.” *Hume v. Am. Disposal Co.*, 124 Wash.2d 656, 667–68, 880 P.2d 988 (1994) (quoting *Carle v. McChord Credit Union*, 65 Wash.App. 93, 102, 827 P.2d 1070 (1992)).

C. Ms. Chambers Met All Evidentiary Burdens Under *McDonnell Douglas*, Despite Rodda’s Failure at the Second Stage to Demonstrate Non-Discriminatory Justification.

To establish a *prima facie* hostile work environment claim, plaintiff must show that: (1) The harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer. *Antonius v. King Cty.*, 153 Wash. 2d 256, 261, 103 P.3d 729, 732 (2004) (citing *Glasgow v. Ga–Pac. Corp.*, 103 Wash.2d 401, 406–07, 693 P.2d 708 (1985)). “A hostile work environment claim is composed of a series of separate acts that collectively constitute one ‘unlawful employment practice.’ ” *Antonius*, 153 Wash.2d at 264 (quoting *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 117, 122 S.Ct. 2061 (2002) (quoting 42 U.S.C. § 2000e–5(e)(1))).

To establish her *prima facie* case, Ms. Chambers proffered evidence satisfying all four prongs of the hostile work environment analysis. Mr. Osborne visited unwelcome and relentless hostile acts upon Ms. Chambers

which included, but were not limited to, demeaning and cruel gender-based discrimination. She produced evidence of a work environment that was reduced to an exercise in walking on eggshells each time Mr. Osborne appeared.

Ms. Chambers became concerned enough to report Mr. Osborne's statements to Human Resource, which *by its own admission* went no farther than to ask Mr. Osborne whether he made the reported statements. CP at 395:17 – 19 (“Regional Manager Jason Lawrence investigated an allegation by Plaintiff that Stan Osborne had made inappropriate comments to Plaintiff. Mr. Osborne denied making those comments.”)

Rodda's failure to act on Ms. Chambers' complaint communicated tacit approval to Ms. Chambers, particularly when she became aware of sexual discrimination reports made by another manager in the district that drew no rebuke from Rodda. CP at 371: 16 – 24. Mr. Osborne's barrage of threats, implicit and explicit, produced fear, emotional upheavals, sleepless nights, and physical manifestations in the form of a diagnosis of hypertension requiring blood pressure medication.

To meet its burden under *McDonnell Douglas*, Rodda relies upon i) an evaluation drafted and by Mr. Osborne, and ii) an email communication procured by Mr. Osborne. Both occurred *after* Ms. Chambers' Human

Resources complaint and Osborne's October 2016 admission of "targeting" Chambers.

Mr. Osborne's February 3, 2017 email to Ms. Wine, fearing that it is time to "coach this one out," forwards an email written by sales representative Ken Reberry. CP at 386 (RP001079, "From: Osborne, Stan"). Mr. Osborne fails to note that Mr. Reberry drafted the email at Mr. Osborne's request, or provide the context of the email. *Id.* Mr. Reberry will testify that "I was asked by Stan to write him an email discussing my opinions with Michelle's management style." CP at 390, ¶ 1. "I was trying to explain the fact that I didn't agree with her working her eight hours and going home." *Id.* Adds Mr. Reberry, "I have been known as a 'workaholic.'" *Id.* Rodda's presentation of, and reliance upon, this email is misplaced and materially false.

Mr. Osborne also attempted to procure a writing critical of Ms. Chambers from former Lacey employee Melanie Heatherington. On the day Mr. Osborne terminated Ms. Chambers' employment, Mr. Osborne asked Ms. Heatherington's new manager to press Ms. Heatherington for a letter; Ms. Heatherington rejects the request. CP at 380. Ms. Heatherington will testify that, "Sarah approached me stating that Stan would like me to write up a document stating what Michelle Chambers at the Lacey store did

differently than [another manager].” CP at 383, ¶ 5. “As I read the text I felt it a demand and more of a threat to write it.” CP at 383, ¶ 6.

In addition to stacking the deck against Ms. Chambers during a period of financial success and zero employee turnover, even Rodda could not seem to get its own justification for terminating Ms. Chambers straight. Ms. Wine cited “poor performance of store’s operations and financial outcome,” CP at 343. In a June 15 report to the Washington State Employment Security Department, Account Manager Robin Quon writes, “After prior warnings she failed to follow the directions given to achieve the goals set. She did not make acceptable progress in spite of substantial experience and a clear plan.” CP at 346, ¶ 1.

In a June 8 text message to herself, Ms. Chambers memorializes learning from a customer that Mr. Osborne’s manager, Brian Villa, told the customer that “I was let go because of my last two audits.” CP at 266, 2. Setting aside the propriety of sharing confidential employee information with customers or employees, Rodda’s reliance on failed audits is undercut by its own audit reports, *supra*, which show Lacey achieving passing audit scores and receiving audit bonus incentives while other stores repeatedly failed. See, e.g., CP at 243, where three stores (Tacoma, Gig Harbor, Puyallup) fail successive audits in 2015 alone. Moreover, not only did Mr. Osborne conduct Lacey’s failing April 2017 after having targeted Ms.

Chambers for removal, he did so with a reputation among store managers for changing audit scores—his own, and where necessary, the scores of his co-auditor. Ms. Heatherington testified at deposition to the audit in which “Everybody got the lowest score they had ever had on it.” CP at 360:13 – 14. “And [Mr. Osborne’s co-auditor, Kelly] made the comment to Sarah that he had scored something higher, but Stan made him change the score to give her a lower score. My understanding is that’s not how it works.” CP at 360:14 – 19.

Mr. Osborne’s thumb is on the scale of each of the many justifications offered at various times by Rodda. His contempt for Ms. Chambers and discriminatory motives well-documented, it only took nine months for Mr. Osborne to admit that he had targeted Ms. Chambers for removal after she reported his sexism to Rodda Human Resource. The actions taken to effect Ms. Chambers’ termination show great effort to generate any reason other than the one that motivated the desired result. In other words, the very definition of pretext.

To the extent that the court puts any stock in the justifications offered by Rodda, the record by definition must then contain reasonable but competing inferences of both discrimination and nondiscrimination, directing the determination of true motivation to the trier of fact.

D. To Establish a Claim of Wrongful Termination in Violation of Public Policy, *Gardner* Requires Plaintiff to Show Her Whistleblower Complaint Was a *Substantial Factor* in Her Dismissal.

In Washington, wrongful discharge lies “where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.” *Gardner v. Loomis Armored Inc.*, 128 Wash.2d 931, 913 P.2d 377, 379 (1996) (citing *Dicomes v. State*, 113 Wash.2d 612, 782 P.2d 1002, 1007 (1989)). The Plaintiff bears the burden of proving that her protected activity was “*a substantial factor* motivating the employer to discharge the employee.” *Rickman v. Premera Blue Cross*, 184 Wash.2d 300, 314, 358 P.3d 1153, 1160 (2015) (emphasis added). The formal four-part analysis adopted in *Gardner* is comprised of:

1. “the existence of a clear public policy (the *clarity* element),”
2. “that discouraging the conduct in which the [plaintiff] engaged would jeopardize the public policy (the *jeopardy* element),”
3. “that the public-policy-linked conduct caused the dismissal (the *causation* element),” and
4. that “[t]he defendant [has not] offer[ed] an overriding justification for the dismissal [of the plaintiff] (the *absence of justification* element).”

Rickman v. Premera Blue Cross, 184 Wash. 2d 300, 310, 358 P.3d 1153, 1158 (2015), *as amended* (Nov. 23, 2015) (quoting *Gardner*, 128 Wash.2d at 941).

WPI 330.50, Wrongful Termination in Violation of Public Policy, states that, “It is unlawful to terminate an employee in retaliation for reporting employer misconduct.”

The *clarity* and *jeopardy* elements are well established, where Ms. Chambers specifically reported sexually discriminatory and demeaning instructions to her employer’s Human Resource department. This employer admits that the report was made. Ms. Chambers’ production of evidence in support of the *causation* element is abundant: Mr. Osborne verbally expressed interest in relieving Ms. Chambers of her employment literally *the day after* Ms. Chambers filed her report.

Mr. Osborne’s repeated suggestion that Ms. Chambers’ job was at risk began when Mr. Osborne suggested to Ms. Heatherington that she get ready to take over Ms. Chambers’ job. The suggestion increased in intensity and seriousness, including being communicated behind Ms. Chambers’ back to her employees. In addition, evidence shows an increase in micro-management, hostility, and removal of job responsibilities, amidst profanity laced outbursts of anger and ever present sexual and racial discrimination.

In the context of Mr. Osborne’s overt actions, it hardly matters that it took Mr. Osborne just nine months to verbalize his efforts to terminate Ms. Chambers seventeen-year employment, or that his efforts were initiated during record high sales and low turnover at Lacey. Nonetheless, these elements combine with the foregoing discussion under the McDonnell Douglas factors to firmly establish the *absence of justification* element.

The factfinder is entitled to weigh the evidence in this matter.

E. The Trial Court Imposed Upon *Plaintiff* the Burden of Proving that Rodda’s Justification was Pretext.

Gardner and its progeny emphasize that the burden of production for the *absence of justification element* rests with the *defendant*. “Once a plaintiff shows the violation of a public policy, the burden *shifts to the employer* to prove the dismissal was for reasons other than those alleged by the employee. *Gardner v. Loomis Armored Inc.*, 128 Wash. 2d 931, 936, 913 P.2d 377, 380 (1996) (citing *Thompson*, 102 Wash.2d at 233, 685 P.2d 1081; *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wash.2d 46, 70, 821 P.2d 18 (1991) (“[E]mployer must articulate a legitimate nonpretextual nonretaliatory reason for the discharge.”)) (emphasis added).

The court’s oral ruling shifted the burden back to Ms. Chambers under *Gardner*. adding a burden that *Gardner* does not contain. Standing alone, Rodda has failed to meet its burden, as discussed under *McDonnell*

Douglas, above. Once Ms. Chambers' demonstrates that her protected activity was a substantial factor in the termination, the burden rests with Rodda to show a legitimate nonpretextual justification. The court's analysis ends at this stage, and if both sides have presented evidence to create a genuine issue of material fact, the job of weighing the evidence moves to the factfinder.

With due respect, even if *Gardner* imposed three-step burden shifting identical to that prescribed under *McDonnell Douglas*, Ms. Chambers met that burden.

F. In Washington State, the Manner in Which Discharge is Accomplished May Constitute Outrageous Conduct

When ruling on Ms. Chambers' claim of Outrage, the trial court quoted from *Grimsby v. Samson*, 85 Wash. 2d 52, 530 P.2d 291 (1975):

[I]t is not enough that a 'defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.' Liability exists 'only where the conduct has been So outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' Comment D. further points out that liability in the tort of outrage 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' In this area plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration. Clearly a case by case approach will be necessary to define the precise limits of such conduct.

Grimsby v. Samson, 85 Wash. 2d 52, 59, 530 P.2d 291, 295 (1975).

Grimsby goes on to say, “Nevertheless, among the factors a jury or court should consider are the position occupied by the defendant, whether plaintiff was peculiarly susceptible to emotional distress and defendant's knowledge of this fact, and whether defendant's conduct may have been privileged under the circumstances.” *Grimsby*, 85 Wash. 2d at 59.

The tort of outrage is available to an employee, as affirmed by the Washington State Supreme Court in *Dicomes*: “It is the manner in which a discharge is accomplished that might constitute outrageous conduct.” *Dicomes v. State*, 113 Wash. 2d 612, 630–31, 782 P.2d 1002, 1013 (1989). The Court emphasized that the conduct of the employer, depending on the facts, may be considered “atrocious and intolerable in a civilized society.” *Id.*

Under *Dicomes*, at summary judgment, Ms. Chambers bears the burden of proof on the claim of outrageous conduct. Ms. Chambers must produce specific facts showing that there is a genuine issue of material fact; she may not simply rest on the allegations of her pleadings. *Dicomes v. State*, 113 Wash. 2d 612, 630–31, 782 P.2d 1002, 1013 (1989) (citing CR 56(e); *Meyer v. UW*, 105 Wash.2d 847, 852, 719 P.2d 98 (1986)).

Ms. Chambers makes no effort to rest on the allegations of her pleadings; nor does she make any of the pitfalls suggested by the *Dicomes*

court (mere insults or indignities, embarrassment or humiliation, bad faith or even malice). Ms. Chambers endured the relentless vitriol of a sexist, racist, verbally abusive bully whose glee derived from reminding her, and her employees, that she had low value and that he had the power to bring seventeen years of employment to an end.

This is not a case about a sexist or racist comment, although the trial court was quick to admit and there was nothing trivial about calling an African-American applicant “Django.” CP at 532:18 – 533:2. The trial court recognized that Mr. Osborne “appeared to be a jerk...No question that he had some vulgarity.” The question for the factfinder is whether the facts presented by Ms. Chambers show a pervasive cruelty and disdain that bordered on abusive – not merely embarrassing or humiliating. It is for the factfinder to determine whether the fear and intimidation to which Rodda exposed a committed, loyal manager rose to the level of “So outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Grimsby, 85 Wn.2d at 59. If reasonable minds can differ as to whether such contemptible abuse is “sufficiently extreme,” then the question belongs to the factfinder.

VI. CONCLUSION

Michelle Chambers was subjected to pervasive, grotesque gender-based harassment and retaliation by the same sexist and cruel District Manager she reported to Rodda Human Resources. She returned to work every day and did her best for her clients, enduring months of threats to her job (and thus financial) security. Her value was attacked. Her job responsibilities were slowly reassigned, even while she was told that seventeen years could be ended virtually on a whim. Despite her loyalty, she was terminated, and no investigation took place.

Ms. Chambers loved her job, and her clients; were she not terminated, she would be working for Rodda Paint today.

In Washington State, this treatment is extreme and outrageous. Whether evidence binders were poorly organized or her arguments poorly briefed, or indeed not what the trial court expected or wanted, Ms. Chambers is allowed to tell her story to the factfinder where her evidence proves genuine issues of material fact. Rodda is not entitled to judgment as a matter of law on the counts enumerated herein, thus the lower court must be reversed as to each.

RESPECTFULLY SUBMITTED this 12th day of July 2019,

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DECLARATION OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this day I caused to be served a true and accurate copy of this document entitled **BRIEF OF APPELLANT** by electronic mail and Hand Delivery on the following individuals:

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