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From Thurston County Superior Court No. 17-2-03430-34

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Michelle Chambers,

Appellant,

v.

Rodda Paint Company,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff/Appellant Michelle Chambers worked for Defendant/Respondent Rodda Paint Company as the manager of its Lacey, Washington store. During the final two years of her employment, Chambers failed two store audits, had four bad job performance assessments, and was put on a performance improvement plan. On June 6, 2017, Rodda terminated Chambers' employment due to her ongoing unsatisfactory job performance.

Chambers sued and claimed that during her employment her supervisor, Stan Osborne, had subjected her to hostile environment sexual harassment in violation of RCW 49.60.030(1)(a) and to the tort of outrage. She also claimed the termination of her employment constituted the tort of wrongful termination in violation of public policy. The trial court granted summary judgment to Rodda on all of Chambers' claims.

Chambers' hostile environment sexual harassment claim fails because she did not carry her burden to establish either the third prima facie case element (*i.e.*, that Osborne's conduct was so pervasive that it altered the terms or conditions of her employment and created an abusive working environment) or the fourth prima facie case element (*i.e.*, that Osborne's conduct is imputable to Rodda).

Chambers' outrage claim fails because Osborne's alleged conduct was not sufficiently extreme and outrageous to be actionable.

Finally, Chambers wrongful termination in violation of public policy claim fails because she failed to establish her first prima facie case element (*i.e.*, that her discharge violated a clear mandate of public policy), her second prima facie case element (*i.e.*, that her public-policy-protected conduct was a "significant factor" in Rodda's termination decision), or her burden at the third step of the shifting burdens.

II. RESPONSE TO CHAMBERS' ASSIGNMENTS OF ERROR

Rodda believes the issue presented to this Court is as follows: Did the Superior Court properly grant summary judgment to Rodda on Chambers' claims?

III. STATEMENT OF THE CASE

Chambers worked for Rodda as the manager of Rodda's store in Lacey, Washington. Beginning in April 2015, Chambers' supervisor was District Manager Stan Osborne. (CP 189:23-26.)

Rodda periodically performs audits on its stores to evaluate the performance of those stores and the managers in charge of those stores. A score below 90 on a store audit is a failing score. (CP 151:6-11; CP 152:16-23; CP 163:2-3; CP 190:6-8; CP 475:23.) On October 19, 2015, an audit was done on the Lacey store managed by Chambers. The

store received a failing score of 72.5. (CP 77-106; CP 181:25 – 182:3; CP 182:23 – 183:4; CP 190:9-11.)

On October 14, 2016, a performance evaluation was done on Chambers (CP 73-76; CP 180:1-7). She received a score of 19, which was a grade of “D”. (CP 76; CP 190:3-5.)

In October 2017, during a corporate growth/strategy meeting of Rodda officials, Chambers was identified as a store manager who should be replaced due to her ongoing poor job performance (CP 386).

In the late fall of 2017, Rodda’s district managers were asked to do an evaluation on each of the stores in their district. Osborne did the evaluation on Chambers’ Lacey store, and she received a failing grade of 1.3 on a five point scale. (CP 107; CP 190:12-15.)

On February 3, 2017, the Commercial Sales Representative in the Lacey store, Ken Reberry, sent an email (CP 108) to Osborne to complain about Chambers. In that email, Reberry (who previously had been a store manager in another store) said: **(1)** he was concerned about Chambers’ lack of “heart, desire, and drive” and that the attitude of her subordinates was being “drastically affected by [Chambers’] lack of motivation”; **(2)** Chambers refused to work extra hours even when her store was under-staffed; **(3)** Chambers was belittling her assistant store

manager; (4) Reberry was trying to coach Chambers on how to improve as a store manager but he “fear[s] what she needs can’t be taught”; and (5) don’t tell Chambers about his email because he feared she would retaliate against him. (CP 190:16-25.)¹

Also on February 3, 2017, Osborne wrote an email (CP 386) which noted that: (1) in light of Chambers’ ongoing poor job performance she had been identified for replacement back at the October 2016 corporate meeting; (2) he had seen no improvement in her job performance since then; and (3) as a result she would be put on a performance improvement plan (“PIP”). Osborne’s email also noted that “I’m afraid it’s time to coach this one out.” (CP 386.)

On February 20, 2017, Osborne wrote an email (CP 377) to Chambers in which he said:

Please allow me to correct any confusion we may have left from our verbal conversation Friday surrounding the financial performance of the [Lacey] Store and your management skills/performance.

While the financial performance of [the Lacey store] and the high turnover of staff is concerning to regional

¹ Chambers argues (Appellant’s Brief 20:3-13) that Rodda made too much of Reberry’s email, and she points to Reberry’s after-the-fact attempt (CP 390) to clarify several of the damning criticisms he had made about Chambers in his email. There is no evidence that anyone at Rodda was aware of those “clarifications” when it terminated Chambers’ employment. Similarly, there is no evidence that anyone pressured Reberry to send his email.

management, I certainly did not mean to leave you with the impression that [Regional Manager] Brian [Villa] had singularly told me to put you on a performance improvement plan. Brian and I BOTH Have Had, and CONTINUE To Have Concerns with the store management, team coaching and performance of [the Lacey store].

I will be taking the lead with your performance improvement process, and will provide you with additional clarity on this subject very soon.

On March 9, 2017, Chambers was put on a 90-day PIP (CP 109-111; CP 328-330; CP 180:11 – 181:3; CP 191:1-2).

On May 16, 2017, an audit was done on Chambers' Lacey store. The store received a failing score of 43 on that audit. (CP 112-132; CP 183:7-10; CP 191:3-5.)

On June 6, 2017, at the end of the 90-day PIP period, Chambers' employment was terminated due to her ongoing unsatisfactory job performance (CP 173:21-25; CP 185:21-22).

On June 21, 2017, Chambers filed this lawsuit. Her Amended Complaint (CP 4-12) alleged five claims for relief, with three of those claims for relief alleging two theories of recovery each. Rodda moved for summary judgment on all of Chambers' claims. At the summary judgment hearing, the trial court ruled as follows:

(1) The tort of outrage – summary judgment was granted to Rodda because Osborne's alleged conduct was not sufficiently extreme and outrageous to be actionable (RP 38:7 – 39:4).

(2) Violation of RCW 49.60.030(1):

(a) Boycott / blacklisting in violation of RCW 49.60.030(1)(f) – Chambers conceded that summary judgment was appropriate (RP 20:14 – 21:1, 29:13-18); and

(b) Hostile work environment sexual harassment in violation of RCW 49.60.030(1)(a) – summary judgment was granted to Rodda because Chambers failed to show that Osborne had engaged in conduct that occurred because of her sex and that was sufficiently pervasive to be actionable (RP 37:8-18).

(3) Violation of the Washington Family Leave Act (“WFLA”), RCW 49.78.010 et seq:

(a) WFLA interference claim – Chambers conceded summary judgment was appropriate (RP 21:2-8, 29:1-12); and

(b) WFLA retaliation claim – Chambers conceded summary judgment was appropriate (RP 21:2-8, 29:1-12).

(4) The tort of defamation – summary judgment was granted to Rodda for two reasons: **(a)** because there was no evidence in the record of a defamatory statement; and **(b)** because the allegedly defamatory statement was not false (RP 29:19 – 30:18).

(5) The tort of wrongful discharge in violation of public policy:

(a) WFLA retaliation – Chambers conceded summary judgment was appropriate (RP 21:2-12, 29:1-12); and

(b) Retaliation for reporting Osborne’s alleged sexual harassment to Rodda’s management – summary judgment was granted to Rodda because Chambers failed to show she was fired because of her report (RP 38:1-6).

On appeal, Chambers’ Brief challenges the trial court’s grant of summary judgment on claims for relief 1, 2(b) and 5(b).

(Appellant’s Brief 3:16-18, 5:5-10.)

IV. ARGUMENT

A. The hostile work environment sexual harassment claim.

1. The prima facie case elements.

Chambers' second claim for relief alleged that Rodda violated RCW 49.60.030(1)(a)² when Osborne subjected her to sexual harassment (CP 10:9-13; CP 153:2-20). To prevail on her hostile environment sex harassment claim, Chambers had to show that Osborne's alleged harassment: (1) was unwelcome; (2) was because she is female; (3) was so pervasive that it altered the terms or conditions of Chambers' employment and created an abusive working environment; and (4) is imputable to Rodda. *Blackburn v. State*, 186 Wn.2d 250, 260, 375 P.3d 1076 (2016); *Glasgow*, 103 Wn.2d at 406-07; *Crownover v. State*, 165 Wn. App 131, 145, 265 P.3d 971 (2011), *rev. den.*, 173 Wn.2d 1030 (2012); *Clarke v. State Attorney General's Office*, 133 Wn. App 767, 785, 138 P.3d 144 (2006). Regarding the fourth element, a supervisor's sexual harassment can only be imputed to the employer if it is shown that the employer authorized, knew or should have known about the harassment

² RCW 49.60.030(1)(a) provides that the "[t]he right to be free from discrimination because of...sex...shall include, but not be limited to...The right to obtain and hold employment without discrimination..." Sexual harassment is a form of sex discrimination. *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2005); *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 405, 693 P.2d 708 (1985).

and failed to take prompt and adequate corrective action. *Glasgow*, 103 Wn.2d at 407.³

To survive summary judgment, Chambers had the burden to establish “specific and material facts to support each element of...her prima facie case.” *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

2. The factual basis of Chambers’ claim is limited to just two alleged comments by Osborne.

At her deposition, Chambers admitted several times that her sexual harassment claim was based on just two alleged comments by Osborne during the almost 26 months that he was her supervisor (CP 154:7 – 156:11; CP 426:21 – 427:4; CP 431:10-16; see also CP 189:23-26). Those two alleged comments were:

- On January 13, 2016, 17 months before she was fired, Osborne allegedly said that employee Melanie Heatherington was “not equipped to make deliveries” to a customer of several hundred

³ Chambers concedes these are the prima facie case elements of her hostile work environment sexual harassment claim (Appellant’s Brief 18:9-12), yet she appears to argue that the *McDonnell Douglas* shifting burden framework also applies to that claim (Appellant’s Brief 16:11 - 22:20). While that framework applies to disparate treatment employment discrimination claims, see, e.g., *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 354, 173 P.3d 688 (2007), Rodda is unaware of any U.S. Supreme Court, Washington Supreme Court, or Washington Court of Appeals case where that framework was applied to a hostile work environment harassment claim.

gallons of paint in five gallon buckets⁴ (Appellant’s Brief 6:15-19; CP 154:7-10; CP 156:12 – 160:11).⁵

- On February 29, 2016, Osborne allegedly said that Chambers should not look at job applications submitted by women because there were “enough hormones” in his district (or in the company, Chambers could not recall which) (Appellant’s Brief 8:4-8; CP 154:11-16; CP 160:12 – 162:9; CP 134).⁶

Chambers admits she only ever made one complaint about Osborne to Rodda’s management (CP 448:9-13). Specifically, on January 14, 2016, one day after Osborne made the “not equipped to make deliveries” comment about Heatherington, Chambers told Jennie Wine in

⁴ Although Chambers initially testified that Osborne said this about both she and Heatherington (CP 154:7-10), Chambers later clarified that Osborne said this about just Heatherington (CP 159:11). Chambers also signed an affidavit in which she said Osborne’s comment was solely directed at Heatherington, and that his comment was that Heatherington was “not built to be making large deliveries” (CP 298, ¶ 1; *see also* Appellant’s Brief 1:16-17 (“Osborne’s discriminatory comments demeaned one of her employees.”)).

⁵ Osborne denies making this comment. He says the Lacey store was delivering approximately 600 gallons of paint in five gallon buckets to an apartment construction job in downtown Olympia. Osborne told Chambers that two employees were needed for this delivery because of safety: One employee would drive the delivery vehicle and stay with the vehicle while it was parked on the sidewalk, and the other employee would hand-carry two five-gallon buckets of paint at a time up to the third floor using the construction stairwell. (CP 191:11-19.)

⁶ Osborne also denies making this comment and notes he has been closely involved in hiring or promoting at least eight women to work in his district in store manager, assistant manager and/or sales associate positions (CP 191:6-10).

Rodda's human resources department about that comment (CP 298, ¶ 1; CP 448:9 – 449:14).⁷

Thus, Chambers admits she never reported to Rodda's management the alleged "enough hormones" comment (CP 162:4-6). As a result, that comment cannot be imputed to Rodda under the fourth prima facie case element. *Glasgow*, 103 Wn.2d at 407 (a supervisor's sexual harassment can only be imputed to the employer if it is shown that the employer authorized, knew or should have known about the harassment and failed to take prompt and adequate corrective action).

In effect, then, Chambers testified that her sexual harassment claim was based solely on the "not equipped to make deliveries" comment. That comment falls far short of the quantity and quality of sexually charged conduct that must exist for an employee's sexual harassment claim to survive summary judgment.⁸ Actionable harassment exists only where it is "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Glasgow*, 103 Wn.2d at 400; *Blackburn*, 186 Wn.2d at 260; *Clarke*, 133 Wn. App at

⁷ Of course, Chambers also testified at one point that she could not recall if she had ever reported the "not equipped to make deliveries" comment to Wine (CP 160:4-8).

⁸ The same is true even if Chambers had complained to Rodda's management about the alleged "enough hormones" comment.

787. This standard is met when the plaintiff shows that her workplace was "permeated with 'discriminatory intimidation, ridicule, and insult.'" *Harris v. Forklift Systems*, 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993) (emphasis added)).⁹

As a result, the courts have uniformly held that a few instances of offensive sexual misconduct or remarks do not create a sufficiently abusive environment to be actionable. *See, e.g., Glasgow*, 103 Wn.2d at 406 ("Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms and conditions of employment to a sufficiently significant degree to violate the law."); *MacDonald v. Korum Ford*, 80 Wn. App. 877, 886, 912 P.2d 1052 (1996) ("although offensive and inappropriate, this isolated indiscretion cannot support a hostile environment claim"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S Ct 2275 (1998) ("isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'"); *Harris*, 114 S. Ct. at 370 (occasional annoying or "merely offensive" comments are not actionable); *Crownover*,

⁹ Washington's courts consistently look to federal case law interpreting federal discrimination statutes to aid in the interpretation of RCW 49.60. *See, e.g., Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 490-91, 325 P.3d 193 (2014); *Antonius*, 153 Wn.2d at 266.

165 Wn. App. at 146 (“It is insufficient that the employer’s conduct is merely offensive or vulgar.”).¹⁰

Three Court of Appeals cases are particularly instructive in determining how "bad" sexually harassing conduct must be before it becomes actionable:

- *MacDonald*, 80 Wn. App. 877. **Facts:** Female plaintiff claimed she was sexually harassed by two supervisors, Huber and Yaeger. Huber "grabbed and kissed her as she left work on New Year’s Eve 1987 and fired her [the next work day] in retaliation for rejecting his sexual advance." *Id.* at 880, 888. Yaeger: (1) had a "habit of coming up behind her and placing his hand on her back; (2) had a "habit of positioning himself in the office hallway so she would brush against him when she passed"; (3) told plaintiff that "with [her] tits [she] should be able to...sell anything or everyone"; and (4) "thanked MacDonald while simultaneously stroking his fly or belt." *Id.* at 886. **Held:** With regard to Huber's conduct, "[a]lthough offensive and inappropriate, this isolated indiscretion cannot support a hostile environment claim." *Id.* at 886 (emphasis added). As to Yaeger's conduct, "[a]lthough inappropriate, Yaeger's behavior was mild in comparison to acts the courts have found create a hostile environment." *Id.* at 887 (emphasis

¹⁰ See also *Keenan v. Allan*, 889 F. Supp. 1320, 1373-74 (E.D. Wa. 1995), *aff'd*, 91 F.3d 1275 (9th Cir. 1996) ("Mere unpleasantness or hostility...is not enough; Congress has not elected to protect against the personality conflicts endemic to any workplace"; "Courts cannot police the incidents of unneighborliness universal to workplaces, any more than they can such incidents in a marriage."); *Candelore v. Clark County Sanit. Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) (isolated incidents of sexual horseplay or inappropriate behavior held insufficient to support sexual harassment claim); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith*, 737 F. Supp. 1070, 1082 (E.D. Mo. 1990), *aff'd*, 985 F.2d 564 (8th Cir. 1991), *cert. den.*, 504 U.S. 918 (1992) (a harassment plaintiff must prove "conduct...so intimidating, offensive or hostile that it 'poisoned' the work atmosphere for [her].")

added). Not only did the Court of Appeals affirm the trial court's grant of summary judgment to the employer, it also affirmed the entry of sanctions against MacDonald's attorney for continuing to pursue her sexual harassment claim after he should have known she had no claim. *Id.* at 887-88, 890-91.

- *Graves v. Dep't of Game*, 76 Wn. App. 705, 887 P.2d 424 (1994). **Facts:** Plaintiff's supervisor asked her how she expected to learn her habitat biologist job and deal with the public (primarily cattlemen) if she "did not cuss, ride a horse, chew 'snoose', hunt or shoot a gun." He also told her not to pursue buying a home because "You might not be around very long." *Id.* at 713-14. **Held:** Directed verdict for employer affirmed because these statements did not constitute "the level of pervasive offensive behavior which would create a climate of sexual harassment." *Id.* at 714.
- *Washington v. Boeing*, 105 Wn. App. 1, 19 P.3d 1041 (2000). **Facts:** Various male employees: (1) said plaintiff could not do her job as well as a man could; (2) used terms like "dear" and "sweet pea" to address plaintiff; and (3) repeatedly refused to assist plaintiff do her job duties. *Id.* at 6, 10-11. **Held:** "The harassing conduct here is not pervasive enough to" give rise to an actionable harassment claim. *Id.* at 10.

In short, harassment claims have been dismissed as a matter of law in the face of evidence far stronger than that relied on by Chambers.¹¹

¹¹ See also *Clark County School District v. Breeden*, 532 U.S. 268, 271-73, 121 S.Ct 1508 (2001) (while a male supervisor, a male co-worker and the female plaintiff were reviewing background reports on job applicants, the two male employees chuckled about a report that one applicant had said to a co-worker "I hear making love to you is like making love to the Grand Canyon"; summary judgment for the employer was affirmed because "No reasonable person could have believed that [that] single incident" could constitute actionable sexual harassment).

3. **Chambers’ attempt to base her claim on additional alleged comments by Osborne.**

Despite Chambers’ repeated admissions at her deposition that her sexual harassment claim was only based on the alleged “not equipped to make deliveries” and “enough hormones” comments (CP 154:7 – 156:11; CP 426:21 – 427:4; CP 431:10-16), her Brief argues that her sexual harassment claim also is based on other alleged comments that she claims Osborne made either: (1) to or about Chambers; or (2) to or about other people (not Chambers). In making this argument, Chambers is improperly attempting to ignore her deposition admissions. *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (a plaintiff cannot create a genuine issue of fact by submitting an affidavit that contradicts her prior sworn testimony). Even if Chambers could now ignore her deposition admissions and ground her sexual harassment claim on those other alleged comments by Osborne, those comments still could not prevent the entry of summary judgment for the following reasons:

a. **The alleged comments by Osborne to or about Chambers.**

1. **The day after Osborne gave Chambers the PIP, he said that if he really wanted to fire her he would find a reason to do so** (Appellant’s Brief 12:3-5). **First**, Chambers admits this comment had nothing to do with her gender (CP 430:9-15; CP 442:23 –

443:1). Thus, this alleged comment is irrelevant to her sexual harassment claim. *Schonauer v. DCR Ent't, Inc.*, 79 Wn. App. 808, 820, 905 P.2d 392 (1995) (“the employee must prove the conduct was because of sex”, *i.e.*, that “it would not have occurred had the employee been of a different sex.”); *Glasgow*, 103 Wn.2d at 406 (same).

Second, this comment is not imputable to Rodda because Chambers admits she never told Rodda’s management about it (CP 448:9 – 449:14; CP 472:1-3). *Glasgow*, 103 Wn.2d at 407 (a supervisor’s sexual harassment can only be imputed to the employer if it is shown that the employer authorized, knew or should have known about the harassment and failed to take prompt and adequate corrective action).

2. **As a joke,¹² Osborne told Chambers that his car had hit her car out in the parking lot, asked her if she had good insurance, took her outside to show her he was kidding, and then told employee Melanie Heatherington that Chambers had hit him out in the parking lot and asked Heatherington (she thinks it was Heatherington but isn’t sure) if Heatherington was ready to take over Chambers’ position** (Appellant’s Brief 7:3-6; CP 199:6-8; CP 256; CP

¹² Chambers admits she understood Osborne was joking when he made his statements (CP 435:23-24).

298:18 – 299:1; CP 435:7 - 436:22).¹³ **First**, Chambers admits this comment was not gender based and had nothing to do with her gender (CP 436:23 – 437:2). **Second**, this comment is not imputable to Rodda because Chambers admits she never told Rodda management about it (CP 437:25 – 438:2; 448:9 – 449:14; CP 472:4-7).

3. Osborne told other Rodda employees that back in 2005 he had not hired Chambers when he worked for a different company (Appellant’s Brief 7:13-17). **First**, Chambers once again admits this comment had nothing to do with her gender (CP 430:10-15). **Second**, this comment is not imputable to Rodda because Chambers admits she never told Rodda management about it (CP 448:9 – 449:14; CP 472:12-15).

4. As thanks for her discovery of an erroneous freight charge, Osborne said he would not put Chambers on a 90-day PIP (Appellant’s Brief 11:1-10; CP 258; CP 299:13-15). **First**, Chambers testified she had no memory of this incident (CP 440:19 – 441:14). **Second**, this comment is not imputable to Rodda because

¹³ Heatherington testified that Osborne never asked her if she was ready to take over Chambers’ position (CP 462:15-18). She also testified that Chambers never indicated Osborne had said or done anything inappropriate to her (CP 462:19-22), that Chambers never said she thought she was being sexually harassed (CP 462:23 – 463:2), and that she is not aware of any Rodda employee who was ever sexually harassed (CP 464:13-17).

Chambers admits she never told Rodda management about it (CP 441:15-17; *see also* CP 448:9 – 449:14; CP 472:8-11).

b. The alleged comments by Osborne to or about other people.

1. Osborne referred to an applicant as

“Jango” (Appellant’s Brief 8:9-13). **First**, while Chambers argues this statement was made about an African-American applicant, there is no evidence in the record showing that employee’s race. **Second**, even if Osborne had made that alleged statement about an African-American, Chambers herself admits that a race-related statement is not relevant to her sexual harassment claim (CP 155:23 – 156:8). Indeed, a “plaintiff may not use evidence of one type of discrimination to prove discrimination of another type.” *Rauh v. Coyne*, 744 F. Supp. 1181, 1183 (D. D.C. 1990) (excluding evidence of racial animus towards African-American employees because plaintiff claimed she was subjected to sex and marital status discrimination; “There is little reason in common experience to infer that an employer who discriminates against blacks in his employment decisions is also likely to discriminate against women.”).¹⁴

¹⁴ *See also Simonetti v. Runyon*, 2000 WL 1133066, at *6 (D.N.J. 2000) (racial and religious discrimination against plaintiff’s co-workers could not be used to prove plaintiff was subjected to disability discrimination); *Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 357-60 (5th Cir. 1995) (district court properly excluded evidence of supervisor’s “bigoted acts or [Footnote continued on next page]

Third, the “Jango” comment is not imputable to Rodda because Chambers admits she never told Rodda management about that comment (CP 427:18 – 428:2; CP 449:2-14; CP 472:16-18).

2. During a disagreement between Osborne and employee Melanie Heatherington, Osborne told Heatherington “I could just punch you in the face right now” (Appellant’s Brief 8:17-20).¹⁵ **First**, Chambers admits this comment was not gender-based and had nothing to do with her gender or sex (CP 433:24 – 434: 7). **Second**, this comment is not imputable to Rodda because Chambers admits she never told Rodda management about it (CP 432:6-13; CP 448:9 – 449:14; CP 472:19-22).

3. Osborne swore in the store and during a phone call he had with an employee in another store, and on one

[Continued from previous page]

statements regarding race, sex and other categories besides...disability” because that conduct has no tendency to prove the supervisor discriminated against plaintiff on the basis of his disability); *Wynes v. Kaiser Permanente Hosp.*, 2010 WL 3220137, at *8-*9 (E.D. Cal. 2010) (where plaintiffs claimed they were fired because of their age and disability, court struck references in their complaint to racial and ethnic discrimination).

¹⁵ Heatherington testified that her relationship with Osborne was one in which they often engaged in banter back and forth (CP 461:4-7), that she didn’t think Osborne was really going to punch her (CP 458:23-25), that she understood he meant his comment as a joke (CP 458:14-16; CP 459:2-4), and that Chambers wasn’t even present during the incident (CP 459:18-23).

occasion he lost his temper with Heatherington (Appellant’s Brief 9:3-8). **First**, mere swearing cannot help Chambers satisfy her duty to show she was subjected to harassing conduct that occurred because Chambers is female. *Crownover*, 165 Wn. App. at 146 (“It is insufficient that the employer’s conduct is merely offensive or vulgar.”). **Second**, Chambers conveniently fails to point out that what caused Osborne to lose his temper with Heatherington was a snide comment Heatherington had made to Osborne, *i.e.*, “thank you Stan for coming down [to our store] and brightening our day” (CP 262; CP 358:12-14; CP 461:8-11). Even Heatherington admits her comment was inappropriate (CP 461:13-16). According to Heatherington, Osborne counselled her by saying “You’re a mother. How do you feel when your kids walk out and mumble something under their breath” (CP 358:23-25). This is the comment that Chambers says “equated [Heatherington] with a child” (Appellant’s Brief 9:12).

4. When Heatherington worked at Rodda’s Chehalis store, she was asked to compare how the Chehalis and Lacey stores handled reimbursing employees for mileage. Chambers argues that Osborne pressured Heatherington, who had transferred to Rodda’s Chehalis store, to write something that was critical of Chambers (Appellant’s Brief 20:14 – 21:2). There is no evidence in the record to

support that argument. Heatherington's un-notarized Affidavit (CP 382-384) merely says that her supervisor, Chehalis store manager Sarah Hensley, sent a text message (CP 380) asking Heatherington to indicate how the Chehalis store compared to the Lacey store in the way that it reimbursed employees for mileage to drive to the bank after the store closed to deposit the day's receipts.

5. Osborne made a sexist comment to an employee named Leanne. Chambers attempts to bolster her sexual harassment claim by arguing that another employee named Leanne complained to Rodda management about a comment made by Osborne (Appellant's Brief 19:11-14). Chambers conveniently fails to note two things. **First**, that there is no admissible evidence in the record regarding any such comment, *i.e.*, no testimony or declaration from Leanne was presented and Chambers admits her knowledge of this alleged statement is hearsay (CP 439:3-13).

Second, Chambers admits she did not learn about this alleged comment until after her employment with Rodda had ended (CP 439:14-17) and she admits "it was not a factor in whether [Chambers was] sexually harassed" (CP 418:17 – 419:9; *see also* CP 453:8-18). *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000) ("Harassment directed towards others of which an employee is unaware can, naturally,

have no bearing on whether she reasonably considered her working environment abusive.”).¹⁶

Third, any alleged comment by Osborne to Leanne was not imputable to Rodda because Chambers could not possibly have told Rodda management about something she didn’t know about (CP 473:1-3).

The bottom line is that, even if Chambers had not repeatedly admitted that her sexual harassment claim was based solely on the alleged “not equipped” and “enough hormones” comments, the additional alleged comments by Osborne could not prevent summary judgment to Rodda on that claim.

¹⁶ See also *Mays v. King County*, 349 Fed. Appx. 180, 181 (9th Cir. 2009) (affirming summary judgment for employer where plaintiff was “previously unaware of harassment directed toward other individuals in the workplace”); *Burnett v. Tyco Corp.*, 203 F.3d 980, (6th Cir. 2000) (sexual harassment of other female employees by the man who allegedly harassed plaintiff and by other male employees was irrelevant to plaintiff’s sexual harassment claim because plaintiff was not aware of that other harassment during her employment); *Mason v. Southern Illinois Univ. at Carbondale*, 233 F.3d 1036, 1046 (7th Cir. 2000) (in race harassment case, “for alleged incidents of racism to be relevant to showing the severity or pervasiveness of the plaintiff’s hostile work environment, the plaintiff must know of them.”); *Cottrill V. MFA, Inc.*, 443 F.3d 629, 637 (8th Cir. 2006) (a sexual harassment plaintiff “may only rely on evidence relating to harassment of which she was aware during the time that she was allegedly subject a hostile work environment.”); *Adams v. Austal, USA, LLC*, 754 F.3d 1240, 1250 (11th Cir. 2014) (race harassment plaintiffs could not rely on evidence they only learned about after their employment ended).

B. The outrage claim.

Chambers' first claim for relief alleged an outrage tort claim. The trial court properly ruled that Rodda was entitled to summary judgment on that claim because Osborne's alleged conduct was not sufficiently extreme and outrageous to be actionable.

To prevail on her outrage claim, Chambers had to show that: (1) Osborne engaged in extreme and outrageous conduct; (2) Osborne intended to inflict emotional distress on her¹⁷; and (3) she incurred severe emotional distress as a result of Osborne's conduct. *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 91, 419 P.3d 819 (2018).¹⁸

Rodda was entitled to summary judgment on this outrage claim because Chambers failed to create a material fact question on the first element, *i.e.*, that Osborne's alleged conduct was sufficiently extreme and outrageous to be actionable.

¹⁷ Chambers testified that Osborne was the only Rodda employee whom she believes intended to inflict emotional distress on her (CP 178:11-25).

¹⁸ "Although these elements are generally factual questions for the jury, a trial court faced with a summary judgment motion must first determine whether reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." *Strong v. Terrell*, 147 Wn. App. 376, 385, 195 P.3d 977 (2008); *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 869-70, 324 P.3d 763 (2014), quoting *Doe v. Corp. of the Pres. Of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007).

To satisfy that first element, Osborne’s conduct must have 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.” *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975), *quoting* Restatement (Second) of Torts § 46, comment D. Liability for the outrage tort “does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities”, and “plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” *Id.* “To sustain an outrage claim, the defendant’s conduct must be so offensive as to lead an average member of the community to exclaim “Outrageous!” *Sutton*, 180 Wn. App. at 870.

The following cases illustrate how heinous a defendant’s conduct must be before an outrage claim can survive summary judgment:

- *Strong v. Terrell*, 147 Wn. App. 376, 195 P.3d 977 (2008).
Facts: Plaintiff’s supervisor: (1) verbally abused her on a daily basis by “screaming at her and criticizing her work in a sarcastic, unprofessional manner”; and (2) told “blonde jokes” and “made fun of her by ridiculing her with remarks about her personal life, including disparaging the house she purchased, her husband’s employment, and saying plaintiff’s son was going to find out that she was a ‘bum’ mother because she had placed him in therapy.” 147 Wn. App. at 381, ¶ 4. **Held:** Summary judgment for employer affirmed because the alleged conduct “at worst fall[s] within the category of [non-actionable] insults, indignities, threats, annoyances, petty

oppressions, or other trivialities” and are not actionable. *Id.* at 386-87, ¶¶ 17-19.

- *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989).
Facts: In order to fire the plaintiff in retaliation for exposing the existence of surplus funds, her superiors created a false report that discussed her mismanagement so as to embarrass and humiliate her and justify her firing. *Id.* at 615-16, 630.
Held: Summary judgment for employer affirmed because these facts could not support an actionable outrage claim. *Id.* at 630-31.
- *Schonauer v. DCR Ent’t, Inc.*, 79 Wn. App 808, 905 P.2d 392 (1995). **Facts:** Nineteen year old plaintiff worked as a waitress in a topless nightclub. Her male supervisor repeatedly entered the women’s dressing room, asked about her sexual preferences and fantasies, and pressured her to participate in the club’s nude waitress contest and dance on stage in a sexually provocative way. Plaintiff was fired in retaliation for her refusal to participate in the contest. 79 Wn. App. at 812-15, 822. **Held:** Although these facts stated a claim for sexual harassment in violation of RCW 49.60.030, they failed to establish an outrage claim because they were merely nonactionable “insults and indignities.” *Id.* at 828.
- *Lawson v. Boeing Co.*, 58 Wn. App. 261, 792 P.2d 545 (1990), *rev. den.*, 116 Wn.2d 1021, 811 P.2d 219 (1991). **Facts:** Defendants deliberately and maliciously lied when they accused plaintiff of making sexually explicit comments, of propositioning them, and of improperly touching them. Their lies resulted in plaintiff’s suspension without pay and eventual demotion. 58 Wn. App. at 263. **Held:** These facts do not reach the “high threshold” of misconduct that must exist for an actionable outrage claim to exist. *Id.* at 550-51.
- *Haubry v. Snow*, 106 Wn. App. 666, 31 P.3d 1186 (2001).
Facts: Plaintiff worked as the receptionist for the defendant doctor in his office. The doctor: (1) stared at plaintiff for long periods of time, sometimes with a focus on her breasts; (2) leered at her on a daily basis; (3) approached her from behind and placed his hands on her shoulders; (4) during a

conversation in which the doctor insisted they sit directly opposite each other, he placed his hands on plaintiff's knees, rubbed the tops of her legs, and moved his finger up to the top of her thigh and then touched her blouse just above her waist; (5) on another occasion he approached plaintiff from behind, put his hands on her waist, pushed himself into her, and commented on her outfit with a sexual tone; (6) on another occasion he approached plaintiff while she was standing on a stool and put his hands on her waist and gave her a squeeze; (7) on another occasion he commented on plaintiff's outfit and placed his hands on the side of her leg, and then moved it up her thigh and around her buttocks until it finally rested between her legs and crotch area; (8) on another occasion he stood behind plaintiff and pressed into her while placing his hands on her arms; and (9) told plaintiff if she wanted a "great orgy," she should try the cinnamon role at a local bakery. 106 Wn. App. at 670-73. **Held:** The doctor's conduct was sufficiently outrageous to be actionable (but summary judgment was affirmed for other reasons). *Id.* at 681.

Here, with regard to Osborne's alleged comments to or about people other than Chambers, those comments were irrelevant to her outrage claim because she did not satisfy the requirement that she "must be an immediate family member of the person who is the object of the defendant's actions, and [s]he must [have been] present at the time of such conduct." *Grimsby*, 85 Wn.2d at 59-60; *Reid v. Pierce Cty.*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (affirming summary judgment for defendant because plaintiffs were not present at the time of the allegedly outrageous conduct); *Lund v. Caple*, 100 Wn.2d 739, 742, 675 P.2d 226 (1984) (affirming summary judgment for defendant because, although plaintiff was an immediate family member of the person at whom the

defendant's conduct was directed, plaintiff was not present at the time of that conduct).

With regard to Osborne's alleged comments to or about Chambers, those comments do not constitute the type of extremely heinous conduct that must exist for an actionable outrage claim to exist. Osborne's comments, at worst, were "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" which are not actionable. *Grimsbey*, 85 Wn.2d at 59.

The trial court properly granted summary judgment to Rodda on the outrage claim.

C. The wrongful termination in violation of public policy tort claim.

As shown in the Statement of the Case section above, Chambers failed two audits, had four bad job performance assessments, and was put on a PIP during the last two years of her employment. Consequently, on June 6, 2017, Rodda terminated Chambers' employment due to her ongoing unsatisfactory job performance (CP 173:21-25; CP 185:21-22).

1. The basis of Chambers' claim.

Chambers' wrongful termination in violation of public policy tort claim alleges that her employment was terminated in retaliation

for a complaint she made to Rodda’s management about Osborne on January 14, 2016, seventeen months before her June 6, 2017 termination (CP 298, ¶ 1; CP 448:9 – 449:14; Appellant’s Brief 6:19-21). Chambers admits that was the one and only complaint she ever made to management about Osborne (CP 448:9-13; CP 298, ¶ 1). The complaint was made to Jennie Wine in Rodda’s human resources department (CP 11:19-25; CP 448:14-15; Appellant’s Brief 1:17-18, 6:11-21; 23:1-4; 24:7-9). The entire substance of the complaint was that Osborne had said employee Melanie Heatherington was “not equipped to make deliveries” to a customer of several hundred gallons of paint in five gallon buckets (CP 154:7-10; CP 156:12 – 160:11; CP 298, ¶ 1; CP 449:2-14; Appellant’s Brief 6:15-19; *but see* CP 160:4-8 (where Chambers testified she could not recall if she had ever reported the “not equipped to make deliveries” comment to Wine)).

2. The shifting burdens that apply to Chambers’ claim.

The Washington Supreme Court has applied a three-step burden shifting framework to analyze tort claims alleging wrongful termination in violation of public policy. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 725-27, 425 P.3d 837 (2018); *Wilmot v. Kaiser Aluminum &*

Chem. Corp., 118 Wn.2d 46, 68-70, 821 P.2d 18 (1991).¹⁹ At the first step in this framework, Chambers has to establish her prima facie case elements. If she succeeds, the burden of production (but not proof) shifts to Rodda to articulate a legitimate, nonretaliatory reason for Chambers' discharge.²⁰ Once that occurs, Chambers has the burden at the third step to show either that that reason is pretextual or that retaliation for

¹⁹ Chambers incorrectly states (at Appellant's Brief 23:1-20; 25:8 – 26:6) that the framework that applies to her claim is the four-part Perritt framework that was adopted in *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). The Supreme Court has held that "the Perritt framework should not be applied to a claim that falls within one of the four categories of wrongful discharge in violation of a public policy." *Martin*, 191 Wn.2d at 723-24; *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 277-78, 286-87, 358 P.3d 1139 (2015). Here, Chambers' claim alleges she was discharged for "whistleblowing" (Appellant's Brief 23:6), *i.e.*, that she was discharged in retaliation for having complained about sexual harassment (CP 5:7-8; CP 11:20-21; Appellant's Brief 24:4-9). That claim falls within one of the four recognized categories of wrongful discharge in violation of public policy claims, and thus the Perritt analysis does not apply here. *Martin*, 191 Wn.2d at 724 ("Martin's suit falls into the fourth category, whistle-blowing, because he alleges that he was fired in retaliation for voicing safety complaints about the need for wall padding in the basketball courts. Thus, the Court of Appeals erred by applying the Perritt test instead of using the standard enunciated in *Thompson* and further refined in *Wilmot*

²⁰ Chambers erroneously states that Rodda's burden at the second stage of the shifting burdens is to "prove a nondiscriminatory justification...." (Pl's Brief 16:22). Actually, Rodda "bears only the burden of producing a legitimate reason for discharge to avoid a directed verdict in [Chambers'] favor." *Kastanis v. Educ'l Employees Credit Union*, 122 Wn.2d 483, 490, 863 P.2d 507 (1994); *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wash.2d 46, 70, 82 P.2d 18 (1991) (the employer only needs to "articulate a legitimate nonpretextual nonretaliatory reason for the discharge... The employer must produce relevant admissible evidence of another motivation, but need not do so by the preponderance of evidence necessary to sustain the burden of persuasion, because the employer does not have that burden.").

complaining about sexual harassment was a substantial factor in the termination decision. *Martin*, 191 Wn.2d at 725-27; *Wilmot*, 118 Wn.2d at 68-72. The ultimate burden of proof, however, remains at all times on Chambers. *Wilmot*, 118 Wn.2d at 69, 72.

3. **Chambers failed to establish her two prima facie case elements.**

a. **The first prima facie case element: The termination must have violated a clear mandate of public policy.**

Chambers has to establish two prima facie case elements.

First, she has to show that her termination violated a clear mandate of public policy that is established in prior judicial decisions or constitutional, statutory, or regulatory provisions or schemes. *Martin*, 191 Wn.2d at 725; *Rose*, 184 Wn.2d at 276 (“the plaintiff is required to identify the recognized public policy and demonstrate that the employer contravened that policy by terminating the employee.”).

The question of what constitutes a clear mandate of public policy is a question of law. *Martin*, 191 Wn.2d at 725; *Sedlacek v. Hillis*, 145 Wn.2d 379, 393, 36 P.3d 1014 (2001). Moreover, the Supreme Court has stated that:

We also recognize that the wrongful discharge exception should be applied cautiously in order to avoid allowing an exception to swallow the general rule that employment is terminable at will. Further, the Legislature is the fundamental source for the definition of this state’s public

policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington. “This court should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that ‘the drafting of a statute is a legislative, not a judicial, function.’” *State v. Jackson*, 137 Wash.2d 712, 725, 976 P.2d 1229 (1999) (quoting *State v. Enloe*, 47 Wash.App. 165, 170, 734 P.2d 520 (1987)). An argument for the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature. *Id.* at 725, 976 P.2d 1229; *see also Roberts*, 140 Wash.2d at 79, 993 P.2d 901 (Talmadge, J., concurring) (“The specter of judicial activism is unloosed and roams free when a court declares, ‘This is what the Legislature meant to do or should have done.’”). Therefore, we should not create public policy but instead recognize only clearly existing public policy under Washington law.

Sedlacek, 145 Wn.2d at 390 (underlining added). *See also Rose*, 184 Wn.2d at 276 (this tort “is a narrow exception to the at-will doctrine and must be limited only to instances involving very clear violations of public policy... This strict clarity requirement ensures that only clear violations of important, recognized public policies could expose employers to liability.”); *Roe v. Quality Transportation Svcs.*, 67 Wn. App. 604, 610, 838 P.2d 128 (1992) (a court must “‘find’ not ‘create’” a clear public policy).

Washington’s appellate courts have not hesitated to reject wrongful termination claims when the plaintiff failed to identify a clear

mandate of public policy that was violated by his/her termination. For example:

- *Martin*, 191 Wn.2d at 725-26. **Facts:** Plaintiff claimed he was terminated in retaliation for complaining that wall padding needed to be added to the college's basketball courts to ensure student safety. *Id.* at 721, 725. **Held:** Summary judgment for employer affirmed because "we find no court decision, statute, or regulation that establishes" a clear mandate of public policy to install wall padding, and plaintiff's mere opinion the wall padding was appropriate was insufficient. *Id.* at 725.
- *Dicomes*, 113 Wn.2d at 617-24. **Facts:** Plaintiff claimed she was terminated in retaliation for publicly disclosing that surplus funds were not being accounted for in her state agency's budget. *Id.* at 615-16. **Held:** Summary judgment for employer affirmed because there was no recognized public policy that protected the plaintiff's public disclosure. *Id.* at 624.
- *Roe*, 67 Wn. App. at 607-10. **Facts:** Plaintiff claimed she was terminated in retaliation for refusing to submit to a drug test. *Id.* at 606. **Held:** Dismissal of claim affirmed because "[n]o clear mandate of public policy yet exists which would preclude mandatory drug testing by a private employer." *Id.* at 610.

The Supreme Court's analysis in *Sedlacek* is instructive on this first prima face case element. In that case, plaintiff Diane Sedlacek's wrongful discharge claim alleged her employment had been terminated because of her association with her husband Jack, who had the disability of leukemia. *Id.* at 381-82. She argued that terminating an employee for associating with a disabled person violated the public policy set out in the Washington Law Against Discrimination. In affirming the dismissal of

Diane’s claim, the Supreme Court found that the WLAD did not make association discrimination illegal. *Id.* at 393.

[W]here there is no violation or potential violation of an enforceable law, as is the case here, a plaintiff cannot rely on the state’s interest in ensuring that its citizens comply with the law. Therefore, we hold that no clear mandate of public policy exists in Washington to protect those who are related to or associated with a person with a disability.

Id. at 392-93.

Here, Chambers failed to establish this first prima facie case element because her only comment to Wine on January 14, 2016 was that Osborne had said Heatherington was “not equipped to make deliveries” to a customer of several hundred gallons of paint in five gallon buckets (CP 154:7-10; CP 156:12 – 160:11; CP 298, ¶ 1; Appellant’s Brief 6:15-19;). There is no established public policy that made it illegal to terminate an employee for complaining about such a comment.

Additionally, where (as here) the situation did not involve “immediate harm to life and limb,” it is not enough for Chambers to show that she had an objectively reasonable belief that Osborne’s alleged “not equipped” comment constituted illegal sexual harassment.²¹ Instead,

²¹ While Chambers may try to argue that what she meant to say to Wine was that she (Chambers) thought Osborne’s comment constituted sexual harassment, there is no evidence that Chambers said that. This situation is similar to the one in *Martin* where, in the course of affirming summary judgment to the employer, the Supreme Court stated that plaintiff Martin’s complaint that
[Footnote continued on next page]

Chambers is required to show that Osborne's comment actually constituted illegal sexual harassment. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000). *See also Bott v. Rockwell Int'l*, 80 Wn. App. 326, 334-36, 908 P.2d 909 (1996); *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 914 P.2d 102, 932 P.2d 1266 (1997). Chambers cannot show this because, as was shown in Section IV(A) above, it is beyond any dispute that that alleged comment could not constitute sexual harassment. Because Chambers cannot prevail on her sexual harassment claim, she also cannot establish her first prima facie case element. *Griffith v. Boise Cascade, Inc.*, 111 Wn. App 436, 445, 45 P.3d 589 (2002) (affirming summary judgment for employer because plaintiff failed to show the employer actually violated the law that she claimed established the public policy); *Smith v. State Empl't Sec. Dep't*, 100 Wn. App. 561, 570, 997 P.2d 1013 (2000) (same).

b. The second prima facie case element: Causation.

The second prima facie case element Chambers had to establish is causation, *i.e.*, that her public-policy-protected conduct was a

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pool-related activities could generate revenue to pay for wall padding in the gym was not the same thing as complaining that it was unsafe to not have wall padding in the gym. *Martin*, 191 Wn.2d at 727.

“significant factor” in Rodda’s termination decision. *Martin*, 191 Wn.2d at 725; *see also* Appellant’s Brief 23:9-11 (“The Plaintiff bears the burden of proving that her protected [complaint to Rodda’s human resources department] was a ‘substantial factor motivating [Rodda] to discharge [her].’”).

Chambers failed to establish a causal link between her January 14, 2016 comment to Wine and her June 6, 2017 termination (CP 186:1-2).²² Her Brief only mentions two things that touch on the causation issue. **First**, she seeks to rely on timing when she says “Osborne verbally expressed interest in relieving Ms. Chambers of her employment literally *the day after* Ms. Chambers filed her report (Appellant’s Brief 24:11-13 (emphasis in original)). This is a reference to the fake car-hitting incident in which Osborne jokingly asked Heatherington, on January 15, 2016, if she was ready to take over Chambers’ position because Chambers had hit him out in the parking lot. *See* the text accompanying footnote 12, *infra*.

Of course, Chambers failed to produce any evidence that Osborne even knew Chambers had complained to Wine the previous day

²² Indeed, when Chambers was asked why she believes her employment was terminated, she did not say that it was because she had reported Osborne’s alleged comment to Wine. Instead, she testified that she believes she was discharged because Osborne “didn’t like me” (CP 173:2-17).

about the “not equipped” comment.²³ *Clark County School District v. Breeden*, 532 U.S. 268, 271-73, 121 S.Ct 1508 (2001) (Breeden claimed supervisor Rice transferred her to a new position in retaliation for the sex harassment complaint Breeden filed with the EEOC, but “there is no indication that Rice even knew about the [EEOC case] when she proposed transferring” Breeden; summary judgment for employer affirmed); *Martin*, 191 Wn.2d at 727 (noting there was no evidence that the supervisors who were accused of retaliating against Martin for his wall padding complaint had ever received that complaint; summary judgment for employer affirmed); *Marin v. King County*, 194 Wn. App. 795, 802, 813, 378 P.3d 203, *rev. den.*, 186 Wn.2d 1028, 385 P.3d 124 (2016) (after Marin complained to human resources that his supervisor at the West Point plant had subjected him to a hostile work environment, Marin then transferred to the South Plant; the trial court properly dismissed Marin’s claim that employees at the South Plant retaliated against Marin for his complaint to HR because “Marin failed to show that anyone at South Plant knew about his protected activity at West Point....”).

²³ Chambers testified that she does not know whether Wine ever talked to Osborne about the “not equipped to make deliveries” comment (CP 449:18-19).

Contrary to Chambers' argument, the timing in this case supports the entry of summary judgment on Chambers' claim. The passage of 17 months between Chambers' comment to Wine and Chambers' termination shows there was no causal link between the two events. *See, e.g., Breeden*, 532 U.S. at 273-74 (2001) (a court may not infer causation from temporal proximity unless the time between the plaintiff's protected activity and the employer's adverse employment action is "very close"; Supreme Court cites with approval two court of appeals cases which held that a three-month and four-month time lapse was insufficient to infer causation); *Wilmot*, 118 Wn.2d at 69 ("Discharge some length of time after the employee's filing of a claim will be less likely to reflect an improper motive connected with that claim."); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) ("A nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation."); court cites cases that held time lapses of four months, five months, eight months and one year were all too long to support a causation finding).

Second, Chambers argues that after the fake car-hitting incident, Osborne made "repeated suggestion[s] that Ms. Chambers' job was at risk" which "increased in intensity and seriousness, including being

communicated behind Ms. Chambers' back to her employees.”

(Appellant's Brief 24:14-18).

This argument conveniently ignores several key things:

(1) Chambers' job was indeed in jeopardy because of her ongoing documented unsatisfactory performance, and Osborne acted appropriately in letting her know that fact so she could attempt to correct her performance deficiencies before her termination. Had Osborne not given Chambers that opportunity, she would now be claiming that that failure was inappropriate; (2) although Chambers claims Osborne told her subordinates that her job was in jeopardy, she has cited no evidence to support that claim; and (3) Chambers completely fails to show how any of this “evidence” establishes a causal link between her January 14, 2016 comment to Wine and her June 6, 2017 termination.

Because Chambers failed to establish her two prima face case elements, Rodda was entitled to summary judgment and this Court's analysis of the wrongful termination claim need not proceed any further.

4. Rodda successfully articulated its nonretaliatory reason for Chambers' termination.

Even assuming *arguendo* that Chambers satisfied her prima facie case elements, the burden shifted to Rodda to articulate a legitimate nonpretextual reason for the discharge. *Martin*, 191 Wn.2d at 725-26;

Wilmot, 118 Wn.2d at 70. Rodda satisfied this requirement by presenting overwhelming evidence that Chambers' employment was terminated due to her ongoing unsatisfactory job performance. *Martin*, 191 Wn.2d at 726 (employer satisfied its burden by presenting job performance evaluations, declarations and emails showing the plaintiff had job performance problems).

5. Chambers failed to carry her third-step burden.

Once Rodda articulated its legitimate nonretaliatory reason for Chambers' termination, the burden shifted back to Chambers to prove either that the reason articulated by Rodda is pretextual or that, although Rodda's stated reason is legitimate, the public-policy-protected conduct was nevertheless a substantial factor motivating Rodda to discharge Chambers. *Martin*, 191 Wn.2d at 726; *Wilmot*, 118 Wn.2d at 73.

Chambers attempts to satisfy her third-step burden by making three arguments. **First**, she argues that while she was told the high turnover of employees in her store was a factor in her termination, she had no turnover in 2017 immediately before her June 6, 2017 termination (Appellant's Brief 3:7-10, 13:7-9, 15:11-15). This argument totally ignores the fact that Chambers' store had at the incredibly high rate of 139% in 2016, which was by far the worst turnover rate of any store in the region (CP 341). Thus, in 2017 her store's employees still were new.

There is no evidence Rodda said it would only consider the 2017 turnover rate when it decided to terminate her employment, but there is abundant evidence that Chambers' termination was motivated by her ongoing unsatisfactory job performance (CP 185:21-22).

Second, Chambers argues that her store's sales were up during the months of January and February 2017 (Appellant's Brief 3:5, 12:6-12). While the Lacey store's sales were up slightly during those months, Chambers' focus on her store's sales is an attempt to deflect attention away from the more important criterion of net income. Her store's dismal net income in the years leading up to her termination was as follows (CP 109):

| 2013 | 2014 | 2015 | 2016 | Jan/Feb 2017 |
|-----------|---------|-----------|-----------|-----------------|
| -\$62,540 | \$3,405 | -\$45,794 | -\$52,242 | -\$24,471 |

Thus, her store consistently lost money in the years leading up to her termination. The importance of having a positive net income was stressed in Chambers' 90-day PIP when it said "Let's...accomplish at a minimum your Net Income Budget...and get [the Lacey store] in a profitable condition sooner rather than later." (CP 111; CP 110 ("It is imperative that we manage the expense and net income lines....")); CP 343 (stating that part of the reason for Chambers' termination was the "poor...

financial outcome” of her store); *see also* Appellant’s Brief 11:16-18 (admitting the PIP identified net income as “a baseline goal”).)

Third, Chambers’ suggests Rodda did not consistently identify the reasons for her termination (Appellant’s Brief 21:4-11). But there is nothing inconsistent about the statements that Chambers was fired for the “poor performance of [her] store’s operations and financial outcome” and for making “unfavorable progress and results” on her 90-day PIP (CP 343), and a statement that “After prior warnings she failed to follow directions given to achieve the goals set. She did not make acceptable progress in spite of substantial experience and a clear plan” (CP 349).²⁴

²⁴ Chambers also points to several other irrelevant things. **First**, she touts the passing scores her store received on audits in 2010 and 2011, more than five years before her termination (Appellant’s Brief 12:14-18, 21:15-19). *Samuelson v. Durkee/French/Airwick*, 976 F.2d 1111, 1114 (7th Cir. 1992) (“An employee’s past performance is not indicative of present performance”; court was not required to consider plaintiff’s entire work record when it granted summary judgment to employer who considered only plaintiff’s most recent performance); *Karazanos v. Navistar Int’l Transp. Corp.*, 948 F.2d 332, 336 (7th Cir. 1991) (“the issue is whether the employee was performing well at the time of his termination... The fact that an individual may have been qualified in the past does not mean that he is qualified at a later time.”); *Puckett v. Niboc, Inc.*, 1990 US Dist Lexis 18813, p 3 (N.D. Ind. 1990) (although 24-year employee’s performance had been satisfactory in prior years, “earlier satisfactory performance does not demonstrate satisfactory performance at the time of the discharge”).

Second, she points to audit incentive pay she received in 2013 (\$400), 2014 (\$800) and 2016 (\$400) (Appellant’s Brief 12:19 - 13:3, 21:15-19). Of course, she fails to point out that Osborne was Chambers’ supervisor in 2016
[Footnote continued on next page]

All of Chambers' arguments ignore the fact that her 90-day PIP required her to accomplish eight action items to save her job (CP 110; Appellant's Brief 11:16-18 (the PIP "identified eight 'action items'")).²⁵ There is no evidence in the record that she accomplished any of those eight things.

The bottom line is that Chambers merely disagrees with Rodda's assessment of her job performance. However, an employee's mere disagreement with her employer's assessment of her job performance does not demonstrate pretext. *Parsons v. St. Joseph's Hosp. & Health Care Ctr.*, 70 Wn. App. 804, 856 P.2d 702 (1993); *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988) (statement in plaintiff's affidavit that his performance was not deficient could not defeat summary judgment); *Chen v. State of Washington*, 86

[Continued from previous page]

when he gave her store the passing audit score that resulted in her getting that pay (CP 189:25-26). This dispels any notion that Osborne was out to retaliate against her for her January 14, 2016 comment to Wine.

²⁵ The eight things were: (1) devote time to managing the store's operating statement; (2) develop a store inventory assessment; (3) establish a Sundry Program service plan; (4) identify key store customers and develop a sales action plan for them; (5) develop an action plan to train her subordinates; (6) improve communication with Osborne and provide him with updates; (7) initiate and participate in weekly meetings with her subordinates; and (8) exhibit a positive attitude to internal and external customers. "Time is of the essence with your implementation of these new procedures and processes." (CP 110.)

Wn. App. 183, 191, 937 P.2d 612, *rev. den.*, 133 Wn.2d 1020, 948 P.2d 387 (1997) (“An employee’s assertion of good performance to contradict the employer’s assertion of poor performance does not give rise to a reasonable inference of discrimination”).²⁶

V. CONCLUSION

Rodda respectfully requests that this Court affirm the trial court’s decision granting summary judgment to Rodda on all of Chambers’ claims.

²⁶ See also *Smith v. Flax*, 618 F2d 1062, 1067 (4th Cir 1980) (“a plaintiff’s “perception of [his own job performance] is not relevant. It is the perception of the decision maker which is relevant.”); *Bradley v. Harcourt, Brace and Co.*, 104 F3d 267, 270 (9th Cir 1996) (“an employee’s subjective personal judgments of her competence do not raise a general issue of material fact”); *Hawkins v. Pepsico, Inc.*, 203 F3d 274, 280 (4th Cir 2000) *cert. denied*, 531 US 875 (2000) (“we have repeatedly held that...it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff”); *Denisi v. Dominick’s Fine Foods*, 99 F3d 860, 865 (7th Cir 1996) (same); *Aungst v. Westinghouse Elec. Corp.*, 937 F2d 1216, 1223 (7th Cir 1991) (a plaintiff’s self-serving testimony regarding his own ability is insufficient to contradict an employer’s negative assessment of that ability).

RESPECTFULLY SUBMITTED this 12th day of August,
2019.

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2019 I served the foregoing RODDA PAINT COMPANY'S RESPONDENT'S BRIEF on:

Gregory Paul Vernon
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Seattle, WA 98121-3504

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