

FILED
Court of Appeals
Division II
State of Washington
9/11/2019 4:38 PM
No. 53003-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RODDA PAINT CO.,

Respondent,

v.

MICHELLE CHAMBERS,

Appellant.

REPLY BRIEF OF APPELLANT

VERNON LAW PLLC
Greg Vernon, WSBA #52221
2801 Western Avenue No. 1227
Seattle, WA 98121
Tel: (206) 605-8249

Email: gregv2k@icloud.com

Attorneys for Appellant Michelle Chambers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

I. REPLY..... 1

 A. Ms. Chambers Established a Prima Facie Case of Hostile Work Environment, Where Unwelcome Gender Discrimination Altered Her Working Conditions and Motivated Her Termination, Rendering Rodda’s Shifting Justifications Pretext 5

 B. Ms. Chambers Met Her Burden by Showing A Reasonable Inference That Retaliation Was a Substantial Factor in Her Wrongful Termination. 17

 C. Mr. Osborne’s Extreme and Outrageous Conduct, Intentionally and Recklessly Inflicted Emotional Distress Upon Ms. Chambers, Triggering Her First Diagnosis of Hypertension 22

II. CONCLUSION..... 24

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>McDonnell Douglas Corp. v Green</i> , 411 U.S. 792, 93 S. Ct. 1817 (1973)	5
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228, 109 S.Ct. 1775 (1989).....	6
<i>St. Mary's Honor Center v. Hicks</i> , 509 U.S. 502, 511; 113 S.Ct. 2742 (1993).....	7
<i>United States v. Stanley</i> , 928 F.2d 575, 577 (2d Cir.), cert. denied, 502 U.S. 845, 112 S.Ct. 141, 116 L.Ed.2d 108 (1991).....	17
State Cases	
<i>Hill v. BCTI Income Fund-I</i> , 144 Wash. 2d 172, 23 P.3d 440 (2001), as amended on denial of reconsideration (July 17, 2001), and abrogated on other grounds by <i>Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.</i> , 189 Wash. 2d 516, 404 P.3d 464 (2017).....	5, 7
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	5
<i>Aka v. Washington Hosp. Ctr.</i> , 156 F.3d 1284 (D.C. Cir. 1998).....	7, 16
<i>Glasgow v. Ga-Pac. Corp.</i> , 103 Wash.2d 401, 693 P.2d 708 (1985).....	7, 8
<i>DeWater v. State</i> , 130 Wn.2d 128, 135, 921 P.2d 1059 (1996).....	8
<i>Carle v. McChord Credit Union</i> , 65 Wash.App. 93, 827 P.2d 1070 (1992).....	17

Gardner v. Loomis Armored Inc.,
128 Wash.2d 931, 913 P.2d 377 (1996)..... 18

Dicomes v. State,
113 Wash.2d 612, 782 P.2d 1002 (1989)..... 18

Farnam v. CRISTA Ministries,
116 Wn.2d 659, 807 P.2d 830 (1991).....18

Milligan v. Thompson,
110 Wn.App. 628, 638 (Div. 2, 2002).....19-20

Sellsted v. Wash. Mut. Sav. Bank,
69 Wash.App. 852, 851 P.2d 716, review denied, 122 Wash.2d
1018, 863 P.2d 1352 (1993) 22

Reid v. Pierce County,
136 Wn.2d 195, 202, 961 P.2d 333 (1998).....22

State Statutes

RCW 49.60..... 18

Rules

Rules of Appellate Procedure (“RAP”) 10.3(c)15

I. REPLY

Rodda Paint (“Rodda”), in Respondent’s Opening Brief, constructs arguments not introduced at the trial court. For example, Rodda argues that Mr. Osborne’s prohibition on paint deliveries by female staff members could be interpreted not as sexist, but as mechanically relating to the physicality of the employee whose team delivery was under discussion. This suggestion merits no consideration.

For context, in 2001, Michelle Chambers (“Chambers”) began her career with Rodda delivering hundreds of orders of large deliveries totaling thousands of five-gallon paint cans to customers throughout Western Washington.

By January 2016, she entered her sixteenth year with Rodda a successful, respected retail manager.¹ Management duties included assigning teams of employees, in groups of two, to deliver large quantities of paint -- just as she had done. In January 2016, she assigned a routine delivery to staff members Melanie Heatherington and Ryan Maher. The employees loaded large quantities of paint into a van, drove to the jobsite, and as a team, unloaded the product onto rolling hand trucks, for delivery to location(s) as directed by the contractor.

¹ Her 2010 review shows “Outstanding” (4) scores for lowering expenses, coming in under inventory budget, “Outstanding store audits,” and Attitude – “Always great!!” Clerk’s Papers (CP) at 321-22, Supervisor Comments.

On or about January 13, 2016, Rodda Paint's then-new Southern District of Western Washington Manager, Stan Osborne ("Osborne"), contacted Ms. Chambers, unhappy with Ms. Chambers' decision to include Ms. Heatherington on the delivery team. Mr. Osborne complained that Ms. Heatherington took the lead, which Mr. Osborne considered emasculating to Mr. Maher.² Mr. Osborne imposed a new rule applicable to future paint deliveries: Ms. Heatherington, Lacey's lone female staff member, would not be allowed to deliver paint.

Ms. Chambers wondered whether Mr. Osborne was aware that her original job at Rodda was delivering paint, or how many thousands of gallons of paint she had delivered when she was in Ms. Heatherington's shoes. Unmoved, Mr. Osborne reasoned that Ms. Heatherington was *not* "built" to deliver paint.

Ms. Chambers asked Mr. Osborne if he preferred that she make the deliveries herself, a question Mr. Osborne answered with silence. Clerk's Papers (CP) at 298, ¶1. The message was clear: Ms. Heatherington and Ms. Chambers, the two female employees of Lacey, were now forbidden from delivering paint. Ms. Chambers realized that women were subject to disparate treatment under the new District Manager.

² This concern was Mr. Osborne's alone; Mr. Maher strongly denied making any such comment. CP 355:22 – 356:8.

Ms. Chambers immediately called Rodda's Corporate Offices and filed a gender discrimination complaint with Human Resource Manager Jennie Wine. Rodda contacted Mr. Osborne's then-supervisor, Jason Lawrence, to investigate what it acknowledged were *inappropriate comments*. CP at 395:17-19. Mr. Osborne denied having made the comments, and the investigation, such as it was, ended. Mr. Lawrence did not contact Ms. Chambers, Ms. Heatherington, or Mr. Maher. Mr. Lawrence did not contact Leanne Dahlquist or Sarah Hensley, also female retail managers in Mr. Osborne's district. Ms. Wine did not contact Ms. Chambers to follow up on Mr. Osborne's ongoing behavior—which soon included overt expressions of sexual and racial animus—or to inform Ms. Chambers that Rodda had closed the matter with a finding of no wrongdoing by Mr. Osborne.

Mr. Osborne appeared, agitated and unannounced, at Lacey the following morning. Upon entry, Mr. Osborne asked Ms. Heatherington if she was prepared to replace Ms. Chambers' as Lacey's store manager. Mr. Osborne claimed that he'd accidentally struck Ms. Chambers' car when pulling into the parking lot, and that Ms. Chambers "punched" him in retaliation. None of the foregoing had occurred. Mr. Osborne awkwardly waved off his comments as a joke. Rodda argues that Ms. Chambers knew this to be a joke—indeed, Mr. Osborne quickly claimed it as such, and Ms.

Chambers knew no such incident had occurred. The joke was not delivered with a smile, and did not invite the listeners to laugh. No one laughed.

This incident marked the first time that a Rodda District Manager, Ms. Chambers' direct supervisor, would threaten her job. From this point on, it occurred with regularity. Mr. Osborne had termination authority, so his threats were never welcomed as jokes. Respondent's Brief seeks for refuge under alternate explanations, mischaracterizations, and that old chestnut, "just a joke." The same refuge used by Mr. Osborne.

Since his 2015 arrival at Rodda, Mr. Osborne laughed when recalling that, in 2004 or 2005, he had *not* hired Ms. Chambers when she interviewed with him at another retailer. Ms. Chambers never found it funny—it's difficult to imagine how a rejection story could be presented as amusing to the rejected. As time went on, Mr. Osborne expanded upon his reminder, warning Ms. Chambers that if he wanted to end her employment now, all he needed to do was find a reason.³ The comments were hostile, not funny.

At Summary Judgment, the trial court was critical that Ms. Chambers did not frame her Response to Defendant's Motion for Summary Judgment according to the *McDonnell Douglas* burden-shifting analysis

³ Mr. Osborne again reminded Ms. Chambers of his earlier rejection in the conversation announcing the female-delivery prohibition. CP at 298, ¶1.

(which, the court allowed, the Defendant had also failed to thoroughly apply in its brief). *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006)). Rodda shares this criticism, but for an entirely different reason: according to Rodda, “Rodda is unaware of any U.S. Supreme Court, Washington Supreme Court, or Washington Court of Appeals case where [the *McDonnell Douglas*] framework was applied to a hostile work environment claim.” Brief of Respondent (“Resp. Br.”) at 8, fn. 3.

Of course, the cases are many and found at a keystroke in the most rudimentary legal search engines. Moreover, the trial court was exhaustive in its analysis of Ms. Chambers’ hostile work environment claim through the lens of *McDonnell Douglas*. Pursuant to Rules of Appellate Procedure (“RAP”) 10.3(c), Rodda’s errant contention requires that Ms. Chambers respond, while also responding to issues raised in Rodda’s Brief.

A. Ms. Chambers Established a Prima Facie Case of Hostile Work Environment, Where Unwelcome Gender Discrimination Altered Her Working Conditions and Motivated Her Termination, Rendering Rodda’s Shifting Justifications Pretext.

McDonnell Douglas set forth an evidentiary burden-shifting protocol to "compensate for the fact that direct evidence of intentional

discrimination is hard to come by." *Hill*, 144 Wn.2d at 181 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'Connor, J., concurring)). Direct evidence is not hard to come by in this matter, where the bad actor not only announced his gender bias, but impacted the working conditions of female employees based on a stated motive of gender discrimination. Thus, Ms. Chambers produced substantial direct evidence of demeaning, gender-based insult, some of which occurred *barely a month after a gender-discrimination complaint*.

Well before the application of *McDonnell Douglas*, which presumes the absence of direct evidence, Mr. Osborne demonstrated contempt for women through demeaning insult and threat of physical violence. Such evidence is *precisely* what Washington courts seek to substantiate gender discrimination allegations.

Genuine dispute of material fact requires dismissal of Rodda's request for Summary Judgment. Ms. Chambers proffered so much evidence establishing a prima facie case and contradicting Rodda's explanation that Rodda's Reply at Summary Judgment was a litany of genuine disputes of material fact on the claims of gender discrimination and retaliation. Because Rodda's evidence of non-discriminatory motive was overcome by enough direct evidence to create the reasonable inference 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*, 144 Wn.2d at 186 (quoting *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1293 (D.C. Cir. 1998); see also *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2751 (1993)) (emphasis added).

To establish a hostile work environment claim, the plaintiff must prove that (1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms or conditions of employment, and (4) the harassment was imputed to the employer. *Glasgow v. Ga-Pac. Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985).

Rodda's arguments that Mr. Osborne's discriminatory conduct cannot be imputed to Rodda finds no purchase in Washington law. Where, as here, a manager personally participates in the harassment, the fourth element is satisfied by proof of the harasser's management status. *Glasgow*, 103 Wn.2d at 407. Rodda does not deny that Stan Osborne held the title of District Manager of Western Washington's South District at all times relevant to this matter. Nor does Rodda suggest that Stan Osborne was a retail store manager. Mr. Osborne supervised managers at the retail level.

Even if we were to posit, *arguendo*, that Mr. Osborne was *not* in management, Rodda is held vicariously liable for the hostile work environment where, as here, (1) the person committing the harassment is an employee, and (2) that the employer authorized, knew, or should have

known of the harassment and failed to take reasonably prompt and adequate corrective action. *DeWater v. State*, 130 Wn.2d 128, 135, 921 P.2d 1059 (1996); *Glasgow*, 103 Wn.2d at 407. Ms. Chambers has shown that the employer knew of Mr. Osborne's harassment, and took no corrective action whatsoever – by Rodda's *own admission*.

The fourth element well satisfied, a prima facie case is established where Mr. Osborne's unwelcome, sexist discrimination and threats affected the working conditions only of female employees. The oppressive conduct only intensified, despite being the subject of a recent gender-discrimination investigation. Rodda's acceptance of Mr. Osborne's denial with no more, without following up with Ms. Chambers, emboldened Mr. Osborne's aggressive retaliation against Rodda's female employees. Rodda's explicit and implicit allegiance to Mr. Osborne preemptively rendered its manufactured non-discriminatory motives for firing Ms. Chambers pretext.

Rodda maintains this allegiance to Mr. Osborne, arguing that Mr. Osborne's overt gender bias is evidenced by "only" two comments. Rodda brushes Mr. Osborne's stated discriminatory motive aside as insufficiently abusive to be actionable. Resp. Br. at 8, §2. This characterization could not be farther from the truth, or the law.

Emboldened by an "investigation" closed by nothing more than a simple denial, Mr. Osborne immediately began laying the groundwork for

Ms. Chambers' termination. He instigated aggressive micro-management: assuming hiring decisions, imposing sexist hiring prohibitions and staff disciplinary actions.

1. Mr. Osborne demanded a role in all store decisions, including hiring. By February 2016, Mr. Osborne announced a new prohibition against female applicants. Mr. Osborne stated that he had "enough hormones in his District."⁴ CP at 257; 299 (March 1, 2016).
2. Barely a week later, Mr. Osborne expressed frustration that a male African American applicant was eligible for hire, asking when "Django" would be starting. CP at 257; 299 (March 10, 2016).⁵

As Mr. Osborne assumed Ms. Chambers' duties, he diminished Ms. Chambers in front of her staff. Mr. Osborne demonstrated to male Lacey staff that he, not Ms. Chambers, was the final authority at Lacey. Mr. Osborne bonded with male employees by bragging that he had not hired Ms. Chambers years before. He shared secrets, including confidential

⁴ The comment insulted all women, including Ms. Chambers, Ms. Heatherington, and the handful of women working in that district.

⁵ "Django" is the name of a slave played by Jamie Foxx in a Quentin Tarantino film; the applicant's name was Charles. CP at 257; 299.

information about Ms. Chambers' employ. He informed male employees of upcoming visits to Lacey with explicit instruction to *not* tell Ms. Chambers.

Mr. Osborne did not share this relationship with Ms. Heatherington, and she was not made party to his club. Instead, Ms. Heatherington and Ms. Chambers were the objects of Mr. Osborne's frustrations, which he would act out in the store with unbridled rage, profanity and sarcasm, in front of employees and customers. Rodda had given Mr. Osborne every reason to believe that he was untouchable, as demonstrated by his conduct:

1. On or about March 2, 2017, Mr. Osborne threatened physical assault when Ms. Heatherington rebuffed his suggestion to watch a store video. "[H]e did this little kind of a head move, almost to get in my face and said, I could punch you in the face," Ms. Heatherington testified. "Then, whatever face I made... he took it back and then tried to shrug it off as, oh, I'm just kidding. Ha-ha-ha, and let it be at that." CP at 353:11-16.
2. Weeks later, on or about March 30, 2017, Mr. Osborne arrived at Lacey in some degree of frustration. 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.
3. Later that day, after "cuss[ing] out" staff at another store, Mr. Osborne demanded Ms. Chambers pull Ms. Heatherington into

Ms. Chambers' office. Mr. Osborne aggressively berated Ms. Heatherington, challenging her professionalism and motherhood, reducing her to tears. "Stan backed down and started to apologize that he shouldn't have said some things. He also said he's not sexist, he has a wife and daughter he works well with." CP at 300 (March 30, 2017). He then bought the store lunch. *Id.*

4. Ms. Chambers later learned that in or around January 2017, Rodda's Sequim Store Manager Leanne Dahlquist also filed a gender discrimination complaint against Stan Osborne, also with Ms. Wine in Rodda Corporate Human Resource.⁶ "[O]ne of the comments that he had said to her: If she would hear a certain word, or her husband would hear a certain word, maybe she would get laid more often..." CP at 371:18-24.
5. An April 2017 email exchange between Ms. Chambers and Mr. Osborne shows the role Ms. Chambers' gender played in Mr. Osborne's evaluation of her efforts. Ms. Chambers developed a

⁶ Rodda elicited this information from Ms. Chambers at deposition. Despite Ms. Dahlquist being identified throughout the record in this matter, including Ms. Chambers' Complaint and list of witnesses, Rodda refers to Ms. Dahlquist as "an employee named Leanne." Resp. Br. at 26, ¶5.

solution related to electronic documentation. Mr. Osborne replied, “That a girl.” CP at 345, ¶¶ 1, 2.

Rodda’s Motion for Summary Judgment relies for evidence of nondiscriminatory motive upon incongruous and disingenuous “evaluations” conducted by the subject of Ms. Chambers’ gender discrimination claim during his already-identified campaign to remove her from Rodda. Additionally, Ms. Chambers showed that when conducting evaluations with a co-evaluator, Mr. Osborne could, and did, change scores at will.

Rodda stands by an email authored by Sales Representative Ken Reberry it mischaracterizes as critical of Ms. Chambers in general.⁷ Ms. Chambers produced Mr. Reberry’s adamant contradiction, expressing frustration only with Ms. Chambers decision to go home after eight hours on an afternoon he felt would have benefitted from her staying later. Ms. Chambers produced evidence that Mr. Reberry’s email⁸ and other writings critical of Ms. Chambers were *solicited by Mr. Osborne*, in the wake of

⁷ In addition to inventing the story behind Mr. Reberry’s email, Rodda misleadingly identifies Mr. Reberry as a “coach,” to Ms. Chambers -- a patently false characterization that witnesses will correct in testimony. Mr. Reberry wasn’t even directly attached to the Lacey store; he performed sales throughout the district.

⁸ “I was asked by Stan to write him an email discussing my opinions with Michelle’s management style. I was trying to explain the fact that I didn’t agree with her working 8hrs [sic] and going home.” CP at 390, ¶1.

Lacey's successes which only served to undercut Mr. Osborne's justifications for termination.

As evidence of non-discriminatory motive, Rodda reports that Ms. Chambers⁹ failed two store audits, had bad job performance assessments, and was put on a Performance Improvement Plan ("PIP") during the "last two years of her employment." (Resp. Br. at 2-5 §III, Statement of the Case; 26 §C). Rodda's proffered evidence was generated or solicited by sexual harasser Stan Osborne for the express purpose of terminating Ms. Chambers' employment. Rodda produces documents constructed by the bad actor, acting with discriminatory animus, to evidence non-discriminatory animus.

Rodda's production is misleading. Mr. Osborne initiated the 2017 audit and performance evaluations (including the PIP and solicited "bad job performance assessments") in the *final three months* of Ms. Chambers' employment—indeed, the length of the ninety-day review—not "two years." Only the introductory 2015 district-wide audit performed by then-new District Manager Stan Osborne falls outside 2017, and merits comment.

⁹ Surprisingly, Rodda refers to Ms. Chambers only as "Chambers," suggesting disrespect, a lack of decorum, or both.

The “2nd Half 2015 Western Region South District Audit” stands out for many reasons. Mr. Osborne entered his new District in 2015 by *failing every store*, save its two “Top Performers.” CP at 243.

The failures of all other stores render this audit an outlier at best. However, there is some value in the numbers: three of the stores show *two consecutive* failing scores. Rodda here produces “two failing audits” as evidence of non-discriminatory motive for terminating Michelle Chambers, yet in 2015, two consecutive failing audits suggested *good news* for the managers of those stores (identified in “Comments” as: Jeff, Casey, Kyle and Craig). *Id.*

Of the failing scores, Lacey dropped from third highest (March 2015) to the middle of the pack. The audit appears to have been conducted as a learning tool, or a “wake up call” from the new District Manager, whose comments adjacent to the scores suggest individualized plans for each store to pass the next audit—which Lacey, but not all others, did.

Several stores show *no passing audits* among multiple non-consecutive audit records produced, piecemeal, by Rodda. The Gig Harbor store has apparently never passed an audit, and its manager, Kyle, retains his job to this day.

Rodda cannot credibly rebut the presumption of discrimination with actions taken by the gender-biased harasser to *effect his stated intent* to

terminate Ms. Chambers' employment. Particularly where Mr. Osborne's finger is on the scale by changing his co-auditor's scores,¹⁰ and compelling current and former coworkers to deliver written testimonials critical of Ms. Chambers.

Rodda is in effect arguing that it did not have a discriminatory motive for firing Ms. Chambers by showing the tools it used to fire Ms. Chambers. Rodda fails at the second step to produce evidence that suggests non-discrimination where it is generated by the sexual harasser in retaliation for Ms. Chambers' statutorily protected activity.

Ms. Chambers produced Rodda's own contradictory evidence showing that Rodda's nondiscriminatory explanation was in fact pretext.

1. Rodda produced a litany of evolving justifications, beginning with Mr. Osborne's February 3, 2017 email, followed by the termination letter sent from Ms. Wine, to Rodda's explanation to the State, to Mr. Osborne's supervisor's comments to Ms. Chambers' customers. Contradictory explanations evidence to the reasonable factfinder a lie,

¹⁰ Mr. Osborne has a reputation among store managers for changing audit scores—including the scores of a 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.

which “should provide even stronger evidence of discrimination” *Aka*, 156 F.3d at 1293

2. Even if Rodda had consistently held to Ms. Wine’s original representation, that representation is patently mistaken. The performance of the Lacey store was, in the months leading up to and including the month of Ms. Chambers’ termination, among the best in the district. Lacey was on a roll, logging its strongest sales numbers. The high turnover rate repeatedly flagged by Mr. Osborne had dropped to zero. Suggestions by Mr. Osborne that Ms. Chambers had problems with Lacey’s books were contradicted by her discovery of a (still unexplained) \$5,000 error that would have been a significant issue had she not caught it.

Rodda seeks to diminish this turnaround, which is precisely what Rodda requested in Ms. Chambers’ PIP, by arguing that it occurred in the wake of the PIP. Rodda then asks the court to look beyond the glowing financial numbers to consider less favorable columns in the ledger. Such efforts merely evidence the lengths required to avoid the conclusion that Ms. Chambers didn’t just hit her targets; she blew them out of the water.

The evidence of rampant, grotesque gender bias produced by Ms. Chambers in the first step of establishing her *prima facie* case of discrimination renders virtually any evidence proffered by Rodda irrelevant, where at Summary Judgment, the court need only find that

gender bias was a factor—not *the* factor, or even the *paramount* factor—in her termination.

Ms. Chambers’ seventeen years of excellence, routinely noted in job evaluations produced by Rodda in discovery,¹¹ speak to the pride she took in her store and her work. Any suggestion that she did not accomplish the PIP evidences the PIP as pretext. The “evaluations” were pretext, and the reasons for her termination were pretext. In that context of that cruelty, it’s painful to read Ms. Chambers’ hopeful enthusiasm when it appeared she had saved her job (“Lacey is on a growth pattern, YA!” CP at 332, ¶ 1.)

Even if the Court were to find that Rodda met its *McDonnell Douglas* intermediate burdens of production, the record contains reasonable but competing inferences of both discrimination and nondiscrimination, tasking the factfinder with choosing between the inferences. *Carle v. McChord Credit Union*, 65 Wash.App. 93, 102, 827 P.2d 1070 (1992) (citing *United States v. Stanley*, 928 F.2d 575, 577 (2d Cir.), cert. denied, 502 U.S. 845, 112 S.Ct. 141, 116 L.Ed.2d 108 (1991)).

B. Ms. Chambers Met Her Burden by Showing A Reasonable Inference That Retaliation Was a Substantial Factor in Her Wrongful Termination.

¹¹ “Doesn’t like policy changes, but always enforces; Always great store audits...” CP at 324, Supervisor Comments (March 7, 2011).

Wrongful termination in Violation of Public Policy is an exception to Washington State’s terminable-at-will doctrine. *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 936 (1996). Among the four situations in which this public policy tort action is “generally allowed” is:

(4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

Gardner, 128 Wn.2d at 937 (citing *Dicomes v. State*, 113 Wash.2d 612, 618, 782 P.2d 1002 (1989)).

To determine whether a clear mandate of public policy is violated, Washington courts consider the *letter or purpose* of a constitutional, statutory, or regulatory provision or scheme. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 669; 807 P.2d 830, 835 (1991). Courts may also consider **prior judicial decisions** for the relevant public policy. *Id.*

Rodda argues that Ms. Chambers failed to clarify a public policy (Resp. Br. at 29 § 3). Rodda is incorrect, where Ms. Chambers’ original complaint cites to Washington State’s Law Against Discrimination (WLAD), RCW 49.60—also cited by Rodda at Summary Judgment. Ms. Chambers also cited to prior judicial decisions recognizing the longstanding public policy prohibiting retaliation against persons reporting employer misconduct. Many of these decisions also cite WLAD, RCW 49.60. The court below expressed no concerns as to Ms. Chambers’ showing that

retaliation for the filing of a sexual discrimination complaint is an established violation of public policy in Washington State.

Rodda also charges that Ms. Chambers failed to prove that Osborne's comments were inappropriate or sex-based (Resp. Br. at 32-33), despite the fact that Rodda *admits* the comments were inappropriate in its own discovery responses. CP at 395:17-19. The initial comments, regarding emasculation and whether a woman was built or equipped to perform simple paint delivery, shocked Ms. Chambers' conscience to the degree that she was willing to put her job at risk by reporting the comment as gender discrimination to Rodda's Corporate Office. Viewing the facts and inferences therefrom in the light most favorable to the nonmoving party who was on the receiving end of gender animus, Rodda's new argument to the contrary is another dispute of material fact for the fact-finder's consideration.

Ms. Chambers established a prima facie case of retaliation by Mr. Osborne for reporting Mr. Osborne's misconduct. sufficient to create a genuine issue of material fact, by showing that (1) she engaged in a statutorily protected activity, (2) Rodda took increasingly severe adverse employment actions against her, culminating in her termination and (3) there were ongoing causal links between her report and the adverse

employment actions. *Milligan v. Thompson*, 110 Wn.App. 628, 638 (Div. 2, 2002).

According to Rodda, Mr. Osborne’s supervisor, Mr. Lawrence, directly asked Mr. Osborne if the statement had been made. At this stage, Rodda Corporate Human Resource, a Rodda Regional Manager, and the bad actor were aware of Ms. Chambers’ gender discrimination complaint.

Adverse employment actions began immediately, including threats to her hard-earned position in the company, removal of responsibilities, micro-management of day-to-day duties, diminishment of her authority, a false and public “offer” of demotion, and finally, termination—all while being targeted for removal. The adverse employment actions were many, which intensified over the next *nine months* until Mr. Osborne’s October 2016 admission that he wanted Ms. Chambers removed.¹²

Despite the litany of increasingly hostile adverse employment actions taken against Ms. Chambers, starting the day after she filed her complaint, the lower court in its ruling found persuasive a timeline of “19 months”¹³ between Ms. Chambers’ January 2016 filing of her complaint and Rodda’s June 2017 termination of Ms. Chambers. Report of Proceedings (“Report Proc.”) at 38:1-6. Despite Mr. Osborne’s written

¹² Rodda errantly identifies the year of this admission as “2017.” Resp. Br. at 3.

¹³ The court erred in its math; there are seventeen months between the dates cited.

declaration that he had targeted Ms. Chambers for removal at an October 2016 corporate meeting, the court held: “19 months was sufficiently distant enough that there needed to be something more here that those reasons for firing were just pretext. I couldn't find it. So I'm going to grant summary judgment on that.” *Id.*

Even if nine months of adverse employment actions, consistent with the plan to which Mr. Osborne finally admitted in October 2016, were set aside, nine months is the accurate timeline connecting Ms. Chambers’ sexual discrimination complaint and Rodda’s decision to end her employment. Everything that followed was mere paperwork that flew in the face of the actual results Ms. Chambers delivered pursuant to her PIP. Even setting aside her seventeen years with the company, and focusing on the store’s accomplishments in the first five months of 2017, Ms. Chambers succeeded in hitting the marks Mr. Osborne set, as pretext, following a 2016 stated intent to remove her from the company. She never had a chance to succeed.

Ms. Chambers demonstrated pretext by showing that the employer’s articulated reasons had no basis in fact, were not the real motivating factors for her termination, and were not used by Rodda as motivating factors in its employment decisions affecting other similarly situated employees. Other retail stores in Mr. Osborne’s District have never passed an audit, or

routinely earned lower audit scores, and whose managers received lower and fewer bonus incentives. These managers remain employed by Rodda.

A reasonable trier of fact could draw the inference that [retaliation] was a [substantial factor] in the decision." *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 860, 851 P.2d 716. Ms. Chamber's Wrongful Termination claim must be heard, and the competing inferences must be considered by the factfinder.

C. Mr. Osborne's Extreme and Outrageous Conduct, Intentionally and Recklessly Inflicted Emotional Distress Upon Ms. Chambers, Triggering Her First Diagnosis of Hypertension

Rodda dismisses Mr. Osborne's appalling behavior as not heinous enough to merit consideration under the tort of Outrage (Resp. Br. at 22, §B).

To establish a common law outrage claim, Ms. Chambers must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on her part. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998).

Mr. Osborne appeared to single out Ms. Chambers on the day after she reported his sexism in an effort to make her job so miserable that she would quit. When that failed, he turned his attention to removing her from the company. Mr. Osborne's conduct included relentless micro-

management, relieving her of regular responsibilities, and diminishing her in front of her employees. He told her he hadn't hired her before, and if he didn't want her there now, he'd simply find a reason.

This period was marked by relentlessly aggressive hostility. He physically threatened the store's only other female employee, and later reduced that same female employee to tears in a barrage of profanity and rage. He diminished women, creating exclusionary, boys-only rules premised on the female "build" and women's "hormones." But he didn't stop there: he also expressed shocking racism, casually referring to an African American applicant named Charles as "Django."

Ms. Chambers was open about the stress that came from walking on eggshells when Mr. Osborne was present. He knew how much she loved her job, and he appeared to take great pleasure in reminding her that he could (and would) end it. Besides humiliating her in front of her staff, Mr. Osborne made the inexplicably cruel offer of a demotion, then told her staff about it, even telling Ms. Chambers that she had a choice between demotion and termination well after he'd already admitted to putting the termination wheels in motion. CP at 264, May 18, 2017; 265, May 17, 2017; 301, May 17, 2017. He forced her to publicly consider a demotion and dock in pay after seventeen years of advancement—a consideration she engaged at a cost of lost sleep, financial fear, wounded pride and ultimately the humility

of accepting the demotion. When Ms. Wine arrived at Lacey to terminate Ms. Chambers, Ms. Chambers believed she was there to discuss the terms of the demotion. Demotion was never an option. Ms. Chambers was blindsided by outright termination, as per Mr. Osborne’s stated intention in Oct. 2016 (not, as incorrectly pled by Rodda, 2017).¹⁴

For Ms. Chambers, Mr. Osborne’s gender-biased anger and insult, including constant threats to the job she loved and the likes of which she never saw directed at the men who worked at Lacey, created a pervasive atmosphere of fear. In addition to the foregoing impacts to her health, her alcohol intake increased as she sought to calm her nerves—a fact that was on the table and discussed with her personal physician. CP at 269, 273, 276, Problem Lists. On December 15, 2016, twelve months of enduring vicious mistreatment produced Ms. Chambers’ first diagnosis of Essential Hypertension (high blood pressure), and prescription of blood pressure medication. CP at 279; CP at 299, ¶ 4 (“December 2016”).

II. CONCLUSION

It’s hard to imagine the cruelty motivating Mr. Osborne’s glee in dangling Ms. Chambers’ job over her head for nine grueling months,

¹⁴ Rodda errantly reports Mr. Osborne’s 2016 admission to targeting Ms. Chambers as occurring in October “2017.” The email in which Mr. Osborne admits to targeting Ms. Chambers for removed is dated February 2017, referring to the October 2016 company meeting.

knowing that Ms. Chambers loved her job, where her advancement in that job was a source of great pride. That cruelty was amplified by Mr. Osborne's false offer of a demotion, allowing Ms. Chambers to *accept the demotion* then blindsiding her with termination.

Having produced evidence establishing prima facie cases of overt gender discrimination and wrongful termination in violation of public policy, abundant evidence contradicting Rodda's proffered non-discriminatory motive, and having established the elements of outrage, she has earned her day in court. Ms. Chambers respectfully asks the Court to overturn the lower court, and allow her to take these claims to trial.

RESPECTFULLY SUBMITTED this 11th day of July 2019,

VERNON LAW, P.L.L.C.



By: _____

Greg Vernon, WSBA #52221
2801 Western Avenue No. 1227
Seattle, WA 98121
Tel: (206) 605-8249
Email: gregv2k@icloud.com

Attorneys for Appellant Michelle Chambers

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:

David John Riewald, WSBA #18758

**BULLARD SMITH
JERNSTEDT & WILSON.**

200 SW Market Street Ste. 1900

Portland, OR 97201-5720

Phone: (503) 248-1134

driewald@bullardlaw.com

Attorneys for Respondent

DATED this 11th day of July 2019, at Seattle, Washington.

/s/ Gregory P. Vernon

Greg Vernon, WSBA #52221

Vernon Law, PLLC

2801 Western Ave. Ste. 1227

Seattle, WA 98121

Tel: (206) 605-8249

Email: gregv2k@icloud.com

GREGORY P. VERNON, ESQ.

September 11, 2019 - 4:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53003-1
Appellate Court Case Title: Michelle Chambers, Appellant v. Rodda Paint Company, Respondent
Superior Court Case Number: 17-2-03430-1

The following documents have been uploaded:

- 530031_Answer_Reply_to_Motion_20190911163419D2219089_4632.pdf
This File Contains:
Answer/Reply to Motion - Reply to Response
The Original File Name was Reply Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- driewald@bullardlaw.com

Comments:

Reply Brief of Appellant

Sender Name: Gregory Vernon - Email: gregv2k@icloud.com
Address:
2801 WESTERN AVE APT 1227
SEATTLE, WA, 98121-3504
Phone: 206-605-8249

Note: The Filing Id is 20190911163419D2219089