

**FILED**

NOV 19 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 29043-3-III

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HAROLD DELGADO,

Appellant

vs.

STATE OF WASHINGTON,  
DEPARTMENT OF TRANSPORTATION,

Respondent

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APPELLANT HAROLD DELGADO'S OPENING BRIEF

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GEORGE FEARING, WSBA # 12970  
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Attorneys for Appellant Harold Delgado

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## **I. ASSIGNMENT OF ERROR**

The Superior Court erred when it granted the State of Washington's summary judgment motion, by dismissing Harold Delgado's sexual hostile work environment and retaliation claims. CP 375 - 7.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

**A.** Whether the statute of limitations bars a claim of hostile work environment, when some of the acts creating the hostile work environment and retaliation in response to reporting the hostile work environment occurred within the limitation period?

**B.** Whether an employee presents some evidence of a hostile work environment, sufficient to survive a summary judgment motion, when the work atmosphere was pervaded by offensive sexual remarks; the employee's supervisor persistently asked for "blow jobs;" the employee reported the supervisor's remarks to management without a response from management; in frustration, the employee, on one occasion, told the supervisor to pull down his pants and the employee was disciplined for his remarks; the employee heard a manager respond to a second employee, who complained about the supervisor asking to take his underage daughter's virginity, that the second employee should reply to the offender

by stating the he will fuck the offender's wife; the employee was subjected to other sexual comments; and management retaliated against the employee because of the reports?

C. Whether an employee presents some evidence of retaliation, sufficient to survive a summary judgment motion, when management refused to separate an employee from a supervisor who persistently engaged in offensive sexual remarks; the employee was assigned additional work with the supervisor; a manager declared "war" on the employee; management called the employee a "bastard child," "water ass," and "crybaby" because the employee reported a hostile work environment; the employee was subjected to yelling and threats of the loss of employment; the employee was reprimanded in response to a report; and the employee withheld other reports of a hostile work environment because of being intimidated and knowing no steps will be taken to end the environment?

### **III. STATEMENT OF CASE**

For the last decade, management of the State of Washington Department of Transportation, in the Pasco region, treated the workplace as a fiefdom, whereby they subjected employees to a hostile work

environment, filled with intimidation, threats of violence, racial slurs, sexist comments, moral filth, and discriminatory conditions. CP 1401 - 6. Six Department of Transportation employees left work because of the intolerable working conditions. CP 1401 - 6. Those employees, including Harold Delgado, through this suit, seek recovery for emotional distress, physical symptoms, and lost income resulting from the hostile work environment.

Harold Delgado sues for a racially charged hostile work environment; sexually charged hostile work environment; handicap discrimination; and retaliation for reporting harassment in the workplace. The State of Washington successfully dismissed, on summary judgment, Delgado's claims for sexual hostile work environment and retaliation. CP 375 -7. The claims of a racially hostile work environment and handicap discrimination were resolved during trial. Delgado now appeals dismissal of his sexual hostile work environment and retaliation claims.

Harold Delgado worked as a maintenance technician in the South Central Region, Area 3, from December 1999 to August 2000. CP 878. He earlier worked seasonally. CP 878. Area 3 of the South Central Region includes the greater Tri-Cities area. The Pasco maintenance

facility manages the maintenance and operations of Area 3. CP 756, 7.  
South Central Region Area 3 is divided into three sections: Pasco, Prosser,  
and Connell. CP 765. Connell serves as a subsection of Pasco. CP 765,  
6.

Harold Delgado, along with plaintiffs Jim Crownover, Roy  
Gilliam, and Joel Havlina served on the Connell crew. CP 445, 841.  
Plaintiffs Shirley Bumpaous and Kelli Ginn worked on the Pasco crew.  
CP 887. Sometimes the two crews worked together. CP 447.

The three top management positions in Area 3 are Superintendent,  
Assistant Superintendent, and two Supervisors<sup>1</sup>. CP 841. The  
Superintendent, the top position, serves the entire Area 3. CP 757. The  
Superintendent directly answers to regional headquarters and his direct  
supervisor is the Assistant Regional Administrator for Maintenance,  
stationed in Union Gap, the South Central Region office. CP 758. The  
Area 3 Assistant Superintendent is assigned administrative and other  
duties by the Superintendent. CP 764. The Assistant Superintendent  
outranks the Supervisor, who oversees maintenance operations in discrete  
geographic sections of the Area. CP 764.

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<sup>1</sup> The term "Supervisor" in this context is an official title, not just a term denoting superior ranking.

Plaintiffs Jim Crownover, Harold Delgado, Kelli Ginn, and Joel Havlina labored as maintenance technicians. CP 445. A maintenance technician performs highway maintenance. CP 761. A maintenance technician repairs roadways, guardrails, luminaries, bridges, and other highway features. CP 761. A maintenance technician also removes litter and animal debris, removes snow and ice, and manages vegetation. CP 761. Managers considered Harold Delgado a good worker. CP 786, 792.

A lead technician is a working foreman who daily assigns tasks to maintenance technicians and works alongside the technicians. CP 446, 841. A lead technician is assigned a geographic area and oversees a crew of 4 to 8 maintenance technicians. CP 763. The Supervisor is next in the chain of command, above the lead technician. CP 763. Plaintiff Roy Gilliam was a lead technician for the Connell crew. CP 840, 1.

The principal management team for the Department of Transportation, for purposes of this case, is Tom Root, Mike Kukes and Tom Lenberg, all who served in various capacities in the South Central Region Area 3 office. CP 448, 448, 756. The three managed the work of plaintiffs and those who imposed the hostile work environment upon plaintiffs. CP 448, 448, 756. The three contributed to the environment

and took no steps to end that environment. CP 448.

Tom Root served as the Maintenance and Operations Superintendent, Area 3, from December 1999 to February 2005. CP 756, 7. Mike Kukes became Supervisor for Pasco and Connell in 1999. CP 672. In 2001, he rose to Assistant Superintendent for Pasco, Connell, and Prosser. CP 672, 3. In turn, he was promoted to Superintendent in 2005. CP 673. Tom Lenberg became Pasco Supervisor in February 2001, at which time he assumed supervisory duties over the Connell crew. CP 673, 4.

Mike Kukes and Tom Root are neighbors, in Grandview, and the two socialize. CP 671, 781. Root appointed Mike Kukes from the position of lead technician to Maintenance Supervisor and then to the position of Assistant Superintendent. CP 780, 1.

The six plaintiff employees contend that management refused to take any action to stop the hostile work environment created by Pasco lead technician Mark Brewster, because, in part, managers were friends with Brewster. CP 447. Managers Tom Lenberg and Tom Root agree they went fishing with Brewster. CP 698, 778, 786. Lenberg's and Brewster's family barbecued together. CP 698. Department of Transportation

Human Resources Consultant Julie Lougheed agreed that Department of Transportation managers played favorites depending upon their buddies. CP 719, 20. Pasco maintenance technician Troy Riblett testified that Lenberg assigned his favorites “gravy work” or premium pay work, such as running equipment. CP 752.

A Section of the Department of Transportation Human Resources Policy Manual prohibits violence, threats and intimidation in the workplace and directs supervisors and managers to prevent such misconduct. CP 831 - 5. This policy applies regardless of whether the intimidation constitutes a civil rights violation. CP 701-4, 776, 7. Nevertheless, evidence shows repeated violations of the Department of Transportation’s workplace policy. In the last half of the 1990s, Jim Leroue served as lead technician for the Connell crew. CP 841. Leroue had a temper and often engaged in angry outbursts. CP 841. Jim Leroue uttered threats of physical harm to the Connell crew. CP 841. Harold Delgado did not serve with the Connell crew, during the tenure of Jim Leroue, but management’s response to complaints about Leroue provides a setting for Harold Delgado’s later complaints about supervisors and management’s later treatment of the Connell crew, including Delgado.

Roy Gilliam, senior member of the Connell crew, repeatedly reported the threatening behavior of Jim Leroue to Pasco manager Mike Kukes, but the behavior continued. CP 842. At the same time, Kukes and Tom Root came to Connell and told the crew that it could not dictate conditions of work. CP 843.

In 1999, Jim Leroue told Jim Crownover that sometimes he felt like loading his guitar and gun and just going away and sometimes he felt like coming to the "Connell shop" and blowing the crew all away. CP 842. In December 1999, Connell crew member Max Yager asked Leroue about a tool cabinet being made. CP 842. Leroue replied that the cabinet was a coffin for four state employees. CP 842. Also in December 1999, Leroue told another crew member Ryan Miller that "If you come in the morning and you see blood all over the floor, don't be concerned about it, it's just Mike Kukes." CP 842.

In 2000, because management had taken no steps to end the violent outbursts of Jim Leroue, the Connell crew wrote a letter of no confidence about Leroue. CP 836, 842. After the letter of no confidence, management transferred Leroue to the Pasco shop, while Department Human Resources Consultant Julie Lougheed conducted an investigation.

CP 843. As a result, Superintendent Root grew angry at the Connell crew.

CP 843. Root addressed the Connell crew the day after the letter of no confidence and fretted that the crew would destroy Jim Leroue's career.

CP 843. Root stated that he did not believe that Leroue made any threats.

CP 446, 843.

The Department of Transportation ordered Jim Leroue to stay away from the Connell crew, during Lougheed's investigation. CP 843. When Leroue violated the instruction, Joel Havlina notified Pasco management.

CP 843. In response, Tom Root said: "Haven't you [the Connell crew] done enough damage to him [Jim Leroue] already? Leave him alone." CP 843. To this day, Root does not perceive what the Connell crew discerned as threats to be threats. CP 799, 843.

Human Resources Consultant Julie Lougheed found that Leroue engaged in impermissible intimidation toward the Connell crew. CP 701, 702, 721, 722. As a result of the investigation, Lougheed expected that the Connell crew would not be subjected to intimidating behavior again. CP 722, 3.

South Central Region management directed Pasco managers to conduct meetings with the Connell crew in follow-up to the Jim Leroue

crisis. CP 861. Pasco management refused to conduct the meetings, however. CP 861. Mike Kukes called the Connell crew “water asses” and “whiners.” 861, 2. A disgusted Tom Root declared to the Connell crew: “It’s over. Just get on with it.” CP 862. Root threatened the Connell crew members with closing the Connell maintenance facility and transferring the crew to Pasco. CP 863.

Pasco management engaged in offensive sexual comments, in front of Harold Delgado and other Connell crew members. In the fall of 2000, Assistant Superintendent Mike Kukes talked about a Superintendent at another location. CP 844. Kukes mentioned that the Superintendent’s daughter had been used as a mattress by another employee, a friend of Kukes. CP 844. Joel Havlina then complained that Kukes was speaking about his cousin and asked Kukes to end the story. CP 844, 862. Kukes refused to stop. CP 844. Roy Gilliam reported the incident to the Human Resources Officer, but Kukes was not disciplined for his sick story. CP 844.

Offensive sexual innuendoes were common at the Department of Transportation. During a pre-winter shift meeting, during the winter of 2004-5, the crew, including Kelli Ginn, ate hot dogs. CP 889. Supervisor

Tom Lenberg said in a nasty voice to Matt Lewis: "Matt, you want a bite of my wiener?" CP 889. Matt responded: "That's as big as it is?" CP 889. Female Ginn recognized that the two men were comparing hot dogs to penises. CP 889. Ginn was offended by the remarks. CP 889. Since management engaged in the offensive comments, Kelli Ginn saw no purpose in complaining to management. CP 889.

Racial slurs were also common at the Department of Transportation workplace. Kelli Ginn heard Mexican jokes, which offended her. CP 889. Kelli Ginn heard Black jokes at work. CP 889. Don Fast told one, in addition to blonde jokes. CP 889. Ginn walked away while he told the jokes. CP 889.

Connell crew member Max Yager told many racial and sexual jokes. CP 447. Yager told Harold Delgado a joke about Black men working in a watermelon field and having sex with watermelons. CP 447, 879. Harold Delgado, among others, was offended by Max Yager's jokes. CP 447, 879.

Max Yager focused much of his crude and racist remarks upon Hispanic Connell crew member Harold Delgado. CP 878. Delgado told Yager to end the derision, but Delgado's objections encouraged Yager to

tell more racist comments. CP 878, 9. Lead technician Roy Gilliam also told Yager to end the racist ridicule. CP 878. Delgado started avoiding Yager, in late summer 2001, but avoiding a coworker on the small Connell crew was difficult. CP 878, 9.

In the presence of Delgado, Yager called Mexican women “Cunt sway low,” for Consuelo. CP 879. Yager commented that Mexicans had no airports and they ran carts and donkeys. CP 879. Yager asked Harold Delgado several times: “How come you dress like a White man?” CP 879. When Delgado removed his boots, Yager automatically stated: “Your feet stink.” CP 879. There were many more offensive comments and jokes by Max Yager, but, because of the large number, Delgado cannot recall all. CP 879.

Max Yager also referred to Mexican women as “cunt sway low” in the hearing of Roy Gilliam. CP 844. Gilliam is married to a Hispanic lady and Gilliam found the reference offensive. CP 845. Gilliam did not complain about the “cunt sway low” comment to management because of how management handled the Jim Leroue situation. CP 845. Gilliam concluded that complaints would likely do no good. CP 845.

In Spring 2002, Roy Gilliam again informed Assistant

Superintendent Mike Kukes of friction between Joel Havlina and Max Yager. CP 845. In response, Kukes called Gilliam a “water ass.” CP 845, 6.

In the fall of 2003, while the Connell crew worked in Pasco, Max Yager approached Harold Delgado and asked: “What color’s my skin?” CP 880. Delgado said: “White.” CP 880. Yager asked “What color’s your skin?” CP 880. Delgado responded: “Brown.” CP 880. Delgado then declared: “Well, you [Delgado] get in the back.” CP 880. Jim Crownover overheard Yager’s disparagement. CP 447.

When Max Yager and Harold Delgado completed a task together, Yager reported to lead technician Roy Gilliam: “Me and the Mex are done.” CP 880. Gilliam reported the saying to Delgado. CP 880. Yager told Jim Crownover that Yager did not want Mexicans or women on the Connell crew. CP 880. Crownover informed Delgado of this prejudicial slur. CP 880.

Max Yager’s offensive comments were not limited to racial references. A lady taught a sexual harassment class for the Connell crew. CP 447. During the class, the lady told Max Yager to turn around. CP 447. In response, Yager put his knee out and said to her: “you can sit right

down here any time.” CP 447. Max Yager told jokes of a sexual nature, during work time, and brought sexually explicit pictures to work. CP 859. Other Department of Transportation employees uttered offensive comments. Employee Bob Skubbina referred to Joel Havlina as Skubinna’s “butt hole bitch.” CP 447.

A principal antagonist, in this suit, is Mark Brewster, who served as lead technician in Pasco. In that position, he served as the direct supervisor of female plaintiff Kelli Ginn. CP 887. Also, when the Connell crew assisted the Pasco crew, Brewster supervised the work of the Connell crew, including Harold Delgado. CP 447, 795.

According to Jim Crownover, Mark Brewster bullied employees by yelling in their faces to make sure that everyone obeyed him. CP 447. Brewster postured as if he would physically assault someone if he did not get his way. CP 447. Brewster seemed obsessed with sex. CP 447. He often remarked about sex with either men or women. CP 447, 8.

During a lunch break, in 1995, in the former Connell maintenance facility, Mark Brewster observed: “The best piece of ass I ever had was my brother.” CP 448. Jim Crownover and Joel Havlina heard the barnyard remark and were sickened. CP 448, 864.

In 1996, Mark Brewster commented, to Roy Gilliam, that Brewster did not believe in mixed marriages, when Gilliam had just married a Hispanic lady. CP 846. Gilliam considered the comment offensive. CP 846. He did not report Brewster's racist remark to management, because Gilliam was a new worker and knew that no one would listen to him. CP 846.

In 1998, while Joel Havlina worked with Mark Brewster in Connell, Brewster asked Havlina: "Where did you get the faggot glasses?" CP 864. Havlina was offended by this remark. CP 864. In 1998 or 1999, Mark Brewster, while at the Connell shop, stepped out the back door and yelled Havlina's name. CP 864. Havlina's sister, Sheri Hockett, was present. CP 864. Havlina and his sister turned and Brewster made the sexual gesture of a pelvic thrust. CP 864.

Around 1999 and 2000, Mark Brewster frequently asked Connell crew member Harold Delgado for "blow jobs." CP 825, 880. Delgado told Brewster that Delgado was offended by his remarks and that he should stop. CP 880. Brewster did not stop. CP 880. Harold Delgado complained to the Department of Transportation of the bizarre and offensive behavior of Mark Brewster. CP 881. One day, out of

frustration, Delgado told Brewster to drop his pants and he will give Brewster a blow job. CP 880. Brewster's friends reported Delgado and Delgado was reprimanded. CP 880. Delgado considered his comment appropriate because Brewster continually harassed Delgado with blow job comments and management took no steps to end the comments. CP 880.

Harold Delgado complained to Tom Lenberg about conduct of Mark Brewster. In response, Lenberg demanded that Delgado place any complaints in writing for Lenberg to investigate the complaint. CP 879. Harold Delgado is not a good writer and did not know how to adequately place the complaint in writing. CP 879.

In the fall of 2000, during an exposition in Moses Lake, Jim Crownover told Joel Havlina that his daughter was living with him. CP 448. Mark Brewster overheard the conversation and asked Havlina about Crownover's daughter. CP 448. Havlina stated that the daughter was attractive and sixteen-years old. CP 448. Brewster then boldly informed Crownover that Brewster would like to "break in" his daughter. CP 448. Crownover was incensed with the perverted Brewster talking about sex with his underage daughter. CP 448. Maintenance technician Don Shute was present when Mark Brewster commented about Jim Crownover's

daughter. CP 448. Shute then remarked: "I never heard anything" and he walked away. CP 448.

As the lead technician in Connell, Roy Gilliam told Pasco management about Mark Brewster remarks about "breaking in" Jim Crownover's daughter. CP 847. Gilliam's report to management fell on deaf ears. CP 847. As lead technician, Gilliam suspected that many others had complaints about Mark Brewster, but they were afraid to come forward because of the dictatorial nature of management, because of Mark Brewster's friendship with management, and because of a fear of retaliation. CP 847.

In the fall of 2000, when a lead technician job was open and Joel Havlina was rated "plus three" for the position because of a disability, Mark Brewster asked Joel Havlina why he was "a plus three?" CP 865. Havlina told Brewster that he had ulcerative colitis. CP 865. Brewster replied to Havlina that he was a "plus three" too, because he had a "short peter." CP 865.

With the open job position, Joel Havlina advised Assistant Superintendent Mike Kukes that Mark Brewster should not be considered for the job. CP 866. Havlina explained the problems with Mark Brewster.

CP 866. No discipline was then imposed upon Brewster. CP 866.

Instead, he was promoted to lead technician. CP 866.

In the spring of 2001, Joel Havlina worked at a fatality accident site, when Mark Brewster, in Harold Delgado's presence, asked Havlina if Havlina wanted to fuck in the pickup. CP 865. Joel Havlina said: "No, I don't think so." CP 865. Brewster responded: "Everyone ... will do what I tell them to do or else." CP 865. Havlina did not then report the incident to management, because the Leroue investigation had just ended and managers called Connell crew members "whiners" and "cry babies." CP 865.

During late 2001, Rick Gifford, Acting Assistant Regional Administrator in South Central Washington, received an anonymous call. CP 661. Gifford asked the caller to identify herself, but she did not wish to be known. CP 665. The caller suggested that Mark Brewster was a problem. CP 662. The lady complained that Brewster might be taking drugs or drinking and that he was a "bully." CP 666. Rick Gifford reported the call to Superintendent Tom Root, who told Gifford "there was no problem." CP 668, 9.

In June 2002, Supervisor Tom Lenberg spoke with Jim Crownover

and Joel Havlina, in a bay at the Connell maintenance facility. CP 448, 669, 867. At that time, Lenberg stated that Mark Brewster accused Crownover of creating a hostile work environment. CP 448. Lenberg, a friend of Brewster, believed Brewster. CP 448. When Havlina heard the accusation, Havlina told Lenberg of Brewster's remark of wishing to "break in" Crownover's daughter, as well as other revolting comments of Brewster. CP 448.

Tom Lenberg ignored the report of Jim Crownover at the bay. CP 696. Lenberg concluded he need not deal with the complaints because the events happened in the past. CP 696, 848. After Jim Crownover reported Mark Brewster, Brewster would not speak with Crownover. CP 449.

At a meeting in fall 2003, Jim Crownover, in the presence of Harold Delgado, told Superintendent Tom Root and retold Tom Lenberg what Mark Brewster said about Crownover's daughter. CP 448, 881. Root responded that, if another told him the other would "fuck" his daughter, he would tell the other that he will "fuck" his wife. CP 448. Crownover was astonished at this response by the top leader in his area of the Department of Transportation. CP 448. During the meeting, Lenberg turned to Root and said: maybe there is a loophole to save Mark Brewster.

CP 881.

Mark Brewster often began a conversation with Joel Havlina by the question: "Do you want to go have sex?" CP 864. Because of the frequency of this comment, Joel Havlina could not number the amount of times he posed the question. CP 864.

Joel Havlina often heard Mark Brewster refer to himself as "fucking Brewster." CP 864. Havlina heard the comment so often, he cannot indicate how many times he heard the comment. Havlina was offended by the comment. CP 864.

Roy Gilliam overheard Mark Brewster utter many offensive comments. CP 847. Gilliam cannot recall all of the offensive comments and statements of Mark Brewster, because there were many. CP 847. Many of the comments were sexual in nature. CP 847. Gilliam found the comments offensive and wanted the comments to end. CP 847. In 1999, Mark Brewster grabbed Harold Delgado's arm and announced to Delgado that he was "Fucking Brewster." CP 825.

Another Department of Transportation employee, Kurt Bald, provided a view of Mark Brewster. Bald served as a maintenance technician on Brewster's Pasco crew. CP 639, 641. Brewster was

intimidating to Bald. CP 642. Brewster referred to himself as “fucking Brewster.” CP 643. Brewster told his Pasco crew members that he was the “sheriff” in town and “you better do what I tell you to do.” CP 644. Supervisor Mike Kukes heard Brewster say many times that there is a “new sheriff in town,” but Kukes took no steps to end the intimidation. CP 683, 4.

Department of Transportation employee Troy Riblett also supplied a perspective on Mark Brewster. Riblett worked as a maintenance technician in Pasco, during which time Brewster served as his lead technician. CP 724. According to Riblett, Supervisor Tom Lenberg played favorites, and one of his favorites was “yes-man” Mark Brewster. CP 726, 7. Brewster was a harsh individual who often remarked: “It’s my way or the highway.” CP 728, 9. When Riblett first met Brewster, Brewster referred to himself as “fucking Brewster.” CP 729. Riblett was shocked by Brewster’s remark, because he did not expect middle management to talk that way. CP 730. Riblett did not report Mark Brewster’s comment, in part, because Riblett did not wish to “make waves.” CP 730, 1.

Riblett overheard other employees complain to Tom Lenberg and

Mike Kukes about Mark Brewster, but management took no steps to end Brewster's conduct. CP 738. When Lenberg and Kukes sought to raise employee morale level, Riblett told Tom Lenberg that Lenberg must change Brewster. CP 739. Lenberg "blew off" Riblett's comment. CP 740.

In 2003, Mark Brewster falsely accused Kelli Ginn of sleeping with co-employee Jeff Bruce. CP 891. On one day in 2003, Ginn's 17-year-old daughter visited Ginn at work. CP 891. Brewster saw her and, after the daughter left, Brewster commented that the daughter was of mixed race. CP 891. Ginn said: yes, she is part Black. CP 891. Brewster then remarked to Ginn that she "fucked a nigger." CP 891. Ginn was offended by the comment, but did not report the incident, because she knew reporting the incident was futile. CP 891. According to Ginn, management favorites could engage in repeated misbehavior without repercussions. CP 891.

Kelli Ginn, along with other employees, was the subject of frequent rampages and berating from Mark Brewster. CP 893. Ginn heard Mark Brewster refer to himself as "fucking Brewster" on many occasions. CP 893. On each occasion, he spoke in a serious, not a joking, tone. CP

893. Ginn was offended by the phrase. CP 893.

Kelli Ginn once complained to Tom Lenberg about Mark Brewster's threatening behavior. CP 893. No action was taken. CP 893. Lenberg told Ginn that Brewster was her lead technician and she needed to follow his direction. CP 893. Thereafter, Brewster told Ginn that, if she had a problem, she was to come to him first. CP 890, 1. Ginn explained to Brewster that his demand was unreasonable. CP 891. Brewster ordered Ginn to adhere to his direction and required her to sign a letter that she would obey the chain of command. CP 891.

For years managers took no steps to investigate the complaints about Mark Brewster's conduct. CP 723. Finally, in October 2003, Julie Lougheed, the Human Resources Consultant, began an investigation of allegations. CP 701, 702, 708. Lougheed interviewed Department of Transportation employees, including Brewster. Lougheed found Brewster to lack credibility. CP 714. During the Brewster investigation, the majority of the Pasco crew were afraid to be interviewed and to tell the truth. CP 744. Troy Riblett heard employees complain: "nothing is going to be done about it [Mark Brewster] anyway, so why say anything?" CP 744.

During the Brewster investigation, Pasco management told Julie Lougheed that Brewster “was doing very well.” CP 712. During the investigation, Assistant Regional Administrator Casey McGill stated he was “prepared to go to war” against the Connell crew. CP 871.

In her findings, Julie Lougheed sustained complaints of sexual harassment and intimidation against Mark Brewster. CP 709, 10<sup>2</sup>. Along these lines, Lougheed concluded that Brewster intimidated employees he supervised. CP 712.

Pasco Superintendent Tom Root received the Julie Lougheed report and responded to her findings with an e-mail on December 11, 2003. CP 714, 5. Root questioned why Lougheed sustained an allegation. CP 715. Root challenged Lougheed’s findings and conclusions. CP 716. Brewster’s defender Tom Root wrote: “I also think the allegation needs to be proven before we take action that will affect a person’s career.” CP 716. Later Root and Casey McGill called Lougheed about her findings and reiterated problems they had with Lougheed’s findings. CP 718. Despite being Mark Brewster’s immediate supervisor, Mike Kukes saw no need to read the investigation report. CP 682, 3.

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<sup>2</sup> The report is found at CP 815-29.

Page 6 of Julie Lougheed's investigative report directs that steps be taken to prevent further acts of sexual harassment or inappropriate or intimidating behavior in the workplace. CP 814. Nevertheless, Tom Lenberg, Mark Brewster's direct manager, denies that anyone recommended any steps in supervising Brewster. CP 694, 5. Despite being a supervisor and despite hearing complaints about Brewster, Lenberg never made any determination as to whether Brewster engaged in intimidating conduct. CP 695. Superintendent Root also took no steps as a result of Julie Lougheed's recommendation. CP 814.

Despite being intimidated by Mark Brewster, Troy Riblett "felt bad" for Brewster when Brewster was disciplined, because Brewster only acted as Tom Lenberg, Tom Root and Mike Kukes wanted. CP 737. Riblett concluded that Mark Brewster believed his intimidating behavior would better his career. CP 737.

After the investigation, Mark Brewster referred to the Connell crew as a "waste of breath." CP 864. Brewster expressed a desire to "get rid of the whole lot." CP 864. He accused the crew of being lazy. CP 450.

The Connell crew, including Harold Delgado, complained that Mark Brewster was not adequately disciplined, just as Jim Leroue had not

earlier been properly punished. CP 682, 789, 790. During a meeting with Tom Lenberg, the crew stated it did not wish to work with Brewster. CP 700, 788. Harold Delgado told Assistant Superintendent Mike Kukes he did not wish to work in Pasco. CP 676. Delgado said working in Pasco was throwing him to the enemy - Mark Brewster. CP 676. Nevertheless, management continued to order the Connell crew to work under the supervision of Brewster. CP 813.

After the conclusion of the Brewster investigation, Regional Administrator Casey McGill met with the Connell crew, for what McGill called "moving forward" meetings. CP 449, 851. Before the first meeting, Roy Gilliam asked union steward Sue Dinneen to attend the meeting. CP 651, 2. According to Dinneen, the Connell crew feared retribution. CP 651, 2. Dinneen asked McGill if she could attend, and McGill said "yes" but was "very irritated." CP 652.

During the first "moving forward" meeting, the Connell crew, including Jim Crownover, described Mark Brewster's behavior and stated they did not wish to work with him. CP 853. Casey McGill downplayed the complaints about Brewster. CP 449. The Connell crew also questioned whether Pasco management should remain as supervisors,

since they failed to end Brewster's conduct, but McGill stated Lenberg, Kukes, Root and Brewster would remain in their positions and the crew would work with them. CP 852, 3. McGill told the crew: "This is how it's going to be." CP 449. McGill grew irritated and ended the meeting prematurely. CP 653, 4.

Neither Mark Brewster, nor anyone in management, apologized to members of the Connell crew, because of the violent threats and sexual harassment. CP 449. Instead, management retaliated against the crew. CP 449. Pasco management increased the amount of time the Connell crew worked in Pasco under the direction of Brewster. CP 449.

Jim Crownover sought a transfer to Washtucna but was refused. CP 450. Lenberg and Brewster assigned Crownover grunt work in Pasco in retaliation for the complaints filed. CP 450.

Roy Gilliam was reprimanded for the Connell crew purportedly failing to properly sign a burn site. CP 850. The reprimand was unfair because Gilliam was not working as lead technician that day because of a doctor's appointment. CP 850.

Harold Delgado filed a complaint against Max Yager, Tom Lenberg, and Tom Root, with the Department of Transportation Office of

Equal Opportunity in August or September 2004. CP 882. Thereafter, Tom Lenberg issued Delgado a reprimand, claiming Delgado was the lead technician on a job. CP 882. The job consisted of burning weeds on 260 East. CP 882. Nevertheless, Kurt Bald was the acting lead technician, such that the reprimand was based upon a false assumption. CP 882. The charges were a failure to employ appropriate traffic safety devices. CP 882.

Joel Havlina's performance evaluations had been excellent before the Mark Brewster investigation, but the evaluations thereafter plummeted. CP 867. Pasco management gave preference for spray jobs to Ryan Miller over Joel Havlina, when Miller had not reported the behavior of Brewster. CP 868, 9. One receives premium pay of \$2 per hour for spray jobs, so Havlina lost premium pay. CP 869. Miller had less seniority than Havlina and Havlina had a pesticide license. CP 869. Havlina did not complain of losing spray jobs, because complaining did no good and, when he complained, he was called a "water ass" and a "whiner." CP 869.

Pasco Supervisor Mike Kukes continued to call the Connell crew "crybabies." CP 450, 681. When Kukes appeared for weekly meetings in Connell, he called the crew "whiners," and "water asses." CP 681, 849.

Through her resignation in 2005, Kelli Ginn heard Pasco management and Mark Brewster call the Connell crew “the bastard children.” CP 888. Also in 2005, Ginn heard Pasco management declare that Roy Gilliam would be fired. CP 888.

In late 2005, Regional Administrator Casey McGill elevated Mark Brewster from the position of lead technician to Supervisor in Prosser. CP 779. Before the promotion, no one consulted Julie Lougheed, who wished she would have been able to provide input. CP 710. A panel of Department of Transportation officials reviewed the applications for the open position. CP 690. Brewster’s friend Tom Lenberg sat on the panel. CP 690. According to Lenberg, the panel did not discuss Mark Brewster’s discipline for creating a hostile work environment. CP 690. Tom Root wrote Brewster a letter of recommendation for the promotion. CP 779. Root did not reference, in his letter, Brewster’s discipline for intimidation. CP 779, 80.

In 2005, the Department of Transportation terminated the employment of Harold Delgado and Joel Havlina ostensibly because of a disability. CP 876, 886.

#### IV. ARGUMENT

##### A. BECAUSE OF THE CONTINUING HOSTILE WORK ENVIRONMENT AND RETALIATION, THE STATUTE OF LIMITATIONS DOES NOT BAR ANY CLAIMS OF HAROLD DELGADO FOR SEXUAL HARASSMENT.

Harold Delgado complains of a sexual hostile work environment beginning in 1999, with Mark Brewster's demands for "blow jobs," and continuing through his discharge in 2005. He brought suit on September 2, 2005, but the limitation period tolled sixty days earlier, because of his filing of a tort claim with the State of Washington. RCW 4.92.110. Nevertheless, Delgado, under the continuing violation doctrine, may still recover for the wrongful conduct occurring three years before filing suit because of the continuing nature of the harassment and retaliation. The same men, Mark Brewster, Max Yager, Tom Root, Mike Kukes, and Tom Lenberg created a pervasive atmosphere of sexual innuendo and filth. The same managers, Root, Kukes, and Lenberg ignored the hostile treatment imposed upon employees, contributed to the hostility, and retaliated against employees for reporting hostile treatment.

Washington's Law Against Discrimination does not contain its

own limitations period. Therefore, discrimination claims must be brought within three years under the general three-year statute of limitations for personal injury actions. **Antonius v. King County**, 153 Wn.2d 256, 261, 2, 103 P.3d 729 (2004). Nevertheless, in **Antonius v. King County**, the court rejected the argument that the statute of limitations commences to run when the plaintiff first has notice of harm. 153 Wn.2d 256 at 269. Instead the court adopted the continuing violation doctrine announced by the United States Supreme Court in **National R.R. Passenger Corp. v. Morgan**, 536 U.S. 101 (2002). Under this rule, when a plaintiff shows a continuing course of conduct or series of events sufficiently related so as to constitute a pattern, those events that occurred outside the limitation period may still be the basis for recovery.

The reasoning behind the **Morgan** Court's ruling is that a hostile work environment "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.... Claims are based on the cumulative effect of individual acts." **Antonius v. King County**, 153 Wn.2d at 270.

Moreover, the nature of a hostile work environment claim strongly indicates that it should not be parsed into component parts for statute of

limitations purposes. **Antonius v. King County**, 153 Wn.2d at 268.

Harold Delgado suffered from retaliatory treatment until his termination in 2005, the same year he filed suit, so he sued well within the limitation period. For purposes of the statute of limitations, the retaliation arising from the initial hostile work environment should be included in the time period. The retaliation is part and parcel of the continuing inhospitable atmosphere at work.

In **O'Rourke v. City of Providence**, 235 F.3d 713 (1<sup>st</sup> Cir.2001), the Circuit Court of Appeals did not directly address whether acts of retaliation should be included when applying the limitation period. Nevertheless, the court recognized that management's retaliation, when limiting plaintiff's access to coworkers, was part of the continuing violation of the employment law.

Even if the court were only to consider instances of sexual slurs, Harold Delgado can identify one obscene remark within three years of his filing the tort claim. At a meeting in fall 2003, Jim Crownover told Superintendent Tom Root and retold Tom Lenberg what Brewster said about "breaking in" his daughter. CP 448. Root responded that, if another told him the other would "fuck" his daughter, he would tell the other that

he will “fuck” his wife. CP 448.

B. HAROLD DELGADO PRESENTS SUFFICIENT EVIDENCE  
TO SUSTAIN A CLAIM OF A HOSTILE WORK ENVIRONMENT  
UNDER WASHINGTON’S LAW AGAINST DISCRIMINATION.

A person has the right to hold employment without discrimination. **Antonius v. King County**, 153 Wn.2d 256, 267 (2004). Thus, RCW 49.60.180(3) prohibits any employer from discriminating “against any person in compensation or in other terms or *conditions of employment* because of ..., *sex*, ....” Italics added. Liberal construction of RCW 49.60 is mandated to accomplish the purpose of eliminating and preventing discrimination. RCW 49.60.020; **Holland v. Boeing**, 90 Wn.2d 384, 387, 8, 583 P.2d 621 (1978). The discrimination statutes embody “public policy of ‘the highest priority. **Antonius v. King County**, 153 Wn.2d at 267, 8 (2004).

The Washington Law Against Discrimination prohibits harassment in the workplace or a hostile work environment, since such harassment affects the conditions of employment. **Glasgow v. Georgia-Pacific Corp.**, 103 Wn.2d 401, 406, 693 P.2d 708 (1985). In support of a hostile work environment claim, a plaintiff must show that harassment was

unwelcome, the harassment was based upon sex, the harassment affected the conditions of employment, and the harassment is imputed to the employer. **Glasgow v. Georgia-Pacific Corp.**, 103 Wn.2d 401, 406, 7, 693 P.2d 708 (1985). Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive. **Schonauer v. DCR Entertainment, Inc.**, 79 Wn.App. 808, 820, 905 P.2d 392 (1995). The question whether particular conduct was unwelcome is usually committed to the trier of fact. **Kahn v. Salerno**, 90 Wn.App. 110, 121, 951 P.2d 321 (1998).

Harold Delgado was subjected to many sexually engendered, unwelcome, and hostile comments. The comments included Max Yager's supposed joke of Black men having sex with watermelons; Mark Brewster demanding "blow jobs;" Mark Brewster's frequent use of the word "fuck" and his constant declaration of being "fucking Brewster;" Brewster's obsessed and frequent remarks about sex with either men or women; Assistant Superintendent Mike Kukes' telling the story of Joel Havlina's cousin being a mattress; and Tom Root talk about retaliating against a coworker who wants sex with one's young daughter by telling the coworker that one would fuck his wife. There were many more instances

of sexually crude and rude remarks, but because of the number, Harold Delgado cannot recall them all.

Under the hostile work environment third element, the harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. **Kahn v. Salerno**, 90 Wn.App. 110, 126, 951 P.2d 321 (1998). Whether the harassment at the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the totality of the circumstances. **Kahn v. Salerno**, 90 Wn.App. 110, 126, 951 P.2d 321 (1998). The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct. **Nichols v. Azteca Restaurant Enterprises, Inc.**, 256 F.3d 864, 872 (9th Cir. 2001). In cases where several incidents occur over time, the court must aggregate the occurrences and analyze the situation as a whole to determine if a hostile workplace existed. **Williams v. General Motors Corp.** 187 F.3d 553, 562 - 3 (6<sup>th</sup> Cir. 1999). Discriminatory ridicule, and insults by themselves may be sufficiently severe or pervasive to alter the conditions of employment. **Kahn v. Salerno**, 90 Wn.App. 110, 126, 951 P.2d 321 (1998).

In **Jones v. Rabanco, Ltd.**, 439 F.Supp.2d 1149, 1167 (W.D.Wa. 2006) (applying Washington law), the employer, Rabanco, argued that the racial slurs were not severe enough to be actionable. Lawrence Ortiz alleged that he only personally heard one racist remark by a co-worker and that he only had a few ageist comments spoken directly to him. Nevertheless, because of other discriminatory conduct, the court considered the evidence of racial slurs sufficient to create a question of fact for the jury.

In the case at bar, Jim Crownover's work environment was permeated with sexual, gender and racial comments. The obscene and sick comments altered the working conditions of Harold Delgado. He suffered humiliation and distress. The distress need not be severe, in order for the employee to sustain a claim for damages resulting from a hostile work environment. **Bunch v. King County Department of Youth Services**, 155 Wn.2d 165, 180, 116 P.3d 381 (2005). In **Bunch v. King County Department of Youth Services**, the evidence of emotional distress was limited, but sufficient. The employee, Bunch, testified that the discrimination depressed and angered him.

Mike Kukes and Tom Root uttered some of the offensive

comments. Harold Delgado's direct supervisor Mark Brewster uttered many of the other comments. The Department of Transportation is automatically liable for the harassment imposed upon Delgado by these three gentlemen, because they were managers and supervisors. **Glasgow v. Georgia-Pacific Corp.**, 103 Wn.2d 401, 407, 693 P.2d 708 (1985). The justification for heightened liability when supervisors are responsible for the creation of a hostile work place is that supervisors are able to use their position within an organization to bring the weight of the organization to bear on an employee. **Holly D. v. CIT**, 339 F.3d 1158, 1173 (9th Cir. 2003).

Even assuming Mark Brewster is not considered a supervisor for purposes of vicarious liability, the State of Washington is still responsible for Brewster's comments. The State is also responsible for the comments and actions of Max Yager. To hold an employer responsible for the discriminatory work environment created by a plaintiff's co-worker, the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. **Glasgow v. Georgia-Pacific Corp.**, 103 Wn.2d at 407. This may be shown by proving (a) that complaints were

made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the work place as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment. **Glasgow v. Georgia-Pacific Corp.**, 103 Wn.2d at 407. In **Ellison v. Brady**, 924 F.2d 872 (9<sup>th</sup> Cir. 1991)<sup>3</sup>, the federal court ruled that warnings given to the harasser did not constitute sufficient disciplinary steps.

Sexual remarks were pervasive within the Department of Transportation. Many of Mark Brewster comments occurred in front of managers. Others were reported to management. Managers took no disciplinary action towards Brewster, which is not surprising. Brewster was Lenberg's fishing buddy and Lenberg engaged in the same hostility. When some discipline was finally imposed upon Brewster, Root complained and challenged the discipline.

The State of Washington contends that a male plaintiff cannot recover for sexually charged comments, when other males utter the

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<sup>3</sup> In the absence of adequate state authority, federal authority is persuasive in interpreting RCW Ch. 49.60. **Xieng v. Peoples National Bank of Washington**, 120 Wn.2d 512, 531, 844 P.2d 389 (1993).

obscene remarks. The Superior Court agreed, but the law is to the contrary. Anyone sexually harassed can pursue a claim, no matter his gender or that of his harasser. **Doe by Doe v. City of Belleville, Ill.**, 119 F.3d 563, 574 (7th Cir. 1997). The prohibition of discrimination “because of ... sex” protects men as well as women. **Oncale v. Sundowner Offshore Services, Inc.**, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). The sex of the plaintiff or the plaintiff’s sexual orientation is not relevant to a claim for sexual discrimination. **Rene v. MGM Grand Hotel, Inc.**, 305 F.3d 1061, 1063 (9th Cir. 2002). In **Rene v. MGM Grand Hotel, Inc.**, 305 F.3d 1061, 1063 (9th Cir. 2002), the employee was subjected to pictures of naked men having sex in addition to being physically assaulted.

The State of Washington may attempt to escape liability by claiming that Mark Brewster, Max Yager, Tom Root, Tom Lenberg, and Mike Kukes harassed both male and female workers, and, therefore, the hostile work environment cannot be considered discriminatory to either sex. Thankfully the law rejects this contention. In **Zabkowicz v. West Bend Co.**, 589 F.Supp 780 (E.D.Wis.1984), the employer sought avoidance of the anti-discrimination law by arguing that its supervisor was

an equal opportunity harasser, since he called both men and women vulgar names. The supervisor called females “dumb fucking broads” and “fucking cunts,” and he called males “assholes.” The court held the harassment violated employment discrimination law.

C. ISSUES OF FACT PRECLUDE GRANTING THE DEPARTMENT OF TRANSPORTATION’S MOTION FOR SUMMARY JUDGMENT ON THE CLAIM OF RETALIATION.

Evidence of retaliation imposed upon Harold Delgado because of reporting working conditions is overwhelming. As a result of the complaints, Assistant Regional Administrator Casey McGill declared war on the Connell crew and McGill kept his word. The Connell crew were called “bastard children,” “water asses,” and “crybabies.” Harold Delgado wanted management to reassign “the enemy” Mark Brewster so that he was no longer under Brewster’s supervision, but instead Delgado was assigned to work more with Brewster. Delgado was subjected to yelling and threats of loss of job. He was disciplined for an act he did not perform.

RCW 49.60.210 reads, in relevant part:

It is an unfair practice for any employer ... or other person to discharge, expel, or otherwise discriminate against any

person because he or she has opposed any practices forbidden by this chapter....

To recover under RCW 49.60.210, a plaintiff need not show any pre-reporting abusive work environment, unwelcome harassment, or interference in work performance. He need only show a report of misconduct, after which he was treated differently. In other words, to recover on the retaliation claim, a plaintiff need not prove the underlying claim of a hostile work environment or discrimination. **Davis v. West One Automotive Group**, 140 Wn.App. 449, 166 P.3d 807 (2007).

A plaintiff need not show that retaliation for reporting wrongful conduct was the only motivating factor behind his treatment by Department managers. Retaliatory motivation need not even be the principal reason for the treatment. **Kahn v. Salerno**, 90 Wn.App. 110, 128, 951 P.2d 321 (1998). If the employee establishes that he or she participated in opposition activity, the employer knew of the activity, and the employer took adverse steps, a rebuttable presumption is created in favor of the employee that precludes the court from dismissing the employee's case. **Wilmot v. Kaiser Aluminum and Chemical Corp.**, 118 Wn.2d 46, 69, 821 P.2d 18 (1991).

In order to establish a prima facie case of retaliatory discharge, a plaintiff must show he had some “adverse employment action” taken against him. **Davis v. West One Automotive Group**, 140 Wn.App. 449, 460 (2007). No “bright-line rules” exist with respect to what constitutes an adverse employment action, and therefore “courts must pore over each case to determine whether the challenged employment action reaches the level of ‘adverse.’” **Fincher v. Depository Trust and Clearing Corp.**, 604 F.3d 712, 721 (2<sup>nd</sup> Cir.2010). Nevertheless, a theme behind the law is that a “materially adverse action” is not limited to those actions that affect the terms and conditions of employment, or even acts that occur in the workplace; it is sufficient to show that the action would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” **Burlington N. & Santa Fe Ry. Co. v. White**, 548 U.S. 53, 68 (2006). Affirmative efforts to punish a complaining employee are at the heart of any retaliation claim. **Fincher v. Depository Trust and Clearing Corp.**, 604 F.3d 712, 721 (2<sup>nd</sup> Cir.2010).

When determining whether a plaintiff shows adverse employment action, the court does not consider discrete acts by themselves, but considers employer’s acts both individually and collectively. **Pears v.**

**Mobile County**, 645 F.Supp.2d 1062, 1095 (S.D.Ala.2009). A severe and pervasive retaliatory atmosphere is by itself sufficient to show adverse employment action. **Morris v. Oldham County Fiscal Court**, 201 F.3d 784, 793 (6<sup>th</sup> Cir.2000).

Adverse employment actions include unwarranted negative job evaluations and toleration of harassment by other employees. **Marrero v. Goya of Puerto Rico**, 304 F.3d 7, 23 (1<sup>st</sup> Cir.2002). The court may consider several factors when assessing a retaliation: exposure to new conditions which are humiliating or demeaning; demotion or reduction in pay; and direct or circumstantial evidence of the employer's discriminatory animus. **Dudley v. Augusta School Dept.**, 23 F.Supp.2d 85, 90 (D.Me.1998). A reprimand, such as received by Harold Delgado, may constitute an adverse employment action. **Morris v. Lindau**, 196 F.3d 102, 110 (2<sup>nd</sup> Cir.1999).

Department of Transportation management's refusal to recognize that a hostile work environment existed was on its own retaliation, because it discouraged further reporting and, without reporting, the cesspool could not be cleaned. Harold Delgado and other Connell crew members were called "cry baby," "water ass," and "bastard child" for reporting the hostile

work environment. The name calling prevented the crew from reporting other discriminatory conduct and other hostile acts and thus goes to the heart of the purpose behind prohibiting retaliation. Disinterested observers in the department would learn, from management's reaction to Harold Delgado's report of misconduct, not to report Mark Brewster's actions.

D. THE DEPARTMENT OF TRANSPORTATION'S  
SUMMARY JUDGMENT MOTION DEFIES PRINCIPLES OF  
SUMMARY JUDGMENT JURISPRUDENCE.

In analyzing the elements of his case, Harold Delgado has already shown the presence of issues of fact defeating summary judgment. Nevertheless, standard principles of summary judgment jurisprudence also support the conclusion that the motion should have been denied.

Summary judgment is proper only where there are no genuine issues of material facts. The burden of showing that there is no genuine issue of material fact falls upon the party moving for summary judgment. **Hash by Hash v. Children's Orthopedic Hosp. and Medical Center**, 110 Wn.2d 912, 914, 757 P.2d 507 (1988). Even when the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, summary judgment is not proper. **Money Savers**

**Pharmacy, Inc. v. Koffler Stores (Western) Ltd.**, 37 Wn.App. 602, 608, 682 P.2d 960 (1984). The party opposing a motion for summary judgment is given the benefit of all favorable inferences that can be drawn from the evidence considered by the court in deciding on the motion. **Meadows v. Grant's Auto Brokers, Inc.**, 71 Wn.2d 874, 881, 431 P.2d 216 (1967).

In **Kahn v. Salerno**, 90 Wn.App. 110, 951 P.2d 321 (1998), the Court of Appeals reversed a summary judgment order in favor of the defendant, because reasonable minds could differ on the question of whether the allegedly ongoing abuse constituted severe and pervasive harassment. Kahn contended she was physically threatened and humiliated by a coworker's conduct but provided details only with respect to a limited number of incidents. Kahn conceded the specific incidents referred to at her deposition were sporadic.

Summary judgment will not often be available, because of the circumstances of the case, in actions involving material issues touching on the state of mind of a person. **Olympic Fish Products v. Lloyd**, 23 Wn.App. 499, 501, 502, 597 P.2d 436 (1979). Along these lines, ordinarily, proof of the employer's motivation must be shown by circumstantial evidence because the employer is not apt to announce

retaliation as his motive. **Wilmot v. Kaiser Aluminum and Chemical Corp.**, 118 Wn.2d 46, 69, 821 P.2d 18 (1991). The question of an employer's intent to discriminate is "a pure question of fact." **Johnson v. Department of Social and Health Services**, 80 Wn.App. 212, 229, 907 P.2d 1223 (1996). Thus, summary judgment should rarely be granted in employment discrimination cases. **Johnson v. Department of Social and Health Services**, 80 Wn.App. 212, 226, 907 P.2d 1223 (1996). Indeed in numerous cases, Washington appellate courts have refused to grant employers summary judgment on claims of retaliatory discharge, because the employer's motive was at question. **Estevez v. Faculty Club of University of Washington**, 129 Wn.App. 774, 120 P.3d 579 (2005); **Renz v. Spokane Eye Clinic**, 114 Wn.App. 611, 60 P.3d 106 (2002); **Kahn v. Salerno**, 90 Wn.App. 110, 128, 951 P.2d 321 (1998).

#### V. CONCLUSION

Issues of fact preclude the granting of summary judgment to the Department of Transportation on Harold Delgado's claim for sexual harassment and retaliation. Delgado respectfully requests that the Court of Appeals reverse the granting of summary judgment and remand the suit for trial.

DATED this 29<sup>th</sup> day of July, 2010.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
Attorneys for Plaintiff Harold Delgado

A handwritten signature in cursive script, appearing to read "George Fearing", is written over a horizontal line.

GEORGE FEARING #12900

**CERTIFICATE OF SERVICE**

I, Kristi L. Flyg, hereby certify that on the 29<sup>th</sup> of July, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

- |                                     |                  |   |
|-------------------------------------|------------------|---|
| <input type="checkbox"/>            | Hand-delivered   | AMY CLEMMONS                                    |
| <input type="checkbox"/>            | First-Class Mail | <b>ATTORNEY GENERAL OF</b>                      |
| <input checked="" type="checkbox"/> | Overnight Mail   | WASHINGTON                                      |
| <input type="checkbox"/>            | Facsimile        | West 1116 Riverside Avenue<br>Spokane, WA 99201 |

  
\_\_\_\_\_  
KRISTI FLYG  
of Leavy, Schultz, Davis & Fearing, P.S.