

FILED

NOV 19 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 29043-3-III

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DIVISION III
OF THE STATE OF WASHINGTON

KELLI GINN,

Appellant

vs.

STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION,

Respondent

APPELLANT KELLI GINN'S OPENING BRIEF

GEORGE FEARING, WSBA # 12970
**LEAVY, SCHULTZ, DAVIS &
FEARING, P.S.**
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Attorneys for Appellant Kelli Ginn

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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 all of Kelli Ginn's claims. CP 378-80.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Whether a female employee presents some evidence of a hostile work environment, sufficient to survive a summary judgment motion, when the work environment was pervaded with sexual and obscene references; the employee's supervisor constantly referred to himself as "Fucking Brewster;" the supervisor remarked to the employee: "You fucked a nigger;" the supervisor falsely accused the employee of sleeping with a male coworker; the supervisor stated on several occasions that he wanted the workplace rid of women; the supervisor repeatedly told the employee that women are not as strong as men; the supervisor frequently called the employee "stupid;" the supervisor yelled at the employee for reporting his conduct; management refused to take any steps in response to reports of harassment and instead disbelieved the reports; the employment workplace contained pornography; a manager, in the hearing of the employee, made references to hot dogs as penises; the

employee was treated differently than male employees when seeking light duty; management demanded that the female employee be a “cheerleader;” management retaliated against the employee because of the reports; the employee overheard management refer to those who complained about sexual misconduct as “cry babies” and “whiners;” and the hostile work environment caused the employee emotional distress and interfered in her work performance?

B. Whether a female employee presents some evidence of discriminatory treatment in the terms and conditions of employment sufficient to survive a summary judgment motion, when the employee’s supervisor relegated the employee to lesser work tasks, while stating that women are not qualified for other assignments, and the female employee is denied light duty when injured, while male employees receive light duty?

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 engages in offensive sexual remarks; management required the employee, against her wishes, to ride in a truck with a male coworker who made sexual advances; the employee complained about a hostile work

environment, but management disbelieved her report, demanded she serve as cheerleader, and ordered her not to complain up the chain of command or else she would be fired; she complained about her supervisor's sexually offensive remarks and the supervisor confronted her in his role as "Fucking Brewster," and ordered her to refrain from any further reports to higher management; and, with this background, she grew in fear of reporting any hostile work environment?

D. Whether an employee presents some evidence of a constructive discharge, sufficient to survive a summary judgment motion, when the employee resigned from employment because anxiety and depression led to medical treatment; when the employee suffered anxiety and panic attacks from the hostile work environment; when the employee's supervisor constantly referred to himself as "Fucking Brewster;" the supervisor remarked to the employee: "You fucked a nigger;" the supervisor stated on several occasions that he wanted the workplace rid of women; the supervisor yelled at the employee for reporting his misconduct; the employee was treated differently than male employees when seeking light duty; management refused to take any steps in response to reports of these comments and instead disbelieved the reports; the work

environment was pervaded with sexual and obscene references; a top manager referred to hot dogs as penises; and management retaliated against the employee because of the reports?

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, where 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. Through this lawsuit, those employees, including Kelli Ginn, seek recovery for emotional distress, physical symptoms, and lost income resulting from the hostile work environment.

Kelli Ginn sues for a sexually charged hostile work environment; retaliation for reporting harassment in the workplace; discrimination in the terms and conditions of employment; and constructive discharge. The State of Washington successfully dismissed Ginn's claims on summary judgment. CP 378-80. Kelli Ginn appeals, because there are issues of fact

precluding dismissal without a trial.

Beginning in April 2001, Kelli Ginn worked as a maintenance technician for the Washington State Department of Transportation, in the South Central Region, Area 3 Maintenance Office. CP 840. 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.

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

The three top management positions in Area 3 are Superintendent, Assistant Superintendent, and two Supervisors¹. CP 841. The Superintendent, the top position, serves the entire Area 3. CP 757. The Superintendent directly answers to regional headquarters and interacts

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

with the community. CP 757. The Superintendent's 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.

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.

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, beginning in 2000.

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.

Before Kelli Ginn's employment with the Department of Transportation, Area 3 was already a cesspit. Connell crew member Max Yager told many racial and sexual jokes. CP 447, 844. One joke remembered by coworkers concerned Black men working in a watermelon field and having sex with watermelons. CP 447, 844. Yager referred to Mexican women "Cunt sway low," for Consuelo. CP 844, 879. Yager brought sexually explicit pictures to work. CP 859. On two or three occasions, Max Yager wore a T-shirt that pictured a mouse with a large penis. CP 859. The caption read: "Here, kitty, kitty, kitty." CP 859.

Area 3 management also engaged in offensive sexual comments. Mike Kukes spoke with the Connell crew, including Roy Gilliam, at the Connell shop in the fall of 2001. CP 844. Kukes talked about a Department of Transportation 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.

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. 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.

Mark Brewster sexual retorts began years before Kelli Ginn's employment with the Department of Transportation. During a lunch break, in 1995, in the former Connell maintenance facility, Mark Brewster observed to coworkers: "The best piece of ass I ever had was my brother." CP 448. In 1998 or 1999, Mark Brewster, while at the Connell shop, stepped out the back door and yelled Joel 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. In the fall of 2000, Brewster boldly informed Crownover that Brewster would like to "break in" Crownover's sixteen-year old daughter. CP 448. In the fall of 2000, when a lead technician job was open, Mark

Brewster told Joel Havlina that Brewster was entitled to a disability rating because he had a "short peter." CP 865. Brewster frequently asked Havlina if Havlina wanted to fuck in the pickup. CP 864, 5. Mark Brewster frequently asked Connell crew member Harold Delgado for "blow jobs." CP 880.

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. Gifford reported the call to Superintendent Tom Root, who told Gifford "there was no problem." CP 668, 9. Management took no action in response to complaints about Mark Brewster. CP 848.

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.

Mark Brewster obscene remarks continued during Kelli Ginn’s tenure. Kelli Ginn 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.

In 2003, Mark Brewster falsely accused Kelli Ginn of sleeping with co-employee Jeff Bruce. CP 891. In the same year, 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.

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, 10². 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. CP 718. Root reiterated problems he 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.

Page 6 of Julie Lougheed’s investigative report directs that steps be

² The report is found at CP 815-29.

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 the 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.

The Connell crew, including Roy Gilliam, complained that Mark Brewster was not adequately disciplined, just as Jim Leroue had not earlier been properly punished. CP 852. 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.

The harassment of Kelli Ginn did not stop with Mark Brewster. Once Kelli Ginn gained employment with the Department of Transportation, she also heard Mexican jokes that offended her. CP 889. At work, she heard Black jokes and Blonde jokes that revolted her. CP 889. Kelli Ginn found pornography in a tool shed and a truck. CP 889. She threw the pornographic magazines away and complained to supervisors. CP 889.

The sexual harassment of Kelli Ginn was not limited to crude sexual remarks but also demeaning and stereotypical comments about women uttered by management. Supervisor Tom Lenberg belittled Kelli Ginn. CP 891. Beginning in 2003 and until Kelli Ginn left employment, Lenberg often commented that she was female and so she must be a cheerleader for management. CP 891. Thereafter, on Ginn's evaluations, Lenberg wrote that Ginn needed to be a cheerleader. CP 891. Kelli Ginn did not report these offensive comments, because she was told she could not complain up the chain of command. CP 891.

Kelli Ginn's direct supervisor Mark Brewster told Ginn that women do not belong working at the Department of Transportation. CP 892. Brewster said women are not as strong as men. CP 892. Brewster

commented to Ginn, ten to twenty times, that women were not capable of performing the work. CP 892. These comments by Mark Brewster offended Kelli Ginn and belittled her as a female worker. CP 892. On numerous occasions, Mark Brewster, in the presence of coworkers, said Kelli Ginn is not bright or that she is stupid. CP 749, 50, 892. The comments caused Kelli Ginn emotional distress and interfered in her work performance. CP 892.

Mark Brewster told Troy Riblett, when the two rode in a pickup, that, if Brewster had his way, no women would work at the Department of Transportation. CP 735, 6. Riblett mentioned the pickup comment to Kelli Ginn. CP 736. Riblett did not report the comment to upper management, because he “knew nothing would get done about it, so why bother?” CP 736, 7.

Mark Brewster made it difficult for Kelli Ginn to gain her class A driving certificate. CP 892. Ginn complained to Mike Kukes about Brewster’s teaching her how to drive a truck. CP 892. That same day, Brewster confronted Ginn as she left the shop. CP 892. Brewster stopped Ginn at the gate and said he was “fucking Brewster.” CP 892. Brewster told Ginn if she had a problem with him to talk to him alone. CP 892.

Ginn did not report the “fucking Brewster” remark, because Ginn had just been retaliated against by Mark Brewster for complaining about him to superiors and nothing was being done to protect Ginn from retaliation. CP 892.

Mark Brewster usually assigned Kelli Ginn traffic control. CP 892. Ginn complained to Brewster that she wanted other assignments. CP 892. Brewster stated that Ginn was not strong enough for other assignments and that women were not qualified for other assignments. CP 892. Ginn did not report this to management because it did no good and Mark Brewster retaliated against her when she earlier reported his comments. CP 892, 3.

When Shirley Bumpaous quit employment with the Department of Transportation, Mark Brewster said to Riblett: “Well one done, two to go.”³ CP 736. Troy Riblett did not report the comment to management. CP 741. According to Riblett, female employees performed as well, if not better, than the men. CP 741. The women were meticulous at their tasks. CP 741.

³ Presumably the “two” were the remaining female employees, Bobbie Sanders and Kelli Ginn.

Maintenance technician Barry Manning, during winter shift 2003, occasionally hugged Kelli Ginn. CP 893. The hugging caused her discomfort, but she did not report the hugging until she received notes, from Manning, in her locker. CP 893. The notes contained checkmarks indicating he wanted to come to Ginn's home, what alcohol she liked, and how he would have sex with her. CP 893. Ginn next found roses with a card, from Barry Manning, at her house door. CP 893. Kelli Ginn then reported the behavior of Manning to Tom Lenberg and Manning was demoted. CP 893. Nevertheless, after the offensive behavior, Ginn asked management and supervisors that she not be placed at work next to Manning. CP 893. Management did not honor her request. CP 893. Ginn was required to ride in a truck sometimes with Barry Manning. CP 893.

During winter shift 2004-5, Kelli Ginn asked Supervisor Tom Lenberg why the operator of a Vactor truck, and not others on the truck, received premium pay. CP 890. Lenberg replied: "I'll tell you what. Why don't you guys knock on whatever doors you feel appropriate to get the answer you're looking for." CP 890. So Ginn e-mailed Doug McDonald, the Director of the Department of Transportation in Olympia,

and asked him the question. CP 890. McDonald never answered. CP 890.

After Kelli Ginn e-mailed Doug McDonald, Tom Lenberg and Mike Kukes scolded Ginn because she broke the chain of command. CP 890. The two managers told Ginn that under no circumstances was she to complain outside the Pasco shop. CP 890. Lenberg and Kukes warned Ginn she would lose her job if she complained to someone else. CP 890. During this corrective action meeting, Tom Lenberg also stated that none of the employees liked working with Ginn. CP 890. For good measure, Lenberg and Kukes ordered Ginn to serve as cheerleader for management. CP 890. As a female, Kelli Ginn was offended by this comment of being a cheerleader. CP 890.

As a result of contacting Doug McDonald, Tom Lenberg directed Kelli Ginn to write a letter about improving her behavior. CP 890. Ginn wrote the letter, but Lenberg did not like it. CP 890. Lenberg took Ginn downstairs, stood behind her, and forced Ginn to write another letter and sign it. CP 890. Kelli Ginn wrote a letter to the Governor's office complaining about this incident. CP 890. Ginn received no response from the Governor's office. CP 890.

Top management also uttered offensive sexual comments during Kelli Ginn's employment with the Department of Transportation. During a 2004-5 winter shift meeting, 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.

Kelli Ginn and other female Department of Transportation employees were denied light duty, when injured, when male employees were granted light duty. In 2005, Kelli Ginn injured herself on the job. CP 894. After she filed a workers compensation claim, Assistant Superintendent Mike Kukes told her that her injuries were not serious and she needed to "suck it up." CP 894. Kukes said: "If you can't handle the work, why don't you leave?" CP 894. Kelli Ginn took the comments to mean, if she complained about getting hurt on the job or if she filed a workers compensation claim, she should leave employment. CP 894.

Ginn also understood the comments to mean she was faking her injuries.

CP 894.

Later in 2005, Kelli Ginn developed, because of repetitive motions, carpal tunnel syndrome. Shoveling and weed eating contributed to carpal tunnel. CP 894. Ginn had two carpal tunnel surgeries. CP 894, 5. After the first surgery, Dr. Tom Burgdorff wrote a note advising Ginn should have no lifting, shoveling, or hammering. CP 895. Ginn handed the note to Supervisor Larry Wilhelm. CP 895. Wilhelm sent Ginn upstairs to perform paper shredding. CP 895. Halfway through the day, Larry Wilhelm appeared and told Ginn he could not provide light duty and she would not be able to work until she was released to full duty. CP 895. Ginn did not return to employment until after the second surgery. CP 895. Kelli Ginn noticed that male employees, who were injured on the job, were granted light duty. CP 895. DOT Pasco employee Don Fast was granted light duty, for about three weeks, when he hurt his shoulder. CP 742, 743, 895. Fast worked around the office. CP 742. Management also granted Jeff Bruce light duty, when Bruce twisted his ankle, even though Bruce did not desire light duty. CP 742, 3. Bruce was assigned the same tasks as Fast. CP 743. Ray Torres hurt his back and was granted

light duty, for about three weeks. CP 742.

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 Loughheed, 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.

Kelli Ginn encountered emotional distress at work, because of the harassment from Mark Brewster, Tom Lenberg, Tom Root, and Mike Kukes. CP 894. The stress at work caused her heart problems. CP 894. She felt as if she was having heart attacks. CP 894. Her neck and throat swelled; she encountered panic and anxiety attacks. CP 894. Ginn's doctor told her she had stress and he placed her on Proxycillin. CP 894. Kelli Ginn did not believe her physician that the hostile work environment

caused me physical symptoms, until, when off work for awhile because of carpal tunnel, the ailments went away. CP 894. When Ginn returned to work after two surgeries, she suffered panic attacks. CP 894.

The threats from management impacted Kelli Ginn's ability to perform my job. CP 894. She encountered difficulty in concentrating at her job. CP 894. On October 13, 2005, Kelli Ginn resigned from employment because of the intolerable and hostile work environment at the Department of Transportation. CP 895.

IV. ARGUMENT

A. KELLI GINN 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).

Kelli Ginn was subjected to many sexually engendered, unwelcome, and hostile comments. Ginn heard Mark Brewster refer to

himself as “fucking Brewster” on many occasions. Brewster falsely accused Kelli Ginn of sleeping with co-employee Jeff Bruce. Brewster spoke of Ginn “fucking a nigger.” Brewster obsessed over sex with both men and women. Kelli Ginn found pornography in a tool shed and a truck. Managers insisted that Kelli Ginn serve as a cheerleader. Ginn’s direct supervisor Mark Brewster told Ginn that women do not belong working at the Department of Transportation. On numerous occasions, Mark Brewster, in the presence of coworkers, said Kelli Ginn is not bright or that she is stupid. When a male coworker exhibited a romantic interest in Ginn and Ginn requested separation from the coworker, she was still required to ride in a truck with him. One top manager referred to hot dogs as penises in Kelli Ginn’s presence.

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 (6th 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, Kelli Ginn's work environment was permeated

with sexual, gender and racial comments. The obscene and sick comments altered the working conditions of Ginn. She suffered humiliation, depression, emotional distress, and physical symptoms of stress, such as panic attacks and heart problems. She encountered difficulty in concentrating at her job and eventually resigned.

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.

Manager Tom Lenberg uttered some of the offensive comments. A direct supervisor Mark Brewster uttered many of the other comments. The Department of Transportation is automatically liable for the harassment imposed upon the Ginn by these two 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. 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 (9th Cir. 1991)⁴, 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 may attempt to escape liability by claiming that Mark Brewster, 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

⁴ 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).

broads” and “fucking cunts,” and he called males “assholes.” The court held the harassment violated employment discrimination law.

B. ISSUES OF FACT PRECLUDE GRANTING THE DEPARTMENT OF TRANSPORTATION’S SUMMARY JUDGMENT MOTION ON THE CLAIM OF DISCRIMINATORY EMPLOYMENT CONDITIONS TOWARDS KELLI GINN.

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 age, *sex*, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability.” Emphasis added. Kelli Ginn was treated differently from male workers. Management denied injured female employees light duty, but granted male workers light duty. Also, Mark Brewster discriminated against Ginn in terms of work assignments, because of Brewster’s view that women cannot perform a man’s job and a desire to rid the Department of Transportation maintenance crew of female workers.

To establish a prima facie case of discrimination due to disparate treatment, the employee must show the employer simply treats some people less favorably than others because of their race. **Shannon v. Pay**

'N Save Corporation, 104 Wn.2d 722, 726, 709 P.2d 799 (1985). In **Jones v. Rabanco, Ltd.**, 439 F.Supp.2d 1149 (W.D.Wa. 2006), Lawrence Ortiz alleged, in part, that he was disciplined more harshly for minor infractions than white employees and that his termination was due, in part, to the fact that he was a minority. The federal district court, applying Washington law, ruled that the allegations, along with the supporting evidence submitted, supported a prima facie showing of disparate treatment of Ortiz on the basis of his Latino identity in this matter. The supporting evidence showed white workers to have been treated better than Ortiz, and, thus, an issue of fact existed as to whether the discipline meted upon Ortiz was harsher than action against his white peers.

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 Kelli Ginn because of reporting working conditions is overwhelming. When she complained to management, management disbelieved her report, demanded she serve as cheerleader, and ordered her not to complain up the chain of command or else she would be fired. When she complained about Mark Brewster's

sexually offensive remarks, Brewster confronted Ginn in his role as “Fucking Brewster,” and ordered her to refrain from any further reports to higher management. Management required Ginn, against her wishes, to ride in a truck with a coworker who made sexual advances. With this background, Kelli Ginn grew in fear of reporting any hostile work environment.

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. She 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 she had some "adverse employment action" taken against her. **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 (2nd 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 (2nd 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 (6th Cir.2000).

Adverse employment actions include toleration of harassment by other employees. **Marrero v. Goya of Puerto Rico**, 304 F.3d 7, 23 (1st 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).

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. Management's yelling and threatening a job loss, if Kelli Ginn reported misconduct to higher authorities, further discouraged reporting of the hostile work environment. Disinterested observers in the department would learn, from management's reaction to Ginn's report of misconduct, not to report Mark Brewster's actions or the misconduct of another. Not only did the retaliation by Department of Transportation management discourage further reporting of wrongdoing but it actually led to the resignation of Kelli Ginn.

D. ISSUES OF FACT PRECLUDE GRANTING THE
DEPARTMENT OF TRANSPORTATION'S SUMMARY JUDGMENT
MOTION ON THE CLAIM OF CONSTRUCTIVE DISCHARGE.

Washington courts recognize the doctrine of constructive discharge as a means to protect against employment discrimination. **Martini v. Boeing Co.**, 137 Wn.2d 357, 366, 971 P.2d 45 (1999). Insidious acts erode the Legislature's laudable goals just as effectively, and perhaps in a more demoralizing fashion, than a direct termination would otherwise accomplish. **Martini v. Boeing Co.**, 137 Wn.2d 357 (1999).

Constructive discharge occurs where an employer forces an employee to quit by making that employee's work conditions intolerable. **Martini v. Boeing Co.**, 137 Wn.2d 357, 366, 971 P.2d 45 (1999). To establish a claim of constructive discharge, an employee must prove the employer deliberately made working conditions intolerable such that a reasonable person in his position would be forced to quit. **Blomster v. Nordstrom, Inc.**, 103 Wn.App. 252, 258, 11 P.3d 883 (2000). The question of whether the working conditions were intolerable is one for the trier of fact, unless there is no competent evidence to establish a claim of constructive discharge. **Blomster v. Nordstrom, Inc.**, 103 Wn.App. 252, 258, 11 P.3d 883 (2000).

Roy Gilliam quit employment because of intolerable working conditions. The conditions included managers allowing a lead technician to engage in intimidation and obscene comments. The conditions included management calling him names and retaliating against him, in terms of work assignments, because he reported wrongdoing. The conditions included racial and sexual jokes and slurs. Because he was the lead technician of the Connell crew, Pasco management singled him out for additional punishment.

Because of intolerable working conditions, Roy Gilliam suffered from kidney stones, depression, high blood pressure, and palpitations. His physician advised him to take leave from work.

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

In analyzing the elements of his case, Kelli Ginn 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 any of Kelli Ginn's claims. Ginn respectfully requests that the Court of Appeals reverse the granting of summary judgment and remand the suit for trial.

DATED this 29TH day of July, 2010.

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CERTIFICATE OF SERVICE

I, Kristi L. Flyg, hereby certify that on the 29th 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	ATTORNEY GENERAL OF
<input checked="" type="checkbox"/>	Overnight Mail	WASHINGTON
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