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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29043-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

JOEL HAVLINA,

Appellant

vs.

STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION ,

Respondent

APPELLANT JOEL HAVLINA'S REPLY BRIEF

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I. ARGUMENT

This brief is written by Joel Havlina to correct errors made by the State of Washington in its brief.

The State of Washington remarkably writes, on page 2, that vulgar comments and sexual remarks were common among the Department of Transportation crew. Just one page later, however, the State characterizes the jokes as “just a handful.” The state cannot have it both ways.

The State of Washington impliedly contends that Joel Havlina willingly joined in the vulgar remarks and behavior. No evidence supports this contention.

The State of Washington contends it cannot be held liable for the sexual misbehavior of Mark Brewster because he was not in management, despite Mark Brewster frequently being the one dictating the work of Joel Havlina. Nevertheless, the conduct of Mark Brewster was so pervasive, that the State can be held responsible since it knew or should have know of Brewster’s behavior. **Glasgow v. Georgia-Pacific Corp.**, 103 Wn.2d 401, 407, 693 P.2d 708 (1985).

As an example, 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. When speaking with Havlina, Brewster also frequently referred to himself as “Fucking Brewster.” CP 864.

The State of Washington contends that the only complaint from Joel Havlina of sexual innuendos within the statute of limitations, is the comment from Mark Brewster that he was going to spend “quality time” with Havlina. The State then discounts the comment as innocuous. Whether the comment is innocuous is a question to be determined by the jury. Based upon the long history of pornographic remarks by Mark Brewster to Joel Havlina, including continued requests by Brewster for Havlina to “fuck” Brewster in the pickup, the jury can reasonably conclude that Mark Brewster was continuing his long pattern of intimidating and sickening Havlina.

Anyway the 2004 comment was not the only offensive comment within three years of the filing of suit. At a meeting in fall 2003, which occurred after the 2002 complaint about Brewster to Tom Lenberg at the Connell facility bay, Crownover told Superintendent Tom Root and retold Tom Lenberg what Brewster said about his daughter. CP 448, 881, 870.

Root responded, in the presence of Joel Havlina, that, if another told him the other would “fuck” his daughter, he would tell the other that he will “fuck” his wife. CP 448.

The State of Washington faults Joel Havlina for not reporting the misconduct of Mark Brewster and others. The State ignores the fact that it was futile to report the misconduct. CP 668, 669, 865. Management did not believe any of the allegations and responded by calling Joe Harvey a whiner or water ass. CP 865. Anyway on occasion, Havlina did report the conduct, to no avail. CP 448, 669, 867. Some of Mark Brewster’s comments were made in the presence of upper management. CP 866.

The State of Washington, who should set an example among employers, claims it is okay for a supervisor to spend years uttering pornographic comments, including requests for sex, as long as the supervisor and the victims are male. Fortunately, the law does not support this defense. **Oncala v. Sundowner Offshore Services, Inc.**, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); **Rene v. MGM Grand Hotel, Inc.**, 305 F.3d 1061, 1063 (9th Cir. 2002); **Doe by Doe v. City of Belleville, Ill.**, 119 F.3d 563, 574 (7th Cir. 1997); **Zabkowitz v. West Bend Co.**, 589 F.Supp 780 (E.D.Wis.1984).

The State pretends that the sexual harassment was not pervasive or severe, despite itself contending the harassment was “not uncommon.” Nevertheless, Joel Havlina’s work environment was permeated with sexual and gender comments. The obscene and sick comments altered the working conditions of Havlina, by resulting in humiliation, emotional distress, and physical symptoms of stress, such as ulcerative colitis.

II. CONCLUSION

Issues of fact preclude the granting of summary judgment to the Department of Transportation on Joel Havlina’s claims. Havlina respectfully requests that the Court of Appeals reverse the granting of summary judgment and remand the suit for trial.

DATED this 18th day of April, 2011.

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CERTIFICATE OF SERVICE

I, Kristi L. Flyg, hereby certify that on the 18th of April, 2011, I caused to be served a true and correct copy of Appellant Joel Havlina’s Reply Brief, by the method indicated below, and addressed to the following:

- Hand-delivered
- First-Class Mail
- Overnight Mail
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