

**FILED**

MAR 18 2011

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

NO. 29043-3-III

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

JAMES CROWNOVER, HAROLD DELGADO, ROY GILLIAM,  
JOEL HAVLINA, and KELLI GINN

Appellants,

v.

THE STATE OF WASHINGTON,  
DEPARTMENT OF TRANSPORTATION,

Respondent

---

**RESPONDENT'S RESPONSE BRIEF FOR KELLI GINN**

---

ROBERT M. MCKENNA  
Attorney General

AMY C. CLEMMONS,  
WSBA No. 22997  
Assistant Attorney General  
Attorneys for Defendants State of  
Washington, Department of  
Transportation  
1116 West Riverside Ave  
Spokane, WA 99201

**ORIGINAL**

**FILED**

**MAR 18 2011**

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

NO. 29043-3-III

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

JAMES CROWNOVER, HAROLD DELGADO, ROY GILLIAM,  
JOEL HAVLINA, and KELLI GINN

Appellants,

v.

THE STATE OF WASHINGTON,  
DEPARTMENT OF TRANSPORTATION,

Respondent

---

**RESPONDENT'S RESPONSE BRIEF FOR KELLI GINN**

---

ROBERT M. MCKENNA  
Attorney General

AMY C. CLEMMONS,  
WSBA No. 22997  
Assistant Attorney General  
Attorneys for Defendants State of  
Washington, Department of  
Transportation  
1116 West Riverside Ave  
Spokane, WA 99201

**ORIGINAL**

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. STATEMENT OF ISSUES ON APPEAL.....3

    1. Should this court affirm the trial court’s award of summary judgment on Kelli Ginn’s hostile work environment claim where Ms. Ginn admits that Mark Brewster was not her supervisor, admits that every claim she made to DOT was thoroughly investigated, and admits that the allegations in her complaint were never reported to DOT management, and where she fails to establish even a prima facie hostile work environment claim based upon relevant, admissible, material evidence that is not time-barred?.....3

    2. Should this court affirm the trial court’s award of summary judgment on Kelli Ginn’s discriminatory treatment claim where Ms. Ginn fails to establish even a prima facie disparate treatment claim based upon relevant, admissible, material evidence that is not time-barred?.....3

    3. Should this court affirm the trial court’s award of summary judgment on Kelli Ginn’s retaliation claim where Ms. Ginn fails to establish even a prima facie retaliation claim based upon relevant, admissible, material evidence that is not time-barred?.....3

    4. Should this court affirm the trial court’s award of summary judgment on Kelli Ginn’s constructive discharge claim where the only admissible evidence establishes that Ms. Ginn voluntarily left her employment with DOT after four and a half years of service in order to “prepare for her future,” thanking DOT for the “opportunity” she had working for the department, for what she had learned, and for the “wonderful people” she had worked with? CP 946.....3

III. STATEMENT OF THE CASE.....4

Procedural Posture.....	4
A. Statement of Facts.....	7
1. Background.....	7
2. DOT’s Management Structure Required That Ginn Report Her Complaints and Concerns to Management .....	9
3. The Complaints and Concerns Ginn Reported During Her Employment Were Addressed By DOT Management. ....	11
a. Ginn complained about fellow female plaintiff Shirley Bumpaous for conduct unrelated to gender.....	12
b. Ginn reported Barry Manning when he expressed a romantic interest in her. ....	13
c. Ginn complained that Mark Brewster was a hard trainer .....	14
d. Ginn complained to the Secretary of Transportation and the Governor that the passenger in the vactor truck should get the same premium pay as the driver .....	16
e. Ginn reported to her team that she had found pornographic magazine on two occasions .....	17
4. Ginn never complained about Supervisor Tom Lenberg during the time she was employed by DOT .....	18
5. Conduct Ginn Never Reported or Complained About During Her Employment with DOT .....	20
a. Jokes and Sexual Comments Never Reported. ....	20
b. Comments by Mark Brewster Never Reported.....	21

6.	Ginn’s claim that she was denied light duty because of her gender has no factual basis.....	22
7.	Ginn’s claim that she was denied training opportunities on heavy equipment because of her gender has no factual basis.....	23
8.	Ginn’s claim that her probationary period was longer than DOT employees—or that it was extended because of her gender—has no factual basis.....	28
9.	Ginn offers no evidence of any kind in support of her claim that she was retaliated against for union activity .....	28
IV.	ARGUMENT .....	29
A.	Standard of Review .....	29
B.	All But One of Ginn’s Claims Are Barred By The Statute Of Limitations.....	29
C.	Ginn Fails to Present Admissible Evidence Sufficient to Support Her Sexual Harassment Hostile Work Environment Claim.....	30
1.	Ginn’s allegations.....	30
2.	Ginn’s allegations are insufficient to establish sexual harassment under the relevant law .....	33
a.	Unwelcome conduct.....	33
b.	Conduct or action because of gender .....	34
c.	Affecting terms and conditions of employment.....	35
d.	Imputable to employer .....	36

D. Ginn Fails to Present Admissible Evidence Sufficient to Support Her Discriminatory Treatment on the Basis of Gender Claim.....	37
1. Ginn’s Allegations.....	37
2. Ginn’s allegations are insufficient to establish discriminatory under the relevant law .....	38
3. Ginn’s discriminatory treatment allegation fails as a matter of law.....	39
a. There is no support for her allegation that she was discriminated against by DOT in receiving light duty at the times she was injured.....	39
b. There is no support for her allegation that she was discriminated against by DOT in training on heavy equipment. ....	40
4. Ginn Fails to Present Admissible Evidence Sufficient to Support Her Retaliation Claim. ....	44
a. Ginn’s Allegations .....	44
b. Ginn’s allegations are insufficient to establish retaliation under the relevant law .....	45
(1) Protected Activity.....	45
(2) Adverse Employment Action.....	46
(3) Causal Link .....	47
5. Ginn Fails to Present Admissible Evidence Sufficient to Support Her Constructive Discharge Claim. ....	48
a. Ginn’s Allegations .....	48

b.	Ginn's allegations are insufficient to establish constructive discharge under the relevant law .....	49
V.	CONCLUSION .....	52

## TABLE OF AUTHORITIES

### Cases

<i>Adams v. Able Bldg. Supply, Inc.</i> 114 Wn. App. 291, 57 P.3d 280 (2002).....	35, 36
<i>Allison v. Housing Authority of Seattle</i> 118 Wn.2d 79, 821 P.2d 34 (1991).....	47
<i>Barrett v. Weyerhaeuser Co. Severance Pay Plan</i> 40 Wn. App. 630, 700 P.2d 338 (1985).....	50, 51
<i>Binkley v. Tacoma</i> 114 Wn.2d 373, 787 P.2d 1366 (1990).....	51
<i>Campbell v. State</i> 129 Wn. App.10, 118 P.3d 888 (2005).....	passim
<i>Coville v. Cobarc Servs. Inc.</i> 73 Wn. App. 433, 869 P.2d 1103 (1994).....	46
<i>Ellis v. City of Seattle</i> 142 Wn.2d 450, 13 P.3d 1065 (2000).....	46
<i>Estevez v. Faculty Club of Univ. of Wash.</i> 129 Wn. App. 774, 120 P.2d 579 (2005).....	33, 45, 48
<i>Francom v. Costco Wholesale Co.</i> 98 Wn. App. 845, 991 P.2d 1182 (2000).....	37
<i>Glasgow v. Georgia-Pacific</i> 103 Wn.2d 401, 693 P.2d 708 (1985).....	36
<i>Grimwood v. Univ. of Puget Sound</i> 110 Wn.2d 355, 753 P.2d 517 (1988).....	39
<i>Harris v. Forklift Systems, Inc.</i> 510 U.S. 17, 114 S. Ct. 367, 370, 126 L.Ed.2d 295 (1993).....	36

<i>Hill v. BCTI Income Fund-1</i> 144 Wn.2d 172, 23 P.3d 440(2001).....	39
<i>Kahn v. Salerno</i> 90 Wn. App. 110,951 P.2d 321 (1998).....	36, 45, 47
<i>Kirby v. City of Tacoma</i> 124 Wn. App 454, 98 P.3d 827 (2004).....	47
<i>Korlund v. Dyncorp Tri-Cities Services, Inc.</i> 156 Wn.2d 168, 125 P.3d 119 (2005).....	49, 51
<i>Kuest v. Regent Assisted Living</i> 111 Wn. App. 36, 43 P.3d 23 (2002).....	39
<i>Lybbert v. Grant County</i> 141 Wn.2d 29, 1 P.3d 1124 (2000).....	29
<i>McDonnell Douglas v. Green</i> 411 U.S.792, 93 S. Ct. 1817, 36 L.Ed.2d 660 (1973).....	39
<i>Meritor Savings Bank v. Vinson</i> 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986).....	34
<i>Payne v. Children’s Home Soc’y of Wash., Inc.</i> 77 Wn. App. 507, 892 P. 2d 1102 (1995).....	35, 36
<i>Robel v. Roundup</i> 148 Wn.2d 35, 59 P.3d 611 (2002).....	47
<i>Schonauer v. DCR Entm’t, Inc.</i> 79 Wn. App. 808, 905 P.2d 392 (1995).....	35
<i>Sneed v. Barna</i> 80 Wn. App. 843, 912 P.2d 1035 (1996).....	50
<i>Washington v. Boeing Co.</i> 105 Wn. App. 1, 19 P.3d 1041 (2000).....	36, 50

**Statutes**

RCW 4.16.080(2)..... 29  
RCW 49.60.210 ..... 46

**Rules**

RAP 9.12..... 29

## I. INTRODUCTION

Kelli Ginn initially asserted claims for hostile work environment sexual harassment, disparate treatment on the basis of her gender, and constructive discharge.

The facts Ginn asserts in support of her hostile work environment claim fall into two categories: 1) claims that she reported to DOT management, which Ginn admits DOT fixed; and 2) claims Ginn never reported, and, consequently, claims DOT management did not know about and had no opportunity to fix. This litigation focuses on the second category. In her complaint, Ginn alleges for the first time that she was offended by a number of jokes and comments made by her co-workers, comments she never reported to DOT management. This court should affirm the trial court's determination that DOT was not responsible for correcting a work environment that Ginn perceived to be hostile, where she admits she never reported the workplace issues that concerned her to DOT management.

Prior to DOT's first summary judgment motion, Ginn's disparate treatment claim was based upon the DOT's alleged failure to give women on the Pasco crew light-duty work after they had been injured. At the first summary judgment hearing, DOT proved that Ginn was not refused light duty when she had completed the necessary paperwork. At the first

summary judgment hearing, Ginn changed the basis for her disparate treatment claim, asserting for the first time that DOT had failed to provide her with training opportunities (on large equipment) because she was female. DOT subsequently established (in its second summary judgment motion) that training opportunities were determined by an objective scoring system, and that Ginn received training opportunities whenever she met the qualifications for training on a particular machine.<sup>1</sup> Ginn acknowledges that, with the exception of her experience as a school bus driver, prior to her employment at DOT, she had no experience operating large equipment. The trial court recognized that experience is a legitimate, objective factor any employer would consider in training individuals to operate large equipment. Distinguishing among candidates on the basis of their prior experience does not constitute disparate treatment. The trial court's summary dismissal of Ginn's unfounded disparate treatment claim should be affirmed by this court.

Ginn does not identify any adverse employment action taken against her in support of her retaliation claim. Ginn quit work, on the advice of her doctor, after she had problems with carpal tunnel. Her resignation letter advised DOT she was leaving because she wanted to

---

<sup>1</sup> Ginn trained on both the broom and roller, but, under the objective evaluation of experience used by DOT, was not eligible to train on the vector or the grader. CP 126-130, 141-146.

prepare for her future and accomplish goals she had set for herself. CP 946. The trial court correctly found that Ginn failed to produce evidence of any sexually harassing conduct to which DOT did not reasonably respond, and that she failed to identify any facts to support the causes of action alleged in her complaint.

DOT respectfully requests that this court affirm the trial court's summary dismissal of Kelli Ginn's claims.

## **II. STATEMENT OF ISSUES ON APPEAL**

1. Should this court affirm the trial court's award of summary judgment on Kelli Ginn's hostile work environment claim where Ms. Ginn admits that Mark Brewster was not her supervisor, admits that every claim she made to DOT was thoroughly investigated, and admits that the allegations in her complaint were never reported to DOT management, and where she fails to establish even a prima facie hostile work environment claim based upon relevant, admissible, material evidence that is not time-barred?
2. Should this court affirm the trial court's award of summary judgment on Kelli Ginn's discriminatory treatment claim where Ms. Ginn fails to establish even a prima facie disparate treatment claim based upon relevant, admissible, material evidence that is not time-barred?
3. Should this court affirm the trial court's award of summary judgment on Kelli Ginn's retaliation claim where Ms. Ginn fails to establish even a prima facie retaliation claim based upon relevant, admissible, material evidence that is not time-barred?
4. Should this court affirm the trial court's award of summary judgment on Kelli Ginn's constructive discharge claim where the only admissible evidence establishes that Ms.

Ginn voluntarily left her employment with DOT after four and a half years of service in order to “prepare for her future,” thanking DOT for the “opportunity” she had working for the department, for what she had learned, and for the “wonderful people” she had worked with? CP 946.

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

#### **Procedural Posture**

Ginn filed a tort claim with the DOT on January 12, 2006, and her Superior Court complaint on May 19, 2006. CP 1415. Ginn asserted claims for hostile work environment sexual harassment, retaliation for union activity, discrimination in the terms and conditions of her employment, and constructive discharge. *Id.* DOT moved for summary judgment dismissal of all of Ginn’s claims. CP 964-966. In response, Ginn raised the following facts in opposition to the summary judgment:

1. Ginn stated that she heard unidentified co-workers at unidentified times tell one joke about a Mexican and some jokes about blacks and blondes. CP 889. Ginn admitted that she never reported the jokes to management. *Id.*

2. Ginn claimed that she found two pornographic magazines, one in a tool shed and a one in truck, which she threw away. CP 889. Ginn did not identify a time frame for this claim. *Id.* Nor did she suggest that finding the magazines was personally directed at her. *Id.*

3. Ginn claimed that during a hot dog social two male employees made a joke about a hot dog. One asked if the other wanted a bite, and the other responded, "That's as big as it is?" CP 889. Ginn did not complain about this exchange to DOT management. *Id.*

4. Ginn complained that Brewster was a hard trainer when she was learning to drive big trucks. CP 892 L. 7. She admitted in her deposition that she did not relate this behavior to her gender, but that Brewster was that way with everyone, both male and female. CP 64; see also, CP 1599, p. 32 (Bumpaous).

5. When a male co-worker (Barry Manning) expressed romantic interest in her, Ginn reported Manning's actions to DOT management. CP 893. Ginn admits that DOT management properly responded to her sexual harassment complaint about Manning. CP 893 L. 19-20. In the affidavit she filed in opposition to summary judgment, Ginn states: "The discipline of Manning was an appropriate response." *Id.* Ginn did not allege that any inappropriate conduct occurred on the one time she was subsequently required to ride with Manning in a truck. CP 893 L. 25.

6. Ginn acknowledges in the affidavit she filed in opposition to summary judgment that she received light-duty assignments when she had medical restrictions. CP 894. However, she generally alleges,

without supporting evidence, that men got more light-duty assignments.

*Id.*

7. Ginn generally asserts that Mark Brewster was a crude bully to everyone, and that he referred to himself as “Fucking Brewster.” CP 888. She admitted that she never reported Brewster’s behavior to anyone. *Id.*

8. Ginn identified two inappropriate comments directed to her by Brewster during her employment, and she admitted that she never reported either comment. CP 891-892.

In response to the first summary judgment motion, Ginn based her allegation that she had received disparate treatment because of her gender on her unsupported belief that male employees got light-duty assignments more often than female employees. CP 894-895. After the trial court granted summary judgment to DOT on all of the claims alleged in Ginn’s complaint, Ginn’s counsel argued that the court failed to address the claim for disparate treatment with respect to training opportunities for women. RP (January 15, 2008) p. 131 L. 24-25; 133.

The trial court noted that the issue was not raised by Ginn in her briefing or argument, but reserved ruling, requesting an additional motion addressing Ginn’s claim that, because of her gender, she had received disparate access to training opportunities. RP (January 15, 2008) p. 131 L.

24-25; 133. DOT filed a second motion for summary judgment on Ginn's disparate to training access claim. CP 211-225. The trial court granted DOT's second motion for summary judgment. RP (November 4, 2008); CP 10-12.

Ginn does not appear to raise the issue of disparate treatment based upon access to training opportunities in her opening brief. Although Ginn may be abandoning this issue on appeal, DOT addresses it here in the interest of completeness. Ginn presents no competent evidence in support of a disparate treatment claim.

**A. Statement of Facts**

**1. Background.**

Kelli Ginn began working for DOT in Pasco, Washington as a Temporary Maintenance Tech 1 on April 17, 2001 and became a permanent Maintenance Tech 1 on December 1, 2001.<sup>2</sup> CP 902, pp. 23-24; CP 924. After a year, Ginn was appointed a Maintenance Tech 2. CP 903, p. 26. Ginn worked for DOT as a permanent employee from December 1, 2001, until she resigned on October 13, 2005. CP 946. It is undisputed that at the time Ginn resigned, she had no pending claims for gender discrimination or hostile work environment. CP 195. Ginn worked

---

<sup>2</sup> At the time Ginn received her permanent appointment, she was advised that she would have a twelve month probationary period. CP 34.

out of the Pasco DOT shop; she worked with the Connell crew approximately ten times throughout her employment. CP 888 L. 12-13.

Ginn's primary experience prior to working for the DOT was in traffic control. CP 83. In her deposition, Ginn testified that she was assigned to work traffic control 90-95% of the time she was employed by DOT. CP 83. She testified that this assignment was appropriate because she was good at traffic control and knowledgeable in that area. CP 83-84. She never objected to this assignment or to the type of assignments she was given at the DOT. CP 80. The assignments described in Ginn's declaration (CP 888) are those specified in the maintenance technician job description. CP 37.<sup>3</sup>

Ginn's immediate supervisor at DOT was Tom Lenberg, the Maintenance Supervisor. CP 927-946. Lenberg's supervisor was Mike Kukes, the Assistant Maintenance Superintendent. CP 927-946.

On October 13, 2005, Ginn quit her job as a Maintenance Tech 2.

Her resignation letter stated:

I would like to take this moment to thank you for the opportunity that I have had working for the Department of Transportation. I have learned a lot of valuable tools and worked with many wonderful people.

---

<sup>3</sup> As a Maintenance Tech, Ginn was required to operate heavy machinery including dump trucks, front end loaders, tractors, mowers and sweepers, install guardrail, posts and signs, flag traffic, clean culverts, cut brush, fill potholes, repair fences and remove litter. CP 37.

I have come to a decision that I need to prepare for my future and accomplish goals that I have set for myself. I do not believe that staying with the department would be a benefit to obtaining these goals. I am giving you my notice as my last day will be Thursday, October 13, 2005.

CP 946.

Ginn alleges that her lawsuit is based upon problems she had during her employment with: 1) a fellow female employee and co-plaintiff, Shirley Bumpaous; 2) a fellow Maintenance Tech in Pasco, Barry Manning; 3) her supervisor, Tom Lenberg; and 4) a Pasco Lead Tech, Mark Brewster. CP 912, p. 69.

**2. DOT's Management Structure Required That Ginn Report Her Complaints and Concerns to Management**

It is undisputed that Mark Brewster, as a lead technician, had no authority to discipline Kelli Ginn or any other worker. CP 538 L. 7. Ginn understood that the only individuals in the DOT management structure with the ability to take any formal disciplinary action were the Supervisor (Lenberg), the Assistant Superintendent (Kukes) and the Superintendent (Tom Root). CP 913 p. 70 L. 23- p. 71 L. 2. Lead techs had no hiring/firing or disciplinary authority. CP 841 l. 4-10.

The trial court recognized at the time of the initial summary judgment motions that lead tech Brewster did not have any authority to take disciplinary action, and, consequently, the misconduct Ginn alleged

needed to be brought to the attention of DOT management in order to meet the knowledge element of a hostile work environment claim. RP (January 18, 2008) p. 127. There was no evidence in the record that any female employee ever reported sexual comments or discriminatory conduct directed at them by Mark Brewster.<sup>4</sup> RP (January 18, 2008) p. 127. The comments now complained of by Ginn were never reported to DOT management. RP (January 18, 2008) p. 127. There was some evidence that the all-male crew shared sexual comments and jokes between 1990-2001. CP 971-88. All Connell and Pasco employees were interviewed by Julie Lougheed, a Human Resource Consultant in the DOT Office of Equal Opportunity, in the investigation conducted in the fall of 2003. The investigation was initiated in response to complaints by male employees at the Connell shop. CP 971-88. None of the female employees who were interviewed reported any problems or concerns, and the male employees who complained reported that “Mr. Brewster’s comments of a sexual nature ceased after 2001.” CP 971, 975, 984, 987. Lenberg became the Supervisor in 2001, no one complained to him about

---

<sup>4</sup> The deposition of co-plaintiff Shirley Bumpaous (CP 1592-1627) is dispositive on this question. Bumpaous grudgingly described Brewster being good at his lead tech duties: “He knew his job, he knew how to look for work, he was very good at trying to provide the knowledge and the tools for people to be able to do these jobs.” CP 1597. But Bumpaous also complained about the bullying and intimidation Brewster directed at the entire crew. CP 1597. Bumpaous does not assert at any point in her deposition that Brewster’s bullying was based on gender; she did not view his bullying as sexual harassment. CP 1599, p. 32.

language or sexual comments after his appointment as Supervisor. CP 987.

Ginn asked the trial court to infer that because there were crude jokes or comments of a sexual nature between the all male crew before 2001, that the DOT should have been on notice of the one inappropriate comment directed at Ginn by Brewster. RP (Jan. 18, 2008) 127. The court asked the question whether “Ms. Ginn is excused from providing notice or making any complaint to the employer because of inappropriate actions that [Brewster] undertook toward other male employees?” RP (Jan. 18, 2008) 128. In response, Ginn’s counsel acknowledged that there were no reports of any sexual comments by women, but simply the general comments that all employees made (male and female) about Brewster being a generally intimidating or rude person. RP (Jan. 18, 2008) 129. The trial court concluded that “the evidence with respect to the comments and behavior of Mr. Brewster as to Miss Ginn were not adequately brought - - there is no evidence that they were adequately brought to the attention of the employer.” RP (Jan. 18, 2008) 129.

**3. The Complaints and Concerns Ginn Reported During Her Employment Were Addressed By DOT Management.**

In her deposition, Ginn summarized the issues she brought to the attention of DOT management during her employment as: 1) the 2001

truck shifting / training incident with Mark Brewster; 2) the 2002 traffic control incident with her co-plaintiff Shirley Bumpaous; 3) Barry Manning's romantic overtures in 2003; and 4) the 2004 premium pay issue concerning the vector truck that resulted in Ginn contacting the Secretary of Transportation. CP 913 -914 p. 72, 76. DOT management addressed all of the issues brought to its attention. CP 913 -914. Ginn testified that she was satisfied with the response of management to her complaints regarding Barry Manning and the shifting issue with Brewster. CP 907, pp. 46-47, CP 914, p. 75-76.

**a. Ginn complained about fellow female plaintiff Shirley Bumpaous for conduct unrelated to gender.**

Ginn was asked in her deposition "Did you have problems, issues or difficulties working with anyone in the Pasco crew?" CP 905, p. 40 L. 12-13. Ginn identified a fellow female employee, Shirley Bumpaous, in response. *Id.* at L. 16. The two got in a dispute over a traffic control issue in 2002. CP 905-906 p. 40-41. Ginn went to Mark Brewster with the issue and both those employees were called into a meeting to apologize to each other. CP 906 p. 42.

Ginn also indicated that Shirley Bumpaous "told people that me and Jeff Bruce were sleeping together" in 2002. CP 906 p. 42 L. 11-15; CP 915. Ginn testified that she did not know who started that rumor, but

she complained about Shirley Bumpaous “going around saying” it. CP 906 p. 44 L. 9-11; CP 915 p. 85 L. 9. Ginn also got in trouble for disparaging Shirley Bumpaous with a cartoon drawing. CP 906 p. 42-43.

Ginn complained that Shirley Bumpaous wanted her fired. CP 906 p. 43-44; CP 915 p. 85-86. Ginn wanted management “to kind of take note” of Shirley’s comment that she wanted Ginn fired, and to “tell Shirley she was wrong”. CP 906 p. 43 L. 20-23; CP 915 p. 83 L. 22. Ginn acknowledged that Lenberg did address the Bumpaous incident although she believes he should have taken some action against Bumpaous. CP 915 p. 83.

**b. Ginn reported Barry Manning when he expressed a romantic interest in her.**

Ginn was asked to identify, other than Shirley Bumpaous, “any other people that you worked with at the Department of Transportation that you had issues, problems, [or] difficulties working with?” CP 906 p. 45 L. 4-7. Ginn identified Barry Manning. *Id.* Barry Manning was a fellow Maintenance Tech that Ginn reported to management as having a romantic interest in her which made her uncomfortable. CP 906 p. 45-46; 893.

Ginn reported Manning’s conduct of hugging Ginn, leaving notes in her locker, and leaving roses on her door step. CP 906 p. 45; 893. Ginn

reported the conduct to Tom Lenberg, who then took the conduct to “the appropriate people.” CP 906 p. 45 L. 20-22. In response to Ginn’s report, the DOT’s office of equal employment (OEO) investigated, and Manning was demoted. CP 906. Ginn testified that “[T]he discipline of Manning was an appropriate response” and the DOT’s response stopped the conduct. CP 893 L. 19.

Q. And Barry Manning was demoted, is that right?

A. Yeah.

Q. And did you think that was an appropriate response by management?

A. Yes.

CP 906 p. 45 L. 23- CP 907 p. 46 L. 2.

Ginn had no further trouble with Manning, but she indicated that she had to ride with him on one occasion in a car with other DOT workers all traveling to a training class in Walla Walla. CP 907 p. 46. Ginn described this experience as “an awkward situation.” *Id.* at L. 14. But Ginn admits that Manning never did anything inappropriate after his demotion. *Id.* at L. 15-20.

**c. Ginn complained that Mark Brewster was a hard trainer**

Ginn came to the DOT with no prior experience driving a truck. CP 64, p. 67. She had only previously driven a school bus, so shifting a

truck was new to her. *Id.* Ginn was aware that management had concerns regarding her ability to shift a truck when she started working for the DOT as a temporary employee. CP 79. She acknowledges that she did have a problem shifting the trucks at first, but she was given extra training and she learned to do it. CP 64-65. Mark Brewster was her trainer. CP 910.

Ginn describes her difficulty with Brewster regarding the shifting as occurring within the first six months of her employment. CP 910. Brewster was trying to teach her to drive a truck, and he asked her “to pretend it was winter ... and there was a car wreck ahead” and he wanted her to “downshift from the highest gear, not skipping any gears, all the way down to the lowest gear from guidepost to guidepost...” CP 910 p. 61. The day Brewster trained her, Ginn informed Mike Kukes, the Assistant Superintendent, that Brewster told her she “had to do that shifting, and just how hard I thought Mark Brewster was on my case about it.” CP 62 L. 16-19. Kukes talked to Brewster about the demands he was making on Ginn as a trainee. CP 62 L. 20-24. Ginn felt Mike Kukes talking to Brewster was an appropriate response to her complaint. CP 914 p. 76 L. 18-20.

Ginn admitted that she could not recall raising any other issues with management regarding Brewster.

Q. Did you tell anyone in management anything else about Mark Brewster's attitude?

A. Just about the truck driving incident and how he was hard on me, that I had told you about earlier.

Q. And that's where he's having you practice driving down a hill with the shifting?

A. Yes.

CP 914, p. 74 L. 16-22.

Q. Can you remember raising with management any issues, other than the downshifting, with regard to Brewster?

A. No, I can't remember specific ones, no.

CP 914, p. 76 L. 12-14.

**d. Ginn complained to the Secretary of Transportation and the Governor that the passenger in the vector truck should get the same premium pay as the driver**

The vector truck is a piece of equipment normally operated by properly trained and authorized maintenance technicians. CP 904. The driver gets premium pay. CP 904. In 2004, Ginn claimed that the employees "as a group" asked about whether the employees helping the driver could get premium pay. CP 916 p. 88 L. 9, CP 904. The second person assisting with the vector operation was not any set employee, and they all rotated doing that job. CP 904 p. 36 L. 5-16. Ginn did not identify her complaint as one based on gender, nor was it a complaint

made by Ginn as an individual. *Id.* Ginn e-mailed her question regarding the vector pay directly to Doug McDonald, the Secretary of the DOT, and she also sent a letter complaining about this to the Governor. CP 904, CP 916 p. 87.

She never got a response from Doug McDonald, but Mike Kukes and Tom Lenberg talked to her one time about the proper use of the chain of command. CP 904, p. 36-37, CP 905, p. 39. The corrective action she received was requiring her to write a letter stating that she understood the chain of command. CP 905, p. 38-39.

**e. Ginn reported to her team that she had found pornographic magazine on two occasions**

In her affidavit in opposition to summary judgment, Ginn asserted that she had found two pornographic magazines: one in a tool shed and one in a dump truck. CP 889 L. 18-20; 919, p. 127. In her affidavit, Ginn does not identify when she found either magazine. CP 889. Nor does she allege that those magazines were directed toward her in any specific way because of her gender. *Id.*

In her deposition, Ginn testified that she did not report finding the pornographic magazine in the tool shed (in 2001 or 2002) to management. CP 919, p. 127. She just “threw it away.” After she found the pornographic magazine (at an unidentified time) in a dump truck, Ginn did

not make a “formal complaint,” instead she made a more general complaint about “garbage and things being left in the truck and did reference the magazine.” Compare CP 919, p. 128 with CP 889, L 19. Ginn testified that the crew responded “that we need to remember to clean out our trucks at the end of the day.” CP 919, p. 128.<sup>5</sup>

As Ginn’s deposition testimony acknowledges, maintenance techs routinely picked up litter and garbage, including pornographic magazines, along the road. CP 37, 485. Ginn does not state—in either her deposition or her affidavit--that she ever found a pornographic magazine after her complaint to “supervisors at a crew meeting.” CP 889, L 19.

**4. Ginn never complained about Supervisor Tom Lenberg during the time she was employed by DOT**

Ginn never made any complaints about Tom Lenberg during her employment. CP 907-910. Ginn felt that Lenberg had favorites, that he--in general--put himself above the staff, that he was rude to a delivery man, that he told her to stay away from troublemakers, and that she should get on board with management, or be a cheerleader for management. CP 907-910. Ginn also stated that problems she would report to Lenberg fell on

---

<sup>5</sup> Havlina admitted that he picked up pornography off the side of the road as part of his job duties. CP 485. This duty (removal of litter) would have been applicable to any maintenance tech. CP 37.

deaf ears. CP 49 L. 23.<sup>6</sup> Ginn identified the problems she reported to Lenberg as: 1) the issue with Bumpaus concerning the cartoon; and 2) Lenberg's failure to give employees who were working on the Fourth of July more notice they were scheduled to work on the holiday. CP 907 p. 49-50.

Ginn also objects in this litigation to the use of the word "cheerleader" in her evaluations. CP 51-53. Ginn did not report her dislike of this term or the use of it to anyone during her employment. CP 908 p. 53 L. 14-17. Lenberg used the term cheerleader with both male and female employees who had problems with their attitude to elicit a more upbeat or positive response from the employees he supervised. CP 516-522.

Ginn's performance evaluations consistently addressed concerns about her attitude as an employee. CP 931, 934, 938, 942. The cheerleader comment was made in the context of requesting both male and female employees to be more positive. *Id.* In Ginn's evaluation for 7-16-02 to 11-16-03, she received the following assessment:

"Kelli was asked to work on demonstrating a positive attitude. I feel that you still need to improve in this area. When you disagree with a decision you need to understand that it's all right to ask but it is not all right to challenge

---

<sup>6</sup> Although not raised in her lawsuit, Ginn brought to management's attention the poor performance of a fellow employee and that employee was terminated. Ginn was satisfied with this response. CP 953 fn4.

that decision or direction that the Department wants to go. My door is always open if you have the need to come and discuss anything that [you're] not clear on.”

CP 938.

In her final evaluation Lenberg stated:

“This year you need to work on being a positive influence with coworkers. In the past there have been times when management has had to spend extra effort with you. We want you to be active and participate in meetings, your actions need to be presented in a positive fashion. You need to become a team player one that supports management and works to achieve the objectives that are set by the organization. You need to be a cheerleader for the organization even though you don't always agree with the direction that has been given.”

CP 942.

A male employee with attitude problems was similarly advised in his evaluation by Mr. Lenberg that “You need to take on the role as a cheerleader ....” CP 522

**5. Conduct Ginn Never Reported or Complained About During Her Employment with DOT**

**a. Jokes and Sexual Comments Never Reported.**

Ginn asserts that she over heard a few jokes during her years of employment at the DOT. CP 889. One was a Mexican joke to “pink up the phone and say yellow.” CP 889. She acknowledges the joke was one overheard and not being told to her, but she does not identify who made the joke, when it was made, or how it relates to her sexual harassment

claim. CP 889. She also claims that she heard jokes about blacks and blondes during her employment, but she does not identify when or by whom. CP 889. She never reported any concern or problem with any of these jokes or comments. CP 889 L. 25.

**b. Comments by Mark Brewster Never Reported.**

Ginn claims that in 2003, Brewster made an inappropriate comment in reference to her biracial daughter. CP 909. Ginn did not report this comment to anyone. CP 909 p. 55 L. 24-25.

In 2001, Ginn claims Brewster commented about her having difficulty driving trucks, said that she was not very bright, and said that she should consider going to drive a “spud truck or something” if she “wanted to get some experience driving truck.” CP 910 p. 60-61. She claims he made comments that women shouldn’t be in that line of work because they are not as strong as men. CP 910. Ginn admitted she never reported these statements to management and, consequently, management never had an opportunity to address Brewster’s comments about women. CP 911 p. 64 L. 22-23.

Ginn also heard Brewster refer to himself as “F[---]ing Brewster” in 2001. CP 911 p. 64 L. 24 – p. 65 L. 7.<sup>7</sup> She never reported any concern with the comment to management because that was “just Mark.” CP 911

---

<sup>7</sup> This was a reference used with male and female employees before the 2003 Loughheed investigation and resulting discipline of Brewster. CP 983.

p. 65 L. 8-11. She attributed these statements to his personality. CP 912

p. 67 L. 5-10.

**6. Ginn's claim that she was denied light duty because of her gender has no factual basis**

Ginn received L & I benefits for time off and a surgery related to her carpal tunnel. CP 919-920. The DOT provided a light duty assignment to Ginn once her doctor provided the appropriate paper work that established Ginn could be released to work light duty. CP 920 p. 134. Initially, Ginn was required to have her doctor fill out the state form to obtain light duty. CP 920 p. 134. The only issue with her getting light duty was her requirement to fill out the right form. *Id.* Ginn admits that right after the proper form was filled out, the situation was corrected. CP 201, CP 920 p. 134, CP 922 p. 151. The injury requiring Ginn to be off work and on light duty was covered by workers compensation, so her benefits were governed by that system. CP 920. Ginn does not identify any occasion where she qualified for light duty, but it was not provided. *Id.* She was paid for the time off under her L&I claim. CP 920.

In addressing Ginn's light duty argument, Judge Yule found that: "There's no indication to the Court of disparate treatment or failure to accommodate her disability when – [the light duty request] was properly documented to the employer. Finding no issue of fact, the Court will grant

the Motion for Summary Judgment with respect to that.” RP (January 15 2008) p. 10.

**7. Ginn’s claim that she was denied training opportunities on heavy equipment because of her gender has no factual basis**

Ginn never asserted during her employment that she was denied training opportunities because of her gender. CP 195. It was not raised at the first summary judgment, but the court allowed additional briefing on the disparate treatment claim solely insofar as it might be illustrated by Ginn’s to the training opportunities. RP (January 15, 2008) 17 L. 11-17.

Ginn claimed that she was not trained to operate the grader and the dozer because of her gender. CP 193 L. 14-25. Ginn admitted that she came to the DOT with prior traffic control experience and that traffic control was an area she enjoyed. CP 191-192. It was also the area in which she was most knowledgeable. *Id.* However, the DOT provides opportunities for employees to train in other areas. CP 126-127.

The DOT has a fair and objective bid selection system in place to determine which employees will receive training opportunities to learn to operate equipment. CP 127. The bid system allows all employees who have achieved a classification of Maintenance Tech II or higher to bid for particular training opportunities. *Id.* Maintenance Tech III’s are given priority because of their rank. *Id.* The DOT trains a set number of

individuals to operate certain pieces of equipment depending on the need or frequency of the use for that piece of equipment. CP 127. When an opportunity to train on equipment becomes available at the DOT, it is posted for any and all qualified employees to bid. CP 127-128, 133-137.

Employees who are bidding on the equipment training fill out an SCR Equipment Training Rating Worksheet. CP 127-137. The employee fills out the form ranking their own score, and the employee with the highest score is selected for the training opportunity. CP 126-130. The system also provides additional fair selection factors in the event of a tied score. CP 135.

Ginn became eligible to receive training on equipment when she became a Maintenance Tech II on April 16, 2003. CP 126-130. During her eligibility, there were two postings one in the fall of 2003 and one in the summer of 2004. CP 126-130, 137, 139. In 2003, Ms. Ginn bid to be trained on the vactor, the grader, the broom and the roller. CP 126-130. Ms. Ginn successfully was the highest scoring bidder and received training on the broom and the roller, but she was not the highest scoring bidder on the grader. CP 126-130, 141-146. She does not challenge the

finding on the vactor, but she asserts that she was denied training on the grader and dozer because of her gender. CP 193.<sup>8</sup>

The results of the bidding were based solely upon the objective rating score sheet with no discretionary input from management. CP 126-130, 152. Although there were only three women maintenance technicians, out of the seven pieces of equipment bid, women won the bid on four pieces of equipment. *Id.*

Ginn incorrectly asserted that Jeff Bruce received training on the grader during her employment based upon hearsay. CP 194-195. Jeff Bruce never bid upon and was never selected for training on the grader. CP 180-183, 126-179.

On one occasion in approximately 2002, Mark Brewster voluntarily demonstrated how the grader worked for Jeff Bruce while the two were on a half-hour lunch break. CP 180-183. This demonstration does not count as either training or experience, and it would not affect the objective bidding process. *Id.*

Ginn did bid for the grader training, but Troy Riblett had a higher SCR score and was therefore the successful bidder who received the training on the Grader. CP 126-179. Jeff Bruce was not trained to operate the grader and was not authorized, approved, or paid to operate the grader

---

<sup>8</sup> Ginn had the lowest bid score on the vactor truck. CP 141-46.

for the DOT during Ms. Ginn's employment as alleged by Ginn based solely upon hearsay. CP 126-130, 155.

Ginn claims she did not get training on the dozer, however there was no indication that Ginn ever bid for training on the dozer. CP 126-130. There is no dozer in the Tri-Cities, and the one out of Wenatchee is used once or twice a year. *Id.* The person selected for the training had ten years of experience operating a dozer. CP 129-130, 167-169. He was also more senior than Ginn, so he objectively had a higher SCR score. CP 129-130.

Ginn did not know why Ryan Miller was selected for training on the dozer. CP 196. She does acknowledge that Ryan Miller had more seniority than she did. CP 197 L. 13-14.

In her deposition, Ginn admitted the training selections had nothing to do with gender.

Q. Do you have any factual information that the decision to train Ryan Miller on the dozer had anything to do with gender?

A. No, on that I don't.

Q. Do you have any factual information that the decision to train Jeff Bruce on the grader had anything to do with gender?

A. No, I don't. As factual proof, no.

Q. Just any facts at all?

A. No.

CP 196 L. 25 – CP 197 L. 9).

Ginn admitted that she was “not aware of how the ‘selective bidding’ process works...” CP 107. The training selection was based upon the rating qualifications, and nothing else. CP 126-130. The points on the form application were determined by the applicant, not management. *Id.*

Ginn’s counsel argued at summary judgment that she did not have to show any facts to support her disparate treatment claim, the fact that she was a woman who was denied a training opportunity was enough in itself.<sup>9</sup> The trial court found that Ginn’s statement that Brewster did not like working with women did not create an issue of fact on her disparate treatment claim, because there was no evidence that Brewster was involved or linked in any way to the training selection. RP (Nov. 4, 2008) 35. The trial court found that Ginn’s “speculation” about how the selection was made was insufficient to defeat summary judgment based upon the clear evidence the DOT presented regarding the objective selection process. *Id.* The trial court granted the DOT’s Motion for

---

<sup>9</sup> “Ginn does not have to come here today and have any actual facts.” Nov. 4, 2009 Tr. 22 L. 20-21. “The fact that she [Ginn] doesn’t have any direct factual evidence as counsel suggests is not going to be fatal to her claim.”

Summary Judgment on the disparate treatment claim. RP (Nov. 4, 2008)

37.

**8. Ginn’s claim that her probationary period was longer than DOT employees—or that it was extended because of her gender—has no factual basis**

Ginn indicated that she thinks, but she is not sure that her probation may have been extended. Ginn’s probation was not extended and expired at the normal time frame in 2002. CP 28-37. Ginn wanted her temporary time to count towards her probation, but a probationary period for any State employee starts when they receive a permanent position. *Id.* Ginn received notice on December 4, 2001, that as a permanent employee she was subject to a 12-month probationary period starting from the date of the letter. *Id.*

There is no evidentiary basis for her allegation that her probationary period was ever extended and certainly not related to her gender.

**9. Ginn offers no evidence of any kind in support of her claim that she was retaliated against for union activity**

Ginn failed to identify any union activity or to assert any adverse employment action related to union activity in response to DOT’s motion

for summary judgment on her claim that she was retaliated against for union activity. CP 887-896.

#### IV. ARGUMENT

##### A. Standard of Review

The standard of review for cases resolved on summary judgment is a matter of well-settled law. This court considers those matters de novo, relying upon the same evidence presented to the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.*; CR 56. If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.* On review of an order granting a motion for summary judgment, an appellate court will consider only evidence and issues that have been called to the attention of the trial court. RAP 9.12.

##### B. All But One of Ginn's Claims Are Barred By The Statute Of Limitations

Ginn's claims are subject to a three year statute of limitations. *See* RCW 4.16.080(2). Ginn filed this lawsuit on February 8, 2007, so she

does not have a claim for incidents which occurred before February 8, 2004.

Any claims based upon the incidents with Bumpaous, Manning, the pornography, and Brewster--except Brewster's alleged comments that Ginn was not very bright to which Ginn does not assign a specific date--are barred by the statute of limitations.

Arguably, Ginn's entire case should be dismissed on statute of limitations grounds because none of the incidents she describes as a basis for her allegations occurred after February 8, 2004.

**C. Ginn Fails to Present Admissible Evidence Sufficient to Support Her Sexual Harassment Hostile Work Environment Claim.**

**1. Ginn's allegations**

In the affidavit she filed in opposition to summary judgment, Ginn alleges that she heard jokes about Mexican, blacks, and blondes during her employment with DOT. CP 889. The Mexican joke she described in her affidavit ("I pick up the phone and I say yellow") was described as being told by a co-worker. CP 889. Although she states in her affidavit that she was offended by the joke, she does not state that she reported it to DOT management. CP 889. Ginn also alleged that she heard a number of "Black jokes" and "blonde jokes" at work from co-worker Don Fast. CP 889. Ginn states that she walked away when he told the jokes, but does

not state that she reported them to anyone in DOT management. CP 889. There is nothing in the jokes alleged by Ginn which relates to gender, and, in her deposition, Ginn explains that she walked away not because she was offended, but because she was afraid that a temporary employee named Goody (a “tattletale”) might report her to Brewster for being part of the crew laughing at Fast’s jokes. CP 918, p. 125. Because no timeframe is identified, it is impossible to determine whether Ginn heard the jokes between April 17, 2001, and February 8, 2004 (outside the statute of limitations) or between February 9, 2004, and October 13, 2005, when Ginn resigned from DOT.

Ginn also alleges in her affidavit that “she found pornography in a tool shed and in a truck.” CP 889. In her affidavit, she states that she complained to “supervisors” about pornography at a crew meeting. CP 889. It is unclear in Ginn’s opposition affidavit whether the supervisors she refers to are members of DOT management, or whether her complaint was made to her “lead tech” who had no power to hire, fire, or discipline members of the crew. CP 889. No timeframe is given in Ginn’s declaration for her discovery of pornography, and, consequently, a finder of fact has no ability to determine that Ginn found the pornography within the statute of limitations, and no ability to determine whether her report at a crew meeting actually ensured that the pornography (which was part of

the garbage gathered along roadsides by maintenance techs), was thrown out when it was found. CP 37, 485, 889, 919. At no point in her affidavit did Ginn allege that finding the pornography was anything other than accidental. CP 889. At no time did her co-workers view and comment on pornography in her presence. CP 889.

Finally, Ginn alleges that she was offended by a discussion of hot dogs at the pre-winter shift meeting during the winter of 2004-2005. CP 889. As Ginn describes the exchange, her Supervisor Tom Lenberg “said in a nasty voice to Matt Lewis: “Matt, you want a bite of my wiener?” Matt responded: “That’s as big as it is?” Ginn then states: “I recognized they were comparing hot dogs to penises.” CP 899. Ginn states that she was offended, but did not report the incident to DOT management. CP 899. Lenberg’s supervisor Mike Kukes, the Assistant Maintenance Superintendent; and Kukes’ supervisor, Tom Root, the Maintenance Superintendent, were also located at the Pasco DOT facility where Ginn worked. CP 927-946. As Ginn describes the incident, Lenberg and Lewis appear to be engaged in a private conversation, one which they did not ask Ginn to listen to or participate in. CP 899

The hot dog discussion is the sole harassment incident described in Ginn’s affidavit that is described as being clearly within the statute of limitations.

**2. Ginn's allegations are insufficient to establish sexual harassment under the relevant law**

In order to establish a claim for sexual harassment and hostile work environment against an employer, an employee must prove each of the following four elements: (a) that the complained language or conduct was unwelcome in the sense that the employee regarded the conduct as undesirable and offensive, and did not solicit or incite it; (b) the language or conduct was of a sexual nature, or the hostile or abusive conduct occurred because of the employee's gender; (c) the conduct or language complained of was so offensive or pervasive that it could reasonably be expected to alter the conditions of the plaintiff's employment; and (d) the harassment can be imputed to the employer. *Campbell v. State*, 129 Wn. App.10, 18-20, 118 P.3d 888 (2005) and *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 120 P.2d 579 (2005).

**a. Unwelcome conduct**

Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive. *Campbell*, 129 Wn. App. at 19. The line between welcome and unwelcome sexual conduct is often very difficult to discern. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106

S. Ct. 2399, 91 L.Ed.2d 49 (1986), the Supreme Court noted that the issue of “welcomeness” is not synonymous with the issue of being “voluntary.” Thus, the Court held that “[t]he correct inquiry is whether the respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” *Meritor*, 477 U.S. at 68.

Here, Ginn does not allege any unwelcome sexual conduct by any employee at DOT other than her co-worker Manning, but this conduct was punished by DOT management (with demotion) as soon as Ginn informed them that the conduct was unwelcome. Manning’s punished overtures are beyond the statute of limitations.

**b. Conduct or action because of gender**

Hostile work environment sexual harassment is not unlawful because it is sexual but because the recipient is being targeted because of his or her gender. The employee's gender must be the “motivating factor” for the conduct. *Campbell*, 129 Wn. App. at 19. *See also Payne v. Children’s Home Soc’y of Wash., Inc.*, 77 Wn. App. 507, 514, 892 P. 2d 1102 (1995). So long as the conduct is “because of sex,” it need not be “sexual in nature,” or “involve sexual advances, innuendo, or physical conduct to be actionable.” *Id.* at 513. It is insufficient that the employee merely suffers “embarrassment, humiliation or mental anguish arising from

non-discriminatory harassment.” *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 298, 57 P.3d 280 (2002). Instead, the plaintiff must prove that the conduct would not have occurred had the employee been of a different gender. *Schonauer v. DCR Entm’t, Inc.*, 79 Wn. App. 808, 820, 905 P.2d 392 (1995). When the plaintiff is a female, she must prove that the conduct was “based on animus toward women.” *Adams*, 114 Wn. App. at 298.

If Ginn is basing her sexual harassment claim on the conduct of Brewster (the demands he placed upon her while training her to drive a large truck) or Lenberg (his insistence that she become a “cheerleader” for her DOT crew), Ginn cannot establish that their alleged inappropriate treatment of Ginn was because she was a woman. The objectionable treatment attributed to Brewster and Lenberg was directed at both males and females. CP 64; see also, CP 1599, p. 32; CP 516-22.

**c. Affecting terms and conditions of employment**

It is insufficient that the employer’s conduct is merely offensive or based on simple vulgarity. *Adams*, 114 Wn. App. at 296; *Kahn v. Salerno*, 90 Wn. App. 110,118, 951 P.2d 321 (1998). Casual, isolated, or trivial incidents do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. *Payne*, 77 Wn. App. at

515 (quoting *Glasgow v. Georgia-Pacific*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985)). A hostile work environment exists “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L.Ed.2d 295 (1993). *See, e.g., Washington v. Boeing Co.*, 105 Wn. App. 1, 9-10, 19 P.3d 1041 (2000) (reference to plaintiff as “dear” and “sweet pea” may have been offensive, but was not sufficiently pervasive to create hostile work environment). The conduct “must be so extreme as to amount to a change in the terms and conditions of employment.”

Here, Ginn alleges that Lenberg’s use of the word “cheerleader” constitutes harassment. This comment by Lenberg was her Supervisor’s effort to have Ginn (and at least one of her male colleagues) demonstrate a positive attitude. Insofar as it may qualify as harassment, it was directed on one occasion toward Ginn.

Nothing Ginn experienced during her four and a half years of employment with DOT was so extreme as to amount to a change in the terms and conditions of employment.

**d. Imputable to employer**

An employer is liable for sexual harassment if the employee (1) authorized, knew, or should have known about a supervisor(s) or co-worker(s) harassment because it was open or obvious, and (2) failed to take reasonably prompt and adequate corrective action. *See Francom v. Costco Wholesale Co.*, 98 Wn. App. 845, 991 P.2d 1182 (2000) (holding that a mid-level manager was not acting as Costco's alter ego for purposes of imputing liability, but noting employer is liable if sexual harassment is brought to the attention of management.) This element can be met if an employer's conduct does not end the harassment complained of by the employee. *Id.* at 20.

Other than the shifting incident with Brewster and Manning's expressions of romantic interest (both of which were addressed by management to Ginn's satisfaction) and which are now beyond the limitations period, Ginn did not ever complain to DOT management that she was being sexually harassed and, consequently, cannot maintain a claim for sexual harassment.

**D. Ginn Fails to Present Admissible Evidence Sufficient to Support Her Discriminatory Treatment on the Basis of Gender Claim.**

**1. Ginn's Allegations**

Ginn alleged that she received discriminatory treatment on the basis of her gender because she believed she did not receive "light duty"

when she was injured as often as male maintenance technicians. Ginn Opening Brief, pp. 32-3. During her summary judgment argument, she expanded her discriminatory treatment argument, arguing that DOT failed to provide her with training on several large machines (where it was possible to earn premium pay) because of her gender. See, *infra*, at pp 23-7. Ginn relies only on her “light duty” argument in this appeal. Ginn Opening Brief, pp. 32-3.

**2. Ginn’s allegations are insufficient to establish discriminatory under the relevant law**

To establish a prima facie case of gender discrimination, a plaintiff must prove the following: (1) she is a member of a protected class; (2) she was qualified for the employment position in question or she performed substantially equal work; (3) an adverse employment decision resulted; and (4) the employer selected a replacement or promoted a person from outside the protected class. *Kuest v. Regent Assisted Living*, 111 Wn. App. 36, 43-44, 43 P.3d 23 (2002).

If Ginn establishes a prima facie case then the burden of production shifts to the employer to articulate a legitimate, non-discriminatory, reason. *Hill v. BCTI Income Fund-1*, 144 Wn.2d 172, 181-82, 23 P.3d 440(2001). Once the employer produces such a reason, the burden shifts back to the employee to show that the proffered reason

“was in fact pretext.” *Hill*, 144 Wn.2d at 182, quoting *McDonnell Douglas v. Green*, 411 U.S.792, 93 S. Ct. 1817, 36 L.Ed.2d 660 (1973). “If the plaintiff proves incapable of showing pretext, the defendant becomes entitled to judgment as a matter of law.” *Hill*, 144 Wn.2d at 182; and *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 753 P.2d 517 (1988).

**3. Ginn’s discriminatory treatment allegation fails as a matter of law.**

**a. There is no support for her allegation that she was discriminated against by DOT in receiving light duty at the times she was injured.**

Ginn admitted that she received light duty whenever she had a doctor’s note and the proper paperwork requesting light duty. CP 201-03. On one occasion, Ginn acknowledged there was some confusion surrounding her eligibility for light duty because she did not bring in the proper paperwork, but once she provided the right form filled out by her doctor, she received light duty. CP 201-03. Ginn asserted that the failure to give her light duty supported both her gender discrimination claim and her failure to accommodate claim. In addressing this argument, Judge Yule found that: “There’s no indication to the Court of disparate treatment or failure to accommodate her disability when – and that was properly

documented to the employer. Finding no issue of fact, the Court will grant the Motion for Summary Judgment with respect to that.” CP 207.

**b. There is no support for her allegation that she was discriminated against by DOT in training on heavy equipment.**

Ms. Ginn also claims that she was not trained to operate the grader and the dozer because of her gender. CP 193. DOT has an objective bid selection system to determine which employees will receive training to operate equipment. The bid system allows all employees who have achieved a classification of Maintenance Tech II or higher to bid for the training opportunity. CP 126-30. Maintenance Tech III’s are given priority because of their rank. CP 126-30. The DOT trains a set number of individuals to operate certain pieces of equipment depending on the need or frequency of the use for that piece of equipment. CP 126-30. When an opportunity to train on equipment becomes available at the DOT, it is posted for any and all qualified employees to bid. CP 126-30.

Employees who are bidding on the equipment training fill out an SCR Equipment Training Rating Worksheet. CP 133. An objective scoring system is used, and the employee with the highest score is selected for the training opportunity. CP 135. The system also provides for selection factors in the event of a tied score. CP 135.

Ginn became eligible to receive training on equipment when she became a Maintenance Tech II on April 16, 2003. CP 127. During her eligibility, there were two postings for equipment training opportunities, one in the fall of 2003 and one in the summer of 2004. CP 137, 139. All equipment training was provided through the posting and objective bid system during Ginn's eligibility. CP 127-8. The bid rating score was based upon seniority, experience, prior training with equipment and demonstrated ability operating equipment. CP 135. Each employee bidding for the training fills out and calculates the rating score. CP 128.

In 2003, Ginn bid to be trained on the vactor, the grader, the broom and the roller. CP 128. Ginn successfully was the highest scoring bidder and received training on the broom and the roller, but she was not the highest scoring bidder on the other pieces of equipment. CP 141-50. Ms. Ginn had the lowest bid score on the vactor truck. CP 141-46. Ms. Ginn and Bobbie Sanders both had rating scores of 9 on the grader in comparison to Troy Riblett who won the grader training bid with a score of 19. CP 148-50. The results of the bidding were based solely upon the rating scores. CP 152.

Ginn incorrectly testified that only one employee was trained to operate the grader during her employment, and that employee was Jeff Bruce. CP 194-5. Ginn's assumption that Bruce was selected for training

on the grader was based upon hearsay statements that she claims were made by Mark Brewster. CP 194-5. However, Jeff Bruce did not bid and was not selected for training on the grader. CP 128-9; 180-3.

Ginn does not have any direct information regarding Jeff Bruce being trained, and she testified that she did not know why he was selected for training. CP 194-5. Jeff Bruce was never selected for training on the grader during Ms. Ginn's employment. CP 128-9; 180-3. On one occasion in approximately 2002, Mr. Bruce asked for and received a demonstration of the grader to assist him in deciding whether the grader was a piece of equipment he would want to be trained on in the future. CP 180-3. Mark Brewster voluntarily demonstrated how the equipment worked while the two were on a half-hour lunch break. CP 180-3. This demonstration does not count as either training or experience, and it would not affect the objective bidding process. CP 180-3. This type of demonstration is common when an employee has an interest in operating a piece of equipment, but would like to know more about it before bidding for the training. CP 180-3.

Training on the grader was up for bid during Ginn's employment. CP 128-9. Jeff Bruce did not bid for the training. CP 128-9. Ginn did bid for the grader training, but Troy Riblett had a higher SCR score and was therefore the successful bidder who received the training. CP 128. Jeff

Bruce was not trained to operate the grader and was not authorized, approved, or paid to operate the grader for the DOT during Ms. Ginn's employment. CP 155-6.

Ginn also asserts that during her employment Ryan Miller was trained to operate the dozer. CP 195-7. There is no indication in DOT records that Ginn ever bid to be trained on the dozer. CP 129. Ginn does not know why Ryan Miller was selected for training on the dozer. CP 195-7. She does acknowledge that Ryan Miller had more seniority than she did. CP 197. In addition, Ryan Miller had many years of experience operating that equipment prior to joining the DOT. CP 148-50, 167-72. Even if Ms. Ginn had bid to be trained on the Dozer, Ryan Miller's seniority and prior experience would have given him a much higher SCR rating score which would qualify him for the training over Ginn. CP 129-30.

The training selection is based upon the rating qualifications, and nothing else. CP 126-30. There is no discretion in the system. Furthermore, Ginn admits that she has no factual information that would indicate the selection for the training opportunities had anything to do with gender. CP 196-7.<sup>10</sup>

---

Q. Do you have any factual information that the decision to train Ryan Miller on the dozer had anything to

**4. Ginn Fails to Present Admissible Evidence Sufficient to Support Her Retaliation Claim.**

**a. Ginn's Allegations**

Ginn alleges that she was retaliated against by DOT management for complaining to management. Ginn Opening Brief, pp. 33-4. In particular she alleges that she was retaliated against: (1) “when she complained about Mark Brewster’s sexually offensive remarks;”<sup>11</sup> and (2) when she was required to ride in a truck with Barry Manning after he had been demoted for making romantic advances toward her, despite her acknowledgement that nothing happened during that trip (CP 893, 906-7). Ginn Opening Brief, pp. 33-4. Inexplicably, Ginn states that when “Brewster confronted Ginn in his role as ‘Fucking Brewster’” and when he ordered her “to refrain from any further reports to higher management” (Ginn Opening Brief, p. 34), those were both examples of retaliation, although it has been clear throughout this case that, as a “lead tech,”

---

do with gender?

A. No, on that I don't.

Q. Do you have any factual information that the decision to train Jeff Bruce on the grader had anything to do with gender?

A. No, I don't. As factual proof, no.

Q. Just any facts at all?

A. No.

<sup>11</sup> This allegation is startling because there is no evidence that Brewster ever made sexually offensive remarks to Ginn and the only Brewster behavior / remarks she ever claims to have reported were related to her truck training. CP 888, 891-2. Management would have had no ability to retaliate against Ginn for things she never claimed to have done.

Brewster had no ability to punish, fire, or promote Ginn. CP 538, 841. He was not a DOT manager and consequently this “retaliation” cannot be attributed to DOT.

**b. Ginn’s allegations are insufficient to establish retaliation under the relevant law**

An employee may bring a retaliation claim against his or her employer. To establish a claim for retaliation, an employee must prove that: “(1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee’s activity and the employer’s adverse action.” *Estevez*, 129 Wn. App. at 797.

**(1) Protected Activity**

In determining whether an employee’s activity is protected, the court will “balance the setting in which the activity arose and the interests and motives of the employer and employee.” *Kahn*, 90 Wn. App. at 130 (citing *Coville v. Cobarc Servs. Inc.*, 73 Wn. App. 433, 439, 869 P.2d 1103 (1994)). An employee’s decision to report a hostile work environment is a statutorily protected activity. *Campbell*, 129 Wn. App. at 22. When the employee’s activity involves a complaint or action based on discrimination, RCW 49.60.210 provides that it is an unfair practice for an employer to “discharge, expel, or otherwise discriminate against any

person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding.” RCW 49.60.210. The protected activity must be one that is recognized under RCW 49.60, and the plaintiff must prove that he or she reasonably believed that the employer’s conduct was unlawful discrimination. *Coville*, 73 Wn. App. at 440; *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000).

Here, Ginn’s report concerning Manning and possibly the report she made against Brewster regarding her truck training were protected activities. However, these situations occurred long before February 8, 2004, and are far beyond the statute of limitations. Additionally, Ginn cites no DOT retaliation based upon these incidents. She states—without evidence—that DOT retaliated against her simply for complaining about legitimate concerns, even though, in each instance, she testified that she was pleased with DOT’s resolution of each of her complaints.

## **(2) Adverse Employment Action**

Adverse employment action includes “a change in employment conditions that is more than an ‘inconvenience or alteration of job responsibilities,’ such as reducing an employee’s workload and pay;” it also includes a “demotion or adverse transfer.” *Campbell*, 129 Wn. App. at 22 (quoting *Kirby v. City of Tacoma*, 124 Wn. App 454, 465, 98 P.3d

827 (2004); *Robel v. Roundup*, 148 Wn.2d 35, 74 n.24, 59 P.3d 611 (2002). The employer's adverse activity must be such that it *could* be a violation of the law. *Kahn*, 90 Wn. App. at 130 (emphasis added). Here, there was no adverse employment action taken against Ginn. Her workload and pay were not altered nor was she demoted or terminated. Ginn left her employment with DOT, of her own volition, to seek alternative employment opportunities after she was having trouble with carpal tunnel.

### (3) Causal Link

The causal link between the employer's adverse action and the employee's activity is that the employee's activity must be "a substantial factor" in the employer's adverse action. *Kahn*, 90 Wn. App. at 130. An employee can recover only if he or she proves that a retaliatory motive was a substantial or determining factor in the employer's conduct. *Allison v. Housing Authority of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991). *See also Estevez*, 129 Wn. App. at 800. When a court inquires as to retaliatory motive, it will take into account the "proximity in time between the adverse action and the protected activity, along with satisfactory work performance." *Campbell*, 129 Wn. App. at 23. Here, there was no protected activity or adverse employment action taken against Ginn so there was no causal link.

In her complaint, Ginn claimed she was retaliated against for reporting discrimination and harassment. The incidents that Ginn reported were the 2001 shifting incident with Mark Brewster, the 2002 traffic control incident with Shirley Bumpaous, the 2003 Barry Manning incident, and the 2004 premium pay issue concerning the vactor truck that resulted in Ginn contacting the Secretary of Transportation.

Ginn's retaliation claim has no foundation. There is no evidence that Ginn was retaliated against for reporting these incidents. First, Ginn testified she was satisfied with the response to the Manning and Brewster incident and these are beyond the limitations period. Second, management responded to the Bumpaous incident but Ginn did not think the response was adequate. She wanted her co-plaintiff to be fired. Finally, Ginn did not like being given corrective action after contacting the Secretary of Transportation but this does not constitute retaliation for any protected activity Ginn took in the course of her employment with DOT.

No evidence supports her retaliation claim.

**5. Ginn Fails to Present Admissible Evidence Sufficient to Support Her Constructive Discharge Claim.**

**a. Ginn's Allegations**

Ginn states no facts on which this court might base a claim for constructive discharge. Ginn Opening Brief, pp. 37-39. Although Ginn

generally states the Washington law relevant to a constructive discharge claim, the only facts she presents are those concerning Roy Gilliam's decision to quit his employment with DOT. Ginn Opening Brief, p. 38.

Whether through inadvertence, or in recognition that Ms. Ginn has no viable claim for constructive discharge, her opening brief gives this court no evidence upon which to rule in her favor on this claim.

**b. Ginn's allegations are insufficient to establish constructive discharge under the relevant law**

An employee may bring a tort claim for wrongful discharge based on a violation of public policy. *See Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005). In order to establish constructive discharge—rather than express wrongful discharge—as a form of wrongful termination, a plaintiff must prove that his or her resignation was the result of conditions created by the employer that were so intolerable that the employee was forced to resign. *Id.* The plaintiff has the burden of proving constructive discharge because the law presumes that a resignation is voluntary. *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035 (1996).

The plaintiff must establish that:

- (1) The employer deliberately made the working conditions intolerable for the employee;
- (2) A reasonable person would be forced to resign;

- (3) The employee resigned solely because of the intolerable conditions; and
- (4) The employee suffered damages.

*Campbell*, 129 Wn. App. at 23. Courts will determine whether a reasonable person would be forced to resign based on an objective standard; the conditions must be so “difficult or unpleasant that a reasonable person in the same shoes would have felt compelled to resign.” *Wash. v. Boeing*, 105 Wn. App. at 14 (citing *Sneed*, 80 Wn. App. at 849). An employee’s frustration, and even receipts of direct or indirect negative remarks, is not enough; on the other hand, the conditions can be shown to be intolerable if there are aggravated circumstances or a continuous pattern of discriminatory treatment. *Wash. v. Boeing*, 105 Wn. App. at 10. A voluntary resignation “occurs when an employee abandons the employment because of a desire to leave.” *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 638, 700 P.2d 338 (1985). A resignation will still be voluntary when an employee resigns because he or she is dissatisfied with the working conditions. *Binkley v. Tacoma*, 114 Wn.2d 373, 388-89, 787 P.2d 1366 (1990). In contrast, an involuntary resignation will occur only if the resignation was prompted by the

employer's deliberate oppressive actions. *Barrett*, 40 Wn. App. at 638; *Korslund*, 156 Wn.2d at 179.

Furthermore, if a claim of constructive discharge is based on public policy, a plaintiff will not be successful if an adequate alternative means exists to promote the public policy upon which the wrongful discharge claim is based. *Korslund*, 156 Wn.2d at 181 (denying plaintiffs' tort claim of constructive discharge because public policy against retaliation—for reporting safety violations, mismanagement and fraud—was protected by the federal Energy Reorganization Act).

In this case, Ginn presents no evidence to contradict the established record.

When Ginn resigned her employment she had problems with carpal tunnel, and because of that she reported that she decided to pursue another line of work. Her resignation letter stated:

I would like to take this moment to thank you for the opportunity that I have had working for the Department of Transportation. I have learned a lot of valuable tools and worked with many wonderful people.

I have come to a decision that I need to prepare for my future and accomplish goals that I have set for myself. I do not believe that staying with the department would be a benefit to obtaining these goals. I am giving you my notice as my last day will be Thursday, October 13, 2005.

CP 946.

It was undisputed that, at the time Ginn resigned, she had no pending claims for gender discrimination or hostile work environment. CP 195. Ginn never asserted during her employment that she was denied training opportunities because of her gender. CP 195

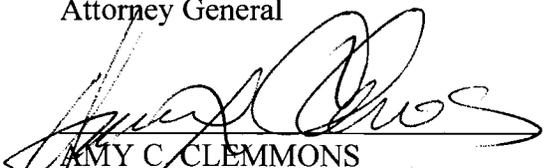
Ginn cannot establish constructive discharge. There were no deliberate oppressive actions by DOT cited by Ginn for her resignation. Ginn voluntarily resigned because she wanted to, "prepare for my future and accomplish goals." CP 946. There is no factual or legal basis for her constructive discharge claim.

#### V. CONCLUSION

DOT respectfully requests that this court affirm the trial court's dismissal of Ms. Ginn's claims as a matter of law.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of March, 2011.

ROBERT M. MCKENNA  
Attorney General



AMY C. CLEMMONS  
Assistant Attorney General  
WSBA #22997  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

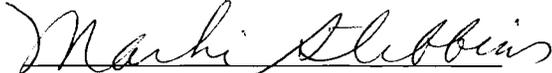
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding was hand delivered and filed at the following address:

Court of Appeals of Washington, Division III  
500 North Cedar Street  
Spokane, Washington 99201-2159

And that a copy of the same was served by First Class Mail on counsel for Plaintiff/Appellants at the following address:

George Fearing  
Leavy, Schultz, Davis & Fearing, P.S.  
2415 West Falls Avenue  
Kennewick, WA 99336

DATED this 17 day of March, 2011 at Spokane, Washington.

  
MARKI STEBBINS