

COA 29338-6-111

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

LEANN LUMPER,
Appellant

v.

EDMO DISTRIBUTORS, INCORPORATED,
Respondent

BRIEF OF APPELLANT

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Attorney for Appellant

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I. INTRODUCTION

Appellant, Leann Lumper was employed with respondent Edmo Distributors, Inc., from April 27, 2004 through April 25, 2008. Edmo is a world-wide distributor of aircraft avionic test equipment, installation and pilot supplies. Ms. Lumper has dyslexia, and advised Edmo of this condition at the beginning of the employment relationship.

From about 2006 through the end of her employment Ms. Lumper was harassed by her co-workers because of her dyslexia. She was also subjected to a gender based hostile work environment. The harassment occurred in the presence of several Edmo managers. These managers took no corrective action to stop it.

Finally, on March 28, 2008 Ms. Lumper met with Edmo CFO, Bob Meeker and reported the harassment. Edmo management investigated but took little or no corrective action. The harassment continued. On Friday April 25, 2008 Ms. Lumper became emotionally distraught because of the ongoing harassment and told Mr. Meeker she could no longer take it. She left work early that afternoon.

The following Monday, Ms. Lumper reported to work at her regularly scheduled time. Edmo management summoned her

and told her they believed she had quit or resigned the previous Friday. Ms. Lumper responded that she had not quit, but rather had to leave early because she could not emotionally handle the ongoing harassment. Edmo then terminated her employment relationship.

Ms. Lumper filed this lawsuit on May 22, 2009 alleging multiple causes of action, including gender and disability discrimination under the Washington Law Against Discrimination (WLAD), RCW 49.60. On August 10, 2010 the trial court granted defendant's motion for summary judgment dismissing all of Lumper's claims. This appeal followed.

The record demonstrates a myriad of factual questions concerning whether Ms. Lumper was subjected to a gender and/or disability based hostile work environment. The trial court erred in dismissing plaintiff's claims of gender and disability discrimination premised on theories of hostile work environment. The order granting defendant's motion for summary judgment should be reversed, and the case should be remanded for trial on the merits.

II. ASSIGNMENT OF ERROR

No. 1. The trial court erred in dismissing appellant's claim of gender based hostile work environment.

No. 2. The trial court erred in dismissing appellant's claim of disability based hostile work environment.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

No. 1. Whether the record demonstrates genuine issues of material fact concerning whether appellant was subjected to a gender based hostile work environment?

No. 2. Whether the record demonstrates genuine issues of material fact concerning whether appellant was subjected to a disability based hostile work environment?

III. STATEMENT OF THE CASE

Plaintiff Leann Lumper was employed with defendant Edmo Distributors Incorporated from April 27, 2004 through April 25, 2008. (CP 61) Edmo Distributors is a world-wide distributor of aircraft avionics, avionic test equipment, and installation and pilot supplies. Ms. Lumper was employed as an order desk salesperson. (Id) She has dyslexia. She advised Edmo of this condition at the beginning of the employment relationship. (CP 334)

The following were employed as officers, managers and supervisors at Edmo:

Kirk Leffingwell:	Operations Manager
Ted Augustine:	Customer Service Manager
Nick Fisher:	Customer Service Manager
Fred Lopez:	Director of Operations
Ken Sidles:	VP of Operations
Bob Meeker:	CFO/HR Manager
Jeff Christensen:	President
Jason Hendrickson:	Manager

(CP 333-334) As more fully discussed below, the record demonstrates that Ms. Lumper was harassed because of her gender and disability in the presence of several of these management personnel. Indeed several participated in the work place harassment at various times.

Ms. Lumper testified that she began to be subjected to disability and gender based harassment in the spring of 2006. (CP 146) She recalled that the harassment began when Edmo hired her co-worker, Shawn Moon. (Id) She identified co-workers Shawn Moon, Nick Fisher and Cory Krum as the main harassers. When asked to give examples of the conduct of her co-workers that constituted harassment Ms. Lumper testified:

Made fun of my disability. They cussed at me, called me stupid, called me a fucking bitch, saying I can't read turning the ringer up really loud on my phone,..., hitting me in the back of the head with a football, everything I touch I fuck up.

(CP 146) She testified that this conduct occurred in the presence of managers Jason Hendrickson, Ted Augustine and Chuck Wright.

(Id).

In her pre trial deposition Ms. Lumper testified about the sexual harassment to which she was subjected:

Q. I'd asked you what the basis for your claim for sexual harassment was, and you said it was comments made by Nick Fisher, Ted Augustine, and Jason Hendrickson. I'm asking if there's anything else that you believe was sexual harassment while you worked there.

A. E-mails. Also pornographic websites Kirk Leffingwell had on his monitor, and also Ted Augustine and Nick Fisher and Corey Krum.

Q. Anything else?

A. E-mails passed between all the guys that I just named, Nick Fisher, Ted Augustine, Jason Hendrickson, Kirk Leffingwell.

Q. Anything else?

A. Not at this time I don't—it's all up there, but I can't remember everything right now. I'm trying.

Q. All up where?

A. It's all up here in my head. I'm sorry. I'm trying to remember.

Q. Okay, Let's talk about the comments first, and let's begin with Nick Fisher. Tell me every comment that Nick Fisher made that you allege was somehow sexual harassment.

A. My breasts.

Q. Tell me the comment specifically.

A. What size they were, how big they were. I didn't need them any bigger. If I would bend over to get something out of the fax machine like put paper in the fax machine because it was empty he would make a comment about my bottom, that it was nice. Another comment would be about the pictures on the website that he was on break.com about the size of women's body parts, about the size of his genital area, and also Jason was standing there when that happened, too.

Q. Jason was standing there for each of these.

A. No. Jason was standing when they were talking about their penis size. It was right next to my cubicle. They were looking at me when they said it.

(CP 252)

Ms. Lumper discussed harassing e-mails, pornographic websites, comments from co-workers about the size of her breasts, and her bottom, comments by co-workers about their genitalia, and other workplace conduct clearly offensive to any reasonable woman. She testified that managers Kirk Leffingwell, Ted Augustine and Jason Hendrickson participated in some of this conduct. She testified that manager Jason Hendrickson was present when her male co-workers discussed their genitalia. (CP 252).

Defense counsel asked Ms. Lumper to identify the dates and times when this conduct occurred. She testified that she could

not remember specific dates and times, but this conduct “was an ongoing thing from 2006 all the way up to 2008”. (CP 252)

Defense counsel then asked for other incidents of sexually harassing conduct. Ms. Lumper testified:

Q. Okay. What else do you want to tell me today for the first time about your sexual harassment claim?

A. About someday else, is that what you are asking?

Q. Sure. Let’s go on to the next one.

A. Okay. Kirk Leffingwell.

Q. Okay.

A. I went over to his desk for some help. He had a pornographic website up, and he was looking at women and men having oral sex, intercourse, what not.

Q. What was the site?

A. I couldn’t tell you. I have no idea. I grabbed my paper and went back to my desk.

Q. Did you say anything to him?

A. No.

Q. Did you say anything to management?

A. Nope.

Q. Okay.

A. Sorry, no.

Q. What else?

A. Ted Augustine had many different pictures of women in Santa outfits with nothing on below. They were wearing hats only. There was an e-mail sent around the whole, and all the cubicles, all the guys about a woman and a bike, and the woman was behind the bike, this motorcycle, red motorcycle, Harley Davidson, and the mirrors would move, and she was naked, and she would touch herself, and then the bike would spit this foamy stuff all over.

And that went from Ted to Kirk to me, and then I sent it back to them because I didn't want to look at it.

Q. You found it offensive?

A. Well, yeah, yes.

Q. So seeing people in the nude at the workplace is offensive to you?

A. Yes.

Q. Was it upsetting to you?

A. Yes.

(CP 253)

Defense counsel criticized Ms. Lumper for not reporting this conduct to management. This criticism was unfounded because management personnel, including Kirk Leffingwell, Ted Augustine, and Jason Hendrickson participated in and witnessed the harassment. It was further unfounded because Edmo's employee handbook instructed employees to report sexual

harassment to their supervisors. (CP 83) The record demonstrates that Ms. Lumper did so, and her supervisors witnessed and participated in the harassment. However, when pressed with respect to why she did not report this conduct to management, Ms.

Lumper testified:

Q. Okay. But again, you didn't bother to report it to anybody in management?

A. I was told from Ted Augustine—

Q. No, I need you to answer my questions.

A. Sorry. Yes.

Q. Yes, you did not report it to anyone in management?

A. Yes.

Q. Okay. All right. Anything else?

A. I was told by upper management or Jason Hendrickson, Ted Augustine, Kirk Leffingwell if I went up to upper and complained about my problems of having problems with these kids or adults that were bugging me, that I would be fired on the spot if I went to Tim Gump or Fred Lopez or Jeff Christensen.

(CP253)

The evidence also demonstrates that Ms. Lumper was harassed because of her dyslexia. She informed Edmo that she had dyslexia at the time of her initial employment interview. (CP 334). She reminded the company of this in an e-mail to her supervisor,

Nick Fisher, dated December 19, 2007.(CP 334, 336) She testified about being laughed at and mocked because of her disability:

Q. Okay. What else, anything else?

A. There was a time where Shawn Moon was sitting at his desk, and Jason Hendrickson was beside him standing there talking, and I was at Ted Augustine's desk talking to Ted, and Shawn Moon popped up and says, you know, you need to change your way you write things in there because it's all messed up because you can't spell very well.

And then Jason says, hah, and starts laughing about it, thought it was real funny.

Q. What was funny?

A. That I can't spell.

Q. Do you have problems spelling?

A. Yes.

Q. That leads to mistakes?

A. Yes.

Q. Was that the extent of this conversation?

A. That I can remember, yes.

Q. Okay. Anything else?

A. Not right now.

Q. Are you alleging that anybody made fun of you or laughed about you?

A. Yes.

Q. Give me the dates.

A. I don't have the dates.

Q. Okay. How many times?

A. Pretty often. It happened from '06 to '08.

Q. Give me every instance.

A. Nick Fisher said that I was stupid, and that I fuck everything up that I touch.

Q. Who was present?

A. Nick Fisher was standing there. I was sitting at my desk, and then Corey Krum was standing above his cubicle and Shawn Moon, and they all three laughed about it.

(CP 256)

Ms. Lumper described other instances of harassing conduct. On several occasions co-workers threw a soft football at her and hit her in the back of the head. (CP 256) Her desk chair was moved around. Co-workers put tape around her chair and put tacks on her seat. (CP 257). Again, much of this conduct occurred in the presence of Edmo management personnel. Management personnel actively participated in some of it. Ms. Lumper testified the conduct was ongoing from 2006 through the spring of 2008.

(CP 252, 256)

Ms. Lumper testified that she complained about this conduct "repetitively". (CP 147) She complained to Jason Hendrickson, Ted Augustine, Kirk Leffingwell, Bob Meeker, Jeff

Christensen and Ken Sidles. She complained to Mr. Hendrickson “a lot in the beginning”. Then she told Mr. Armstrong. Id. No corrective action was taken and the conduct continued.

On March 28, 2008 Ms. Lumper met with Edmo CFO Bob Meeker and discussed the harassment with him. (CP 140-141) Several days later she met with Meeker and Edmo President Jeff Christensen. For some time following their meeting, the situation improved a little. (CP 261) However, it escalated again and on April 25, 2008 reached the point where Ms. Lumper had to leave early. She explained:

Q. Okay. So on Friday, April 25th what happened?

A. On the 25th? They were—let’s see, what date is Friday? Okay. Friday the 25th one of the managers were not in the building, and they were talked to about the harassment. I’m not sure who they are, but most of the people I’m understanding. But as soon as the managers were not in the office the harassment got really bad, name calling, saying I’m not going to put up with this crap any longer from Nick Fisher looking right at me, directing the comment to me saying to everybody in the office that I’m not going to be upset anymore. And I just—I’d had enough that day of the harassment, so I got up, went to Bob Meeker’s office and told him in the doorway that I was leaving for the day, and that I was tired of the harassment. I couldn’t handle it anymore. And he turned around and looked at me and says, “Well, what do you want me to do about it? What do you want me to say?”

Q. Did he tell you not to leave?

A. He didn't say anything. He just looked at me, sitting there in his chair with his back towards me, but looking at me kind of over his shoulder.

Q. Did you intend to quit on Friday, April 25th when you left early?

A. No, I did not. All I wanted was the problem resolved.

Q. Have you left early on other occasions from work?

A. Yes, I have.

Q. You returned to work the next day after leaving early?

A. Yes.

(CP 149-150)

Ms. Lumper reported to work the following Monday, April 28, 2008, at her regularly scheduled time. (CP 336) Early in the morning Edmo management summoned her and told her they had "accepted her resignation" the previous Friday. Edmo terminated the employment relationship. (CP 336, 300-305)

On May 22, 2009 plaintiff filed this lawsuit in Spokane County Superior Court alleging multiple claims of employment discrimination, and wrongful termination. (CP 1-12) Defendant Edmo moved for summary judgment seeking dismissal of all

plaintiff's claims on March 26, 2010. (CP 23-60) On August 10, 2010 Spokane County Superior Court Judge Annette S. Plese filed a written opinion granting defendant's motion and dismissed all of plaintiff's claims on summary judgment. (CP 405-415) This appeal timely followed. (CP 416-428).

IV. SUMMARY OF ARGUMENT

The trial court dismissed appellant's employment discrimination claim on summary judgment. This was in error. Summary judgment should rarely be granted in employment discrimination cases. In the instant case the evidence in the record demonstrates genuine issues of material fact with respect to (1) whether Ms. Lumper was subjected to a gender based hostile work environment, and (2) whether she was subjected to a disability based hostile work environment. These factual questions preclude summary judgment. The trial court decision dismissing plaintiff's disability and gender discrimination claims on summary judgment should be reversed, and this case remanded for trial on the merits.

V. ARGUMENT

1. Standard of Review.

The trial court dismissed appellant's employment discrimination claims on summary judgment. When reviewing an

order of summary judgment the appellate court engages in the same inquiry as the trial court. *Honey v. Davis*, 131 Wn. 2d 212, 217, 937 P.2d 1052 (1997). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hash v. Children's Memorial Hospital*, 110 Wn. 2d 912, 915, 757 P.2d 507 (1988). A material fact is one upon which the outcome of the litigation depends. *Greater Harbor 2000 v. City of Seattle*, 132 Wn. 2d 267, 279, 937 P.2d 1082 (1997). The burden is on the moving party to establish its right to judgment as a matter of law, and facts and reasonable inferences from the facts must be considered in the light most favorable to the non moving party. *Kahn v. Solerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). If reasonable minds might reach different conclusions with respect to the evidence and the facts, the motion should be denied. *Bernethy v. Walt Failor's Inc.*, 97 Wn. 2d 929, 653, P.2d 280 (1982); *Sangster v. Albertsons, Inc.*, 99 Wn. App. 156, 163, 991 P.2d 674 (2000).

2. The record demonstrates genuine issues of material fact concerning whether Ms. Lumper was subjected to a gender based hostile work environment.

The Washington Law against Discrimination, RCW 49.60, protects employees from sexual harassment. *Sangster v. Albertsons, Inc.*, 99 Wn. App. 156, 161, 991 P.2d 674 (2000). The statute provides in relevant part: “(i)t is an unfair practice for any employer...to discriminate against any person in compensation or in other terms or conditions of employment because of...sex...” Sexual harassment claims are characterized as either “quid pro quo harassment” or “hostile work environment” claims. *De Water v. State*, 130 Wn. 2d. 128, 134, 921 P.2d 1059 (1996) (quoting *Payne v. Childrens Home Society*, 77 Wn. App. 507, 511, n.2, 892 P.2d 1102 (1999)). The latter type of claim is at issue here.

To establish a prima face case for a hostile work environment claim, the employee must demonstrate that there was (1) offensive, unwelcome contact that (2) occurred because of sex or gender (3) affected the terms or conditions of employment, and (4) can be imputed to the employer. The evidence in the record supports findings by the trier of fact that each of these elements are present in this case.

First, the evidence is more than sufficient to support a finding that Ms. Lumper was subjected to offensive, unwelcome conduct or contact by her co-workers and supervisors. She testified that she was exposed to pornographic websites on the computer

monitors of Kirk Leffingwell, Ted Augustine, Nick Fisher and Corey Krum. Mr. Leffingwell was the operations manager. Mr. Augustine was the customer service manager. Mr. Fisher was the customer service trainer, and Ms. Lumper's supervisor. Ms. Lumper testified that Fisher commented on her breast size, and her bottom. He commented about the size of womens' body parts, and the size of his own genital area. She testified that this conduct and these comments occurred regularly over a two year period. She found them offensive. This evidence is more than sufficient to support a factual finding that Ms. Lumper was subjected to offensive, unwelcome contact. See, *Kahn v. Salerno*, 90 Wn. App. 110, 119, 951 P.2d 321 (1998) (Conduct is unwelcome if the employee does not solicit or invite it, and regards it as undesirable or offensive).

The record also supports a finding that the offensive conduct occurred because of Ms. Lumper's female gender. To prove that conduct occurred because of sex or gender, the plaintiff must prove she would not have been singled out and caused to suffer the harassment had she been male. *Sangster*, 99 Wn. App., at 161; *Kahn*, 90 Wn. App., at 122. Ms. Lumper testified that she was called a "fucking bitch" by her male co-workers. Nick Fisher commented to her on her bottom and her breast size. Beyond this

she was exposed to pornographic websites on the computer monitors of managers and supervisors. The Washington court has found conduct much more benign than this sufficient to demonstrate a triable issue of fact concerning whether the conduct was because of sex or gender. See, *Sangster*, 99 Wn. App. At 162; *Kahn*, 90 Wn. App., at 122-125. Under *Sangster* and *Kahn*, the evidence in the record is more than sufficient to demonstrate a triable issue of fact concerning whether Ms. Lumper was subjected to sexually offensive conduct because of her gender.

The evidence is sufficient to support a factual finding that the gender based hostile conduct affected the terms and conditions of Mr. Lumper's employment. Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms of employment to a sufficiently significant degree to violate the law. The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. *Glasgow v. Georgia Pacific*, 103 Wn. 2d 401, 406, 693 P.2d 708 (1985). Whether the harassment is such that it creates an abusive working environment may be determined by examining the totality of the circumstances. *Sangster*, 99 Wn. App. at 163; citing *Payne v. Childrens Home Society*, 77 Wn. App. 507, 515, 892 P.2d 1102 (1995). Courts consider the "frequency of the

discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Sangster*, at 163, quoting *Harris v. Forklift Systems, Inc.*, 510 US 17, 23, 114 S.Ct. 367, 126 L.Ed 2d 295 (1993). Whether harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment is a factual question for jury determination. *Sangster*, 99 Wn. App. at 162-163.

Ms. Lumper testified that she was subjected to pornographic websites on managers' and supervisors' computer screens. She testified that co-workers called her a "fucking bitch". She testified that her supervisor commented on her breast size and bottom. She testified she was subjected to this kind of conduct almost on a daily basis from 2006 through 2008.

In *Sangster*, the plaintiff worked in a grocery store deli department for several years. The store director under whom she worked referred to her as "honey" "sweetie" and "little girl". He commented on her clothing and breast size, and made a number of other sexually suggestive comments. The plaintiff sued Albertson's alleging that she had been subjected to a discriminatory hostile work environment. The trial court dismissed the plaintiff's claim

on summary judgment, ruling that the conduct at issue was not sufficiently pervasive to alter the terms of employment and create an abusive working environment. The court of appeals reversed. First, the court of appeals summarized the conduct at issue, focusing on a number of gender based, inappropriate comments by the store director. Then the court rejected several of the comments at issue based on its determination that they were not in fact gender based. The court held that the evidence was sufficient to demonstrate a triable issue of fact concerning whether the conduct and comments created an abusive working environment:

Albertson's argues that the alleged sexual harassment was only part of Ms. Sangster's discontent with her job. Further, Albertson's minimized the sexual harassment, characterizing it as casual or trivial. Albertson's maintains that it is not clear that the harassment, without Ms. Sangster's other problems at the store, was sufficiently pervasive so as to alter the conditions of her employment and create an abusive working environment. However, the evidence is sufficient to create an issue of fact because reasonable persons could reach different conclusions as to whether the harassment altered the conditions of employment. Ms. Sangster has established the third element of her prima facie case.

99 Wn. App., at 163

In the instant case plaintiff Lumper was exposed to pornographic websites on her managers' and co-workers' computer monitors. Her supervisor commented on her breasts and bottom and made frequent comments about his own genitalia. Plaintiff testified this type of conduct occurred almost daily for a two year period from 2006 to 2008. On at least one occasion a co-worker called her a "fucking bitch". This evidence is more than sufficient to demonstrate a triable issue of fact concerning whether the gender based harassment to which Ms. Lumper was subjected altered the terms and conditions of employment. *Kahn v. Salerno*, 90 Wn. App. 110, 125-127, 951 P. 2d 321 (1998). (Evidence of ongoing but sporadic harassment over three year period sufficient to demonstrate factual question concerning whether harassment altered the terms and conditions of employment.)

Finally, the evidence in the record supports a factual finding that the gender based harassment should be imputed to *Edmo*. Under the Washington court's decision in *Glasgow v. Georgia Pacific Corp.*, 103 Wn. 2d 401, 407 (1985), to establish employer liability:

The employee must prove that the conduct is imputable to the employer. Conduct is imputable to the employer if it is the conduct of an owner, manager, partner, or corporate officer, or, alternatively if

it is the conduct of a supervisor which the employer authorized, knew of, or should have known of, and the employer failed to take reasonably prompt and adequate corrective action.

Since *Glasgow*, the Washington courts appear to have adopted the analysis of the United States Supreme Court in *Burlington Industries v. Eller*, 524 US 742, 118 S. Ct. 2257, 141 L.Ed 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 US 775, 118 S. Ct. 2275, 141 L.Ed 2d 662 (1998). See, *Henningsen v. WorldCom Inc.*, 102 Wn. App. 828, 9 P.3d 948 (2000); *Sangster v. Albertson's*, 99 Wn. App.156 (2000). Under the *Faragher/Eller* analysis “an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.” *Eller*, 118 S. Ct., at 2261. However, the employer can establish an affirmative defense by showing “(a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise...” *Eller*, 118 S. Ct., at 2270; *Faragher*, 118 S. Ct., at 2293.

The evidence in the record is more than sufficient to support a finding that the discriminatory harassment to which Ms. Lumper was subjected should be imputed to Edmo. First, much of the harassment at issue came from Edmo corporate officers and/or managers. Kirk Leffingwell was defendant's operations manager. Ted Augustine was the customer service manager. Ms. Lumper testified that both of these managers had pornographic websites on their computer screens and she was subjected to this regularly over the two year period between 2006 and 2008. Ms. Lumper worked under Edmo's customer service trainer, Nick Fisher. She testified that Mr. Fisher made comments about her breasts and bottom, and her genitalia on an ongoing basis for the two year period between 2006 and 2008. This was done in the presence of Jason Hendrickson, Ms. Lumper's manager.

Mr. Leffingwell and Mr. Augustine were management level employees. Edmo is subject to vicarious liability for their conduct. *Glasgow*, 103 Wn.2d at 407 (Sexual harassment is imputed to employer if harasser is management level employee). Arguably, Mr. Fisher, as plaintiff's customer service trainer, falls into this category as well. However, even if Fisher is characterized only as a supervisor, his conduct is imputed to Edmo. Edmo had an

employee handbook that contained a sexual harassment policy.

That policy provided in relevant part:

Any employee who feels that they are a victim of sexual harassment, ..., should bring the matter to the immediate attention of their supervisor or to any member of Edmo's management.

...

In summary, Edmo will not tolerate any worker harassing another. Any employee who feels they are a victim or a witness of sexual harassment should bring the matter to the immediate attention of their supervisor who will deal with the situation promptly.

(CP 83)

Thus, defendant Edmo's sexual harassment policy instructed plaintiff to bring concerns of sexual harassment to her supervisor. If Mr. Fisher is characterized as a supervisor, under the terms of Edmo's policy his sexually harassing conduct is imputed to the company. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 861, 991 P.2d 1182 (2000). (Where handbook instructs employee to report harassment to supervisor, supervisor's knowledge of harassment constitutes constructive knowledge of employer.)

Mr. Leffingwell and Mr. Armstrong were management level employees. Their sexually harassing conduct was therefore imputable to Edmo. Mr. Fisher was arguably also a management level employee whose harassment was imputable to the employer. Even if Fisher was a supervisor, by the terms of Edmo's sexual harassment policy, his harassing conduct was imputable to the company. Therefore, the evidence in the record is clearly sufficient to support a finding that the gender based harassment to which Ms. Lumper was subjected was imputable to defendant Edmo.

The record demonstrates genuine issues of material fact concerning (1) Whether Ms. Lumper was subjected to offensive, unwelcome contact that (2) occurred because of sex or gender, (3) affected the terms or conditions of employment, and (4) can be imputed to defendant Edmo as her employer. These factual questions preclude summary judgment. The trial court erred in granting defendant's motion for summary judgment on plaintiff's gender based hostile work environment claim. That decision should be reversed.

3. The record demonstrates genuine issues of material fact concerning whether plaintiff was subjected to a discriminatory, disability based hostile work environment.

The Washington Supreme Court has recognized a cause of action for a disability based hostile work environment. See, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 45, 59 P.3d 611 (2002). To establish this claim the plaintiff must prove that (1) she was disabled within the meaning of the antidiscrimination statute, (2) the harassment was unwelcome, (3) it was because of disability, (4) it affected the terms and conditions of employment, and (5) it was imputable to the employer. *Id.*, at 45; see also, *Rotter v. Con Am Management Corp.*, 393 F. Supp. 2d 1077, 1085 (W.D. Wash., 2005) The finder of fact must determine whether the plaintiff has met her burden as to each of these elements. *Robel*, 148 Wn. 2d, at 45. The record demonstrates triable issues of fact with respect to each of the five elements of Ms. Lumper's disability based hostile work environment claim. The trial court order dismissing her disability harassment claim should be reversed.

First, the record supports a finding that Ms. Lumper had a disability under the WLAD. RCW 49.60.040(7)(a) defines "disability" as the presence of a sensory, mental or physical impairment that:

- (i) is medically cognizable or diagnosable.
- (ii) exists as a record or history;
or

- (iii) is perceived to exist whether or not it exists in fact.

RCW 49.60.040(7)(c) provides in relevant part:

- (c) For purposes of this definition, “impairment” includes, but is not limited to:

...

- (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to, cognitive limitation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

At the time of her initial interview with Edmo Ms. Lumper disclosed to the company that she had dyslexia. (CP 334) She reminded Nick Fisher of this by e-mail dated December 19, 2007. (CP 334). On November 24, 2008 clinical psychologist Samantha Chandler confirmed that Ms. Lumper suffered from several learning disabilities including Reading Disorder, Mathematics Disorder, and Disorder of Written Expression. Dr. Chandler also diagnosed Ms. Lumper as suffering from Attention Deficit Hyperactivity Disorder and Adjustment Disorder. (CP 380) Therefore, the evidence supports a finding that Ms. Lumper had a disability under the WLAD.

Second, the record supports a finding that plaintiff was subjected to unwelcome harassment. Ms. Lumper testified that her co-workers laughed at her and made fun of her on an ongoing basis for two years from 2006-2008. Co-workers criticized her for not being able to spell very well. Nick Fisher told her she was “stupid” and she “fucked everything up that she touched.” Ms. Lumper stated this harassment was ongoing for 2 years. She complained about it to her supervisor Jason Hendrickson as early as September 2006. (CP 335). This evidence is sufficient to support a finding that plaintiff was subjected to unwelcome harassment. See, *Robel*, 148 Wn. 2d at 45-46.

The harassment directed at Ms. Lumper was because of her disability. She had difficulty reading and writing and spelling because of her learning disabilities. Her co-workers laughed at her and called her “stupid” on an ongoing basis for two years. Clearly these comments were “directly or proximately” related to her learning disability. The evidence supports a factual finding that Ms. Lumper’s co-workers harassed her because of her dyslexia/learning disabilities. *Robel*, at 46.

There is little doubt that the disability based harassment directed at Ms. Lumper over a two year period affected the terms and conditions of her employment. She complained to her

• . . . •

supervisor Jason Hendrickson as early as September 2006. She sent another e-mail to Mr. Hendrickson and Ted Augustine on June 29, 2007. That e-mail stated in part: “Look, I don’t have time for the kid’s play I am trying to concentrate on my job and what now I have to do with each order and the more hassling I get the harder it is.” (CP 359). Ms. Lumper’s testimony and documentary evidence is sufficient to demonstrate a triable issue of fact concerning whether the disability based harassment was sufficiently pervasive to alter the conditions of employment and create an abusive environment. *Robel*, 148 Wn. 2d, at 46, *Rotter*, 393 F. Supp. 2d, at 1085-1086.

Finally, the evidence supports a finding that the disability based harassment must be imputed to the employer. Ms. Lumper reported the harassment to her manager/supervisor, Jason Hendrickson, as early as September, 2006. She complained again by e-mail in June 2007. She testified that she complained about the harassment “repetitively” throughout her tenure of employment. Edmo took no corrective action until Ms. Lumper finally went to CFO Bob Meeker in March 2008. Even then the conduct continued, although to a lesser degree. The evidence in the record demonstrates that Ms. Lumper complained continuously to her supervisor about the disability based harassment from 2006 to

2008. The evidence demonstrates a triable issue of fact concerning whether the disability based harassment must be imputed to Edmo.

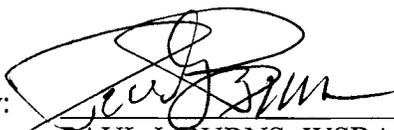
The evidence in the record demonstrates triable issues of fact with respect to each of the five elements of Ms. Lumper's disability based hostile work environment claim. The trial court erred in dismissing that claim on summary judgment. That order should be reversed.

VI. CONCLUSION

Appellant respectfully requests the court to reverse the decision of the trial court which dismissed her claims of disability and gender based hostile work environment under the WLAD. Appellant respectfully requests the court to remand those claims to the trial court for trial on the merits.

RESPECTFULLY SUBMITTED this 22 day of
December, 2010.

PAUL J. BURNS, P.S.

By: 
PAUL J. BURNS, WSBA #13320
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 22 day of December, 2010, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

Michael H. Church Stamper Rubens, P.S. 720 West Boone, Suite 200 Spokane, WA 99201	<input type="checkbox"/> Regular Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail
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PAUL J. BURNS