

No. 293386

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

LEANN LUMPER,
Appellant,

v.

EDMO DISTRIBUTORS, INC., a Washington Corporation,
Respondent.

BRIEF OF RESPONDENT

Michael H. Church, WSBA # 24957
Melody D. Farance, WSBA # 34044
Stamper Rubens, P.S.
Attorneys for Respondent EDMO
720 West Boone Avenue, #200
Spokane, WA 99201
Telephone: (509) 326-4800

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I. INTRODUCTION

EDMO is the former employer of the Plaintiff in this matter, who worked in EDMO's Customer Service department for approximately four years. Her position required a high degree of accuracy. The Plaintiff made frequent mistakes in her work while employed at EDMO, and her supervisors and trainer often had to talk to her about her job performance. The Plaintiff perceived her co-workers' comments as "harassment," and complained to EDMO's upper management.

EDMO immediately took steps to investigate and address the Plaintiff's allegations, met with the Plaintiff to follow up on their efforts, and took affirmative action to counsel all employees about appropriate interactions with their co-workers. Despite EDMO's reasonable efforts to address the Plaintiff's allegations, however, the Plaintiff walked off the job one Friday afternoon, before her shift was over, saying "I've had it and I'm leaving." EDMO understood her to have resigned. The Plaintiff inexplicably returned to the workplace the following Monday, however. EDMO upper management employees met with the Plaintiff, advised her that EDMO accepted her resignation, and requested that she leave.

The Plaintiff subsequently brought suit against EDMO, alleging, in part, that she had been discriminated against because of a disability and

because of her sex. The Superior Court dismissed the Plaintiff's Complaint in its entirety on EDMO's Motion for Summary Judgment.

The Plaintiff has appealed the trial court's decision, arguing that she submitted sufficient evidence to create genuine issues of material fact as to her claims for gender-based and disability-based hostile work environment. A review of the available evidence in this matter, however, clearly shows that the Plaintiff cannot support the essential elements of her claims. EDMO, therefore, requests that this Court affirm the trial court's summary judgment dismissing the Plaintiff's claims.

II. FACTUAL BACKGROUND

A. **EDMO Has A Clearly-Defined Organizational Structure And Provided Its Employee With Written Policies.**

The Respondent, EDMO, is a world-wide distributor of aircraft avionics, avionics test equipment, and installation and pilot supplies. Its principal place of business is in Spokane Valley, Washington. *CP 61.* The Appellant (Plaintiff below) was an order desk employee of EDMO from April 27, 2004 to April 25, 2008. *CP 61.*

The EDMO "team" includes Executives Jeff Christensen (President), and Ken Sidles (Vice President of Operations). Fred Lopez and Tim Gump are Directors of EDMO. *CP 343-44.* In addition, Bob

Meeker is the Chief Financial Officer and Director of Human Resources.
CP 140-41, 206, 345.

During the pertinent time frame, EDMO maintained an Employee Company Policy Manual (“manual”). The Plaintiff acknowledged that she had received a copy of the manual on July 22, 2006. In that acknowledgment, the Plaintiff also agreed to “read, observe, and abide by the conditions of the employment policies and rules contained” in the manual. *CP 92; 241.*

The manual contained a provision on sexual harassment at page 15. It states, in pertinent part:

Any employee who feels 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.

EDMO Distributors will not condone any sexual harassment of it’s *[sic]* employees. All worker’s *[sic]*, including managers, will be subject to discipline up to and including discharge for any act of sexual harassment they commit. No employee nor employee witness will be subjected to retaliation for pursuing a complaint.

(Emphasis added.) *CP 83.*

A similar provision was included under “miscellaneous” policies at page 19 of the manual. It states:

Discriminatory public conversation or actions that may be offensive to others, including racial, sexual, or religious, shall not be tolerated and will be grounds for disciplinary action, including termination. *EDMO Distributors, Inc. does not condone or tolerate discrimination or harassment of any kind. If you are subjected to or witness any sexual or other type of harassment please submit your concerns in writing and the situation will be addressed immediately.*

(Emphasis added.) CP 87. The Plaintiff testified that she understood these policies. CP 244.

B. The Plaintiff Was Frequently Counseled About Errors In Her Work And Violation Of EDMO's Employee Policies.

The Plaintiff's order desk duties included taking orders, assisting customers with questions about specific parts, working back orders, inputting web orders, and inputting orders into the computer system. The position required a high degree of accuracy. CP 254. The Plaintiff said her job was difficult for her. She made mistakes in spelling, trying to remember people's names, and getting callers to the right person. Her mistakes occurred on a daily basis, probably more than six times a day. CP 241.

In addition to repeated mistakes in her work, the Plaintiff was reprimanded for using her personal cell phone at work to call her mother. CP 244-45. On December 28, 2007, she sent two e-mails to her mother on her work computer. In the first one, she complained about a co-worker asking her to pick up the phone. In the second, she talked about getting in

trouble for using her cell phone, and then stated, “I just don’t understand at all, I am always getting in trouble for something?” *CP 155, 24*. The Plaintiff admitted that she was getting in trouble for something on almost a daily basis at that point. *CP 245*.

The Plaintiff often took offense at having her work corrected. On March 12, 2008, she again used her work computer to e-mail her mother for personal reasons. In that e-mail she told her mother that she was just “sick and tired” of her trainer telling her what to do. *CP 157*.

C. The Plaintiff Was Offended By What She Perceived To Be “Harassing” Treatment By Her Co-Workers.

While she was employed at EDMO, the Plaintiff felt that her co-workers were making an excessive number of comments to her about how badly she was doing her job. Her co-workers, Customer Service members of the EDMO “team,” included Kirk Leffingwell, the Customer Service Operations Manager and an order desk area supervisor; Jason Hendrickson, another order desk area supervisor; Ted Augustine, a Customer Service Manager; Nick Fisher, a Customer Service Trainer; and Corey Kromm and Shawn Moon, Customer Service employees. *CP 329, 341-42*. She claimed she was hearing comments from them more than five or six times a day. *CP 242*. She was unhappy when a co-worker told her she needed to change the way she wrote things because there were

many misspellings. She took offense at other comments and conduct by her co-workers. For example, she did not appreciate it when her trainer asked her where she was going when he saw her leaving her desk. When she told him she was going to the restroom, he said she couldn't go, so she "flipped him off" and told him it was none of his business. *CP 255-56.* She alleged that people made fun of her because of her mistakes. *CP 256.* She asserted that a co-worker threw a nerf football that hit her in the back of her head, although she admitted she didn't know whether he intended the football to hit her because she was facing in the opposite direction. *CP 256-57.* She claimed her co-workers played practical jokes on her, such as moving her chair to different places, putting tape around it, or putting tacks on her seat. She never reported any of these alleged activities to EDMO upper management. *CP 257.*

D. The Plaintiff's First Complaint To EDMO's Upper Management Was In March 2008.

On March 28, 2008, the Plaintiff requested a meeting with Bob Meeker, Chief Financial Officer and Director of Human Resources for EDMO. During that meeting, the Plaintiff told Mr. Meeker that she was being "harassed" by her co-workers, in the form of derogatory comments about mistakes she made in her work. Although she claimed that those sorts of things had been happening over the previous few years, she had

never brought any such complaints to the attention of Mr. Meeker before the March 28, 2008 meeting. *CP 140-41.*

The Plaintiff met with Mr. Meeker again on April 1, 2008. Jeff Christensen, the President of EDMO, was also present for the April 1 meeting. *CP 222.* The Plaintiff told her story to Mr. Christensen, who assured her that he would follow up with an investigation of her complaint that she was being subjected to derogatory comments about her mistakes from co-workers. *CP 143.*

E. EDMO'S President Took Immediate Steps To Investigate And Respond To Plaintiff's Complaints.

Mr. Christensen immediately took steps to investigate the Plaintiff's complaints. *CP 223.* Mr. Christensen spoke to Jason Hendrickson and Kirk Leffingwell, order desk area supervisors, and asked them to talk to the co-workers about whom the Plaintiff had complained in order to get their sides of the story. *CP 223-24, 329.*

Approximately two weeks later, on April 17, 2008, Mr. Christensen had a follow-up meeting with the Plaintiff. The Plaintiff told Mr. Christensen that things were getting better. She said that although her co-workers were still "pretty much" "harassing" her, it was lighter than it had been. Mr. Christensen asked the Plaintiff if it was possible she was being a little over-sensitive. She acknowledged that it was. *CP 144, 330.*

During this second meeting with Mr. Christensen, the Plaintiff claimed there were also vulgarities occurring in her work area. *CP 144, 331.* Mr. Christensen assured the Plaintiff he would have Ken Sidles, Vice President of Operations for EDMO, follow up to address that issue with the other employees. *CP 144, 331.* Within two to three days after this second meeting, a company-wide email was sent out, reminding everyone of appropriate workplace behavior. *CP 144-45, 195.*

Ken Sidles worked in an office that was three cubicles, or about twenty feet, away from the Plaintiff's work station. He was one of the Plaintiff's supervisors. *CP 212-13.* During the time he worked in the area just outside of the Plaintiff's work space, he never observed any improper interaction between her and other employees. He never saw any evidence of what he would consider harassing conduct directed to the Plaintiff. *CP 216.* The Plaintiff never made any complaints about being harassed, discriminated against, or made fun of to Mr. Sidles. *CP 214-15.*

In addition to sending the company-wide email reminding EDMO employees of the code of conduct, Mr. Sidles also met with Kirk, Ted, and Jason, to make sure everyone knew how to behave in the workplace. He also inquired about some of the specific accusations the Plaintiff had made. *CP 217, 220.* Kirk, Ted, and Jason were asked to follow up with

regard to some of the complaints the Plaintiff had made, which they did. They reported back to Mr. Sidles that they had found no corroborating evidence of the complaints. *CP 217, 221.* Mr. Sidles confronted Ted about the Plaintiff's accusation that he had called her an "F'ing bitch." Ted told Mr. Sidles the accusation was false. Mr. Sidles was unable to find any corroborating evidence that supported the Plaintiff's claims. *CP 217.*

Jeff Christensen left for an out-of-town business convention after the April 17 meeting. Upon his return, he intended to sit down with Ken Sidles and Jason and Kirk to find out what information had been gleaned from their investigations. He planned to meet with the Plaintiff after that and, if necessary, the co-workers about whom she had complained, to "get to the bottom of her complaints." *CP 226.*

From the time of the follow-up meeting on April 17, 2008, until April 25, 2008, the Plaintiff did not report any further incidents of harassment in the workplace. *CP 145.*

F. Plaintiff Walked Off The Job, Terminating Her Employment.

On April 25, 2008, the Plaintiff went to Bob Meeker's office, prior to the end of her scheduled shift, and stated: "I have had it and I am leaving." The Plaintiff did not ask Mr. Meeker for permission to leave

early for the day, nor indicate that she had asked anyone else for permission to leave for the day. CP 247. In fact, during the approximately four years the Plaintiff worked at EDMO, she had never asked Mr. Meeker for time off. CP 120, 206. The Plaintiff testified that if she wanted personal or vacation time, she would ask her supervisor, Jason Hendrickson. CP 119-20. She testified she would, however, approach Mr. Meeker if she wanted to *terminate* her employment. CP 120. At no time during her short conversation with Mr. Meeker did the Plaintiff indicate she was just leaving for the day or that some harassment had occurred which led to her wanting to leave for the day. CP 208-09. Mr. Meeker understood the Plaintiff's statement to mean she was terminating her employment with EDMO. CP 208. He testified that "It didn't sound like the topic was up for discussion." CP 211.

At a September 16, 2008 unemployment hearing before Administrative Law Judge Bale, the Plaintiff gave the following testimony in response to the judge's questioning about her actions on April 25, 2008:

ALJ BALE: And when were you supposed to get off work?

MS. LUMPER: 4:00

ALJ BALE: And did you know that you were leaving your shift?

MS. LUMPER: Yes, I did.

ALJ BALE: What did you think about that?

MS. LUMPER: Well I felt bad because I really liked the company. I really liked working with some of the people there. But I just couldn't handle it anymore.

CP 229-230.

G. When Plaintiff Later Returned To EDMO, She Was Advised Her Resignation Had Been Accepted.

The following Monday, the Plaintiff re-appeared at EDMO, ostensibly to report for work. Mr. Meeker was surprised when she showed up, and asked her why she was there. *CP 209-210.* The Plaintiff asked for a meeting with Jeff Christensen. *CP 210.* Sometime over the previous weekend the Plaintiff had asked her mother to be available as a witness on Monday, so she also sent an email to her mother, from her work computer. She told her mother that a meeting had been called and said "I know it's about what happened on Friday." *CP 131-32.*

Later that morning, the Plaintiff and her mother met with Fred Lopez, a Director of EDMO, Jeff Christensen, and Ken Sidles. *CP 221, 332.* During that meeting, Ken Sidles advised the Plaintiff it was their understanding she had quit her employment with EDMO. The Plaintiff was told that EDMO accepted her resignation and she was asked to leave. She was also told that someone would box up her personal items from her desk and get them to her. *CP 227, 332.* (Later that day, Ken Sidles went

to the Plaintiff's desk to get her personal items and found there were none.) *CP 332*.

The Plaintiff made no response except to say "Okay." *CP 227*. She never protested nor indicated she left because she was being harassed again. *CP 228*. As she and her mother left the building, however, one of them stated, "You just gave us what we wanted." Loud comments including the words "discrimination," "retaliation," and "lawsuit" were made by the Plaintiff and her mother as they left the building. *CP 218, 227, 332*.

H. The Plaintiff Never Reported Any Incidents Of Sexual Harassment While Employed By EDMO.

When asked at her deposition whether she had reported to Jeff Christensen and Bob Meeker "all issues that you had concerning your treatment at the company at the time of that meeting" in March of 2008, the Plaintiff testified "yes." *CP 261*. Her own written account of the March 28, 2008 meeting with Mr. Meeker did not mention any complaints of sexual harassment, discrimination, disability discrimination, or retaliation. *CP 187-88*. EDMO's internal documentation of the Plaintiff's complaints similarly shows a complete absence of any complaints relating to any kind of discrimination or sexual harassment. *CP 326-332*. Despite this testimony, and the documentation of the March 28 meeting (by both

Plaintiff and EDMO), the Plaintiff claimed at her unemployment hearing in September of 2008 that she was subjected to *sexual* harassment while employed at EDMO. *CP 46.*

At her deposition taken in this case, the Plaintiff alleged the sexual harassment consisted of comments made by her co-workers, Nick Fisher, Ted Augustine, and Jason Hendrickson. She claimed that Nick Fisher made comments about the size of her breasts or bottom, and that he made comments about women in certain pictures on a pornographic website. She went on to state that Jason and other male employees stood next to her cubicle and talked about penis size. She also claimed that male co-workers sent pornographic e-mails between themselves and/or had pornographic websites on their computer monitors. *CP 252-53.* The Plaintiff admits that she, herself, sent some of these e-mails back to the co-workers, writing her own comments on them. *CP 253.* The Plaintiff also complained during her deposition about her co-workers using vulgarities and profanity in the workplace. She said she found such language offensive. *CP 257.*

Interestingly, the Plaintiff could not remember any dates or time frames during which these alleged sexually-harassing comments occurred, although she now claims “[i]t was a daily thing.” Also, despite the fact

that the Plaintiff had been sending e-mails to her mother on a regular basis, mentioning all sorts of issues that occurred at work, she did not once send an e-mail to her mother complaining about sexual harassment. *CP 252.* She did, however, send e-mails to her mother, from her work computer, that contained profanity. The Plaintiff claimed at her deposition that it was “okay” for her to engage in profanity-laced banter with her mother, in an EDMO e-mail, when she was mad. *CP 164, 257.*

Even more telling is the fact that the Plaintiff never reported any of these alleged comments or activities, in writing or otherwise, to anyone in upper management at EDMO. She did, however, acknowledge she understood the policy in the manual required her to do so. *CP 252-53.* The Plaintiff never said anything to anyone in upper management about other employees accessing pornographic Websites on EDMO computers. *CP 253.* She never called the EEOC to complain about sexual harassment either. *CP 253.* There is no written record of any of these alleged incidents. *CP 253.* There is absolutely no independent evidence of these alleged incidents, only the Plaintiff’s own self-serving testimony.

Plaintiff also knew that she could go to Tim Gump, one of the owners and director of EDMO, if she had any problems in the workplace. At no time during her employment by EDMO did the Plaintiff ever notify

Mr. Gump in writing or otherwise that she was being sexually harassed or discriminated against in any way. *CP 242*. Similarly, the Plaintiff never complained to Fred Lopez, another owner and director of EDMO, about sexual harassment, discrimination, or any other intolerable work experience she was having. *CP 242*.

I. The Trial Court Dismissed All Of Plaintiff's Claims Against EDMO On Summary Judgment.

Plaintiff filed suit against EDMO in May of 2009. Her Complaint included claims for disability discrimination, sexual harassment, hostile work environment, retaliation, wrongful termination in violation of public policy, negligent and intentional infliction of emotional distress, breach of the implied covenant of good faith and fair dealing, and violation of Washington's wage laws. *CP 1-12*. All of the claims were dismissed upon EDMO's Motion For Summary Judgment. *CP 405-415*. Plaintiff now appeals only the dismissal of the hostile work environment claims.

III. ARGUMENT

Although the trial court granted summary judgment to EDMO as to all of the claims set forth in Plaintiff's Complaint, Plaintiff assigns error only to the dismissal of her claims for gender-based hostile work environment and disability-based hostile work environment. *Brief of Appellant, p. 6*. A review of the evidence submitted in this matter,

however, reveals there are no genuine issues of material fact as to either hostile work environment claim. EDMO, therefore, was entitled to summary judgment dismissing both of those claims as a matter of law, and respectfully asks this Court to affirm the trial court's rulings.

A. The Trial Court Properly Granted Summary Judgment Because Plaintiff Failed To Produce Sufficient Admissible Evidence To Create Genuine Issues Of Material Fact As To The Essential Elements Of Her Hostile Work Environment Claims.

Summary judgment is appropriate when, viewing the facts and reasonable inferences in favor of the non-moving party, the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

The party moving for summary judgment has the burden to show that no genuine issue of material facts exists. *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The moving party can meet its burden by showing there is an absence of evidence from which the non-moving party can make out a *prima facie* case. *Id.*, citing *Celotex Corp. v. Catrell*, 477 U.S. 317, 325 (1976); *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). Where there is "a complete failure of proof

concerning an essential element of the nonmoving party's case," all other facts become immaterial and the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323.

In reviewing a summary judgment, the court considers all facts submitted and all reasonable inferences from them in a light most favorable to the nonmoving party. *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 67, 42 P.2d 968 (2002). However, the nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. *Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 612-614 (2003); *Young*, 112 Wn.2d at 225-26. When, in view of all of the evidence, reasonable persons could reach only one conclusion, summary judgment is appropriate. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). An appellate court reviews summary judgment orders de novo and makes the same inquiry as the trial court. *Wilson*, 98 Wn.2d at 437.

In response to EDMO's Motion for Summary Judgment, the Plaintiff submitted nothing more than argumentative assertions and self-serving statements of "fact," completely unsupported by any independent evidence. In addition, one piece of evidence heavily relied upon by the

Plaintiff was ruled inadmissible by the trial court. Even viewing the Plaintiff's evidence in a light most favorable to her, it is clear the evidence was insufficient to establish the elements of the Plaintiff's claims for hostile work environment. Therefore, her claims fail as a matter of law.

B. Plaintiff Failed To Produce Sufficient Evidence To Support A *Prima Facie* Case For Gender Based Hostile Work Environment.

To establish a hostile work environment sexual harassment claim brought under Washington antidiscrimination law, a plaintiff must demonstrate (1) offensive and unwelcome conduct that (2) was serious enough to affect the terms or conditions of her employment, (3) occurred because of sex, and (4) can be imputed to the employer. RCW 49.60.180(3). In this case, the Plaintiff's claim fails because she did not produce sufficient evidence to support the essential elements of her cause of action.

1. The only evidence of sexual harassment is the Plaintiff's own-self serving testimony.

The Plaintiff in this case claims that she was subjected to sexual harassment by her co-workers during her employment with EDMO. According to the Plaintiff's testimony, this sexual harassment included comments made by her co-workers about the size of her breasts or bottom. She claims the same male employees stood next to her cubicle and

discussed penis size. She says they sent pornographic emails between themselves and viewed pornographic websites on their computer monitors. *CP 252.*

The Plaintiff testified that this behavior “was a *daily* thing.” (Emphasis added.) However, she never mentioned anything about any sexual harassment occurring at EDMO in any of the numerous emails that she sent to her mother from work, in which she complained about all sorts of other issues. *CP 252.* It is also significant to note that despite the Plaintiff meeting with EDMO’s upper management on three occasions from March 28, 2008 to April 17, 2008, during which she complained about her co-workers’ criticism of her work, she never once mentioned that any sort of sexually-harassing behavior had occurred. *CP 252-53.*

There is absolutely no evidence in this matter, other than the Plaintiff’s own self-serving testimony, that she was subjected to any sort of sexual harassment while she was employed at EDMO. There is no documentation of any sexual harassment incidents, despite the fact that the Plaintiff clearly went to great pains to document any perceived slight she allegedly endured, through emails to her mother. *CP 252.* There is no documentation of any complaint to upper management, despite the fact that she took her own notes when she reported the alleged harassment in

connection with the errors she made at work. *CP 187-88*. Likewise, there is nothing in EDMO's documentation of the Plaintiff's complaints suggesting the Plaintiff had made any claims of sexually-harassing conduct. The Plaintiff admitted in her deposition that she never reported any of this alleged sexual conduct to EDMO, in writing or otherwise, even though EDMO's policy manual required her to do so. *CP 252-53*.

While the Plaintiff tries to explain away her failure to report the alleged sexual harassment by saying that her immediate supervisors told her she would be fired if she complained, that did not stop her from complaining to upper management about the "mean" comments her co-workers allegedly made to her about her poor work. If this allegedly inappropriate sexual behavior occurred on a "daily" basis, why is there no independent record of it? If the Plaintiff felt free enough to complain about the "mean" comments her co-workers made to her about her work, why would she not also report their inappropriate sexual remarks and conduct?

The Plaintiff asserts that her testimony is "more than sufficient" to support a finding that she was subjected to offensive, unwelcome conduct by her co-workers. *Brief of Appellant, p. 20*. She cannot, however, create a genuine issue of fact by providing only her own self-serving testimony,

unsupported by any independent evidence. The Plaintiff is not entitled to have her “affidavits considered at face value.” *Charles*, 148 Wn.2d at 612-614; *Young*, 112 Wn.2d at 225-26. Her “evidence,” therefore, was insufficient to create a genuine issue of material fact as to whether the harassment occurred and whether it affected the terms and conditions of her employment.

2. *The Plaintiff cannot establish that the alleged conduct was unwelcome, because she solicited and incited it.*

“Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive.” *Schonauer v. DCR Entertainment, Inc.*, 79 Wn. App. 808, 820, 905 P.2d 392 (1995), *review denied*, 129 Wn.2d 1014, 917 P.2d 575 (1996), citing *Glasgow*, 103 Wn.2d at 406. “The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation . . . was voluntary.” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68(1986). *See, e.g. Reed v. Shepard*, 939 F.2d 484 (7th Cir.1991) (Plaintiff who did not complain about sexually-charged work environment to anyone at the workplace and who exhibited participation and receptiveness to sexually-suggestive jokes and activities failed to establish *prima facie* case of hostile work environment).

The evidence in this case shows that when the Plaintiff allegedly received emails of a sexual nature from her co-workers, she would sometimes return them with comments to the sender or pass them on to others with her comments. *CP 253*. She also admitted that she, herself, used profanity in her emails and had even used obscene gestures to her trainer. *CP 164, 255-257*. As discussed above, she never reported any of the allegedly offensive conduct nor is there any independent evidence that she ever complained about such conduct to *anyone* in the workplace. *CP 252-253*. Even if the conduct did occur, the evidence shows the Plaintiff participated in the same sort of conduct of which she now complains. Like the plaintiff in *Reed*, then, the Plaintiff here incited and solicited the alleged behavior. She cannot establish that the conduct was offensive and unwelcome, and her claim for sexually-based hostile work environment fails.

3. *The Plaintiff cannot show that the conduct complained of is imputed to EDMO; Plaintiff's claim is also successfully defeated by the Ellerth/Faragher defense.*

In *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 693 P.2d 708 (1985) Washington's Supreme Court held that where an owner, manager, partner, or corporate officer personally participates in the harassment, the fourth element of a claim for hostile work environment is

met by proof of management status. *Id.* at 407. Where the person harassing the worker is not in management, the employer is not held responsible for the discriminatory work environment created by a plaintiff's supervisor or co-worker. *Id.* This is subject to the exception that if the employer (1) authorized, knew, or should have known of the harassment and (2) failed to take reasonably prompt and adequate corrective action, there can be liability. *Id.*

An employer will not be vicariously liable for a hostile work environment, however, if it proves (1) that it "exercised reasonable care to prevent and correct any sexually harassing behavior," and (2) the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). "[T]he law against sexual harassment is not self-enforcing, and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists." *Brown v. Perry*, 184 F.3d 388, 397 (4th Cir.1999). "The law requires an employer to be reasonable, not clairvoyant or omnipotent." *Id.* "Evidence that the plaintiff failed to utilize the company's complaint procedure will normally suffice to satisfy the company's burden under the second element of the affirmative

defense.” *Matvia v. Bald Head Island Mgmt.*, 259 F.3d at 269 (4th Cir.2001) (quoting *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir.2001)). Nor will a generalized fear of retaliation or “an employee’s subjective belief in the futility of reporting a harasser’s behavior” constitute a reasonable basis for failing to take advantage of any preventive or corrective opportunities provided by the employer.” *Barrett*, 240 F.3d at 267-68.

The Plaintiff in *Washington v. Boeing*, 105 Wn. App. 1, 19 P.3d 1041 (2001), was a mechanic at Boeing’s 767 factory for several years. After she resigned her employment, she sued Boeing and alleged, among other things, that the company knowingly permitted a hostile work environment to exist for its female employees in its flight line and factories. She claimed that co-workers and a supervisor used inappropriate names to address her. The trial court granted the defendant’s motion for summary judgment, dismissing all of the plaintiff’s claims. The plaintiff appealed.

On appeal, the plaintiff asserted that the trial court had erred by summarily dismissing her hostile work environment claim, because she had produced sufficient evidence to establish the essential elements of her cause of action. As to the fourth element of her sex-based hostile work

environment claim – whether the sexual harassment could be imputed to her employer – the plaintiff argued that her flight line crew managers’ participation in negative gender-related comments should be automatically imputed to the defendant because of their status as managers. The plaintiff alternatively argued that the managers in her flight line crew knew of the harassment and failed to take prompt corrective action.

Division I of the Washington Court of Appeals analyzed the arguments made by the plaintiff and stated:

First, assuming the flight line managers participated in the harassment, liability cannot be automatically imputed to Boeing because the numerous managers who supervised Washington do not occupy sufficiently high level positions within Boeing to be considered its alter ego. Second, there is no support in the record before us for Washington’s assertion that flight line crew managers participated in the harassing conduct except for the incident where [a manager] called her “dear.” And once Washington told [the manager] that she did not want to be addressed as “dear,” [he] apologized immediately and never called her “dear” again. *Moreover, Boeing counseled [the manager] and other employees regarding use of inappropriate terms to address co-workers.* Similarly, once Washington informed her manager of the offensive conduct – the calendar display and [a co-worker’s] refusal to assist her – the calendar was taken down and her manager talked to [the co-worker] about assisting her.

Washington, 105 Wn. App. at 11-12 (*emphasis added*), citing *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 854-56, 991 P. 2d 1182, *review denied*, 141 Wn.2d 1017, 10 P.3d 1071 (2000) (holding that mid-

level manager at one of Costco's 200 warehouses was not acting as Costco's alter ego; thus, liability for mid-level manager's actions cannot be imputed directly to Costco.) Based upon the *Washington* plaintiff's inability to establish that the offensive conduct was attributable to her employer, and Boeing's reasonably prompt and adequate response to the plaintiff's reports, the Court of Appeals held that her hostile work environment claim must fail. *Id.* at 11-12.

As in *Washington*, the Plaintiff here claims that her immediate supervisors' participation in the allegedly harassing conduct is automatically imputed to EDMO because of their status as "managers." *Brief of Respondent, pp. 26-27.* However, the evidence in this case clearly shows that Kirk Leffingwell, Ted Augustine, and Jason Hendrickson were *mid-level* "managers," at most. Nick Fisher was her trainer. These individuals were "managers" only in the sense that they "managed" the Customer Service department at EDMO and they supervised the other Customer Service employees. *CP 329, 341-42.* These mid-level "managers" did not occupy sufficiently high level positions within EDMO to be considered its alter ego. Furthermore, the Plaintiff's argument that Nick Fisher's conduct is imputable to the employer because he was the Plaintiff's supervisor, and the manual instructed Plaintiff to report harassment to her supervisor, is similarly unpersuasive. The manual

clearly instructed an employee to bring the matter to the attention of his or her supervisor “*of any member of EDMO’s management.*” *CP 83.* Plaintiff, therefore, certainly had the option of reporting her allegations to someone other than her immediate supervisor, which is what she did when she reported her complaints about the “mean” comments made by her co-workers. Thus, based on the facts in this matter, Plaintiff cannot establish that the conduct complained of is imputed to EDMO.

Even if Plaintiff could establish that the conduct of which she complains is imputed to the employer, EDMO has a complete defense pursuant to *Ellerth/Faragher*. First, EDMO’s Employee Company Policy Manual contained a very strongly-worded provision on sexual harassment which clearly articulated its policies. This provision also instructed any employee who believed he or she was a victim of sexual harassment to bring the matter to the immediate attention of *any* member of EDMO’s management. That instruction was also repeated a second time, under “miscellaneous” policies. *CP 83, 87.* The Plaintiff acknowledged that she had received a copy of the manual on July 22, 2006 and understood the policies. *CP 92, 241, 244.* In addition to the clear policies included in the manual, the Plaintiff also knew through a conversation with Jeff Christensen, EDMO’s president, that if she ever had any problems, she should bring them to his attention. *CP 143, 328.* (The Plaintiff did, in

fact, report her frustration with being teased by her co-workers because of the mistakes she was making at work to the Director of Human Resources, as well as to Jeff Christensen, EDMO's President.) Thus, EDMO can satisfy the first prong of the *Ellerth/Faragher* defense.

Furthermore, the evidence is undisputed that despite the fact this allegedly unwelcome gender-based conduct occurred on an almost daily basis (according to the Plaintiff's self-serving testimony), she *never* reported it to *anyone* in an *upper* management position for EDMO. *CP 242, 252-53.* EDMO could not be expected to correct the alleged harassment unless the Plaintiff made a concerted effort to inform EDMO that a problem existed. *See Brown*, 184 F.3d at 397. The Plaintiff's complete failure to utilize EDMO's complaint procedures to report any allegations of sexual harassment satisfies EDMO's burden under the second prong of the *Ellerth/Faragher* defense.

It is also important to note that when the Plaintiff *did* notify EDMO of *other* types of conduct she perceived as harassment, EDMO took reasonably prompt action to investigate and address her concerns. EDMO's executives discussed the allegations with the mid-level "managers" of the Customer Service Department. *CP 223-24, 329.* They met with the Plaintiff on at least two subsequent occasions to follow-up

with her on the situation. CP 140-41, 144, 222, 330. When the Plaintiff complained during her third meeting with EDMO executives about her co-workers using vulgarities in the workplace, they promptly took steps to counsel *all* the employees regarding the use of inappropriate language. CP 144-45, 195, 331.

What EDMO could not do, however, was address any concerns the Plaintiff did not relay to EDMO's executive team. It most certainly could not address any concerns the Plaintiff did not raise until several months after she quit her job.

When all of the evidence available in this case is considered, it is clear that the Plaintiff did not produce sufficient evidence to create a genuine issue of fact as to the essential elements of her claim for gender-based hostile work environment. The trial court, therefore, correctly dismissed the claim on summary judgment.

C. **There Was Insufficient Evidence To Support The Elements Of Plaintiff's Claim For Disability-Based Hostile Work Environment.**

To present a *prima facie* case of a disability-based hostile work environment, a plaintiff must initially prove she was disabled and harassed and, further, that (1) the harassment was unwelcome; (2) was because of her disability; (3) affected the terms or conditions of her employment, and

(4) was imputable to her employer. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 45, 59 P.3d 611 (2002). Generally, whether a person is “handicapped” is a question of fact for the jury. *Doe v. Boeing Co.*, 121 Wash.2d 8, 15, 846 P.2d 531 (1993); *Phillips v. City of Seattle*, 111 Wn.2d 903, 909-10, 766 P.2d 1099 (1998). Similarly, whether harassment is sufficiently severe or pervasive is also a question of fact. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). However, “the trial court may decide factual issues as a matter of law if there is only one conclusion reasonable minds could reach.” *Rhodes v. URM Stores, Inc.*, 95 Wn. App. 794, 799, 977 P.2d 651 (1999).

The Plaintiff in this matter did not submit sufficient evidence to show that she was disabled. Moreover, the evidence was inadequate to create a genuine issue of material fact as to whether the harassment affected the terms and conditions of her employment. Her failure to establish these essential elements of her claim rendered all other evidence immaterial. Therefore, her claim for disability-based hostile work environment cannot be sustained.

1. Plaintiff submitted no evidence that she is “disabled.”

Pursuant to RCW 49.60.040(7)(a), a “disability” is defined as the presence of a sensory, mental, or physical impairment that is (i) medically cognizable or diagnosable; (ii) exists as a record or history; or (iii) is

perceived to exist whether or not it exists in fact.¹ The Plaintiff in this case argues that the evidence supports a finding that she had a disability under the WLAD. First, the Plaintiff cites evidence that she notified EDMO she had dyslexia. Second, the Plaintiff relies on a clinical psychologist's office notes that were attached to her own Affidavit. *Brief of Appellant*, p. 30. This evidence is unavailing, however, because the Plaintiffs' disclosure of her own perception of a disability is insufficient to establish that she had a disability, and the psychologist's office notes are inadmissible.

a. The Plaintiff provided no evidence that EDMO viewed her as disabled.

In arguing her alleged disclosure to EDMO that she had dyslexia, the Plaintiff is apparently relying on subparagraph (iii) of RCW 49.60.040(7)(a), set forth above. Her reliance on this disclosure is insufficient, however. It is not enough for the Plaintiff to perceive herself as disabled without other supporting evidence of a disability.

The case of *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 6 P.3d 30 (2000) is instructive here. The plaintiff in that case was a former employee of a State agency. While she was an employee, the plaintiff

¹ Pursuant to RCW 49.60.040, the definitions contained therein apply to any claim for discrimination, whether it is based upon disparate treatment, failure to accommodate, or hostile work environment.

gave notice to the head of her division that she had a disabling condition requiring accommodation. She later filed suit against the employer for, among other things, failure to accommodate a disability. The employer moved for summary judgment on the basis that the plaintiff had failed to present evidence of a disability. The trial court agreed, and dismissed the plaintiff's claim. The plaintiff then appealed.

On appeal to Division II of the Court of Appeals, the employer argued that the plaintiff had failed to present evidence of a disability and could not, therefore, sustain a claim for failure to accommodate the disability. The plaintiff disagreed, and cited the definition of disability (under the former WAC 162-22-040(1)), which stated that a person is disabled where a "sensory, mental, or physical condition" is "perceived to exist." The plaintiff argued that she perceived herself to be disabled and had told her supervisors she was depressed and/or suffering from PTSD. This, she contended, was sufficient to put the employer on notice of her disability.

The Court of Appeals reviewed the essential elements of a claim for failure to accommodate a disability, and noted that in order to establish the first element – that the plaintiff was disabled – she must produce evidence of a disability. *Id.* at 808-09. It cited to the definition of

disability set forth in the former WAC 162-22-040 (which is essentially identical to the current definition in RCW 49.60.070(7)(a)). *Id.* at 809. The court then found the plaintiff's argument that she had established the presence of a disability merely by stating she perceived she had a stress problem to be unpersuasive. "If relying on perception to establish disability, the employer, not the employee, must perceive the disability." *Id.* at 810, quoting *Rhodes*, 95 Wn. App. at 800-01; WAC 162-22-040(2) ("rejection of a person for employment because he had a florid face and the *employer thought* that he had high blood pressure") (emphasis theirs).

The court then commented that the plaintiff had offered no evidence that her *employer* perceived her as disabled, and had provided no other support for her claim that she was depressed and/or suffered from PTSD. Finding that "[h]er unsupported claim was inadequate to show that she gave notice to [the employer] of an alleged disability or that she, in fact, suffered from such a disability," the court affirmed the trial court's conclusion that the plaintiff had not established a *prima facie* case of failure to accommodate a disability and had not erred in granting summary judgment to the employer. *Id.* at 810.

Like the plaintiff in *Fischer-McReynolds*, the Plaintiff in this case relies upon notice to her employer, EDMO, of her own perception that she

has a disability – dyslexia. There is *no* evidence whatsoever that EDMO perceived the Plaintiff to be disabled. The Plaintiff’s own perception of her disability is insufficient to establish that she had a disability under the WLAD, and to the extent that her claim is based on such evidence alone, it fails.

b. The clinical psychologist’s office notes were stricken by the trial court as inadmissible and should similarly not be considered on appeal.

As further support for Plaintiff’s claim that she has a disability, she attempts to rely upon an office note from clinical psychologist Samantha Chandler, which was attached as Exhibit AA to the Affidavit of Leanne Lumper (CP 333) and submitted in response to EDMO’s Motion for Summary Judgment. EDMO moved to strike Dr. Chandler’s office note as lacking proper authentication (CP 389-393) and the trial court agreed. The exhibit was stricken as hearsay and inadmissible. *CP 410*. Notably, the plaintiff did not assign error to the trial court’s evidentiary determination and has made no argument in that regard; therefore, the plaintiff did not preserve any claim that the trial court should not have stricken the exhibit. However, even if the plaintiff had preserved the issue, there is no question that the trial court’s decision to strike the exhibit was correct.

ER 901(b)(1) provides that a document may be authenticated by the testimony of a witness with knowledge that the document is what it is claimed to be. In the case of a business record – which includes records such as the office note attached as Exhibit AA to the Plaintiff’s Affidavit – authentication must be done by the custodian of the record or another witness qualified to testify to the record’s authenticity and mode of preparation. RCW 5.45.020.

The Plaintiff’s Affidavit states, at paragraph 31, “Attached hereto as EXHIBIT AA is a true and correct copy of Dr. Chandler’s chart notes” (CP 337). This attempt by the Plaintiff to authenticate the chart notes fails. The Plaintiff is *not* a person with knowledge that Dr. Chandler’s office note is what Plaintiff claims it to be. Clearly, the Plaintiff is also not the custodian of Dr. Chandler’s records, nor is she qualified to testify to the office note’s authenticity or mode of preparation. Therefore, the trial court was correct in striking Exhibit AA to the Plaintiff’s Affidavit and in not considering it in connection with the summary judgment motion.

Dr. Chandler’s office note is inadmissible. There was no evidence that EDMO perceived the Plaintiff as disabled. Thus, the Plaintiff could not produce any evidence to establish a disability, the first element of her

prima facie case of disability-based hostile work environment, and the trial court's dismissal of her claim was appropriate.

2. ***There was no evidence that the conduct complained of affected the terms of Plaintiff's employment or was because of her alleged disability.***

In order to establish that harassment affected the terms and conditions of her employment, a plaintiff must show that the harassment was sufficiently pervasive so as to alter her employment conditions. *Washington v. Boeing*, 105 Wn. App. 1, 10, 19 P.3d 1041 (2001). It is not sufficient that the conduct is merely offensive. *Id.* To determine whether the conduct was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment, the court looks at the totality of the circumstances. *Adams v. Able Building Supply*, 114 Wn. App. 291, 296, 57 P.3d 280 (2002). The court will consider the frequency and severity of the conduct, whether the conduct involved words alone or also included physical intimidation or humiliation, and whether the conduct interfered with the employee's work performance. *Harris*, 510 U.S. at 21.

The conduct must be so extreme as to amount to a change in the terms and conditions of employment, and be both objectively abusive (reasonable person test) and subjectively perceived as abusive by the victim. *Id.* However, a civil rights code is not a "general civility code."

Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), quoting *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

The Plaintiff is also required to show that her alleged disability was the motivating factor for the unlawful harassment. *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406, 693 P.2d 611 (2002). This requires a “nexus” between the specific harassing conduct and the particular disability. *Id.*; *see also Robel*, 148 Wn.2d at 45.

The evidence in this case shows that the Plaintiff believed her co-workers were making excessive comments to her about how poorly she was performing her job. For example, she sent an email in September 2006 to one of her managers stating, “All I want to do is my job and not hear all the time how bad I do it.” She also complained that her co-workers were asking her to answer the phone and to stop getting up from her desk, and that one co-worker was transferring calls back and forth to her, resulting in the callers getting mad. *CP 358*. She sent another email in June 2007 claiming, “I am really getting tired of Shawn and Corey asking why I don’t answer the phone.” *CP 359*. These two emails are the Plaintiff’s *only* documented proof of what she considers to be a hostile work environment.

The Plaintiff also testified that she told EDMO's Director of Human Resources, on March 28, 2008, that she was being "harassed" by co-workers, who were making derogatory comments about her mistakes. She said these comments were not "constructive criticism," but were "mean." *CP 140-41*.

Plaintiff attempts to argue that this so-called "harassment" was sufficiently pervasive to alter the terms and conditions of her employment. She relies on a statement in the June 2007 email, as follows: "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." *Brief of Appellant, p. 32; CP 359* (Emphasis added). This is absolutely unpersuasive.

The only thing these emails and the Plaintiff's testimony show is that her co-workers were complaining that she was not doing her job properly and she did not appreciate hearing that. Not only do the Plaintiff's own words refer to her co-workers' actions as nothing more than "kid's play," but the remaining content of the June 2007 email shows that the acts she complains of were limited to her co-workers asking why she didn't answer the phone and transferring calls to her. These are

reasonable expectations in the workplace – hardly the type of conduct that a reasonable person would view as “harassment.”

Moreover, the Plaintiff cannot show that these comments have any nexus with her alleged disability. As discussed above, she has submitted *no* evidence to show that her employer or co-workers perceived her to have a disability. There is no evidence that similar comments would not have been directed to any employee who consistently made mistakes and failed to properly perform her job duties. Thus, there is no evidence that the comments were made “because of” any alleged disability.

The Plaintiff may have found her co-workers’ comments and other actions as “mean,” annoying, or even offensive. The law, however, does not require general civility in the workplace. The evidence is simply insufficient to show that the conduct Plaintiff complains of was severe and pervasive enough to alter the terms and conditions of her employment. Furthermore, she produced no evidence to suggest that the conduct was because of her alleged disability. Therefore, the Plaintiff also failed to establish these essential elements of her claim for disability-based hostile work environment. The trial court properly granted summary judgment to EDMO on that basis as well.

IV. CONCLUSION

The Plaintiff failed to produce evidence sufficient to create genuine issues of material fact as to the essential elements of her claims for gender-based and disability-based hostile work environment. Her claims, therefore, failed as a matter of law. The trial court was correct in granting EDMO's Motion for Summary Judgment and in dismissing the Plaintiff's Complaint. EDMO respectfully requests this Court to affirm the trial court's decision.

DATED this 4th day of April, 2011.

STAMPER RUBENS, P.S.

By: 
MICHAEL H. CHURCH
WSBA # 24957
MELODY D. FARANCE
WSBA # 34044
720 W Boone, Suite 200
Spokane, WA 99201
(509) 326-4800
Attorneys for Respondent
EDMO Distributors, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2011, I caused to be served the within and foregoing **BRIEF OF RESPONDENT** on the following parties at the following addresses:

Paul J. Burns, Esq.
421 West Riverside Avenue, #610
Spokane, WA 99201

by delivering to said parties a true and correct copy of the same, certified by me as such, by way of Regular First Class U.S. Mail, postage prepaid.


MELODY D. FARANCE