

FILED
MAY 20 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297004

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OF THE STATE OF WASHINGTON

ROCHELLE CORNWELL, APPELLANT

V.

ROSES AND MORE, a corporation, RESPONDENT

BRIEF OF APPELLANT

GREGORY G. STAEHELI

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I. INTRODUCTION

Before 1910, a worker injured on the job could only sue his employer under the common law i.e. negligence.

In 1911, employees and management came to an agreement codified in law whereby, if an employee had an on the job injury, he would give up claims for general damages (pain and suffering) but only had to prove that the injury was sustained on the job. (1911 c 74 § 1; RRS § 7673 now RCW 51.04.010)

By 1985, our State recognized the attempt by some employers to circumvent the Labor & Industry law (RCW 51.04.020) by intimidating workers and discriminating against workers who did file on the job injury claims. Our legislature then passed RCW 51.34.020 which was designed to discourage intimidation and discrimination against workers who file such claims. Please also note the case of *Griffith v. Schnitzer Steel Indus.*, 128 Wn.App. 438, 115 P.3d 1065 (2005) cited by the Respondent in which, coincidentally, a general manager paid union workers 20 cents more per hour if they never documented an on the job injury. (*Griffith*, 128 Wn.App. 444) Further, the same general manager ignored a request for a closer parking space for a partially disabled employee who lost a leg in an on the job injury. (128 Wn.App. 44)

II. ASSIGNMENTS OF ERROR

1. The trial court failed to require the Respondent –employer (the moving party) to show the absence of disputed issues of fact.
2. The trial court failed to resolve contested and disputed issues of fact in favor of the nonmoving party, Appellant-employee.
3. The trial court failed to assume facts most favorable to the nonmoving party, the Appellant-employee
4. The trial court ignored that the employer’s lack of documentation of deficiencies.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court require the moving party (Respondent-employer) to show the absence of disputed issues of fact?

Answer: No.

2. Did the trial court resolve disputed issues of fact in favor of Appellant-employee as the non-moving party?

Answer: No, disputed issues of fact were resolved in favor of the moving party.

3. Did the trial court fail to assume facts most favorable to Appellant as the non-moving party?

Answer: Yes.

4. Under what circumstances does lack of documentation for termination not create a triable fact in a wrongful termination case?

Answer: Only when the terminated employee admits facts justifying termination. (*Griffith v. Schnitzer Steel Indus.*, *supra*)

IV. STATEMENT OF THE CASE

Appellant, Rochelle Cornwell, was hired by the Respondent, Roses and More Corporation (hereinafter Roses) on January 19, 2009, (CP 77, L 23) as a Floral Supply Sales Person. (CP 77, L 25) She was fired on August 19, 2009 (CP 79, L 18-19), twenty-two (22) days after she had an on the job injury. At the time of her hire, she was given and she read an employee manual which in pertinent parts stated in writing as follows:

1. Ms. Cornwell was not considered a “full time” employee until she completed the introductory period. (from 1/19/09 to 4/19/09) (CP 78, L 2-3)
2. The first 90 days, (1/19/09 to 4/19/09) were a tryout. (CP 78, L 4)
3. In the first 90 days (January to April), Roses would evaluate her suitability for work. If her attitude,

performance did not measure up to Roses standards, she would be fired. (CP 78, L 5-6)

4. Roses expected prompt and courteous service (to customers) and any failure to meet this standard could result in discipline including termination. (CP 79, L 24-25)
5. A written record of all policy violations is maintained in the individual's employee file. (CP 78, L 14)
6. Ms. Cornwell's manager, Chris Chandler, is continuously evaluating her. (CP 78, L 17)
7. Telephone, emails, fax machines, and voicemails were monitored by Roses for quality control and employees were strictly prohibited from using the phones in an unprofessional or harassing manner. (CP 78, L 20-24)

Because she enjoyed and needed this job, she contends that she was never rude or inconsiderate over the phone to anyone including customers. (CP 79, L 1-5) After her L & I injury, Roses then contends she was rude to customers over the phone, yet they never monitored one call. They never documented one rude call as required for her employee file.

Ms. Cornwell reviewed the affidavits of two customers and four employees all dated over a year after her injury and

termination in August, 2009. (CP 82, L 1-4) By their affidavits, it is contended that Ms. Cornwell was rude and inconsiderate to customers starting when she was hired in January 15, 2009. In clear contrast to the employee in the *Griffith* case (cited below) relied upon by the Respondent, Ms. Cornwell specifically denies any claims of rude behavior over the phone to any customer, as claimed in the sixteen month post-termination affidavits of the two (2) customers and four (4) employees. (CP 82, L 1-4) Whether she was rude is a disputed issue of fact. Before her injury, there is not a single reference in her file to any customer or employee who now claims she was deficient in any way over the phone. In fact, prior to her L & I injury, the only written reference to phone calls is in her April, 2009 performance review which states as follows: MAKE SURE SALES CALLS ARE BEING MADE. (CP 80, L 16) Not one single contemporaneous document that says anything differently.

Her 90 day performance review was conducted in April 2009, which was three months after two (2) customers and four (4) employees now claim she was rude. (CP 82, L 1-4) Before her injury, Appellant asserts that no one contended orally or in writing that she was rude or inconsiderate in any call from January 15, 2009, when she was hired, to April, 2009, when her performance as an employee was reviewed by her supervisor. (CP 81, L 1-30)

In fact, the complaints asserted in this case by declaration are all dated long after her on-the-job injury and, after she filed suit. (CP 57, L 21 & CP 54, L 24)

No written policy violation was ever filed in her employee file as required in the employee manual. While it is a written policy not to be rude or inconsiderate, no one contended in any way that she was deficient in any way toward any customer over the phone or otherwise in her ninety (90) day performance review. (CP 81, L, 23-24)

Because she was told in writing that she is “being continuously evaluated by her supervisor”, Chris Chandler, she constantly asked him, “How am I doing?” to which her supervisor said, “You are doing great.” (CP 78, L 19) We invite the Respondent to point out any denial of this statement by Mr. Chandler in the record. Appellant also assumed that, at all times, the written employee manual promising monitoring of phone calls was true. (CP 78, L 21-23)

V. ARGUMENT

In *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214,961 P.2d 358 (1998) the Court of Appeals ruled as follows at page 22-23:

CR 56 (c) directs a court to grant summary judgment to a moving party “if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law” A material fact is one upon which the outcome of the litigation depends. *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)...In reviewing a summary judgment motion, the appellate court stands in the same position as the trial court and must consider all of the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 351, 779 P.2d 697 (1989).

In *Hallauer v. Certain*, 19 Wn.App. 372, 575 P.2d 732

(1978) the Court of Appeals ruled as follows at page 375:

It is well settled that a party moving for summary judgment must establish that there is no genuine issue as to any material fact and that the undisputed facts require judgment in his favor. (Emphasis added)

The Respondent-Employer, as the moving party, claimed Petitioner was fired for rudeness to customers which are the

material facts in this motion. The Respondent had the burden to prove that these material facts were not disputed. This claim was not only disputed by Appellant in her affidavit but, in addition, she relies on the Respondents own business records to show:

1. Any such deficiencies are required to be in her employment file and there are none.
2. All the affidavits of rudeness were created sixteen (16) months after her on-the-job injury and after industrial claim.
3. There are no contemporaneous records of any act of rudeness in her file.
4. While her supervisor was continuously evaluating her, Appellant continuously asked, "How am I doing?" Her supervisor said, "Great." This was not contested by the supervisor.
5. After ninety (90) days, Respondent's agents refer to her phone calls with the admonition, "MAKE SURE SALES CALLS ARE BEING MADE."

In the instant case, Appellant's affidavit by itself contested the material facts. In addition, the Respondent's own business records support her and contradicted the employer. The Trial Court resolved issues of fact and credibility, even though the

burden is on the Appellant Employer to show no genuine issues of fact. The issue of fact were clear, unmistakable, and then resolved in a motion.

The Trial Court ignored the requirement that it was the Respondent employer who had the burden of showing no material issue of fact. Appellant demonstrated clear and significant issues of fact by her own affidavit and by the Respondent's own business records which showed the absence of rudeness to any customer.

To support its motion for Summary Judgment, Respondent had not one contemporaneous record (filed before her Labor & Industry injury) of any of the following:

1. Any written account of rude phone calls by any customer including the four (4) employees and two (2) customers, Carr and French, who all provided affidavits sixteen (16) months after her injury and termination and after this lawsuit was filed.
2. Any written or even verbal requests by anyone to use the phone monitoring system to listen in on Ms. Cornwell's calls and thereby confirm her bad behavior over the phone.
3. Any contemporaneous record of any customer complaining of any rude behavior.

4. Any record of any employee at the common sales desk (where Rochelle talked to customers) expressing the slightest concern over her phone behavior, tone or words.

The written claims of bad phone behavior are not only beyond her injury date, but actually were prepared in December of 2010, over 1 year and 4 months after her injury on July 29, 2009 and termination on August 19, 2009.

Ms. Cornwell in her affidavit has reviewed each of these affidavits submitted by Respondent and has categorically denied them. (CP 82, L 1-4) Please appreciate this contrast to *Griffith v. Schnitzer Steel Industries*, 128 Wn.App. 438, 115 P.3d 1065 (2005), which is relied upon by the Respondent for the proposition that lack of documentation does not create a triable fact. In *Griffith*, the fired employee admitted he had discussions with the employer about each justification for his termination before his termination. There was no such admission by Ms. Cornwell and her verbal denial is supported by the complete lack of any record in her employee file which is required to be in her employee manual.

In contrast to the employee in *Griffith supra*, Ms. Cornwell specifically denied the late affidavits by the two customers and the four employees that she was rude as now described from January,

2009, when she was hired to her termination in August 2009.

In Appellant's affidavit (CP 78, L 18-19), she relied upon the Respondent's own written records and the oral conversation with Chris Chandler that when she continuously asked him, "How am I doing?" he responded "You're doing great." Significantly in the four (4) page declaration of Chris Chandler (CP. 35-38), there is not one word denying the conversation in which Appellant alleges that he verbally told her she was "doing great".

Appellant doesn't just rely on her own denial. She relies on the Respondent's own records which show no written complaint in her employee file which is a written requirement of the employer. There is absolutely not one written record from any of the employees or customers who supplied affidavits sixteen months after her termination.

Please note the Respondent's stated reason for termination was horrible phone conduct beginning in the same month as her hiring. Ninety (90) days later in April, 2009 she has a written performance review which was conducted three months before her on-the-job injury. There is not one word of bad phone behavior in the performance review. (CP 105) After her Labor & Industry claim is made in late July, 2009, the Respondent employer claims suddenly that the customers are complaining through their own employees in the same month she was hired which was January,

2009. All performance violations are required to be in her employee file but there are none.

Respondent cites *Griffith v. Schnitzer Steel Indus.*, 128 Wn.App. 438, 115 P.3d 1065 (2005). In sharp contrast to *Griffith*, Appellant specifically denied any phone misconduct toward customers and points to the written documents of the employer created before she was injured on the job. While it is now claimed that the phone conduct began in January when she was hired, three months after she is hired, she is told in writing at her performance review without any qualification by her supervisor, Chris Chandler, "MAKE SURE SALES CALLS ARE BEING MADE." (CP 105)

In her ninety (90) day review in April, she was disciplined for singing along with the radio which was disruptive to the business. If she is close enough to bother other employees by singing at the warehouse sales desk, how could not one of these employees in close proximity in a nine month period, not hear her being rude and flippant over the phone at the sales desk?

The singing along with the radio, which was subject to complaint, was never listed as the reason for termination but we point this out because being rude and inconsiderate to customers by any measure of common sense should be a higher priority especially when two of the Respondent's salesmen claim they

heard complaints as early as January, 2009. Yet, before her injury, there is not a single reference to this rude behavior to customers in this performance review but there is to singing.

In *Griffith supra*, Griffith sued on a claim of termination from employment based on his Mormon faith and his age, 52. Roses cites this case for the proposition that employer's "lack of documentation of any employees poor work performance does not create a triable issue" (emphasis added). What is clearly distinguishable with Ms. Cornwell is that the employer in *Griffith* did not need any documentation. No documentation was required because Griffith did not contest that the following deficiencies existed and that they were discussed with his employer before his termination (emphasis added):

1. Griffith encouraged workers NOT TO DOCUMENT WORK RELATED INJURIES. (*Griffith v. Schnitzer Steel Indus.*, 128 Wn.App. 438, 115 P.3d 1065 (2005))
2. Griffith paid workers \$.20 more an hour as a bonus IF THEY DID NOT DOCUMENT WORK RELATED INJURIES. (128 Wn.App. 444)
3. Griffith permitted an employee who ran the company store to keep all the profits for himself. (128 Wn.App. 444)

4. Griffith's facility had an operating cost that was routinely \$300,000 to \$400,000 more than comparable Schnitzer facilities. (128 Wn.App. 444)
5. An employee who lost a leg in an on the job injury was repeatedly ignored on his request for a disabled parking place. (emphasis added) (128 Wn.App. 444)
6. His employee advanced \$200,000 to a customer who then filed bankruptcy. (128 Wn.App. 444)
7. His employee ran up a repair bill of \$50,000 on a \$24,000 truck. (128 Wn.App. 444)
8. The facility Griffith managed suffered a loss of \$5 million dollars. (128 Wn.App. 450)
9. Griffith admitted that all the above deficiencies were discussed with his supervisor before his termination and did not contest the deficiencies. (128 Wn.App. 450)

With these admissions, Schnitzer Steel did not need documentation. In contrast to *Griffith* above, Ms. Cornwell not only denies the newly claimed deficiencies but backs up her claim by showing that her 90 day performance review contains none of the claims of rudeness which Roses claim began shortly after her being hired ninety (90) days earlier.

Further, the only thing Roses documents, before her injury, on the phone issue is “MAKE SURE SALES CALLS ARE BEING MADE.”

Additionally, in sharp contrast to *Griffith*, Ms. Cornwell specifically denies the allegations of the two (2) customers and the four (4) employees who signed affidavits sixteen months after her injury and termination.

Further, if the trial court based its decision in any part on the contested and late affidavits of the two (2) customers and four (4) employees, we respectfully point out that this resulted in a resolution of facts and credibility in a motion for Summary Judgment.

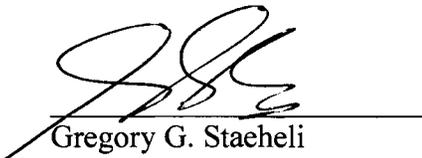
Ms. Cornwell denied any allegation of rude or inconsiderate behavior in her affidavit responding to each of the six (6) witnesses who signed affidavits sixteen (16) months after her termination. She also relies on the Respondent’s written evaluation which highlights the complete absence of any record of misconduct which was required, by Roses, to be placed in her own employee file.

In light of the obvious concern of the Legislature, it is more than plausible that this employer has sent a not to subtle message to all its employees. “If you wonder what happens if you file an on-the-job injury, just look at Rochelle Cornwell.”

VI. CONCLUSION

We have the greatest respect for the Trial Judge but this motion for Summary Judgment should be reversed so this can be heard and resolved by a jury. When a lawyer loses his skill to make a point, the first sign of trouble is repetition. For that I apologize to the Court and counsel and my client.

Dated this 12 day of May, 2011.



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