

No. 30269-5-III

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

ALBERT DAVIS,

Appellant,

v.

FRED'S APPLIANCE, a corporation,

Respondent.

---

RESPONDENT'S BRIEF

---

WILLIAM M. SYMMES, WSBA # 24132  
SAMUEL C. THILO, WSBA # 43221  
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ATTORNEYS FOR RESPONDENT

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## **I. RESPONSE TO ASSIGNMENT OF ERROR**

1. The trial court did not err in granting Defendant Fred's Appliance's motion for summary judgment dismissal.

2. The trial court did not abuse its discretion by striking certain portions of Plaintiff's affidavit, in particular, where much of the motion was unopposed by Plaintiff.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Plaintiff, Albert or "Al" Davis (referred interchangeably to "Plaintiff" or "Mr. Davis") brought suit stemming from when Steve Ellis, a Fred's Appliance sales manager, teased him about his first name. Mr. Ellis referred to Mr. Davis in jest as "Big Gay Al." He did this a total of four times over three separate occasions. The name "Big Gay Al" is the name of a popular cartoon character from the satirical television show South Park.

The teasing nonetheless offended Mr. Davis and when discovered by management, led to an investigation and a formal admonishment of Mr. Ellis, who was instructed to apologize to Mr. Davis. Unfortunately, the apology went awry because Mr. Davis believed the apology to be insincere. Mr. Davis became visibly upset, angry and loud. Mr. Davis' conduct was such that one of Defendant's vendors -- who was unknown to be present by Mr. Davis -- observed Plaintiff's behavior and reported what he saw to Mr. Varness for fear of what might happen. As a result, Mr.

Varness intervened and Mr. Davis eventually calmed down and went home. When the Company later spoke to Mr. Davis by phone, he directed profane language at a member of management and was fired.

Mr. Davis brought suit over the name calling and his termination. He claims primarily that he was discriminated against due to his "perceived" sexual orientation, though it is undisputed that Mr. Davis is not a homosexual and no person believed him to be one. Plaintiff alleged four theories of liability: (1) hostile work environment based on perceived sexual orientation; (2) retaliation; (3) defamation (slander); and (4) wrongful termination in violation of public policy. Plaintiff's retaliation and wrongful termination claims are based upon the allegation that he was fired for expressing a desire to file a formal written complaint against Mr. Ellis; however, he admitted in his deposition that he never informed management of his desire to file such a complaint.

Fred's Appliance moved for summary judgment on a number of grounds, including: (1) the name calling was not severe and pervasive; (2) the name-calling was not motivated by Mr. Davis' sexual orientation, perceived or otherwise; (3) perceived sexual orientation is not a protected class; (4) the name-calling was not defamation as a matter of law; (4) Mr. Ellis' conduct could not be imputed to Fred's Appliance; (5) the public policy claim is not cognizable pursuant to the Supreme Court's opinions in

*Cudney and Korlund*,<sup>1</sup> and (6) Mr. Davis could not establish a retaliation as a matter of law.

In support of summary judgment, Defendant submitted numerous affidavits, but relied primarily on Mr. Davis' own deposition testimony. In response, Mr. Davis submitted his own affidavit that in parts contradicted his deposition testimony, and in other parts relied on conjecture, speculation, and hearsay. Defendant moved on various grounds to strike 21 specific portions of the affidavit. Fred's Appliance additionally moved the trial court to consider only those portions that comply with CR 56(e). In response, Mr. Davis only opposed three of the 21 requests, leaving 18 of the 21 motions to strike unopposed.

Due primarily to the unopposed nature of Defendant's motion to strike, the trial court granted, in part, the motion to strike and then granted summary judgment dismissal because Mr. Davis failed to establish genuine issues of fact as to each *prima facie* element of his claims.

Contrary to what Mr. Davis argues on appeal, the issues before this Court are as follows:

1. Whether the trial court abused its discretion by granting the portion of Defendant's motion to strike that Plaintiff did not oppose.
2. Whether the trial court abused its discretion under CR 56(e) by striking statements that comprised hearsay, speculation, or were contrary to deposition testimony.

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<sup>1</sup> *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524 (2011); *Korlund v. DynCorp Tri-Cities, Services, Inc.*, 156 Wn.2d 168 (2005).

3. Whether the trial court abused its discretion under RCW 50.32.097 by striking the ruling of the Washington Department of Labor and Industries granting Mr. Davis unemployment benefits.

4. Whether a cause of action exists under RCW 49.60.180 for hostile work environment based upon perceived sexual orientation.

5. Whether being called "Big Gay Al" four times over three different occasions amounts to a discriminatory environment under RCW 49.60.180, and if so, whether liability for this conduct can be imputed to Fred's Appliance given the limited scope of Mr. Ellis' supervisory authority and Fred's Appliance immediate steps to remediate the situation.

6. Whether Mr. Ellis referring to Mr. Davis as "Big Gay Al" in reference to a popular satirical cartoon character amounts to defamatory statement that can be imputed to Fred's Appliance under Washington law.

7. Whether referring to Mr. Davis as "Big Gay Al" is defamation *per se*.

8. Whether Mr. Davis established a triable issue over actual damages for purposes of his defamation claim.

9. Whether Mr. Davis' public policy discharge claim is foreclosed by the *Korlund* and *Cudney* decisions.

10. Whether Mr. Davis presented admissible evidence to establish a *prima facie* showing of retaliation.

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### III. STATEMENT OF THE CASE<sup>2</sup>

#### A. FRED'S APPLIANCE IS A SPOKANE-BASED APPLIANCE RETAILER.

Fred's Appliance is a brand source dealer of major household appliances such as gas stoves, refrigerators, microwaves, dishwashers, and other products. (CP 14, ¶ 3) Fred's Appliance operates retail and distribution locations throughout the Inland Northwest. *Id.*

Mr. Davis was hired as a delivery truck driver in June 2009. (CP 14, ¶ 4) Mr. Davis' job required him to deliver appliances from the main warehouse to various retail locations. (CP 42:22-46:13) Additional tasks included loading and unloading his truck, installations of appliances, and freight transfer. *Id.* Mr. Davis reported to the Warehouse Manager, Ed Miller. (CP 46:14-25) Mr. Davis is heterosexual. (CP 3:20-22; 42:5-8; 214:9-11)

#### B. MR. STEINAUER TEASED MR. DAVIS ABOUT HOW HIS NAME REMINDED HIM OF THE CARTOON CHARACTER, "BIG GAY AL."

Over the weekend of May 14-16, 2010, Fred's Appliance conducted a "tent sale" in the parking lot of its Spokane Valley store. (CP 15, ¶ 6) Delivery drivers, such as Mr. Davis, were responsible for delivering appliances to and from the tent sale and other Fred's Appliance locations. (CP 54:22-55:7) A day or so prior to the opening of the tent

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<sup>2</sup> Fred's Appliance submitted affidavits of persons who were present at certain relevant events; however, for purposes of summary judgment (and this appeal), Fred's Appliance relied primarily on the deposition testimony of Mr. Davis to establish the absence of a material issue of fact.

sale, Mr. Davis delivered product the Monroe Street store. (CP 48:21-49:23) Sometime just after entering the store, Brett Steinauer, a Fred's Appliance salesman, said, "Here comes Big Gay Al." (CP 30, ¶ 2; 49:18-51:7)

Mr. Davis looked at him and Mr. Steinauer responded by asking, "Have you ever seen the show, South Park?"<sup>3</sup> (CP 51:9-13) Mr. Davis said, "No." (CP 51:12-17) Mr. Steinauer explained that "Big Gay Al" was a cartoon character on the show and that he referred to Mr. Davis as "Big Gay Al" because his first name was "Al" also. (CP 31:1-2; 51:9-52:2; 52:19-23) Mr. Steinauer nonetheless apologized to Mr. Davis and never called him that name again. (CP 52:19-53:6; 53:25-54:7) The incident with Mr. Steinauer is not part of Mr. Davis' claim in this case. (CP 124:17-23) Mr. Davis' claim stems solely from when Steve Ellis called him "Big Gay Al." (CP 124:17-26).

**C. STEVE ELLIS, ONE OF THE SALES MANAGERS AT THE MONROE STREET STORE, ALSO TEASED MR. DAVIS ABOUT HIS NAME.**

Steve Ellis is a sales manager at the Monroe Street store. (CP 173-75) As a sales manager, Mr. Ellis was not a part of the management at Fred's Alliance and had limited supervisory authority. *Id.* In particular, Mr. Ellis did not have the authority to hire, fire, enter into contracts,

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<sup>3</sup> South Park is a late-night cartoon television program on Comedy Central. "Big Gay Al" is a satirical, homosexual character on the show known for his flamboyant and positive demeanor. (CP 84 n.3)

participate in corporate policy making, or engage in corporate planning. *Id.* Mr. Ellis also had no authority over employees outside of sales, such as Mr. Davis. (CP 174, ¶ 6)

A day or so after Mr. Steinauer teased Mr. Davis, Mr. Ellis also called Mr. Davis, "Big Gay Al." According to Mr. Davis, Mr. Ellis called him that name four times over three different occasions between May 14 and May 20. (CP 54:9-14)

The first incident occurred on the first day of the tent sale at the Valley location on Friday, May 14, 2010. (CP 54:9-55:7) According to Mr. Davis, he walked through the back room of the Valley store into a sales area where Mr. Ellis was sitting on a chair and he said, "Hey, there is Big Gay Al." (CP 55:8-14) Mr. Davis responded, "Excuse me?" Mr. Ellis said, "Hey Big Gay Al." (CP 55:8-14; 56:15-23; 57:9-58:3) Mr. Davis completed his delivery and left without comment. *Id.*

Typically, Mr. Davis and Mr. Ellis rarely saw each other -- maybe twice a week for just a short period. (CP 58:21-59:9) Incident #2, however, occurred the next day at the tent sale. (CP 58:4-10) The two ran into each other and Mr. Ellis again called Mr. Davis "Big Gay Al." (CP 58:4-13) This time, Mr. Davis asked Mr. Ellis to stop. *Id.* Mr. Ellis explained, "Well, it's from South Park." (CP 58:12-14) Mr. Davis replied, "I don't like that show. I don't think it's funny; don't call me that anymore." (CP 58:15-18) Mr. Ellis complied. (CP 59:10-19)

The last incident occurred a few days later at the Monroe Street store on about May 20, 2010, three or four days after the tent sale. (CP 59:19-25) Mr. Davis walked into the Monroe Street store and Mr. Ellis said, "Hey, Big Gay Al." Mr. Davis responded, "Hey, I thought I already asked you to stop?" (CP 59:19-60:7) That was the last time Mr. Ellis, or anyone for that matter, called Mr. Davis "Big Gay Al." (CP 60:2-25; 214:13-20) At no time did Mr. Ellis refer to Mr. Davis with any other term or refer to him literally as being a homosexual. (CP 60:21-61:3)

**D. MANAGEMENT'S RESPONSE TO MR. DAVIS' CLAIMS.**

***1. Meeting with Ed Miller.***

Though it is unclear what occurred next at the Monroe Street store on May 20, 2010, it is undisputed that some form of an incident occurred whereby a discussion involving Steve Ellis, Mr. Davis, and two other Fred's Appliance employees, Dallas Martin and Ryan Muzatko, became heated. (CP 61:11-20) According to Mr. Davis, Mr. Ellis became upset and called him a jerk and threatened to call Mr. Davis' supervisor. (CP 210:20-212:7; 230:1-9; 332:23-333:7) According to the other employees at the scene, Mr. Davis threatened Mr. Ellis with profanity and aggressive behavior. (CP 27-28; 77-78)

In any event, what is undisputed is that, as a result of whatever occurred, Mr. Ellis called Mike Fisher, Operations Manager, and reported that Mr. Davis had used profanity and threatening behavior towards him.

(CP 21, ¶¶ 3-4) Mr. Fisher contacted Mr. Miller, Mr. Davis' direct supervisor, to find out what happened and to suspend Mr. Davis if it were true that he threatened Mr. Ellis. (CP 22, ¶ 5) Mr. Miller confronted Mr. Davis with these accusations. Mr. Davis responded by explaining for the first time that Mr. Ellis had called him, "Big Gay Al" and that is what led to the heated discussion. (CP 227:23-231:11) As a result, Mr. Miller informed Mr. Fisher about what Mr. Davis had said, and Mr. Fisher chose not to issue any discipline until after an investigation. Mr. Davis was then permitted to take the next day off. (CP 22, ¶¶ 6-8; 231:5-232:9; 232:20-234:17; 235:2-25; 236:15-24)

**E. MEETING WITH TROY VARNES, THE GENERAL MANAGER.**

On Monday, May 24, Mr. Fisher contacted Troy Varness, general manager of Fred's Appliance, and informed him about the "Big Gay Al" comments by Mr. Ellis. (CP 22, ¶ 9) Mr. Varness had been out of the office the previous Friday through Sunday and missed the incidents between Messrs. Davis and Ellis. (CP 15, ¶ 7)

Mr. Varness first met with Mr. Davis to learn his side of the story. (CP 15, ¶¶ 8-13) Mr. Davis described how Mr. Ellis called him "Big Gay Al." (CP 16, ¶ 14; 236:15-237:7) Mr. Varness told Mr. Davis that he did not condone such behavior, but indicated that he thought Mr. Ellis meant it as a joke, albeit a poor one. (CP 16-17, ¶¶ 14-16, 18; 236:15- 237:24; 238:21-239:6; 241:24-242:23; 244:24-245:18)

At the end of the meeting, Mr. Varness explained he would speak to Mr. Ellis and arrange a meeting for Mr. Ellis to apologize. (CP 17, ¶ 19; 246:6-247:2; 248:6-18) The goal was for the two to work things out if possible. *Id.* Mr. Davis never indicated to Mr. Varness that he wanted to make a written complaint. (CP 17, ¶ 18; 243:1-24) He instead agreed to meet with Mr. Ellis to resolve the matter. (CP 246:20-247:2; 248:6-18)

Mr. Varness took this approach because he was mindful that many of the employees had just completed a long sales week in preparation for the tent sale over the weekend. (CP 16-17, ¶¶ 15-19) Many of the employees had worked over seven days in a row and were tired and on edge. *Id.* Mr. Varness concluded at the time that he had worked things out from his and Mr. Davis' perspective. (CP 17, ¶ 20; 248:6-18)

**F. REPRIMAND OF STEVE ELLIS.**

Steve Ellis was not in the office on the Monday when Mr. Varness met with Mr. Davis, so Mr. Varness spoke to him the next morning on Tuesday, May 25th. (CP 17, ¶ 21) Mr. Varness asked Mr. Ellis about the "Big Gay Al" comments, and Mr. Ellis admitted saying it, but said he did not mean anything by it. *Id.* He explained he was just teasing based on Mr. Davis' first name being the same as a cartoon character on South Park. *Id.* Mr. Varness told him that such conduct was not acceptable in the workplace. *Id.* Mr. Varness admonished Mr. Ellis and told him to apologize to Mr. Davis. *Id.* Mr. Ellis apologized to Mr. Varness and

agreed to meet with Mr. Davis. (CP 18, ¶ 22) At that time, Mr. Varness considered the matter closed. *Id.*

**G. TERMINATION OF MR. DAVIS.**

Later that morning, Mr. Davis arrived at the Monroe Street store to make a delivery. (CP 249:5-20) Mr. Fisher previously had met with Mr. Davis and informed him about the meeting with Mr. Ellis. (CP 249:17-250:21) Mr. Fisher, Mr. Ellis, and Mr. Davis then proceeded to the loading dock at the store to work things out. (CP 23, ¶ 12; 251:21-252:3)

According to Mr. Davis, Mr. Ellis first summarily denied calling him "Big Gay Al," but when pressed, he apologized. (CP 252:18-21) However, Mr. Davis did not feel the apology was sincere and became upset and walked away to sit in a truck. (CP 252:5-253:18; 333:15-18; 333:22-26) Mr. Fisher recalls Mr. Davis speaking very loudly and cursing. (CP 23-24, ¶¶ 14-19) Though Mr. Davis testified in his deposition that he did not recall either way whether he swore, he later admitted he used at least the "S" word during this meeting. (CP 257:12-14; 336:18-21) Mr. Davis also acknowledged that he has a loud voice and that had he been yelling profanities, "for sure somebody would hear it." (CP 257:22-25)

Unbeknownst to Mr. Davis, this scene was witnessed by Dan Atkinson, a vendor from Luwa Distributing. (CP 33, ¶¶ 2-6, 9) Mr. Atkinson witnessed Mr. Davis' behavior and perceived it as being

threatening and using profanity. (CP 33, ¶ 4) Mr. Atkinson rushed inside the Monroe Street store to inform Mr. Varness of what he perceived to be a volatile situation. (CP 34, ¶¶ 11-12) Mr. Atkinson told Mr. Varness that one of the employees (Mr. Davis) was outside swearing and threatening Mr. Fisher and Mr. Ellis. (CP 34, ¶¶ 4, 6-10, 12)

Mr. Varness then intervened and approached Mr. Davis in the truck and told him it was not safe to drive due to him being so upset. (CP 254:14-22; 258:1-6) Mr. Davis complied with this request. (254:14-22; 333:22-24) Mr. Davis then left work and went home. (CP 254:10-22) Mr. Varness and Mr. Fisher discussed what had occurred, including prior incidents involving Mr. Davis, and Mr. Varness decided that probably the best thing would be to terminate Mr. Davis, but left the final decision to Mr. Fisher. (CP 18-19, ¶ 30)

Mr. Fisher returned inside the store and informed the dispatcher at the warehouse that he wanted to speak to Mr. Davis if he called in. (CP 24, ¶ 22) Later that day, Mr. Davis called Mr. Fisher. (CP 25, ¶ 23; 254:23-255:2) Mr. Fisher explained that the Company had decided to terminate him. (CP 256:14-25) Mr. Davis responded by stating, "You are firing me for being sexually harassed? You f\*\*\*ing prick. You never respected me." (CP 19, ¶ 31; 25, ¶ 23)<sup>4</sup>

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<sup>4</sup> Mr. Davis never denied the conversation. (CP 329-41)

#### IV. SUMMARY OF ARGUMENT

The two orders on appeal are: (1) Order Granting Defendant's Motion to Strike Portions of the Affidavit of Albert Davis;<sup>5</sup> and (2) Order Granting Defendant's Motion for Summary Judgment Dismissal.<sup>6</sup> The trial court should be affirmed on all grounds.

First, the Order on Defendant's motion to strike should be affirmed because most of the motion was unopposed. Defendant moved to strike 21 different sections of the affidavit, but Plaintiff only opposed three of the objections. (CP 162-71; 307-09) It was not error for the trial court to grant the portion of the motion that was unopposed by Plaintiff.

Second, the trial court did not err in striking the "Determination Notice" from the State of Washington Employment Security Department. The documents comprised an unknown declarant's inadmissible hearsay statements and rulings that are statutorily prohibited by RCW 50.32.097.

Third, the trial court correctly ruled that Plaintiff's statements about Mr. Ellis' authority were based upon speculation and lacked personal knowledge as required by CR 56(e).

Lastly, on appeal, Mr. Davis failed to make specific assignments of error to any of the trial court's rulings on the motion to strike. The trial court should be affirmed on that ground as well.

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<sup>5</sup> (CP 347-52, 367-88)

<sup>6</sup> (CP 353-55)

Similarly, the trial court did not err in dismissing each of Mr. Davis' causes of action. First, as to the hostile work environment claim, Mr. Davis claims he was teased due to his perceived sexual orientation; however, there was no *prima facie* showing of a discriminatory animus because it is undisputed that no one teased him because of his sexuality. They teased him because of his name. Moreover, as a matter of law, there is no cause of action for discrimination based upon "perceived" sexual orientation.

In addition, Plaintiff failed to establish that the claimed harassment was sufficiently severe and pervasive to be actionable. Being referred to as "Big Gay Al," just four times over three occasions does not constitute an unlawful violation of RCW 49.60.180.

Lastly, Plaintiff failed to establish facts to impute Mr. Ellis' alleged harassment to Fred's Appliance. Mr. Ellis was not management and Defendant took reasonable remedial steps to stop the harassment as a matter of law when it learned of Mr. Davis' allegations.

As to the defamation claim, the trial court correctly held that Mr. Ellis' teasing did not amount to a defamatory statement that could be imputed to Fred's Appliance as a matter of law. The teasing by Mr. Ellis was not a statement of fact to be taken literally as required for a defamation claim under Washington law. Moreover, given the change in societal norms, referring to someone as a gay is not defamatory as a matter

of law. But, even assuming such comments could be found to be defamatory, it was not defamation *per se* and Plaintiff failed to submit facts establishing he suffered any actual damage.

Finally, the trial court did not err dismissing both theories of wrongful termination. First, the claim for wrongful discharge in violation of public policy is foreclosed by the holdings of *Cudney* and *Korlund*. The Supreme Court in both cases held that public policy discharge claims may not be brought as an exception to the at-will doctrine when adequate remedial measures already exist in the law to protect the public policy at issue. Here, Mr. Davis seeks damages for retaliation for wanting to file a harassment complaint at work. RCW 49.60.210 provides the remedy for the claim and adequately protects the public at large.

The trial court also correctly dismissed Mr. Davis' retaliation claim under RCW 49.60.210 because he failed to establish a genuine issue of fact over pretext. A trial court is to grant summary judgment in wrongful termination cases whenever the plaintiff fails to establish that the employer's stated reason for the termination is unworthy of belief or that an unlawful reason was a substantial factor in the decision to terminate an employee. Even if a plaintiff establishes a weak issue of fact as to pretext, if there is abundant and uncontroverted, independent evidence that no discrimination occurred, summary judgment is still proper.

In this case, Mr. Davis claimed Defendant terminated him because he sought to file a written complaint over Mr. Ellis; however, Mr. Davis admitted he never told Mr. Varness or Mr. Fisher he wanted to file a complaint. Thus, there is no causal nexus between Mr. Fisher terminating him and his alleged activity. Furthermore, Mr. Davis failed to establish that his complaining about Mr. Ellis was the substantial factor in Defendant's decision to terminate him. The undisputed facts establish that by the time the Company terminated Mr. Davis, the Company had known of Mr. Davis' complaints for days, during which the Company conducted an investigation and reprimanded Mr. Ellis. The Company did not retaliate against Mr. Davis for reporting the "Big Gay AI" comments. The Company terminated him for his conduct at the meeting with Mr. Ellis as witnessed by a vendor. In sum, the record contains abundant and uncontroverted independent evidence that no discrimination occurred.

## V. ARGUMENT

### A. THE TRIAL COURT DID NOT ERR IN STRIKING PORTIONS OF PLAINTIFF'S AFFIDAVIT.

#### 1. *Standard of Review for Evidentiary Rulings.*

The decision to admit or exclude evidence for consideration on summary judgment lies within the trial court's sound discretion and will

not be set aside absent an abuse of discretion.<sup>7</sup> *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn. App. 608, 616 (1997) (citing *McKee v. American Home Prods.*, 113 Wn.2d 701, 706 (1989)); *Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 917 (2004). In exercising its discretion, the trial court must adhere to Civil Rule 56(e), which requires affidavits submitted on summary judgment to be based on personal knowledge and comprise statements that would otherwise be admissible at trial:

CR 56(e) requires that affidavits submitted in summary judgment proceedings be made on personal knowledge and set forth such facts as would be admissible in evidence. The affiant must affirmatively show competence to testify to the matters stated. It is not enough that the affiant be 'aware of' or be 'familiar with' the matter; personal knowledge is required. Unsupported conclusory statements and legal opinions cannot be considered in a summary judgment motion.

*Marks v. Benson*, 62 Wn. App. 178, 182 (1991).

Likewise, documents submitted on summary judgment may not be considered unless they would otherwise be admissible at trial. *Dunlap v. Wayne*, 105 Wn.2d 529, 535 (1986) (a court may not consider inadmissible evidence on summary judgment). In short, only admissible

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<sup>7</sup> In his opening brief, Mr. Davis failed to identify or set forth argument as to the proper standard of review of motions to strike and has thus waived any argument to the contrary. RAP 2.52(a).

evidence may be considered by a trial court on summary judgment; inadmissible evidence may never establish a genuine issue for trial.<sup>8</sup> *Id.*

**2. *The Trial Court Did Not Err in Granting the Unopposed Portion of Defendant's Motion to Strike.***

Defendant moved the trial court to strike 21 different sections of Mr. Davis' affidavit. (CP 162-171) In its motion, Defendant identified with particularity the inadmissible statements, exhibits and grounds supporting each objection. *Id.* Mr. Davis, however, did not oppose 18 of the 21 objections made by Defendant. (CP 307-09; 322-23; RP 4-13)<sup>9</sup> As to the unopposed grounds, it should be axiomatic that the trial court did not abuse its discretion by granting the unopposed motions to strike.

In addition, Mr. Davis also has waived his right to now contend that these sections of the affidavit are now admissible for purposes of this appeal. "Appellate courts will not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926 (2007); RAP 2.5(a); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290 (1992) ("Arguments or theories not presented to the trial court will generally not be considered on appeal."). Indeed, Mr. Davis failed to even identify in his appellate brief the specific assignments of error associated with the trial court's

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<sup>8</sup> Also, a party may not establish a triable issue by providing affidavit testimony that is contrary to his or her deposition testimony. *Sun Mountain Productions, Inc.*, 84 Wn. App. at 617-18.

<sup>9</sup> The record delineates precisely the motions to strike that were unopposed by Plaintiff. For purposes of brevity, they will not be restated here. They are summarized in the record at pages 322 and 323 of the Clerk's Papers.

order or the grounds on which he would argue that the trial court abused its discretion. *Appellant's "Opening Brief,"* p. 3. The 18 unopposed motions to strike should be affirmed out of hand.

Plaintiff nonetheless, objects for the first time on appeal that the trial court erred by striking certain portions to which he did not object in the trial court. For example, the phrase: "The store is the busiest in my opinion." *Opening Brief,* p. 28. Defendant objected to this line under ER 701 because it lacked foundation and was speculation. (CP 163:8-13) Defendant reasserts that objection here. The fact also is immaterial because it does not establish any element upon which Plaintiff will bear the burden at trial because it is irrelevant to the issues before the Court. Lastly, as indicated, Plaintiff did not oppose this line being struck in the trial court and thus his argument is improper on appeal. (CP 307-09; 322:13)

Plaintiff also argues for the first time on appeal that the following statement is admissible: "Ellis made the point of making this statement not in the back room but on the sales floor in an area where customers were not only expected to be but were present at the time." *Opening Brief,* p. 30. Defendant moved to strike this statement because Mr. Davis lacked foundation or personal knowledge as to why Mr. Ellis said what he said or where he said it. (CP 163:25-164:6) Plaintiff again did not oppose this

part of the motion to strike in the trial court, and thus the trial court should be affirmed. (CP 307-09; 322:14)

**3. *The Trial Court Did Not Err As to the Portions of the Motion to Strike Opposed By Plaintiff in the Trial Court.***

To reiterate, Mr. Davis opposed only three aspects of Defendant's motion to strike in the trial court: (1) the exclusion of the State of Washington Employment Security Department Determination Notice; (2) the exclusion of Mr. Davis' statement that Mr. Ellis called him a homosexual (as opposed to "Big Gay AI"); and (3) the exclusion of Mr. Davis' testimony concerning what he believed Mr. Ellis's authority was as a sales manager. (CP 307-09; RP 4-13) The trial court properly exercised its discretion to exclude all three types of evidence and Mr. Davis has failed to establish on appeal how the trial court erred.

First, Mr. Davis attempted to introduce a State of Washington Employment Security Department Determination Notice as evidence of Defendant's putative prior inconsistent statement as to why it terminated Mr. Davis. (CP 342-46; RP 10; *Opening Brief*, pp. 18-19) However, there is no admissible statement by Fred's Appliance within that document. It is authored by an *unknown* employee of the Employment Security Department and is inadmissible hearsay. (CP 342-46) Indeed, the document constitutes hearsay within hearsay. ER 801-02.

Plaintiff also argued to the trial court and to this Court that the document was admissible to demonstrate the outcome of Plaintiff's

claim for unemployment benefits. *Opening Brief*, pp. 4, ¶ 8; 10; 13-14; 18-19. This argument cannot establish a genuine issue of fact because the findings, rulings, final orders, and determinations of an administrative law judge, review officer, and the like are inadmissible pursuant to RCW 50.32.097:

Any finding, determination, conclusion, declaration, or final order made by the commissioner, or his or her representative or delegate, or by an appeal tribunal, administrative law judge, reviewing officer, or other agent of the department for the purposes of Title 50 RCW, shall not be conclusive, nor binding, **nor admissible as evidence** in any separate action outside the scope of Title 50 RCW between an individual and the individual's present or prior employer before an arbitrator, court, or judge of this state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts or was reviewed pursuant to RCW 50.32.120.

*Id.* (emphasis added). The trial court did not abuse its discretion by adhering to the requirements of RCW 50.32.097. *Reninger v. Dep't of Corr.*, 79 Wn. App. 623, 636 (1995).

*Korlund*, cited by Plaintiff is inapposite and provides no basis to disregard this RCW 50.32.097 or the hearsay rules. Contrary to what Plaintiff argues, the *Korlund* court did not rule that unemployment rulings or findings are admissible evidence in wrongful termination cases. 156 Wn.2d at 181. Its holding was not dependent in anyway on an unemployment compensation decision. *Id.*

Plaintiff additionally argues that the Employment Security document is admissible to rebut Fred's Appliance putative "new reasons"

for Mr. Davis' termination as set forth in the supposed affidavits of Scott Fitzgerald, Justin Hofeldt, Brad and Bradley Steinman, and Dan Flake. *Opening Brief*, p. 19. However, Mr. Davis continues to misapprehend the record on this point because Defendant did not submit affidavits by any of these gentlemen, and none were considered by the trial court on summary judgment. Indeed, one of the unopposed portions of Defendant's motion to strike was based on the argument that Plaintiff cannot establish a material issue of fact by denying statements of potential witnesses that were never introduced by Defendant or included in the record.<sup>10</sup> (CP 170-71; 323:2)

Second, the trial court did not err by striking Mr. Davis' affidavit testimony where he suggested that Mr. Ellis referred to him as something other than "Big Gay Al." Mr. Davis testified in his deposition that Mr. Ellis never referred to him as anything other "Big Gay Al" (he did not use the word "homosexual" or any other term or phrase). (CP 60:21-61:3) The trial court committed no error by striking affidavit testimony that contradicted Plaintiff's deposition testimony. *Pierre*, 84 Wn. App. at 617-18.

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<sup>10</sup> During discovery, Defendant produced certain statements provided by various witnesses about what they observed. These statement, however, were part of a post-termination investigation and were neither submitted into the record nor relied upon by Defendant on summary judgment. (CP 170-71) Nonetheless, Plaintiff did not oppose Defendants' motion to strike these immaterial statements. (CP 170-71; 307-09; 322:7-323:2)

Third, the trial court did not err by striking speculative statements about Mr. Ellis' authority as a manager because Mr. Davis established no foundation as to what his personal knowledge comprised on the subject. Mr. Davis attempted to establish an inference that Mr. Ellis was part of upper management for purposes of imputing liability to the Company for his actions; however, the only admissible, *material* facts in the record concerning Mr. Ellis' managerial authority in the Company are those submitted by the General Manager Mr. Varness. And Mr. Varness' unopposed declaration established beyond dispute that Mr. Ellis was a sales manager without the authority to hire, fire, make policy, or engage in any upper management function. (CP 173-75) Nothing in Mr. Davis' affidavit disputed these admissible facts, provided any facts material to whether Mr. Ellis was part of upper management, or provided any basis from which he could testify that Mr. Ellis was in management. What Mr. Davis believed or understood does not establish triable issues. The trial court did not err in this regard. *Marks*, 62 Wn. App. at 182-83 ("[An] affiant's 'understanding' of a fact is similar to his being 'aware' of it. It says nothing about personal knowledge and is inadmissible.").

Lastly, Plaintiff suggests in his briefing that the trial court struck portions of Mr. Davis' affidavit after-the-fact and after ruling on summary judgment. *Opening Brief*, p. 5, ¶ 9. This is not true. The motion to strike was filed on August 1, 2011 and argument heard in open court on August

5. (CP 160-172; RP 3) The Court then ruled on both motions in open court on August 9 and indicated it would be sending a letter ruling out so an order could be drafted and presented. (RP 36) Both the orders on summary judgment and motion to strike were noted for presentment concurrently. Plaintiff received full opportunity to argue his position and did so in open court.

In sum, the trial court did not abuse its discretion by striking affidavit testimony that was: (1) contradictory to Plaintiff's own deposition testimony; (2) based upon speculation or hearsay; or (3) inadmissible under statute. Nor did it err by granting unopposed motions.<sup>11</sup>

**B. THE TRIAL COURT DID NOT ERR BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.**

***1. Summary Judgment Standard.***

The review of a summary judgment decision is *de novo*; the appellate court engages in the same inquiry as the trial court and only considers evidence that would be admissible at trial. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359 (1988). As indicated, inadmissible facts cannot establish triable issues of fact to avert summary judgment. *Id.* A triable issue of fact is one upon which the outcome of the litigation depends, in whole or in part. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 487 (2004).

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<sup>11</sup> In any event, Defendant reasserts all objections on appeal and asks the Court not to consider any submissions not in compliance with CR 56(e).

To avoid summary judgment in an employment case, an employee must do more than express opinions or make conclusory and speculative statements. *Id.*; accord *Marquis v. City of Spokane*, 130 Wn.2d 97, 105 (1996). He or she "must establish specific and material facts to support each element of his or her *prima facie* case." *Anica*, 120 Wn. App. at 488; *Francom v. Costco*, 98 Wn. App. 845, 852 (2000). An employee's belief or opinion about his or her job performance or why he or she was fired cannot establish a triable issue. *Francom*, 98 Wn. App. at 852; *Milligan v. Thompson*, 110 Wn. App. 628, 637 (2002).

**2. Plaintiff Failed to Establish a Discriminatory, Hostile Work Environment.**

To establish a claim for discrimination based upon a hostile work environment theory, Plaintiff had to establish: (1) unwelcome conduct; (2) because he is a member of a protected class; (3) the conduct was so severe and pervasive that it altered the terms and conditions of employment; and (4) the conduct is imputable to his employer. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07 (2000); *Clarke v. State Att'y Gen. Office*, 133 Wn. App. 767, 785 (2006). Mr. Davis failed to submit admissible evidence to establish specific and material facts as to elements (2), (3), and (4).

**a. Mr. Davis Was Not Teased Because of His Sexual Orientation, Perceived or Otherwise.**

It is undisputed that Mr. Davis is not a homosexual and that the

statements made toward him were not motivated by any animus against Mr. Davis' sexuality. Mr. Ellis referred to Mr. Davis as "Big Gay Al" in a teasing manner by comparing his first name to that of a satirical cartoon character from South Park. (CP 31:1-2; 51:4-52:2; 52:19-23; 58:4-16) Mr. Davis admitted in his deposition that his name was the animus behind the teasing, not his sexuality. *Id.*

As held by the Court of Appeals in the context of a hostile work environment claim based upon gender:

To establish that offensive conduct constituted sex discrimination, [Plaintiff] must show that the conduct was (a) directed at women and (b) motivated by animus against them.

*Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297-98 (2002). (emphasis added). In other words, to be discriminatory, Mr. Davis had to be a member of a protected class and that membership had to be the motivation behind the inappropriate conduct. *Id.*; see also *Glasgow*, 103 Wn.2d at 406 (the recipient's membership in a protected class must be the motivating factor behind the offensive conduct). Thus, the dispositive question is whether Mr. Davis was singled out and caused to suffer the putative harassment *because* of his sexual orientation. See *Kahn v. Salerno*, 90 Wn. App. 110, 122 (1998) ("[t]o prove that the conduct occurred because of sex or gender, [plaintiff] must prove she would not have been singled out and caused to suffer the harassment had she been a male."). Put another way, would Mr. Davis have been subjected to the

same harassment if he had been of a different sexual orientation. *Adams*, 114 Wn. App. at 297-98. The undisputed record established that he would have been so teased, because his name was the reason for the teasing, not his sexual orientation. (CP 31:1-2; 51:9-52:2; 32:19-23; 58:12-14) Plaintiff is not a homosexual (CP 3:20-22; 42:5-8; 214:9-11) Plaintiff could point to no facts from which a reasonable juror could conclude that Mr. Davis was singled out because of his sexual orientation as opposed to his name.

Mr. Davis argues that his actual membership in a protected class does not matter. He argues that it is sufficient for him to be treated differently because of his "perceived" sexual orientation. *Opening Brief*, pp. 31-34. This claim lacks merit for two reasons. First, as indicated above, there are no facts in the record that suggest Mr. Ellis perceived Mr. Davis to be a homosexual or that this perception was why Mr. Ellis teased Mr. Davis. Second, as a matter of law, there is no cause of action under RCW 49.60.180 for *perceived* sexual orientation discrimination. RCW 49.60.180 makes it unlawful to discriminate based on one's "sexual orientation." *Id.* The statute does not list "perceived sexual orientation" as a protected class. *Id.* RCW 49.60.040(26) provides the definition of "sexual orientation" as used in the statute:

"Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "**gender expression or identity**" means having or **being perceived** as having a gender identity, self-

image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

*Id.* (emphasis added).

As the above definition demonstrates, when the legislature promulgated RCW 49.60.040(26), it contemplated actionable forms of perceived discrimination and elected only to make actionable discrimination based upon one's perceived "gender expression or identity," not homosexuality.<sup>12</sup> *Id.* And, there is no claim or facts by Mr. Davis that he was supposedly singled out due to his gender expression or identity.

Plaintiff relies on *Barnes v. Washington Nat. Gas Co.*, 22 Wn. App. 576 (1979), to argue that one's perceived membership in a protected class is enough to establish a cause of action. The *Barnes* court, however, only held that the definition of "handicapped" for purposes of disability discrimination included, one perceived to be handicapped under WAC 162-22-020. *Id.* It made no other holding and the dictum relied by Plaintiff is contrary to well-established civil rights law.

Washington courts often look to interpretations of Title VII when applying RCW 49.60.180. *Payne v. Children's Home Soc. of Washington, Inc.*, 77 Wn. App. 507, 512 (1995) ("Since Title VII prohibits

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<sup>12</sup> When the Legislature or the Human Rights Commission intends a cause of action to exist for perceived membership in a protected class, they have expressed that intent clearly by statute or regulation. See RCW 49.60.040(26) (perceived gender identity); RCW 49.60.174 (perceived HIV or hepatitis C infection); WAC 162-22-020 (perceived disability).

discrimination in "terms, conditions, or privileges of employment . . .," such cases are persuasive when construing RCW 49.60.180(3)."); WAC 162-16-200 (purpose is to interpret RCW 49.60.180 consistently with Title VII). And as held by one federal district court in granting summary judgment:

As defendant points out, Title VII protects those persons that belong to a protected class, . . . and says nothing about protections of persons who are *perceived* to belong to a protected class.

*Butler v. Potter*, 345 F.Supp. 2d 844, 850 (E.D. Tenn. 2004); *also Lewis v. North Gen. Hosp.*, 502 F.Supp. 2d 390, 401 (S.D.N.Y. 2007) (citing cases for majority rule that Title VII does not extend to persons perceived to be in a protected class). Except where specifically enumerated, RCW 49.60.180 says nothing about protections for persons perceived to belong to a protected class.

In sum, teasing someone, even if the teasing comprises a derogatory or offensive term, is not unlawful harassment in and of itself. "It is not sufficient to show that [an] employee suffered embarrassment, humiliation, or mental anguish" from offensive conduct. *Adams*, 114 Wn. App. at 298. The conduct must be motivated by the recipient's membership in a protected class as enumerated in RCW 49.60.180.

**b. In Any Event, the Conduct Was Not Sufficiently Severe and Pervasive to Be Discriminatory.**

Even assuming perceived sexual orientation is a protected class,

Mr. Ellis' conduct was not severe and pervasive enough to constitute unlawful treatment. To reiterate, hostile work environment claims do not lie just because a plaintiff is subject to humiliating, hostile, or offensive conduct. It must be based on a discriminatory animus and be so severe and pervasive that it affects the terms and conditions of one's employment. *See MacDonald v. Korum Ford*, 80 Wn. App. 877, 886-87 (1996) (conduct affects the terms and conditions of employment when it is so ongoing and pervasive that tolerating it becomes a common or daily event in one's employment relationship).

The "Civil Rights Code" (RCW 49.60) is not a 'general civility code.'" *Adams*, 114 Wn. App at 298. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes and conditions of employment." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71, 121 S.Ct. 1508 (2001). As the *Kahn* Court held, "[l]aws against discrimination are 'not directed at unpleasantness *per se*.'" 90 Wn. App. at 118. Likewise, "simple vulgarity does not give rise to a cause of action." *Id.*

These standards are firm and meant to filter complaints "attacking the ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes [or racial-related or sexual orientation related jokes] and occasional teasing." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275 (1998) (quotations omitted); *see also*,

*Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998 (1998) ("[C]ourts and juries should not mistake ordinary socializing in the workplace—such as male-on-male horseplay . . . for discriminatory 'conditions of employment.'). Or, as originally held in *Glasgow*, "[c]asual, isolated or trivial manifestations of a discriminatory environment do not affect the terms and conditions of employment to a sufficient degree to violate the law." 103 Wn.2d at 406–07.

It is beyond dispute that Mr. Davis' claim for hostile work environment is based on being referred to as "Big Gay Al" just four times over three different occasions. (CP 54:9-55:14, 56:15-25, 57:9-21, 58:4-20, 59:10-60:19) No other derogatory names were directed at Mr. Davis. (CP 48:8-20; 61:1-3) As a matter of law, being referred to as "Big Gay Al" four times over three occasions does not amount to a violation of RCW 49.60.180. It speaks volumes that Plaintiff has yet to address this argument concerning such a critical element of his claim.

**c. No Facts Exist to Support Imputing Liability to Fred's Appliance under RCW 49.60.180.**

Mr. Davis claims that Mr. Ellis' alleged harassment should be imputed automatically to Fred's Appliance because he carried the title of "sales manager." Mr. Davis also argues that Defendant failed to take adequate remedial measures to end the putative harassment when it learned about it. Both claims lack merit and are unsupported by the record.

First, liability for unlawful harassment does not impute automatically to an employer unless it is perpetrated by a member of upper management. *Francom*, 98 Wn. App. at 854-56 (mid-level warehouse manager was not at a sufficiently high level in the company to impute his acts automatically to the employer) (citing cases). The offender must occupy "[such] a sufficiently high level position within [the company] to be considered its alter ego." *Washington v. Boeing Co.*, 105 Wn. App. 1, 12 n.23 (2000). It is undisputed that Mr. Ellis occupied no such level of authority at Fred's Appliance. (CP 174-75) Indeed, though it was Plaintiff's burden on summary judgment to submit *prima facie* facts for each element of his claim, he offered no admissible facts concerning Mr. Ellis' rank or authority within Fred's Appliance.

Plaintiff's speculation and reference in an affidavit about whether Mr. Ellis could require Mr. Davis to help customers load merchandise into their cars, even if admissible, was not probative or material to whether Mr. Ellis occupied such a level at Fred's Appliance to be considered its alter ego. The only facts in the record demonstrate he did not occupy such a high level in management and thus, as a matter of law, automatic liability did not attach. (CP 174-75)

Second, assuming again for the sake of the argument that being called "Big Gay Al" on three occasions constitutes unlawful harassment, Mr. Davis nonetheless failed to establish genuine issues over whether

Fred's Appliance failed to take reasonable remedial measures when it became aware of Mr. Davis' claims. To impute liability to an employer for hostile work environment, the plaintiff must establish that the employer: a) authorized, knew, or should have known of the harassment and b) failed to take reasonably prompt and adequate corrective action to stop it. *Glasgow*, 103 Wn.2d at 407-08.

Here, it is undisputed that not only did Fred's Appliance take prompt corrective action when it learned of the teasing, but it also took measures to prevent such conduct in the first place. First, it is undisputed that upon being hired by Fred's Appliance, Mr. Davis received Fred's Appliance handbook containing its policy against workplace harassment and describing the process to report claims of harassment. (CP 207:23-208:25; 213:19-214:20, 282, 284, 306)

Second, in accordance with its policy, when Fred's Appliance learned of the "Big Gay AI" comments, it immediately suspended discipline it was going to issue to Mr. Davis for what it thought was an unrelated incident and investigated the allegation. (CP 22, ¶ 7; 232:19-235:6, 236:15-24) Mr. Varness, the General Manager, then met with Mr. Davis to learn his side of the story and then admonished Mr. Ellis for his comments. (CP 17, ¶¶ 21-22, 248:5-25) Contrary to what Plaintiff suggests in his argument, Defendant had no duty to terminate Mr. Ellis for his conduct. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 793

(2004); see also *Intlekofer v. Turnage*, 973 F.2d 773, 779-80 (9th Cir. 1992) (remedial action can be in form of oral counseling, depending upon the gravity of the circumstances).<sup>13</sup> Simply put, the trial court did not err in dismissing Plaintiff's harassment claim.

**C. PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE FOR DEFAMATION/SLANDER.**

***1. Mr. Ellis' Statements Were Not Defamatory As a Matter of Law.***

To establish a claim for defamation, a plaintiff must demonstrate a false and unprivileged statement of fact, fault, and damages. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55 (2002). The first inquiry, which is a question of law for the court, is whether a statement is actionable as a statement of fact or whether it is a non-actionable expression of opinion or satirical statement not meant to be taken literally. *Id.*; *Hoppe v. Hearst Corp.*, 53 Wn. App. 668, 672 (1989). For example, a statement is not defamatory when it is "understood only as good-natured fun, not intended to be taken seriously and in no way intended to reflect upon the individual." *Hoppe*, 53 Wn. App. at 672.

Here, the trial court properly considered the "totality of circumstances" and the factors enunciated in *Dunlap v. Wayne*, 105 Wn.2d 529, 539 (1986), utilized in *Hoppe* and *Robel*, and held that Mr. Ellis'

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<sup>13</sup> Contrary to what Mr. Davis argues now, he testified in his deposition that he agreed to the proposed resolution of Mr. Ellis apologizing, and he never asked to put anything in writing. (CP 248:5-25)

statements to Plaintiff were not statements of fact that could be interpreted literally as referring to Plaintiff's sexual orientation:

[T]he comment made was a smart-aleck and potentially a mean comment. It was made in an environment and in a context, however, and I do not believe reasonable minds could differ that it was not made as a statement of fact. It was an insulting comment made but **it was not a statement of fact that the plaintiff was, in fact, gay.**

(RP 38) (emphasis added). Contrary to Plaintiff's argument, it was not error for the trial court to so rule because such a determination is always one of law to be decided by the court.<sup>14</sup> *Robel*, 148 Wn.2d at 55; *Hoppe*, 53 Wn. App at 672.

Moreover, there is no dispute that Mr. Ellis was not referring to Mr. Davis as in fact being a homosexual, but instead teasing Mr. Davis about his name. Furthermore, there is no evidence in the record that would suggest that the co-workers or the so-called unidentified customers who supposedly overheard these comments considered them to mean literally that Mr. Davis was a homosexual. It is not unlike the holding in the *Hoppe* case wherein the court held that referring to someone as "Hurley Herpes" was not defamatory as a matter of law because it could

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<sup>14</sup> In responding to Fred's Appliance's summary judgment motion and on appeal, Mr. Davis asserts that for a statement to be of opinion rather than fact, the speaker must use qualifying words such as "in my opinion," otherwise, it is defamatory. (CP 130) There is no support in the law for this argument.

not be reasonably understood as describing a fact about someone's medical condition.<sup>15</sup> 53 Wn. App. at 673.

Indeed, in *Robel*, co-workers and supervisors referred to the plaintiff as a "liar", "snitch", and "squealer" in front of co-workers and customers. The Court nonetheless held that given the context in which the statements were made (in a store in front of customers and co-workers), these statements did not amount to defamation as a matter of law. *Robel*, 148 Wn.2d at 56. The court instead found the statements to be non-actionable name calling based on animosity. *Id.* at 56-57.

Those facts are almost on all fours with this case with one exception. Being called "Gay" no longer carries with it a negative connotation or exposes one to hatred and ridicule, as do the terms "liar," "snitch," and "squealer." Societal norms have changed. Nonetheless, the Court found the offensive terms in *Robel* not to be defamatory as a matter of law. And if those terms were not defamatory in *Robel*, there is no basis to argue that "Big Gay Al" was defamatory here. *See* p. 37-40, *infra*.

The work place invites teasing and banter among workers, and name calling is not out of the norm. As an audience, the co-workers and managers were "prepared for mischaracterization and exaggeration." *Id.* at 57. Likewise, any customer who would have overheard Mr. Ellis' comments would not have taken the statements as literally meaning

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<sup>15</sup> Calling someone "Big Gay Al" or better yet, just "gay" could connote various meanings to various listeners, including but not exclusive of one's sexuality.

Plaintiff was a homosexual, but would rather more reasonably be understood it as office banter between co-workers. *Id.* The trial court did not err by ruling that the statements were non-actionable teasing. *See Robel, Hoppe, supra.*

**2. *In Any Event, Plaintiff Failed to Establish Any Harm from Mr. Ellis' Statements Given Today's Societal Norms.***

For the first time on appeal, Mr. Davis argues that a jury question is presented because what Mr. Ellis said to him amounts to defamation *per se*. Mr. Davis relies on *Caruso v. Local Union No. 690*, 100 Wn.2d 343 (1983), and a series of New York state cases. This argument lacks merit and is nothing more than an effort to cure the defect that Mr. Davis presented no admissible evidence of actual damage as a result of Mr. Ellis comments.

Damage is a *prima facie* element of defamation that Mr. Davis had to establish to avoid summary judgment. *See Mark v. Seattle Times*, 96 Wn.2d 473, 486 (1981); *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 601-02 (1997) (a defamation plaintiff must establish special damages in terms of actual economic harm). Moreover, as indicated above, not every misstatement is actionable: "it must be apparent that the false statement presents a substantial danger to the plaintiff's personal or business reputation." *Duc Tan v. Le*, 161 Wn. App. 340, 355, *review granted*, 172 Wn.2d 1010 (2011). Here Defendant presented no facts to establish a *prima facie* showing of actual damages.

Mr. Davis instead argues that damages are presumed in this case because being called "gay" amounted to defamation *per se*. Though no Washington Court has ever held as such, this argument is contrary to Washington's public policy and the current jurisprudence concerning defamation law. It also contravenes the current societal norm that being gay no longer suggests one is some sort of a deviant, a second class citizen, or engages in illegal activity. It no longer "exposes a person to hatred, contempt, ridicule or obloquy, or to deprive[s] him of the benefit of public confidence or social intercourse . . .", the requisite showing for defamation *per se*. *Caruso*, 100 Wn.2d at 353.

Though being referred to as a homosexual has previously been considered defamation *per se* in other jurisdictions, the majority rule is now to the contrary and trending not to be considered defamation at all. For example, false statements regarding homosexuality are no longer defamatory just as it is no longer defamatory to refer to a White person as Black or vice versa. See *Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252, 261 (Ct. App. 1985) ("[C]ourts will not condone theories of recovery which promote or effectuate discriminatory conduct."); *Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551, 553-54 (Ga. Ct. App. 1989); *Ledsinger v. Burmeister*, 318 N.Wn.2d 558, 563 (Mich. Ct. App. 1982). Federal courts have adopted the rationale that the false imputation of homosexuality can be defamatory is no longer sustainable. *Albright v.*

*Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004); *Stern v. Cosby*, 645 F. Supp. 2d 258, 273-76 (S.D.N.Y. 2009).

Indeed, it is ironic that Plaintiff seeks on one hand protection from unlawful discrimination under Washington's Civil Rights Act (RCW 49.60.180), the same statute intended to eradicate discrimination against those who have historically been stereotyped as second class citizens (such as homosexuals), but on the other hand seeks to have this Court validate and perpetuate this stereotype of homosexuals by ruling that being referred to as gay is defamation *per se* let alone defamation. *See Albright v. Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004) ("[i]f [the court] were to agree that calling someone a homosexual is defamatory *per se*[,] it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status."). This Court should not condone such a theory of recovery here; that is, one that perpetuates or effectuates discriminatory conduct.<sup>16</sup> *See* Haven Ward, "I'm Not Gay, M'kay?": *Should Falsely Calling Someone a Homosexual Be Defamatory?*, 44 Ga. L. REV. 739 (2010).

Moreover, holding that the false imputation of homosexuality is defamatory would contravene today's public policy of intolerance for and condemnation of invidious discrimination in Washington. In fact, Washington has become a front-runner regarding equal rights and

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<sup>16</sup> Otherwise, a homosexual would likewise have a cause of action for defamation if he were incorrectly referred to as heterosexual.

treatment among all its citizens, heterosexual, homosexual, and otherwise. In addition to prohibiting discrimination against a person due to their sexual orientation, on February 13, 2012, Governor Chris Gregoire signed the Marriage Equality Act into law making gay marriage lawful. *See* Jim Camden, *Gregoire Signs Gay Marriage Bill*, SPOKESMAN REVIEW, Feb. 13, 2012.<sup>17</sup> A judicial pronouncement that such a statement is defamatory is inconsistent with Washington's public policy and RCW 49.60.180. Just as referring incorrectly to someone who is Christian as Jewish or someone who is White as Black cannot constitute defamation in today's culture, neither should referring incorrectly to someone as gay be defamatory.

In sum, because Mr. Ellis' statements, at a minimum, did not constitute defamation *per se*, damages are not presumed and must be established with specific and admissible evidence to avert summary judgment. Plaintiff failed to submit any such facts and thus the trial court did not err. This Court should affirm the decision and, in addition, hold that being called "gay" is not defamatory as a matter of law.

**3. *Fred's Appliance Cannot Be Liable for Allegedly Defamatory Statements Made By an Employee Outside the Scope of His Employment.***

In addition to the reasons provided above, Fred's Appliance is not liable as a matter of law for Mr. Ellis' comments because his statements

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<sup>17</sup> Available at <http://www.spokesman.com/stories/2012/feb/13/gregoire-signs-gay-marriage-bill/>

were nonetheless made outside the scope of his employment. As held by the Supreme Court in *Snyder v. Med. Serv. Corp. of E. Washington*,

[w]hen an employee's intentionally tortious or criminal acts are not in furtherance of the employer's business, the employer is not liable as a matter of law, even if the employment situation provided the opportunity or means for the employee's acts.

145 Wn.2d 233, 242-43 (2001). Under Washington law, an employee's conduct is outside the scope of his or her employment if "it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Robel*, 148 Wn.2d at 53 (citing RESTATEMENT (SECOND) of AGENCY §§ 228(1) & (2) (1958)). "The proper inquiry is whether the employee was fulfilling his or her job functions at the time he or she engaged in the injurious conduct" *Id.* at 53-54. "[W]hether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, whether he was engaged at the time in the furtherance of his employer's interest." *Lunz v. Dept. of Labor & Indus.*, 50 Wn.2d 273, 278 (1957).

Here, Plaintiff presented no facts or argument as to how Mr. Ellis' comments were made in furtherance of Defendant's business or within the scope of his employment. First, viewing the evidence in a light most favorable to Plaintiff, it is undisputed that Mr. Ellis violated Company policy by teasing Mr. Ellis and interfering with his work. (CP 282) Also,

Mr. Davis worked in a different department and did not report to Mr. Ellis. (CP 42:22-46:25; 174, ¶¶ 6-7, ) Thus, to tease Mr. Davis, Mr. Ellis had to cease his sales function to engage in behavior which served no purpose for his employer. *Compare Robel*, 144 Wn.2d at 53 (no evidence that the employees violated company policy or rules) *with Snyder*, 145 Wn.2d at 242-43 (company forbade conduct alleged to be tortious). Given the uncontroverted facts of what transpired, no inference arises that Mr. Ellis was acting within the scope of his employment to impute liability to Fred's Appliance. *Snyder*, 145 Wn.2d at 242-43.

**D. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S PUBLIC POLICY CLAIM AND PLAINTIFF FAILED TO APPEAL THE RULING ANYWAY.**

Defendant moved against Plaintiff's claim for wrongful termination against public policy on the ground that Plaintiff could not establish as a matter of law the "jeopardy element." (CP 100-01) In the trial court, Plaintiff did not respond to this part of Defendant's motion. (CP 124-43) Likewise, on appeal, Plaintiff does not attempt to establish the "jeopardy element" of his claim. The trial court should be affirmed on this ground alone. RAP 2.5(a); *Washburn*, 120 Wn.2d at 290.

Nonetheless, the *prima facie* elements for the public policy tort are: (1) the existence of a clear public policy in Washington (*clarity element*); (2) that discouraging the conduct in which a plaintiff engages in would jeopardize the public policy (*jeopardy element*); (3) that the policy-

protected conduct caused the dismissal or termination (*causation element*); and (4) that the defendant must not be able to offer an overriding justification for the dismissal (*the absence of justification element*). *Korlund*, 156 Wn.2d at 178; *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941 (1996). As indicated, Plaintiff failed to establish the jeopardy element.

To satisfy the "jeopardy" element of the public policy tort, a plaintiff must establish that no alternative means exist to safeguard the relevant public policy other than through a new exception to the employment-at-will doctrine. *Cudney*, 172 Wn.2d at 524; *Korlund*, 156 Wn.2d at 182-83. To the extent such an alternative means exists, Plaintiff must then establish that the "other means of promoting the public policy are inadequate." *Cudney*, 172 Wn.2d at 530; *Korlund*, 156 Wn.2d at 181. Whether an alternative means to safeguard a public policy exists or is inadequate is a question of law for the Court. *Id.* And, it is immaterial whether the applicable alternative means provides any remedy to the Plaintiff "so long as the alternative means are adequate to safeguard the public policy." *Cudney*, 172 Wn.2d at 538; *Korlund*, 156 Wn.2d at 183 (emphasis added). Most importantly, when the particular statute or relevant law upon which the public policy tort is based has enforcement procedures or provides remedies to safeguard compliance therewith, the jeopardy element cannot be established as a matter of law. *Cudney*, 172

Wn.2d at 534-35; *Korlund*, 156 Wn.2d at 181-82.

Mr. Davis' claim for wrongful termination in violation of public policy stems from a claim that Fred's Appliance terminated Mr. Davis in violation of the public policy promulgated in Chapter 49.60. (CP 7) Chapter RCW 49.60, however, already provides a remedy for such claims under RCW 49.60.210 (retaliation), and Mr. Davis has asserted this claim as well. (CP 6) Thus, pursuant to both *Cudney* and *Korlund*, the trial court did not err in dismissing this claim.

**E. MR. DAVIS FAILED TO ESTABLISH A PRIMA FACIE CASE FOR WRONGFUL TERMINATION**

***1. Appellant Must Submit Facts Establishing Retaliation Was a Substantial Factor for Mr. Davis' Termination.***

To establish a claim for retaliatory termination under RCW 49.60.210, a plaintiff needed to first establish a *prima facie* case comprising these elements: (1) he engaged in a protected activity (2) he suffered a termination; (3) he had been doing satisfactory work; and (4) his termination occurred under circumstances that raise a reasonable inference of unlawful treatment. *Anica*, 120 Wn. App. at 488; *Milligan*, 110 Wn. App. at 636-38. Once a plaintiff provides specific, admissible facts as to each of the *prima facie* elements, a rebuttable presumption of retaliation arises and the burden of production (not burden of proof) shifts to the employer to provide a legitimate, lawful reason for the termination. *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 447 (2005);

*Anica*, 120 Wn. App. at 492; *Milligan*, 110 Wn. App. at 636-37. Upon the employer meeting this burden, the presumption drops from the case and the plaintiff must then present admissible and specific facts that the employer's stated reasons are pretextual and unworthy of belief. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181-82 (2001); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 618-19 (2002).

In other words, to defeat summary judgment, Mr. Davis needed to establish both specific facts to make out a *prima facie* case and establish that Fred's Appliance's reasons for termination are pretextual and unworthy of belief. *Hill*, 144 Wn.2d at 185-86. But, even when a plaintiff establishes both a *prima facie* case and pretext, an employer will still be entitled to judgment as a matter of law if no rational trier-of-fact could conclude that the retaliation was a **substantial factor** in the employer's action. *Id.* at 448 (emphasis added). Put another way:

A court may grant summary judgment even though the plaintiff establishes a *prima facie* case and presents some evidence to challenge the defendant's reason for its action. The Supreme Court recently held that when the 'record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created **only a weak issue of fact** as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,' summary judgment is proper.

*Milligan*, 110 Wn. App. at 637 (emphasis added). Likewise, "[c]ourts are not to be used as a forum for appealing lawful employment decisions simply because employees disagree with them." *Hill*, 144 Wn.2d at 190

n.14. Here, the record does not support a *prima facie* case of retaliation, pretext, or that retaliation was a substantial factor in Respondent's decision to terminate him.

**2. *Mr. Davis Failed to Establish a Retaliatory Motive As a Matter of Law.***

Defendant's stated reason for Mr. Davis' termination was because of his conduct during and after the attempt by Mr. Ellis to apologize to him (even assuming Mr. Ellis' apology was less than sincere). Mr. Davis, however, argues in his affidavit that this reason is unworthy of belief and a pretext (a false reason) to cover up for the real reason; namely that he sought to file a written complaint over the "Big Gay AI" comments. This contention is without fact and in direct contradiction to Mr. Davis' deposition. Mr. Davis admitted he never filed a complaint or spoke with Mike Fisher (the person who ultimately terminated Mr. Davis) or Troy Varness about filing one. (CP 236:1-246:35) Thus, this argument cannot establish a material issue of fact. *See McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 111 (1999) ("Self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact.")

Furthermore, this argument makes no sense because it is undisputed that Fred's Appliance had discussed the "Big Gay AI" comments days before Plaintiff's termination, and had taken reasonable steps to correct the matter. It did not retaliate. It instead, attempted to fix

the problem. Aside from the disappointing outcome of the meeting with Mr. Ellis, it remains undisputed that Defendant came to the aid of Mr. Davis when it learned about the "Big Gay AI" comments -- it did not retaliate against him.

Then, per Mr. Davis' own admission, at the meeting with Mr. Ellis, Mr. Davis became admittedly upset and admittedly used profanity, conduct in contravention of Fred's Appliance policy. (CP 113:18-21; 254:14-22, 258:1-6; 282) Mr. Davis also did not dispute the profanity he directed at Mr. Fisher over the phone when he was terminated. (CP 25, ¶ 23; 329-41) Both undisputed facts establish as a matter of law a legitimate basis to have terminated Mr. Davis. *See, e.g., Colville v. Cobrac Serv., Inc.*, 73 Wn. App. 433, 439 (1994) ("opposition to an employer's possible discrimination does not enjoy absolute immunity; an employee may still be terminated for proper cause even when engaged in protected activity.").

Lastly, to the extent there could any doubt over the legitimate basis for Mr. Davis' termination, there is also abundant, uncontroverted, *independent* evidence that no discrimination occurred per the *Milligan* standard set forth above. First, in Mr. Davis' deposition, he admits that his voice is loud and that would carry for others to hear if he were to use profanity. (CP 257:17-25) Second, it is undisputed that, unbeknownst to Mr. Davis, a third-party witness was in fact within hearing distance and overheard Mr. Davis using threatening and profane language at Messrs.

Ellis and Fisher, and then reported what he witnessed to Mr. Varness. (CP 33-35) Mr. Davis cannot dispute what was reported to Mr. Varness or the effect the report may have had on Mr. Varness' impression of Mr. Davis as an employee. Third, Fred's Appliance then terminated Mr. Davis due to the behavior witnessed and reported by Mr. Atkinson, and for his conduct on the phone with Mr. Fisher.

Simply put, Mr. Davis cannot dispute what Mr. Atkinson witnessed, and more importantly, what Mr. Atkinson reported to Mr. Varness. Mr. Davis admitted he did not know others were a witness to his behavior and he was not present to hear what Mr. Atkinson reported to Mr. Varness. (CP 112:7-10, 113:17-18, 114:8-9)

As a result, not only did Plaintiff fail to submit any admissible facts establishing Fred's Appliance terminated Mr. Davis for seeking to file a written complaint against Mr. Ellis, Mr. Davis' own testimony, along with Mr. Atkinson's eye-witness declaration, establish abundant, uncontroverted independent evidence establishing the legitimate basis for Mr. Davis' termination as a matter of law. Mr. Davis' argument that Mr. Atkinson's undisputed eye-witness account is untruthful, inaccurate, or biased is not enough to defeat summary judgment absent admissible controverting facts. *See, e.g., Nat'l Union Fire Ins. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) ("neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility

suffices to avert summary judgment."); *Wessel v. Buhler*, 437 F.2d 279, 282 (9th Cir. 1971) ("Of course, the jury could have disbelieved the denials, but disbelief does not become a substitute for affirmative evidence."); *see also, Soar v. Nat'l Football League Player's Assoc.*, 550 F.2d 1287, 1289 n.4 (1st Cir. 1977) ("A court is not obliged to deny an otherwise persuasive motion for summary judgment on the basis of a vague supposition that something might turn up at trial.")

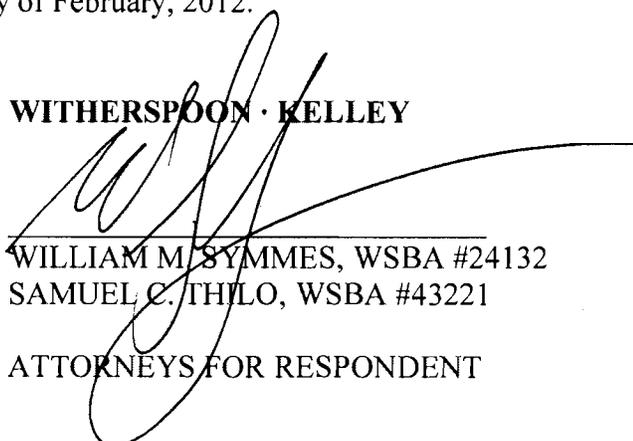
The trial court did not err in applying the *Milligan* standard to dismiss Mr. Davis' claim for retaliatory discharge pursuant to RCW 49.60.210.

#### IV. CONCLUSION

Based upon the foregoing, Defendant respectfully requests that the Court of Appeals affirm the trial court's order on Defendant's motions to strike and for summary judgment on all grounds.

DATED this 16 day of February, 2012.

**WITHERSPOON · KELLEY**

  
WILLIAM M. SYMMES, WSBA #24132  
SAMUEL C. THILO, WSBA #43221

ATTORNEYS FOR RESPONDENT

**DECLARATION OF SERVICE**

On the 16<sup>th</sup> day of February, 2012, I caused to be served a true and correct copy of the within document described as RESPONDENT'S BRIEF to be served on all interested parties to this action as follows:

Gregory Staeheli 301 West Indiana Ave Spokane, WA 99205 Phone: 509-326-3000 Fax: 509-326-5604 Attorney for Appellant	<input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Via Electronic Mail
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**WITHERSPOON · KELLEY**

  
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ALICIA ASPLINT, Legal Assistant