

NO. 325407

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KEESHA KNUTSON

Appellant,

vs.

**WENATCHEE SCHOOL DISTRICT #246, a Washington School
District**

Respondent,

BRIEF OF RESPONDENT

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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I. ASSIGNMENTS OF ERROR

The Appellant assigns error to the trial court's Order of Dismissal on Summary Judgment, dismissing her claims alleging hostile work environment claim and retaliation.¹

II. COUNTER STATEMENT OF THE CASE

A. PROCEDURAL:

Appellant, a former employee of the Respondent School District brought suit against the District after she was laid off for budgetary reasons. The suit was filed in the Chelan County Superior Court on October 30, 2012. (CP 003 - 014). She alleged three causes of action; Gender Discrimination and Hostile Work Environment, Retaliation and Due Process Violations. (Id) After concluding discovery, the District moved for summary judgment. (CP 043 – 068) On May 13, 2014 the Honorable Lesley A. Allan, entered an order granting the District's Motion for Summary Judgment and dismissing the former Employee's complaint with prejudice. (CP 354-55) The former Employee timely appealed this Order.

¹ Appellant also alleged a "Due Process" violation that was dismissed by the learned trial judge. The Appellant does not appeal from that portion of the Order on Summary Judgment.

B. FACTUAL:

1. FACTS RELATED TO HOSTILE WORK ENVIRONMENT CLAIM.

The learned trial judge determined as a matter of law that the relevant acts that could be considered in the former Employee's Hostile Work Environment claim were insufficient, as a matter of law, to support the claim. She excluded actions that occurred outside the statute of limitations since they were clearly of a different character than those inside the statute of limitations. The "acts" occurring outside the statute of limitations were of a far different character than those relied upon within the statute. Act occurring before October 30, 2009 were outside of the statute of limitation.

i. MATTERS OCCURRING OUTSIDE OF THE STATUTE OF LIMITATIONS

1. During a conference in Tacoma in 2006 Mr. Vandervort came to Ms. Knutson's hotel room around 8:00 p.m. while she was watching an episode of a television show titled "Survivor." He remained in her room until sometime after 9:00 p.m. During the show they discussed matters involving Mr. Vandervort's marriage and his personal life. Ms. Knutson was not offended by the conversation. She was not uncomfortable with the conversation. During the entire time Mr. Vandervort acted as a

gentleman. Ms. Knutson never reported this encounter to anyone at the District because they were work colleagues and she had nothing to complain about regarding the encounter. (CP 128 – 132)

2. On one occasion sometime between 2005 and 2007 Mr. Vandervort told Ms. Knutson about an HBO television series known as “Cathouse.” He told her that the show was about a Bunny Ranch. He “light-heartedly” told her that his favorite girls on a show titled “Cathouse” were Sunset and Summer and that owing a “bunny ranch” would be a perfect job for him. It was a light hearted conversation. Ms. Knutson was not offended by the conversation and had no reason to report the conversation to anyone. It was just banter between co-employees. (CP 133 - 136)

3. On one occasion between December 2006 and December 2007 Mr. Vandervort shared with Ms. Knutson that he had an affair with a woman after a separation with his first wife. The conversation arose because Ms. Knutson had recently separated from her husband and was sharing with Mr. Vandervort issues related to that separation. Mr. Vandervort had called Ms. Knutson to see how she was doing since her separation with her husband. Ms. Knutson confided with Mr. Vandervort about personal matters related to her separation and in response Mr. Vandervort told her about an affair that he once had as a young man. He worked at a different

school district at the time of the affair. The conversation was confidential between them. They had developed a relationship where they would share confidential matters with each other. She knew a fair amount about Mr. Vandervort's personal life and she shared a fair amount about her personal life with him. (CP 136 - 140)

4. On one or two occasions Mr. Vandervort invited Ms. Knutson to attend a dance class offered at the District. Mr. Vandervort instructed dance classes at the District after school hours as part of a District sponsored wellness program. Ms. Knutson told Mr. Vandervort that she knew how to "line dance." Mr. Vandervort asked Ms. Knutson "a couple of times in his office" if she would show him a couple of different dance moves. He also asked to borrow a couple of her line dancing music tapes. He would periodically ask her why she did not attend the after school dance program. She did not report this to anyone because there was nothing to report since the "were office friends." On occasion he would demonstrate a particular dance step to Ms. Knutson and other employees while in the office. (CP 141-43; 192)

5. On one occasion in 2006 or 2007 after a brief encounter with Mr. Vandervort, Ms. Knutson's sister told her that Mr. Vandervort "could not get his eyes off of your boobs." Ms. Knutson does not recall that Mr. Vandervort acted in any way that caused her concern in that encounter.

She did not remember her response to her sister's comment. She did not report the incident to anyone because she did not believe that it was an issue that needed to be reported. (CP 144-46)

6. In late June 2008, Ms. Knutson came to work admittedly dressed in inappropriate attire. She was wearing shorts and a tank top. Another employee complained to Mr. Vandervort. Ms. Knutson was frustrated that the employee who complained did not know that she was not working on that day. While discussing the complaint with the Ms. Knutson and her frustrations, Mr. Vandervort stated in a light-hearted manner "Well I don't know. I kinda like your cleavage." Ms. Knutson thought the comment was odd but she was not offended by it because they were workplace friends. (CP 146 - 49)

7. In September 2008 Mr. Vandervort noted in her evaluation that "as a role model you set the standard for appropriate dress." Ms. Knutson understood this comment to refer to the earlier incident in June (see above). Ms. Knutson asked Mr. Vandervort if he put this reference into her evaluation "because of the complaint so that they can't complain anymore?" In response Mr. Vandervort looked at her, laughed and said "Well." Ms. Knutson thought he made the statement "in a flirtatious manner." Ms. Knutson did not report the incident to anyone at the District. Ms. Knutson received a favorable evaluation. (CP 150 -53)

8. Mr. Vandervort told Ms. Knutson on several occasions that “If you ever want to talk, we could meet somewhere and go talk together.” She understood that the offer was made between “work friends.” He also said, “We can go talk. You know, if there’s anything you need, I’d do anything for you.” Ms. Knutson thought the comments seemed like genuine expressions of a work friends concern and care for her. (154- 55)

9. Ms. Knutson testified that on occasions Mr. Vandervort would make music CD’s for her. He would put music he was listening to or liked on a CD and give it to Ms. Knutson. She remembers receiving two music CD’s from Mr. Vandervort during the time they worked together. She thought that giving her the CD’s was a “kindly gesture” on the part of Mr. Vandervort. She never complained to anyone about receiving the CD’s. (CP 155- 57)

10. In March 2008 Mr. Vandervort offered to lend Ms. Knutson money so she could go back to school and obtain her college degree. Ms. Knutson was one class short of obtaining a college degree. She did not take the class because she could not afford it. She thought the offer was “inappropriate” but she was not offended by the offer. Ms. Knutson thought it would be inappropriate to borrow money from a supervisor or coworker. Mr. Vandervort also offered to help her with her studies if she

took the class. Ms. Knutson told him that she “did not feel comfortable with that.” (CP 157 - 60)

11. Sometime around the middle of October 2008 Mr. Vandervort asked Ms. Knutson if she was dating Russ Waterman and if she thought that was a smart thing to do. Ms. Knutson stated that their work relationship changed 100% after that conversation. The relationship changed from one of being friendly, jovial, and kindly to being very “cold-shouldered” and aloof. (CP160- 61; 125-26)

12. On December 16, 2008 Ms. Knutson was in a staff meeting with Mr. Vandervort and Lisa Turner and Steve Cole, then the Executive Director of Human Resources. In the meeting, Mr. Vandervort yelled at her that she should not refer to the out-of-school program as “school-age care.” He wanted her to refer to it as daycare. He also told Ms. Knutson that she needed to attend leadership meetings and keep regular work hours. Mr. Cole then told her that it was important for her to attend leadership meetings. She was upset with this comment but did not explain why she was upset. She simply promised to attend leadership meetings. In a later meeting that day between Ms. Knutson and Mr. Vandervort, she reminded Mr. Vandervort of a meeting where he told her she did not have to attend leadership meetings. Mr. Vandervort stated “Oh, I can’t believe

you didn't throw me under the bus. I forgot about that. I will go talk to Steve Cole." After that he lowered his voice. (CP 95 -113; 115 - 17)

13. A few months later (February 2009) Ms. Knutson was called into a staff meeting by Lisa Turner. Mr. Vandervort was also in attendance. Mr. Vandervort stated that he needed a report from her that she claims he had never asked Ms. Knutson to produce. He then raised his voice and looked at Ms. Knutson and said "See! I get nothing! I just get nothing!" (CP 123 - 24)

14. She claims that from October 2008 Mr. Vandervort stopped sitting next to her at the monthly leadership meetings. (CP 163)

ii. MATTERS OCCURRING WITHIN THE STATUTE OF LIMITATIONS

15. Ms. Knutson recalls a time in September or October 2009 or 2010 when Mr. Vandervort was walking by her on the stairway and she stopped him to talk. He told her "Well, you know, I thought I had tried to make you a director, but that just might not work out." He did not explain himself further and said that he could not talk then because he was on his way to an Administrative Cabinet meeting. (CP 165)

16. She recalls once in the 2009-2010 school year while in the workroom Mr. Vandervort said "Hi" to the other women in the room but not to her. (CP 165 - 66)

17. In October 2010 Ms. Knutson was in a meeting with her supervisor, Chet Harum, and Mr. Vandervort regarding the budget. Mr. Vandervort raised his voice in the meeting, snickered, shook his head and rolled his eyes. This was in response to Ms. Knutson's suggestion that her program could raise revenue by making parents pay for the summer program. (CP 173 - 76)

18. In the summer of 2010 Mr. Vandervort asked Ms. Knutson to follow up with a woman named Natalie who wanted to use part of the playground where the District was holding its summer camp. When Mr. Vandervort found out that Ms. Knutson had not followed up on the matter he yelled at Ms. Knutson saying "why the hell haven't you called her back yet?" He may have also said "shit" in that encounter. (CP 181 - 85)

2. FACTS RELATED TO RETALIATION CLAIM.

The learned trial judge based her decision to dismiss the Retaliation claim on the undisputed fact that the former Employee was laid off as a result of budget cuts made by the Wenatchee School District Board of Directors, who were not aware of any claims of hostile work environment. (CP 356). The trial judge concluded that the former Employee failed to establish that the reasons for her termination were pretextual. The trial judge also concluded that the former Employee failed to establish any causal link between her layoff and the alleged

discrimination. The material and undisputed facts on the Retaliation claim relate to pretext and causation.

The former Employee was admittedly an at-will employee. (CP 087) She was employed by the District as the Director of the childcare program. (CP 004) The Childcare program was a “self-sufficient” program, meaning that the District expected the revenue generated from the program would meet or exceed the expenses. (CP 191) The Childcare program consistently ran at a financial loss. (CP 191, 202)

In 2008, in response to a nationwide economic downturn, the Wenatchee School District Board of Directors (Board) started to implement cost saving measures in anticipation of reduced revenues from the State. (CP 192, 201, 205-06) In the 2009-10 school year to save money the District did not hire certified staff to replace twenty (20) certified staff who retired. In addition, the Board decided to layoff the Assistant Director of Maintenance and the Day Care billing clerk. (Id.) By March of 2011 the State had cut the District’s funding by \$3,000,000 and was threatening even deeper cuts. (CP 192, 202).

In the 2010-11 school year the Board directed the administrative staff to look at budget cuts in “self-sufficient” programs that were operating at a deficit. (CP 192, 202, 205-06) The Administrative Cabinet, consisting of the Superintendent and several high level administrators,

reviewed the various options and came up with various budget-cutting recommendations. Chet Harum, a District administrator and direct supervisor of the former Employee advised her in March, 2011 that the District was looking at cuts in “self-sufficient” programs that were running at a deficit. He also advised her that the Childcare program could not justify a full-time director. (CP 196)

The Superintendent, Brian Fones presented the various recommended budget-cutting measures to the Board, that included the elimination of the position of Director of Childcare. (CP 202) At the time that he made these recommendations he was not aware of any claim by the former Employee of a hostile work environment or claims of discrimination. (CP 202) On May 10, 2011 the Board entered a resolution that included a number of cost-cutting measures including the elimination of the position of Director of Childcare. (CP 19, 202, 206) At the time that the Board directed the cuts the Board Chair was unaware of any complaints being made by the former Employee and that the Board had never received any reports indicating any issues related to the former Employee’s working conditions. (CP 206) The former Employee’s position was eliminated solely for budgetary reasons. (Id)²

² The former Employee argues that the Board could have taken money from its reserve fund to pay for the Director’s position. This is true but immaterial. The

III. ARGUMENT

A. STANDARD OF REVIEW

The Court should review the trial court's decision *de novo*. When reviewing a summary judgment order, this Court should engage in the same inquiry as the trial court. *Tyrrell v. Farmers Ins. Co.*, 140 Wash.2d 129, 132–33, 994 P.2d 833 (2000). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, entitling the moving party to judgment as a matter of law. CR 56(c). The Court should consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wash.2d 1, 3, 721 P.2d 1 (1986)

B. THE TRIAL COURT PROPERLY EXCLUDED THE ALLEGED “FLIRTATIOUS BEHAVIOR” OCCURRING OUTSIDE OF THE STATUTE OF LIMITATIONS PERIOD.

The former Employee argues that the trial court erred when it did not consider the allegedly flirtatious behavior in ruling on the hostile work environment claim relying on *Antonius v. King County*, 153 Wash.2d 256,

Board has the sole discretion to determine the District's budget. The only material issue is whether the former Employee can come forward with evidence that the Board's was really motivated by her workplace complaints and that the budget explanation was merely a pretext.

261–62, 103 P.3d 729 (2004).³ In order to consider conduct that is outside of the statute of limitations period the court must find that the untimely conduct was part of “the same actionable hostile work environment” that occurred within of the statute of limitations. *Antonius*, 153 Wash.2d at 271, 103 P.3d 729. Acts that are “so discrete in time or circumstances that they do not reinforce each other” do not constitute a single hostile work environment in order to defeat the statute of limitations. *Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 727 (7th Cir.2004) See also, *Loeffelholz v. University of Washington*, 175 Wash.2d 264, 273, 285 P.3d 854, 858 (Wash.,2012); *Crownover v. State ex rel. Dept. of Transp.* 165 Wash.App. 131, 144, 265 P.3d 971, 977 (2011) In this case, there is a clear demarcation of conduct. The former Employee argues that she was subjected to flirtatious conduct or unwelcome advances until the “Waterman” conversation of October 2008. After that date, her relationship with Mr. Vandervort changed 100% and Mr. Vandervort never again communicated with her in a flirtatious manner. (CP 127) After October 2008 “he was cold” to her. *Id.* After October 2008 her hostile work environment claim is based on her claims that Mr. Vandervort gave her the “cold shoulder.” The trial judge was correct in excluding from the hostile work environment claim the allegedly

³ See 1-10 under section II(B)(1)(a) of this brief.

“flirtatious” conduct that occurred outside of the relevant statute of limitations period.

C. THE FORMER EMPLOYEE FAILED TO ESTABLISH A PRIMA FACIE CASE OF A HOSTILE WORK ENVIRONMENT.

The trial judge assumed that every relevant fact regarding the hostile work environment claim was true but that the totality of facts alleged did not, as a matter of law, create a *prima facie* case of discrimination. The trial judge determined that the conduct was neither offensive enough nor pervasive enough to create a cognizable claim.⁴ The non-barred remaining relevant events that relate to the hostile work environment claim involve claims that Mr. Vandervort allegedly yelled at her on two occasions and ignored her on a few occasions. The trial judge properly concluded that these events were not sufficient to establish a *prima facie* hostile work environment claim as a matter of law.

⁴ Frankly this is true even if the court considered the allegedly flirtatious conduct as well. It was mostly welcome conduct between two work friends and the former Employee was not offended by the conduct. In addition these events cannot be considered as unwelcome or offensive. The Plaintiff admits that items 1 (watching survivor), 2 (talking about “Cathouse”), 3 (discussion of the affair), 4 (Invite to dance class), 6 (the cleavage comment), 7 (saying “Well” in a flirtatious manner), 8 (saying they could talk anytime), 9 (making of CD’s), 10 (Offer to loan money to take college class) were neither offensive nor unwelcome. One might infer that the sister’s comment about Mr. Vandervort staring at Ms. Knutson (5) might be considered offensive and unwelcome but interestingly Ms. Knutson did not notice Mr. Vandervort acting in the matter reported by the sister and could not recall the specifics of the incident.

In order to make out a *prima facie* claim of hostile work environment the former Employee must establish the following; (1) the harassment was unwelcome and offensive, (2) the harassment was because of her gender, (3) the harassment affected the terms and conditions of her employment, and (4) the harassment is imputable to the employer. *Loeffelholz v. University of Washington*, 175 Wn.2d 264, 275, 285 P.3d 854, 859 (2012)

While it may be a stretch of the imagination to do so, this Court can assume that the relevant conduct was unwelcome⁵ and offensive⁶ to the former Employee. However, the former Employee cannot establish that the relevant conduct (yelling at her and snubbing her) was directed at her because of her gender. Likewise, she cannot establish that the relevant conduct was severe and pervasive enough to amount to a change in the terms and conditions of her employment. *Washington v. Boeing Co.*, 105 Wn.App. 1, 10, 19 P.3d 1041 (2000); *Adams v. Able Bldg. Supply, Inc.*, 114 Wn.App. 291, 296, 57 P.3d 280 (2002) The trial judge determined, as a matter of law, that it was not.

⁵ While the trial judge found it “questionable” as to whether the conduct was unwelcome between these work friends, she did not ground her decision on this issue. This Court should not be distracted by this issue either.

⁶ In her brief she admits that “she did not originally find the flirtatious conduct to be offensive. Appellant’s Brief at 24

a. THE FORMER EMPLOYEE CANNOT ESTABLISH THAT THE GENDER NEUTRAL CONDUCT WAS DIRECTED AT HER BECAUSE OF HER GENDER.

The former Employee claims that Mr. Vandervort yelled at her on at least three occasions and ignored her in the presence of others on at least three occasions. This is the sum and substance of her hostile work environment claim. The acts of yelling or ignoring someone are gender neutral. They do not, in and of themselves, provide evidence of gender discrimination. Mr. Vandervort has stated that he does not yell often but if he does it is more often directed at men than it is at women. In determining whether harassment occurs “because of sex”, the appropriate question is: “would the employee have been singled out and caused to suffer the harassment if the employee had been of a different sex?” *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). Under *Glasgow*, gender must be the “motivating factor” for the unlawful discrimination. (*Id.*); See also, *Payne v. Children's Home Soc. of Washington, Inc.* 77 Wash.App. 507, 514, 892 P.2d 1102, 1107 (Div. 3, 1995) “Sex” in this context refers to gender, not activity of a sexual nature generally. *Doe v. Dep't of Transp.*, 85 Wn.App. 143, 149, 931 P.2d 196, (1997), *rev. den.* 132 Wn.2d 1012, 940 P.2d 653 (1997). She cannot rely upon comments made to a group of people or comments that were not specifically directed at her. *Sangster v. Albertson's, Inc.*, 99 Wn.App. 156,

162, 991 P.2d 674 (2000) (comment on another female employee's figure to a group was not “because of sex” because it was not directed at the plaintiff)

To establish that offensive conduct constituted sex discrimination, the employee must show that the conduct was (a) directed at women and (b) motivated by animus against them as women. Title VII is not a “general civility code”. It is not sufficient to show that the employee suffered embarrassment, humiliation, or mental anguish arising from non-discriminatory harassment. *Payne*, 77 Wash.App. 514 The dispositive question is whether the employee would have been subjected to harassment if she had been a man. *Payne*, 77 Wash.App. 514. In accord, see *Adams v. Able Bldg. Supply, Inc.* 114 Wash.App. 291, 297-298, 57 P.3d 280, 284 (Div. 3,2002)

Adams and *Payne* are instructive. In *Adams* the plaintiff's boss was a “rude, boorish, thoroughly obnoxious supervisor prone to outrageous temper tantrums.” He got mad and popped all of the birthday balloons that employees had put in his office. He swore at a meeting, slammed a pencil down on the desk and stormed out. The pencil almost hit the plaintiff. He got mad at the plaintiff and left his office angry and swearing. He shoved plaintiff away from her computer. A shouting match ensued. Plaintiff was crying. He got mad at plaintiff because she

was having trouble removing a sawhorse from a box. He “went ballistic” and swore angrily at plaintiff. The Court of Appeals upheld the summary judgment dismissal of the employees harassment claim concluding that the conduct was not sufficiently gender specific to support a claim of gender based harassment. *Adams* at, 298(Ms. Adams makes no showing that the conduct was based on animus toward women)

In *Payne* a female employee sued claiming that her boss was abusive. She alleged that when he (the boss) would talk, if he were the least bit upset he would begin to get red in the face. He would pace back and forth on the floor, use a tone of voice that was very demeaning and degrading. He was so unsure most of the time of what he needed and what he wanted and when he needed it. His means of dealing with most women in the office were anger and outbursts. “It was like you should have known what he needed and wanted before he did.” *Payne* 77 Wash.App. at 509 The plaintiff claimed that his behavior toward her was unlike his behavior toward men. *Id.* at 515. The *Payne* court upheld the summary judgment of dismissal concluding that the employee did not come forward with sufficient evidence to establish that her supervisors conduct was directed at her because of her gender.

There is no evidence in the record to establish that Mr. Vandervort yelled at Ms. Knutson or ignored her in the hallway because she was a

woman. In fact Mr. Vandervort admits that he has yelled at male employees more frequently than female employees. He admits that he would have responded the same to the events involving Ms. Knutson regardless of her gender. (CP 193) Mr. Harum and Ms. Turner both have indicated that Mr. Vandervort has demonstrated this behavior in encounters with both men and women. (CP 196; 199) The described encounters of yelling or ignoring someone are not gender specific. For example, the former Employee admits that on one occasion Mr. Vandervort did not acknowledge her but he did acknowledge other women in the room. This is evidence that he does not ignore women as a class and that the slight was not gender based. He may have ignored her because he was upset with her or wanted to avoid upsetting her. It was not because of her gender since he did not ignore the other women in the room. The same is true of the other encounters she relies on to establish her case. As a matter of law the former Employee has not come forward with sufficient evidence to establish the gender requirement of her claim.

b. THE FORMER EMPLOYEE CANNOT ESTABLISH THAT THE RELEVANT CONDUCT WAS SO SEVERE AND PERVASIVE THAT IT AFFECTED THE TERMS AND CONDITIONS OF HER EMPLOYMENT.

Even if the Court decides that the behavior of yelling and ignoring the former Employee was gender based, she still has not met the severe

and pervasive element of the claim. In deciding whether the relevant conduct was severe or pervasive enough to affect the terms and conditions of employment, the Court must look at the totality of the circumstances, including the frequency and severity of the conduct, whether it was physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interfered with the employee's work performance. *Boeing*, 105 Wn.App. at 10, 19 P.3d 1041. "Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law." *Id.* In addition, the conduct must be objectively and subjectively abusive. *Adams*, 114 Wn.App. at 297, 57 P.3d 280. See also, *Davis v. Fred's Appliance, Inc.* 171 Wn. App. 348, 287 P.3d 51(2012); *Payne*, supra at 77 Wn.App. at 515; *Kahn v. Salerno*, 90 Wn.App. 110, 125-26, 951 P.2d 321 (1998), *rev. den.* 136 Wn.2d 1016, 966 P.2d 1277 (1998); *MacDonald v. Korum Ford*, 80 Wn.App. 877, 885, 912 P.2d 1052 (1996)

As the Court noted in *Faragher v. City of Boca Raton* , 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998):

These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code. . . . Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." B. Lindemann & D. Kadue, *Sexual Harassment in Employment Law* 175

(1992) We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view. See, e.g., *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577-578 (C.A.2 1989); *Moylan v. Maries County*, 792 F.2d 746, 749-750 (C.A.8 1986); See also 1 Lindemann & Grossman 805-807, n. 290 (collecting cases granting summary judgment for employers because the alleged harassment was not actionably severe or pervasive) (Some citations omitted)

A grant of summary judgment dismissing a hostile work environment claim is appropriate if the submissions demonstrate nothing more than “[c]asual, isolated or trivial manifestations of a discriminatory environment” because such manifestations do not affect the conditions of employment “to a sufficiently significant degree to violate the law.” *Washington v. Boeing Co.*, 105 Wn.App. at 10 (citing *Faragher*, 524 U.S. at 788; *Glasgow v. Ga.-Pac. Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985)). The former Employee’s claims that she was yelled at by Mr. Vandervort on three or four occasions and that she was snubbed by him in the hallways and at meetings simply do not rise to the level required to make out a *prima facie* claim. See, e.g., *Manatt v. Bank of America, NA*, 339 F.3d at 792, 799 (9th Cir.2003) (finding no hostile work environment where colleagues told jokes including phrase “China Man,” pulled eyes back with fingers to mock appearance of Asians, and ridiculed plaintiff for word mispronunciation) See also, *Vasquez v. County of Los Angeles*, 307

F.3d 884, 893 (9th Cir.2002) (no hostile environment discrimination where employee was yelled at in front of others, told that he had “a typical Hispanic macho attitude,” that he should work in the field because “Hispanics do good in the field”); *Star v. West*, 237 F.3d 1036, 1037 (9th Cir.2001) (no pervasive harassment where coworker touched plaintiff's breasts, shoulders, and hips and grabbed her around the shoulders); *Brooks v. City of San Mateo*, 229 F.3d 917, 924-25 (9th Cir.2000) (plaintiff's allegation that coworker fondled her breasts and touched her stomach insufficient to show severe or pervasive harassment); *Washington v. Boeing*, 105 Wn.App. 1, 13, 19 P.3d 1041 (2000)(the reference to an African American woman as ‘brillo head,’; a transfer after a coworker remarked that she couldn't perform her job as well as a man; failure to provide her with training; and calling her ‘dear’ and ‘sweat pea while highly offensive, were isolated incidents and not sufficiently pervasive to alter the conditions of her employment.”); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir.1990) (five instances of inappropriate comments about employee's appearance and/or sexual advances not sufficiently severe or pervasive to sustain hostile work environment allegation); *Davis v. Fred's Appliance, Inc.*, 171 Wash.App. 348, 362, 287 P.3d 51, 58 (Div. 3,2012) (referring to a heterosexual male employee as “Big Gay Al” three times in one week was not sufficiently pervasive to avoid summary

judgment.); *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F.Supp.2d 970, 992 (C.D.Cal.2000) (concluding that fifteen to twenty different comments in reference to sex or gender over an eighteen-month period failed to constitute an objectively abusive workplace); *Kortan v. California Youth Authority*, 217 F.3d 1104 (9th Cir.2000)(during a meeting with the plaintiff, the plaintiff's supervisor referred to various females in the office as "regina," "madonna," or "castrating bitch," and referred to women generally as "bitches" and "histrionics".)

Drotz v. Park Electrochemical Corp. 2013 WL 6157858, 1 -3 (D.Ariz.,2013) is a good illustration of the level of conduct required in a gender-based discrimination claim. In *Drotz*, a female employee complained that the following behavior constituted sex harassment:

(1) The supervisor called Plaintiff on the phone, yelled at her, and verbally reprimanded that "it's your job to know what that notation is."

(2) On one occasion the employee approached her supervisor who remarked in front of other male employees in the office "Oh, [Plaintiff] just came in. I totally lost my train of thought." Plaintiff claims that she felt "insulted" by the comment because the supervisor just kind of looked off into the distance like he was dazed or something, "Like somehow I was distracting him."

(3) On another occasion the supervisor asked Plaintiff if she had any children. Plaintiff responded in the negative, and the supervisor asked, "Oh, not yet?" Plaintiff claims that she felt insulted by the question. Plaintiff assumed that the question was predicated on an "insulting" assumption that Plaintiff (a female) would want to have children.

(4) Plaintiff was struggling with a particular job assignment. In response, the supervisor loudly and repeatedly voiced his dissatisfaction with the Plaintiff's work. Plaintiff claimed that her supervisor never criticized the men the way she was criticized.

(5) The supervisor called Plaintiff into his office for a closed-door meeting to discuss why Plaintiff had not yet completed a job assignment. Plaintiff explained that she was working on it but was waiting for more information. The supervisor became upset, yelled at Plaintiff that she was a "liar," and "said that he knew people at Park who could hurt [Plaintiff] and hurt [Plaintiff's] career." Plaintiff claims that she had never seen the supervisor treat anybody else like that.

(6) The supervisor called Plaintiff into his office to question her failure to properly perform one of her job duties involving calibration of some equipment. During the meeting, Plaintiff was unable to answer the supervisor's questions regarding what a notation on the calibration report meant. The supervisor responded by "raising his voice," showing Plaintiff

a copy of her job description, and reminding Plaintiff that, as lab manager, she was solely responsible for calibrating the lab's equipment. Plaintiff claims that the supervisor's tone and manner of presentation indicated that he wanted to "pick a fight" with Plaintiff, and Plaintiff had never seen him address a male that way.

The court granted the employer's summary judgment motion on the gender-based harassment claim because the plaintiff did not establish the gender requirement or the pervasive requirement of a prima facie case. The court noted that the supervisor's actions were in response to Plaintiff's failure to properly complete assigned job tasks. The court noted that "A supervisor's occasional verbal criticism, even if delivered untactfully, does not transmute into sex-based harassment merely because the subject of the criticism is of a different sex than the majority of her non-criticized coworkers. *Id.* at 12. The court also noted that:

Plaintiff also fails to establish the third element of a prima facie case. Plaintiff's evidence is insufficient to establish that [supervisor's] conduct was severe or pervasive enough to alter the conditions of Plaintiff's employment. The two stray remarks and three instances of verbal criticism, spread over several months, do not constitute pervasive conduct. Additionally, the job-specific criticism, uttered without profanity or otherwise demeaning language, does not constitute severe conduct merely because [supervisor] unspecifically used his tone and volume to express his displeasure at Plaintiff's poor job performance.

Id. at 13. In accord, *Garity v. Potter*, 2008 WL 872992, 3 (D.Nev.,2008)(Summary judgment granted to employer where Plaintiff claimed that she was berated” in front of fellow employees, that her supervisor was rude to her, that she was deprived of receiving logical and clear instructions, that she was yelled at, that the amount of time she spent on lunch breaks was questioned, that she was posted on the time clock to come in later than other mail carriers, that she was constantly scrutinized, that she was put in no-win situations, that her supervisors and others “watched her” and “hovered around” her, that she was denied overtime opportunities, that she was required to undergo psychological counseling, that she was disciplined for safety and rule violations, that she was denied the opportunity to start work early, and that she was generally treated less preferentially than non-white employees)

Here, the severity of the hostile work environment claims does not reach the threshold level suggested by the case law. Even in the aggregate, Mr. Vandervort’s alleged actions, pale in comparison to conduct in cases where the court granted summary judgment. At best, the claims demonstrate an unpleasant employment atmosphere where Mr. Vandervort may have been rude, unfriendly, or even disliked the former Employee. However, she has not presented evidence to show that the conduct in question was so severe or pervasive that it effectively altered the terms and

conditions of her employment. The learned trial judge properly dismissed this claim as a matter of law.

D. THE FORMER EMPLOYEE CANNOT ESTABLISH A CAUSAL LINK BETWEEN THE BOARD'S DECISION TO ELIMINATE HER JOB AND HER ALLEGED COMPLAINTS OF WORK PLACE HARASSMENT

To establish a violation of RCW 49.60.210 for retaliatory discharge, an employee must show: (1) she or he engaged in a statutorily protected opposition activity; (2) an adverse employment action was taken; and (3) a causal link between the former and the latter. *Delahunty v. Cahoon*, 66 Wash.App. 829, 839, 832 P.2d 1378 (1992) The standard for deciding if a causal link exists between the opposition activity and discharge under RCW 49.60.210 is whether retaliation was a “substantial factor” motivating the discharge. *Allison v. Housing Authority*, 118 Wash.2d 79, 95–96, 821 P.2d 34 (1991); *Balkenbush v. Ortho Biotech Prods., LP*, 653 F.Supp.2d 1115, 1122 (E.D.Wash.2009).

The District will concede that the former Employee’s alleged report to the Director of Human Resources, Mr. Cole, would satisfy the first element of the retaliation claim. Likewise, the District will concede that elimination of an employee’s job will satisfy the adverse employment action element. However, the former Employee cannot make out a *prima facie* case on the third element, causation. With regard to the third element, a plaintiff bringing suit under RCW 49.60.210 must prove causation by showing that retaliation was a substantial factor motivating the adverse employment decision. *Allison v. Housing Authority of City of Seattle*, 118 Wash.2d 79, 96, 821 P.2d 34, 43 (Wash.,1991)⁷ Normally

⁷ It is questionable if this is still the standard in light of the recent ruling in *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2533 (U.S.,2013) where the United States Supreme Court ruled that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened substantial

the employee would have to come forward with some evidence to establish some proximity in time between the adverse employment action (the elimination of her job in 2011) and the protected activity (the December 2008 report to Mr. Cole), along with evidence of satisfactory work performance, in order to meet this burden. *Campbell v. State*, 129 Wn.App. 10, 23, 118 P.3d 888 (2005), rev. den., 157 Wn.2d 1002 (2006). Furthermore, she would have to produce some evidence that the Wenatchee School Board knew of her oppositional activity, and took adverse action against her because of her complaints. *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn.App. 774, 799, 120 P.3d 579 (2005)

The 9th Circuit has held, as a matter of law, that a final appointing authority's wholly independent decision making would negate any causal connection between a subordinate's retaliatory bias and the appointing authority's decision to terminate. *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 809 (C.A.9 (Or.), 2009) To establish a causal link the former Employee would have to produce some evidence that the school board was influenced in its decision to eliminate her job by the animus or bias of Mr. Vandervort to the point that their decision was substantially the result of this improper bias. This record is absolutely devoid of any evidence that the Wenatchee School Board ever considered the former Employee's reports to Mr. Cole or Mr. Harum or the bias of Mr. Vandervort when making the decision to eliminate her job position. The former Employee has not met her burden of coming forward with some evidence that the elimination of her job was substantially causally related to her complaints to Mr. Cole or Mr. Harum or the alleged bias of Mr. Vandervort. She does not meet the causation requirement of the retaliation claim as a matter of law.

factor test. In this case it would not matter since the former Employee's claim would fail under either causation standard.

**E. EVEN IF A PRIMA FACIE CASE IS ESTABLISHED
PLAINTIFF HAS NOT COME FORWARD WITH
EVIDENCE TO ESTABLISH PRETEXT.**

If the court determines that Ms. Knutson has met the burden of establishing a *prima facie* case of retaliation the court must then apply the *McDonnell Douglas* burden-shifting scheme to determine the question of pretext. *Hill v. BCTI Income Fund-I*, *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wash.2d 214, 137 P.3d 844 (2006); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wash.App. 611, 618, 60 P.3d 106 (2002); *Milligan v. Thompson*, 110 Wash.App. 628, 638, 42 P.3d 418 (2002). Under this burden-shifting scheme, the employee must first establish a *prima facie* case of retaliation. *Renz*, 114 Wash.App. at 618, 60 P.3d 106. If the employee fails to establish a *prima facie* case, then the defendant employer is entitled to summary judgment as a matter of law. *Hill*, 144 Wash.2d at 181, 23 P.3d 440. The District has argued *supra* that she has failed to establish a *prima facie* claim.

If the employee succeeds in establishing a *prima facie* case, the burden shifts to the employer to produce admissible evidence of a legitimate, non-retaliatory reason for its adverse employment action. *Hill*, 144 Wash.2d at 181, 23 P.3d 440 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n. 7, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)); *Renz*, 114 Wash.App. at 618, 60 P.3d 106. The District has clearly met this burden. The District was facing significant budget cuts in a variety of programs. The Board of Directors asked the District to review all “self-sufficient” programs that were operating on a deficit to determine if they could be eliminated to help balance the budget. As early as April or May 2011 Mr. Harum advised Ms. Knutson that her program was being scrutinized because it was losing money every year. The program lost over \$1,000,000 during the time that Ms. Knutson was its director. Mr. Harum

indicated that the program could no longer justify the position of Director. The administrative cabinet made several budget cutting recommendations to the Board, including the elimination of approximately 30 staff positions which included the Director of Daycare position. The Board's decision to eliminate the Director of Daycare's position was clearly based on financial considerations which is a legitimate and nondiscriminatory reason.

If the employer provides evidence of a legitimate non-retaliatory reason for eliminating the former Employee's position, then the burden shifts back to her to show that the District's reason is actually a pretext for what, in fact, was a retaliatory purpose for its adverse employment action. *Grimwood*, 110 Wash.2d at 364, 753 P.2d 517; *Renz*, 114 Wash.App. at 618–19, 60 P.3d 106. If the former Employee fails to make this showing, the District is entitled to judgment as a matter of law. *Hill*, 144 Wash.2d at 182, 23 P.3d 440; *Renz*, 114 Wash.App. at 619, 60 P.3d 106.

To prove that the District's articulated reason for eliminating the Director of Daycare position for budget reasons is a pretext, the former Employee must produce substantial evidence that the Board's decision to eliminate her position for budget reasons is unworthy of belief. *Kuyper v. State*, 79 Wash.App. 732, 738, 904 P.2d 793 (1995). "Speculation and belief are insufficient to create a fact issue as to pretext. Nor can pretext be established by mere conclusory statements of a plaintiff who feels that he has been discriminated against." *Hines v. Todd Pacific Shipyards Corp.*, 127 Wash.App. 356, 372, 112 P.3d 522 (2005) (quoting *McKey v. Occidental Chem. Corp.*, 956 F.Supp. 1313, 1319 (S.D.Tex.1997)) The former Employee must demonstrate pretext by showing that the District's articulated reason for elimination of her position had no basis in fact or was not the real motivating factor for its adverse employment decision. *Kuyper*, 79 Wn.App. 738. See also, *Sellsted v. Wash. Mut. Sav. Bank*, 69

Wn.App. 852, 860, 851 P.2d 716 (emphasis added), *review den.*, 122 Wn.2d 1018 (1993), *overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995).

The record before this court is devoid any evidence that would create a question of fact regarding the Board's motivation in eliminating her position. In fact, the undisputed record is that the Board was never aware of her complaints to Mr. Cole or the problems she claimed existed between her and Mr. Vandervort. She does not point to any conflicting reasons for the decision or to any reasons given to her that are subject to disbelief. The District has consistently stated that the only reason for the elimination of the Director of Childcare position was because the program was a non-essential, self-sufficient program that was consistently losing money. When the District faced its financial difficulties it made good sense to eliminate self-sufficient programs that were not self-sustaining. The former Employee has not and cannot point to any evidence in the record that calls that reason into question.

As the court noted in *Kuyper v. State*, 79 Wn.App. 732, 738-739, 904 P.2d 793, 797 (1995):

A plaintiff cannot create a pretext issue without some evidence that the articulated reason for the employment decision is unworthy of belief. *Sellsted*, 69 Wash.App. at 859, 851 P.2d 716. To do this, a plaintiff must show, for example, that the reason has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision or was not a motivating factor in employment decisions for other employees in the same circumstances. 69 Wash.App. at 859-60 n. 14, 851 P.2d 716. Kuyper's evidence shows none of these things. Although summary judgment in favor of the employer in discrimination cases is often inappropriate because the evidence will generally "contain reasonable but competing inferences of both discrimination and nondiscrimination" that must be resolved by a jury, *Carle v. McChord Credit Union*, 65 Wash.App. 93, 102, 827 P.2d 1070 (1992), this does not mean that discrimination cases may never be disposed of on summary judgment. Where, as here, the

plaintiff has produced no evidence from which a reasonable jury could infer that an employer's decision was motivated by an intent to discriminate, summary judgment is entirely proper. [Footnote omitted]

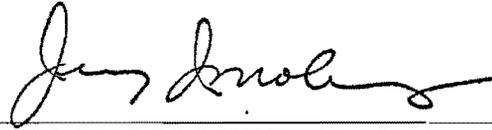
The former Employee here has not made any better showing of pretext than the plaintiff in *Kuyper*. The trial court recognized that and granted summary judgment to the District. This Court should affirm that ruling.

IV. CONCLUSION

The trial judge was correct in her decision to grant summary judgment in this case. The former Employee never complained that she was being discriminated against because of gender until after her position was eliminated and she brought this lawsuit. The conduct that she now complains of was simply part of the give and take in an adult workplace. It was not directed at her because of gender and it certainly was not so severe and pervasive that it became a part of her contract of employment. She has not established a *prima facie* claim of a gender hostile work environment. Likewise, her Retaliation claim fails because she cannot show any causation nexus between her vague report of mistreatment in 2008 to her supervisor and the School Board's legitimate budget-based decision to eliminate her job position in 2011. In addition, she has not come forward with any evidence that the Board's budget-based decision was merely a pretext for some other illegal and discriminatory motive. This Court should affirm the trial judge's ruling.

RESPECTFULLY SUBMITTED November 5, 2014.

JERRY MOBERG & ASSOCIATES

A handwritten signature in black ink, appearing to read "Jerry Moberg", written over a horizontal line.

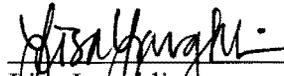
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 5th day of November, 2014, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered in the manner indicated below to the following counsel of record:

Bryce Mackay
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DATED this 5th day of November, 2014 at Ephrata, Washington.



Lisa Laughlin
Legal Assistant