



Court of Appeals No. 326357

---

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

---

LACY STOREY-HOWE, a married individual,  
Appellant/Plaintiff

v.

OKANOGAN COUNTY,  
Respondent/Defendant

---

RESPONDENT OKANOGAN COUNTY'S  
ANSWERING BRIEF

---

**Heather Yakely**  
Attorney for Respondent, Okanogan County  
Evans, Craven & Lackie, P.S.  
818 W. Riverside, Suite 250  
Spokane, WA 99201  
(509) 455-5200

TABLE OF CONTENTS

I. STANDARD OF REVIEW..... 1

II. ISSUES ON APPEAL..... 2

III. STATEMENT OF THE CASE ..... 3

IV. LAW/ANALYSIS ..... 16

    1. A Non-Moving Party May Not Rely on Speculation To Support A Response To Summary Judgment ..... 16

    2. Ms. Storey-Howe Failed To Establish A Severe And Pervasive Behavior ..... 24

    3. Okanogan County Took Immediate Action Upon Notification Of Storey-Howe’s Complaints. .... 33

    4. Ms. Storey-Howe Cannot Establish Any Adverse Employment Action..... 36

    5. Ms. Storey-Howe Resigned ..... 39

    6. Negligent Retention ..... 44

V. CONCLUSION ..... 477

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Adams v. Able Building Supply, Inc.</i> , 114 Wash.App 291, 332 P.3d 1006 (2002) .....	28, 29
<i>Antonius v. King County</i> , 153 Wn.2d 256, 103 P.3d 729 (2004) .....	24
<i>Baldwin v. Silver</i> , 165 Wash.App. 463, 269 P.3d 284 (2011) .....	20
<i>Barrett v. Weyerhaeuser Co. Severance Pay Plan</i> , 40 Wash.App. 630, 700 P.2d 338 (1985) .....	40, 41, 42
<i>Betty Y. v. Al-Hellou</i> , 98 Wash. App. 146, 988 P.2d 1031 (1999) .....	44
<i>Bierlein v. Byrne</i> , 103 Wash.App. 865, 14 P.3d 823 (2000) .....	38
<i>Binkley v. City of Tacoma</i> , 114 Wash.2d 373, 787 P.2d 1366 (1990) .....	40
<i>Blomster v. Nordstrom, Inc.</i> 103 Wash.App. 252, 11 P.3d 883 (2000) .....	17, 20
<i>Bulaich v. AT &amp; T Info. Sys.</i> , 113 Wash.2d 254, 778 P.2d 1031 (1989) .....	40, 41
<i>Burchfiel v. Boeing Corp.</i> , 149 Wash. App. 468, 205 P.3d 145 (2009) .....	37
<i>Burlington Indus., Inc., v. Ellerth</i> , 524 U.S. 742, 118 S.Ct. 2257 .....	35

<i>Carlsen v. Wackenhut Corp.</i> , 73 Wash.App. 247, 868 P.2d 882 (1994) .....	44
<i>Clarke v. Officer of the Attorney Gen.</i> , 133 Wash. App. 767, 138 P.3d 144 (2006) .....	26
<i>Crownover v. State ex rel. Dep't of Transp.</i> , 165 Wash. App. 131, 265 P.3d 971 (2011) .....	41
<i>Cummins v. Lewis County</i> , 156 Wash.2d 844, 133 P.3d 458 .....	2
<i>Delahunty v. Cahoon</i> , 66 Wn. App. 829, 832 P.2d 1378 (1992) .....	36
<i>Elcon Constr., Inc. v. E. Wash. Univ.</i> , 174 Wn.2d 157, 273 P.3d 965 (2012) .....	2
<i>In re Estate of Rippee</i> , 149 Wash.App. 1009 (2009) .....	17
<i>Estevez v. Faculty Club of University of Washington</i> , 129 Wash. App. 774, 120 P.3d 579 (2005) .....	24, 37
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).....	26, 32, 35
<i>Francom v. Costco Wholesale Corp.</i> , 98 Wash. App. 845, 991 P.2d 1182 (2000) .....	44, 45
<i>Frisino v. Seattle Sch. Dist. No. 1</i> , 160 Wash. App. 765, 249 P.3d 1044, <i>review</i> <i>denied</i> 172 Wash.2d 1013, 259 P.3d 1109 (2011).....	2
<i>Glasgow v. Georgia Pacific Corp.</i> 103 Wn.2d 401, 693 P.2d 708 (1985) .....	25, 31, 33, 34

<i>Grimwood v. Univ. of Puget Sound</i> , 110 Wash.2d 355, 753 P.2d 517 (1988) .....	17
<i>Guild v. Saint Martin's College</i> , 64 Wash.App. 491, 827 P.2d 286 (1992) .....	44
<i>Harris v. City of Seattle</i> , 315 F. Supp. 2d 1112 (W.D. Wash. 2004) <i>aff'd</i> , 152 F. App'x 565 (9th Cir. 2005) .....	38
<i>Harris v. Forklift Sys., Inc.</i> , 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).....	26, 29
<i>Haubry v. Snow</i> , 106 Wash. App. 666, 31 P.3d 1186 (1991) .....	42, 43
<i>Henningsen v. Worldcom, Inc.</i> , 102 Wash. App. 828, 9 P.3d 948 (2000) .....	25
<i>Herried v. Pierce County Pub. Transp. Benefit Auth. Corp.</i> , 90 Wash.App. 468, 957 P.2d 767 .....	45
<i>Hollenback v. Shriners Hospitals for Children</i> , 149 Wn.App. 810, 206 P.3d 337 (2009) .....	36
<i>Irving v. Dubuque Packing Co.</i> , 689 F.2d 170 (10th Cir. 1982).....	40
<i>Kirby v. City of Tacoma</i> , 124 Wash.App. 454, 98 P.3d 827 (2004) .....	38
<i>Lybbert v. Grant County, State of Washington</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000) .....	1, 31

<i>Meritor Savings Bank FSB v. Vinson</i> , 477 U.S. 57, 106 S. Ct. 2399, 106 L.Ed.2d 49 (1986).....	27, 30, 31
<i>Micone v. Town of Steilacoom Civil Service Comm'n</i> , 44 Wash.App. 636, 722 P.2d 1369, review denied, 107 Wash.2d 1010 (1986) .....	39, 41
<i>Molsness v. City of Walla Walla</i> , 84 Wn.App. 393, 928 P.2d 1108 (1996) .....	40, 42
<i>Munich v. Skagit Emergency Commc'n Ctr.</i> , 175 Wash. 2d 871, 288 P.3d 328 (2012) .....	2
<i>Niece v. Elmview Group Home</i> , 131 Wash.2d 39, 929 P.2d 420 (1997) .....	44
<i>Nivens v. 7-11 Hoagy's Corner</i> , 133 Wn.2d 192, 943 P.2d 286 (1997) .....	1
<i>Oliver v. Pac. Northwest Bell Tel. Co.</i> , 106 Wash.2d 675, 724 P.2d 1003 (1986) .....	24
<i>Oncale v. Sundowner</i> , 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).....	29, 30
<i>Payne v. Children's Home Soc. of Washington, Inc.</i> , 77 Wash.App. 507, 892 P.2d 1102 (1995) .....	2
<i>Peck v. Siau</i> , 65 Wash.App. 285, 827 P.2d 1108 (1992) .....	44, 45
<i>Preston v. Duncan</i> , 55 Wash.2d 678, 349 P.2d 605 (1960) .....	16
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn.App. 611, 60 P.3d 106 (2002).....	37

<i>Riccobono v. Pierce County</i> , 92 Wash.App. 254 (1998).....	41
<i>Richard v. Credit Suisse</i> , 242 N.Y. 346, 152 N.E. 110, 45 A.L.R.1041 .....	16
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995) .....	1
<i>Sangster v. Albertson's Inc.</i> , 99 Wn. App. 156, 991 P.2d 674 (2000) .....	24, 25, 31
<i>Schonauer v. DCR Entm't, Inc.</i> , 79 Wash. App. 808, 905 P.2d 392 (1995) .....	33
<i>Seven Gables Corp. v. MGM/UA Entm't Co.</i> , 106 Wash.2d 1, 721 P.2d 1 (1986) .....	17
<i>Sneed v. Barna</i> 80 Wash.App. 843, 912 P.2d 1035 (1996) .....	39
<i>Spriggs v. Diamond Auto Glass</i> , 242 F.3d 179 (4th Cir. 2001).....	27
<i>Thompson v. Everett Clinic</i> , 71 Wash.App. 548, 860 P.2d 1054 (1993), <i>rev</i> <i>denied</i> 123 Wash.2d 1027, 877 P.2d 694 (1994) .....	45
<i>Townsend v. Walla Walla School Dist.</i> 147 Wash.App. 620, 196 P.3d 748 (2008).....	39
<i>Washington v. Boeing Co.</i> , 105 Wn.App 1, 19 P.3d 1041 (2000).....	26, 29, 31, 41
<i>Weyerhaeuser Co. v. Aetna Cas. &amp; Sur. Co.</i> , 123 Wn.2d 891, 874 P.2d 142 (1994) .....	1

<i>Wilson v. Steinbach</i> , 98 Wash.2d 434, 656 P.2d 1030 (1982).....	17
<i>Yoeun v. Steiner</i> , 133 Wash. App. 1032 (2006) .....	18
<b>Statutes</b>	
RCW 49.60.180 .....	34
<b>Other Authorities</b>	
CR 56(c).....	1
CR 56(e).....	16, 17
ER 401 .....	18
ER 602 .....	21
34 Wash. Prac., Sum. Jdgmt. & Rel. Term. Motions §5:45 (2012 ed) .....	20

## I. STANDARD OF REVIEW

“On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court.” *Lybbert v. Grant County, State of Washington*, 141 Wn.2d 29, 1 P.3d 1124 (2000) (citing *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997)). “When ruling on a summary judgment motion, the court is to review all facts and reasonable inferences therefrom most favorably toward the nonmoving party.” *Id.* (citing *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994)). “A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* (citing *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); see also CR 56(c)). In a negligence action, whether an actionable duty was owed to the plaintiff is a threshold determination. *Id.* That determination is a question of law

reviewed de novo. *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wash. 2d 871, 877, 288 P.3d 328, 332 (2012), *citing*, *Cummins v. Lewis County*, 156 Wash.2d 844, 852, 133 P.3d 458. (en banc)

In discrimination cases, summary judgment will be granted when the plaintiff fails to raise a genuine issue of material fact on one or more prima facie elements. *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wash. App. 765, 777, 249 P.3d 1044, *review denied* 172 Wash.2d 1013, 259 P.3d 1109 (2011); *Payne v. Children's Home Soc. of Washington, Inc.*, 77 Wash.App. 507, 514, 892 P.2d 1102, 1107 (1995); *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164–65, 273 P.3d 965 (2012)(a material fact precluding summary judgment is a fact that affects the outcome of the litigation).

## II. ISSUES ON APPEAL

Plaintiff, Lacy Story-Howe, brought four issues on appeal against Okanogan County alleging errors in the dismissal of Storey-Howe's claims for hostile work

environment; adverse employment action; constructive discharge and negligent retention claims because no material facts existed to support the claim. The trial court properly dismissed Okanogan County on Summary Judgment and this Court should uphold the dismissal.

### **III. STATEMENT OF THE CASE**

Plaintiff, Lacy Storey-Howe, (hereinafter Ms. Storey-Howe) was hired by Okanogan County as a communications deputy in approximately November, 2009. (CP 54) She worked for the County for "almost two full years." (CP 54) Her immediate supervisors were Sergeant Jennifer Johnson and Sergeant Pat Stevens. (CP 55)

Shawn Messinger, a named Defendant in this litigation, was the Chief Special Operations Deputy of Okanogan County and Ms. Storey-Howe's ultimate Supervisor during her employment. (CP 64) However, she rarely worked with him because he worked 8-5. It would only be when she was on day shift or swing shift. (CP 64-65)

When Ms. Storey-Howe started her employment she was provided with a personnel manual. (CP 62) She admits that she did not read the entire manual. However, she read the sections that were important to her including those sections on sexual harassment, along with the sections on hours, benefits and employee conduct. (CP 63) Trainings outside of Okanogan County were not unusual. (CP 63)

Ms. Storey-Howe was scheduled to attend "Navigator 2011" training in Las Vegas, Nevada on April 17- 22 or 23. (CP 67-68) Employees Heather Almont, Patrick Baker, Walt Stadler, Shawn Messinger also attended the training. (CP 68)

Approximately one month prior to the trip, Mr. Messenger asked Ms. Storey-Howe if she wanted a free trip to Vegas. He said, "You have to share a room with Heather and as long as you are okay with that, do you want to go." Ms. Storey-Howe said she would like to attend. (CP 69)

Prior to the training in Las Vegas, Ms. Storey-Howe never had problems with Mr. Messinger; he never tried to

harass her, threatened her; tried to kiss her, or touch her in any way. (CP 66) Except for a “couple of incidences” relayed to her in December, 2010, from Heather Almont, Ms. Storey-Howe was not aware of any prior concerns regarding Mr. Messinger. (CP 70)

Ms. Storey-Howe has no idea if Heather Almont ever complained about Mr. Messinger's behavior to anyone. (CP 114) Ms. Almont did not report these incidences to a sergeant or supervisor. Ms. Storey-Howe did not report any of Ms. Almont's allegations to anyone. (CP 71)

Ms. Storey-Howe admits that Mr. Messinger did not act inappropriately on the drive to Spokane from Okanogan County, at the airports, or on the flight to Las Vegas. (CP 72-73) He did ask her if he could buy her a drink several times, but he stopped asking when she said that she didn't drink. (CP 73) It was on the first night at the hotel that Ms. Storey-Howe alleges Shawn Messinger subjected her to "unsolicited, undesirable, and offensive conduct in the following way:

He brought our luggage in. Heather was out so I was there by myself. I had a pair of sweats and a t-shirt on because I didn't have anything else to wear. He knocked on the door and he had Heather's suitcase and my suitcase...Then he sat down on Heather's bed and started to make small talk with me about why we were going to training and what the week was going to be like...she believed that he was intoxicated because he was "obnoxious," slurring his words and was talking loudly ...As he was sitting on Heather's bed, I opened my suitcase and it had a notice from TSA that it had been inspected. Mr. Messinger responded with "you're fine as long as

you didn't bring your BOB with you."

Ms. Storey-Howe said she did not know what a BOB was and he responded that it was a "battery operated boyfriend."

Ms. Storey-Howe then alleged that she was very uncomfortable so she took the charger out of her suitcase and plugged it in to text Patrick to come to her room.

As she was plugging in her phone, Mr. Messinger jumped on top of her. "[H]e flattened me on to the bed on my back and laid on top of me and yelled 'Steamroller' when he did it."

(CP 74-81)

Immediately after this, Ms. Storey-Howe told Mr. Messinger that he needed to leave and he said, "I was just trying to play around," then he started to talk about work again. (CP 82)

Ms. Storey-Howe did not ask Mr. Messinger to leave prior to when he tried to "steam roll her" as described above. (CP 80-81) She admitted that she wasn't "that uncomfortable" until he steamrolled her. (CP 81)

The employee's bags were missing and they would be reimbursed for replacement clothes (CP 119) Ms. Storey-Howe started a joke about her wedding dress being missing and pretending she was getting married that day. (CP 119)

Ms. Storey-Howe also felt that it was inappropriate for Mr. Messinger to grab her hand while they were shopping at the mall for clothing, despite the fact that she had started the joke about pretending that she was in Vegas to get married and her wedding dress was missing. (CP 119-121)

However, Ms. Storey-Howe also believes that it is okay for a supervisor to touch a coworker at times. (CP 118-119)

Ms. Storey-Howe did not tell anyone about what had occurred that night with Mr. Messinger. (CP 83) However, the next morning, Ms. Storey-Howe called dispatch and asked any

supervisor who was available to call her. Sgt. Jennifer Johnson was the first one to return her call and she told Sgt. Johnson what had occurred. (CP 84)

Ms. Storey-Howe has no other actionable complaints. The only behavior that Ms. Storey-Howe believes inappropriate was the next day when Mr. Messinger came to their room and asked her and Ms. Almont when they would be ready. Later, in the lobby, he then questioned them "in front of everyone "about why she and Heather didn't answer the door. (CP 85-86)

Mr. Messinger also apologized to her on the second day of class. (CP 87-88) This followed a discussion that Patrick Stevens, had with Mr. Messinger following his learning of the "steamroller" incident from Heather Almont. (CP 122-123)

Following Mr. Messinger's apology, he also stayed away from Ms. Storey-Howe and Ms. Almont. (CP 89-90) Mr. Messinger did nothing else inappropriate the rest of the trip and she attended classes all week. (CP 86-87)

Undersheriff Someday started an investigation immediately following notification by Sgt. Johnson (CP 98) Ms. Storey-Howe does not know how Undersheriff Someday became aware of her complaint, she only knew that he contacted her and asked her to provide him with a written statement. (CP 103) Ms. Storey-Howe was aware that when she provided a written statement to Undersheriff Someday it was for the purpose of an internal investigation into her allegations. (CP 96-97; 103)

Ms. Storey-Howe believes that Undersheriff Someday took appropriate actions regarding her complaint. (CP 102)

Upon her return to work, she worked only one shift with Mr. Messinger on May 11, 2011, before she quit. (CP 91; 125-127). This was the first and last day, that Ms. Storey-Howe saw Mr. Messinger on his return from Las Vegas. (CP 92; 99-100) On May 11, 2011, Mr. Messinger had just returned from training and came to work at 8:00. He was the only one there when Ms. Storey-Howe and Heather Almont were there. When

Sgt. Johnson came in at 10:00, she agreed that they couldn't be working together and that she would "figure something out."  
(CP 104)

That morning after Sgt. Johnson arrived, Ms. Storey-Howe and Heather Almont went to talk to Sheriff Rogers about the fact that Mr. Messinger was in the Communications Center.  
(CP 101) Sheriff Rogers agreed that he should not have been there. (CP 101)

Ms. Storey-Howe admits that she could have called the Sheriff, or Undersheriff regarding Mr. Messinger's presence on that date, but chose to wait for Sgt. Johnson instead. (CP 104-105)

Mr. Messinger quit his employment on July 15, 2011.  
(CP 129) However, Ms. Storey-Howe remained "upset" with the County because it "let him quit instead of being fired [and] that it sent [her] an email to wish him well in his future endeavors." (CP 100; 109) She also remained upset with the County because she worked with him for a "few hours" on

May 11th. (CP 109) Except for the fact that she wasn't sure why he was allowed to resign, she has no concerns about how the investigation was handled. (CP 110)

Ms. Storey-Howe alleges that the incident with Mr. Messinger affected the terms and conditions of her employment because "an immediate supervisor (Sgt. Stevens) came and told her not to press a sexual harassment suit while I was working." (CP 93-94) However, Ms. Storey-Howe cannot recall the date that Sgt. Stevens told her this or even whether it was before or after Mr. Messinger quit his employment. (CP 94) She also admits that she never asked for clarification to Sgt. Steven's statement when she said, "we don't want another boss in here." (CP 117)

Nonetheless, Ms. Storey-Howe alleges that she quit because Sgt. Stevens made her work environment "unbearable;"

In my opinion she was going to set out  
to get me to leave because she – we  
were always like on friendly terms

before that where she was just a coworker and treated me fine. After the Shawn incident she singled me out...asking me who I was texting, yelling over everybody's head, telling me I was doing my calls wrong.

(CP 106-107)

She alleges that Sgt. Steven's "whole behavior" changed after Vegas. (CP 116) However, Ms. Storey-Howe admits that supervisors are supposed to listen to dispatcher's calls. (CP 114-115)

The only "intolerable working conditions," Ms. Storey-Howe can articulate is (1) Sgt. Stevens picking up her phone calls and listening, and (2) asking her who she is talking to while on the phone and/or instant messaging with. (CP 115) There was also an incident where another dispatcher asked if she could work an extra ½ day for extra pay. Ms. Storey-Howe alleges that Sgt. Stevens denied her the right to work this extra

shift just so that Sgt. Stevens "worked with her all day instead."  
(CP 116) She has no other proof of this.

Ms. Storey-Howe also alleges she told her supervisor, Sgt. Johnson; about three particular instances that she believed was retaliation. (CP 111) (1) On July 20, 2011, Ms. Storey-Howe took a suicide call and alleges Sgt. Stevens was over her shoulder during the call and talked into her ear; (2) On July 21, 2011 Ms. Storey-Howe went outside to take a personal call for 5-7 minutes and alleges Sgt. Stevens yelled at her and asked where she was and who she was speaking with; and (3) on July 25, 2011 Ms. Storey-Howe alleges Sgt. Stevens yelled across the dispatch center and asked who she was speaking with twice during a call with an employee of the jail. (CP 131) On July 28, Ms. Storey-Howe told Sgt. Johnson that if she didn't talk to Sgt. Stevens that she would go and talk to Undersheriff Somday. (CP 112)

Ms. Storey-Howe quit her employment with Okanogan County in September, 2011. (CP 61)

Ms. Storey-Howe never talked to Undersheriff Somday, or Sheriff Rogers, about her allegations of retaliation by Sgt. Stevens. She never talked to anyone in HR about her concerns. (CP 112) Ms. Storey-Howe rarely worked with Supervisor Sgt. Stevens. (CP 107-108)

She did not file a grievance against Sgt. Stevens, "because she didn't know how to file a union grievance or what you had to do to file a union grievance" despite the fact that she had conversations with the Union Representative. (CP 113) She differentiates this from filing the complaint against Shawn Messinger because she didn't file a complaint, she only told Sgt. Johnson what had happened and "they took care of it for [her.]" (CP 113)

Ms. Storey-Howe alleges that the County "knew or should have known" about Mr. Messinger's "history" of improper conduct directed toward females "because Jennifer Johnson talked to [her] about concerns about Shawn's behavior in Vegas before [they] went to Vegas." (CP 95)

#### IV. LAW/ANALYSIS

##### 1. A Non-Moving Party May Not Rely on Speculation To Support A Response To Summary Judgment

Without Ms. Storey-Howe's speculative Declaration and varying assumptions, she has not raised any questions of fact sufficient to defeat a Motion for Summary Judgment.

"The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine or substantial, so that only the latter may subject a suitor to the burden of a trial." *Preston v. Duncan*, 55 Wash.2d 678, 684, 349 P.2d 605, 608 (1960), quoting, *Richard v. Credit Suisse*, 242 N.Y. 346, 152 N.E. 110, 111, 45 A.L.R. 1041. "[Affidavits supporting and opposing summary judgment] shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e).

CR 56(e) is explicit in its requirements which serve the ultimate purpose of a summary judgment motion. Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. *In re Estate of Rippee*, 149 Wash.App. 1009 (2009), citing, *Grimwood v. Univ. of Puget Sound*, 110 Wash.2d 355, 359, 753 P.2d 517 (1988); *Blomster v. Nordstrom, Inc.* 103 Wash.App. 252, 259-60, 11 P.3d 883 (2000). See CR 56(e).

While inferences are to be accepted in a light most favorable to the non-moving party, Ms. Storey-Howe's Response goes well beyond reasonable inferences and into speculation. See, *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982)(In reviewing a motion for summary judgment, we consider all facts and reasonable inferences in the light most favorable to the nonmoving party); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wash.2d 1, 13, 721 P.2d 1

(1986)(the nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value); *Yoeun v. Steiner*, 133 Wash. App. 1032 (2006).

This Court should disregard Ms. Storey-Howe's Declaration as it is not relevant to any issues that are before this Court. "Relevant evidence" "[means] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

There are essentially three issues before this Court: (1) whether Mr. Messinger's conduct was significant, severe, and pervasive enough to affect the terms and conditions of Ms. Storey-Howe's employment; (2) whether Okanogan County reacted appropriately and immediately to remedy the situation once it received notice; and (3) whether Ms. Storey-Howe suffered an adverse employment action due to her resignation.

Ms. Storey-Howe's declaration simply does not address, much less make any of the foregoing more probable or less probable. For example, Ms. Storey-Howe alleges various behaviors exhibited by Mr. Messinger with other employees. (CP 251-255) Importantly, Ms. Storey-Howe does not allege that any Okanogan County Sergeants were aware of such behaviors or provide any corroboration to establish knowledge. Likewise, Ms. Storey-Howe discusses her relationship with Sergeant Stevens. (CP 251) However, such statements simply establish Sergeant Stevens was performing her supervisory role as sergeant. Finally, Ms. Storey-Howe discusses newspaper articles that were published following the incident in Las Vegas. (CP 261-261) These Newspaper articles are not relevant and in no way does Ms. Storey-Howe's Declaration establish a causal connection. Ms. Storey-Howe admitted that immediately after returning to work, an investigation was performed which resulted in Mr. Messinger being given the option to resign or be demoted. (CP 258) Further, Ms. Storey-Howe admitted she and

Mr. Messinger were immediately separated once Undersheriff Somday was notified of her allegations. (CP 259) She worked with him for a brief two hour time until the scheduling error was discovered. (CP 125-127)

Additionally, in deciding a motion for summary judgment, the court should not consider conclusory statements made by either party. *Blomster v. Nordstrom, Inc*, 103 Wash.App. 252, 260, 11 P.3d 883 (2000). In *Baldwin v. Silver*, the trial court held that a summary judgment affidavit of homeowner, asserting damage to deck of \$10,000 could not be considered as it was conclusory and set out unsupported statements. The court of appeals upheld the trial court's refusal to consider [the] affidavit as proof of damages in homeowners' cross-claim against insurer for promissory estoppel, bad faith, and related claims, as part of contractor's action against homeowners and insurer, where no receipt, quote, or any other piece of evidence supported statement. *Baldwin v. Silver*, 165 Wash.App. 463, 269 P.3d 284 (2011) (citing 34 Wash. Prac.,

Sum. Jdgmt. & Rel. Term. Motions § 5:45 (2012 ed.)). Further, "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. ER 602. Ms. Storey-Howe's Declaration teems with such speculation regarding what Okanogan County, employees, the Sheriff, or Undersheriff knew.

- *"Mr. Messinger's special treatment toward Mrs. Almont was well known to other office employees"* (CP 252)
- *"Others in the Sheriff's Office, some of whom were Mr. Messinger's superiors also gave him warnings prior to the Navigator 2011 trip regarding his behavior at the trip"* (CP 252)
- *"I attribute this lack of training and not taking Mr. Messinger's behavior seriously as a contributing factor as to the creation of the circumstances that allowed Mr. Messinger to take the actions that he took at the Navigator 2011 trip"* (CP 253)

- *"which given the context, I took to mean attention in a physical, flirty, and sexual manner" (CP 254)*
- *"Mr. Messinger grabbed Mrs. Almont's hair and patted her head. She told him to stop" (CP 254)*
- *"I took this to mean for sex, given the context, which was highly inappropriate and offensive" (CP 255)*
- *"I did not believe that he was signed up for this class and found it very odd and uncomfortable that he was there" (CP 257)*
- *"I had seen Sergeant Stevens engage in this kind of behavior before towards a Communications Deputy that was hired shortly after I was. Her name was something like Dae Lynch, I do not remember exactly. Sergeant Stevens started riding her like she was to me. A Communications Deputy informed me that Sergeant Stevens was trying to get Ms. Lynch to quit" (CP 260)*
- *"Undersheriff Somday was well aware of the fact that I would receive the e-mail" (CP 261)*

- *"These actions of making these comments in the newspapers and sending the e-mail out again show that Okanogan County would rather endorse the perpetrator of sexual harassment and assault than support the victim. In addition, it reflects on the culture that existed all along of allowing Mr. Messinger to behave the way he did under the guise that it was just the way that he was" (CP 261-262)*
- *"the sergeants should have seen these inappropriate physical contacts" (CP 150)*

As noted supra, Ms. Storey-Howe's Declaration provides wholly inadmissible testimony existing of conclusory statements of the intentions of various individuals, their knowledge, and their thought processes. Such statements are pure speculation, have no corroboration, and should not be considered by this Court.

## **2. Ms. Storey-Howe Failed To Establish A Severe And Pervasive Behavior**

The parties generally do not dispute the elements of a hostile work environment claim. *See generally, Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004)(“(1) the harassment was unwelcome, (2) the harassment was because [plaintiff was a member of a protected class], (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer”), *Sangster v. Albertson’s Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000).

Since the WLAD is patterned after Title VII, federal cases interpreting Title VII are persuasive authority for the construction of the WLAD. *Estevez v. Faculty Club of University of Washington*, 129 Wash. App. 774, 793, 120 P.3d 579, 587 (2005)(citing *Oliver v. Pac. Northwest Bell Tel. Co.*, 106 Wash.2d 675, 678, 724 P.2d 1003 (1986)); *see also*,

*Henningsen v. Worldcom, Inc.*, 102 Wash. App. 828, 842, 9 P.3d 948, 956 (2000).

For purposes of appeal, Okanogan County does not dispute that there may exist a question of fact regarding whether the contact between Mr. Messinger and Ms. Storey-Howe was “offensive, unwanted contact,” or that it occurred because of gender.

However, Ms. Storey-Howe cannot establish the third or fourth elements of hostile work environment. The behavior “affected the terms or conditions of employment; or “that it can be imputed to the employer. *Sangster*, 99 Wn. App at 161; *Glasgow v. Georgia Pacific Corp.* 103 Wn.2d 401, 406–07, 693 P.2d 708 (1985).

The third element is satisfied if the harassment is “sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment[,] ... to be determined with regard to the totality of the circumstances.” *Glasgow*, 103 Wn.2d at 406–07, 693 P.2d 708. The employer’s

conduct must be both objectively abusive and subjectively perceived as abusive by the victim. *Clarke v. Officer of the Attorney Gen.*, 133 Wash. App. 767, 787, 138 P.3d 144 (2006)

However, the alleged hostile behavior must also be more than one single isolated incident. “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.” *Washington v. Boeing Co.*, 105 Wn.App 1, 10, 19 P.3d 1041 (2000); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)(stating that simple teasing, offhand comments, and isolated incidents are not sufficient to amount to discriminatory changes in the terms and conditions of employment); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)(we consider the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

unreasonably interferes with an employee's work performance").

Ms. Storey-Howe argues that the "totality of the circumstances," includes consideration by the courts of facts "targeted at persons other than the plaintiff." (*Opening Brief*, p. 18.) In making this argument, Ms. Storey-Howe relies on *Meritor Savings Bank FSB v. Vinson*. However, her interpretation is not supported by *Meritor*. *Meritor* is the seminal case that applied "hostile work environment" to gender. *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 65-66, 106 S. Ct. 2399, 106 L.Ed.2d 49 (1986). It does not, as Ms. Storey-Howe alleges support any review of conduct targeted at other persons. *Spriggs v. Diamond Auto Glass*, is also distinguishable. In *Spriggs*, the issue was a racial hostile work environment and described a working environment where racial slurs were directed at other employees on a continual basis. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184-185 (4<sup>th</sup> Cir. 2001). Here, Ms. Storey-Howe's allegations involve a

onetime incident. (CP 365) (Even assuming Mr. Messinger acted inappropriately toward Ms. Almont on the Las Vegas trip this does not rise to the level required to establish severe and pervasive.)

Ms. Storey-Howe also relies extensively on *Adams v. Able Building Supply, Inc.*, 114 Wash.App 291, 332 P.3d 1006 (2002). *Adams* is factually distinguishable and in actuality, *Adams*, bolsters Okanogan County's position not Ms. Storey-Howe's. In *Adams*, a female employee alleged sexual harassment because her supervisor "shouldered" her after a heated exchange as he tried to leave. However, there, the Court held that she failed to show that the behavior was because of sex, or that it was motivated by an animus toward women. *Adams*, 114 Wn. App. At 297-298. Neither issue is before this court.

The *Adams* Court went on to reiterate long standing Washington law holding that "severe and pervasive must be looked at from the totality of the circumstances, including the

severity and whether the conduct involved words alone and whether it interfered with the employee's work performance." *Adams*, at p. 296-97, citing, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.3d.295 (1993); *Washington v. Boeing Co.*, 105 Wash. App. at 10, 19 P.3d 1041 (other citations omitted).

Finally, the *Adams* Court held, "here, there is only one single incident alleged which is arguably the result of animus toward women – the "shouldering" incident. This, first of all, is a single incident..." *Adams*, 114 Wn. App at 298. Here, Ms. Storey-Howe also complained of only one single isolated incident. As has been made clear for years that is simply not enough to arise to the level of a hostile work environment and *Adams* is inapposite of Ms. Storey-Howe's position.

Ms. Storey-Howe next relies on *Oncala v. Sundowner Offshore Services, Inc.*, to argue that the "totality of the circumstances" is context dependent and looks to community sensibilities and courts consider targeted employees other than

the plaintiff. (See *Storey-Howe's Opening Brief*, p. 18-19) *Oncale* does not support this proposition.

In *Oncale v. Sundowner*, the U.S. Supreme Court addressed the issue of whether “same sex” discrimination was protected under the statute. *Oncale v. Sundowner*, 523 U.S. 75, 76, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). There, the court held that same sex harassment is actionable and should be reviewed from a reasonable person’s perspective. Nothing more.

Ms. Storey-Howe has also misconstrued *Meritor Savings Bank FSB*. It does not stand for the premise that alleged harassment can be applied as directed to other individuals. (See Storey-Howe’s Opening Brief, p. 18) In fact, it found plaintiff’s allegation sufficient because it was criminal conduct. (*Meritor*, 477 U.S. at 67, 106 S.Ct. 2399 (1986))

Here, Ms. Storey-Howe argues that Mr. Messinger’s behavior was “much more egregious” than other Washington cases. However, the reality is just the opposite. See e.g., string

cites. Ms. Storey-Howe also attempts to rely on allegedly poor behavior that was directed toward a third party and co-employee, Ms. Heather Almont. However, Ms. Almont never reported any of Mr. Messinger's alleged behaviors to the County. (CP 364-366)

Further immediately after Mr. Messinger's allegedly poor behavior, and Ms. Storey-Howe's direction to him to leave her room, he had limited, to no further contact. (CP 42-43; 80-81; 86-90)

Despite Ms. Storey-Howe's loose interpretation, no Washington or federal court holds an employer liable for an isolated incident unless it is extremely serious or as *Meritor* noted, criminal in nature. Neither *Sanger*, *Washington*, nor any other cases offered by Ms. Storey-Howe rise to the level of anything more serious than isolated incidents, which simply are not actionable. *See e.g.*, "'Casual, isolated or trivial' incidents are not actionable. *Sangster v. Albertson's, Inc.*, 99 Wn. App. at 163, *citing*, *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d at

406, 693 P.2d 708, *see also*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2283 ('isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") Mr. Messinger was not at any time inappropriate before Vegas. (CP 66) He was not inappropriate after. (CP 86-87) Thus, we are limited to the single isolated steamroll incident. (CP 72-84) By, Ms. Storey-Howe's own admission Mr. Messinger did not bother her or even talk to her the rest of the conference. (CP 89-90) The incident was immediately investigated by the County and it resulted in Mr. Messinger's demotion or resignation. (CP 43; 96-97; 102-103)(*infra*) Thus, as a matter of law, the trial court properly dismissed Ms. Store-Howe's claim for Hostile Work Environment. She failed to establish either severe and pervasive behavior or that this was imputable to the County or that it failed to take action.

**3. Okanogan County Took Immediate Action Upon Notification Of Storey-Howe's Complaints.**

Ms. Storey-Howe argues that because Mr. Messinger was an employee of Okanogan County that it is virtually de facto liable. However, this argument does not take into account that liability only attaches where an employer failed to take reasonable and prompt remedial action before an employer can be held liable.

In addition, "[An] employee must prove that the conduct is imputable to the employer in order for the employer to held liable. Conduct is imputable to the employer if it is the conduct of an owner, manager, partner, or corporate officer, or, alternatively, if it is the conduct of a supervisor which the employer authorized, knew of, or should have known of, and the employer 'failed to take reasonably prompt and adequate corrective action.'" *Schonauer v. DCR Entm't, Inc.*, 79 Wash. App. 808, 821, 905 P.2d 392, 400 (1995); *Glasgow*, 103 Wash.2d at 407, 693 P.2d 708(emphasis added).

As the *Glasgow* Court held:

This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the work place as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment.

*Glasgow*, 103 Wash. 2d at 407, 693 P.2d at 712; RCW 49.60.180.

The Supreme Court is also clear that an employer may escape liability if it can demonstrate, by a preponderance of the evidence, that (1) it “exercised reasonable care to prevent and

correct promptly any harassing behavior”; and (2) the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 751, 753-54, 118 S.Ct. 2257; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Here, Ms. Storey-Howe has presented absolutely no evidence that Okanogan County knew, or should have known about Mr. Messinger's allegedly inappropriate behavior. (CP 40-42; 70-71; 83; 114) In this appeal she relies heavily on allegations of conduct by Mr. Messinger against another employee, Heather Almont. As addressed *infra* this is not sufficient. Further, as soon as the County was made aware of Mr. Messinger's behavior in Las Vegas, the Undersheriff immediately commenced an investigation, which ultimately ended in Mr. Messinger's demotion from Communications Chief. (CP 43; 96-97; 102-103) Ms. Storey-Howe admits that

she had no further contact with Mr. Messinger, except for a limited contact that lasted for two hours on May 11, 2011. (CP 43-44; 91-92; 99; 125-127) Ms. Storey-Howe was also satisfied with the investigation except that she felt Mr. Messinger should have been terminated rather than permitted to resign. (CP 43-44; 100; 102; 109-110) Thus, Ms. Storey-Howe's hostile work environment claims should be dismissed as she has failed to establish either the third or fourth elements required as a matter of law.

**4. Ms. Storey-Howe Cannot Establish Any Adverse Employment Action**

To maintain a retaliation claim, Ms. Storey-Howe must establish that: "(1) she participated in a statutorily protected activity; (2) an adverse employment action was taken against her; and (3) her activity and the employer's adverse action were causally connected." *Hollenback v. Shriners Hospitals for Children*, 149 Wn.App. 810, 821, 206 P.3d 337, 343 (2009) (citing *Delahunty v. Cahoon*, 66 Wn.App. 829, 839-41, 832

P.2d 1378 (1992)). "The employee must also show that retaliation was a substantial factor motivating the adverse employment action." *Burchfiel v. Boeing Corp.*, 149 Wash. App. 468, 482, 205 P.3d 145, 152 (2009). Once an employee has established a prima facie case of retaliation, the burden shifts to the employer to advance a legitimate, non-discriminatory reason for the action taken. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 622, 60 P.3d 106 (2002); *Estevez*, 129 Wn.App. at 797-98.

For the purposes of this Response, Defendant Okanogan County concedes that Ms. Storey-Howe's complaint to Sgt. Jennifer Johnson may satisfy the first element of her retaliation claim. However, Ms. Storey-Howe's retaliation claim fails nonetheless because she cannot demonstrate that she experienced any adverse employment action and/or that the action about which she complains was taken in response to her complaint.

"An actionable adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities, such as reducing an employee's workload and pay." *Kirby v. City of Tacoma*, 124 Wash.App. 454, 465, 98 P.3d 827 (2004) (citations omitted) (quotations omitted)(emphasis added). This "includes termination, demotion, reassignment with significantly different responsibilities, or significant reduction in pay or benefits." *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1125 (W.D. Wash. 2004) *aff'd*, 152 F. App'x 565 (9th Cir. 2005) (citing *Bierlein v. Byrne*, 103 Wash.App. 865, 871, 14 P.3d 823 (2000)).

Here, Ms. Storey-Howe offers absolutely no evidence to support a claim for retaliation which requires an actionable adverse employment action. Admittedly she quit. She faced no change in shifts, (CP 57) no reassignment, (CP 54; 57; 361) no change in pay, (CP 361) or any other adverse action. While Sgt. Stevens may have arguably made a comment there is absolutely

no evidence as a matter of law that this comment somehow dovetailed into an adverse employment action. In fact Ms. Storey-Howe admits she did not have any significant contact with Sgt. Stevens. (CP 46; 107-108) While she gave three limited instances of contact with Sgt. Stevens, there is no causal connection whatsoever. As a matter of law the trial courts dismissal was appropriate.

#### **5. Ms. Storey-Howe Resigned**

Ms. Storey-Howe wholly ignores the fact that she quit her employment. (CP 60-61)

"A resignation is presumed to be voluntary, and it is incumbent upon the employee to introduce evidence to rebut that presumption." *Sneed v. Barna* 80 Wash.App. 843, 849, 912 P.2d 1035, 1038 (1996); *Townsend v. Walla Walla School Dist.* 147 Wash.App. 620, 627, 196 P.3d 748, 752 (2008)(we presume a resignation is voluntary and, thus, cannot give rise to a claim for constructive discharge); *Micone v. Town of Steilacoom Civil Service Comm'n*, 44 Wash.App. 636, 642, 722

P.2d 1369, *review denied*, 107 Wash.2d 1010 (1986); *Molsness v. City of Walla Walla*, 84 Wn.App. 393, 398, 928 P.2d 1108 (1996)(generally, we presume a resignation is voluntary and, thus, cannot give rise to a claim for constructive discharge) *Molsness v. City of Walla Walla*, 84 Wash.App. 393, 398, 928 P.2d 1108 (1996).

An employee who was not fired must establish constructive discharge rather than voluntary resignation. A constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him or her to quit his job. *Bulaich v. AT & T Info. Sys.*, 113 Wash.2d 254, 261, 778 P.2d 1031 (1989) (citing *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wash.App. 630, 631, 700 P.2d 338 (1985)). “[C]ourts must determine ‘whether a reasonable man would view the working conditions as intolerable.’ ” *Binkley v. City of Tacoma*, 114 Wash.2d 373, 388, 787 P.2d 1366 (1990) (quoting *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir.1982)).

“[T]he employer's action creating the intolerable condition must be... a deliberate act of the employer creating the intolerable condition, without regard to the employer's mental state as to the resulting consequence.” *Bulaich*, 113 Wash.2d at 261, 778 P.2d 1031.

However, quitting because of mere dissatisfaction with working conditions does not rise to the level of constructive discharge; rather it constitutes a voluntary resignation. See *Barrett*, 40 Wash.App. at 638, 700 P.2d 338(emphasis added); *Crownover v. State ex rel. Dep't of Transp.*, 165 Wash. App. 131, 149, 265 P.3d 971, 981 (2011), citing, *Boeing Co.*, 105 Wash.App. at 10, 19 P.3d 1041(An employee's frustration, and even receipts of direct or indirect negative remarks, is not enough to show intolerable working conditions); *Micone v. Town of Seilacoom Civil Service Com'n*, 44 Wash.App 636, 642, 722 P.2d 1369, 1373 (1986), *overruled on other grounds*, *Riccobono v. Pierce County*, 92 Wash.App. 254 (1998)(forcing employee to submit to a psychological evaluation and mayor's

directive to do the same was not enough to allege being forced to resign); *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wash. App. 630, 631, 700 P.2d 338, 339 (1985)(Plaintiff was assigned a new position that combined new duties with some of the duties she previously had performed. After 3 days at her new position, Mrs. Barrett concluded the job imposed unreasonable demands upon her and quit alleging "intolerable working conditions.")

An employee may rebut a presumption of constructive discharge by showing the resignation was prompted by duress or an employer's oppressive actions. *Id.* But duress is not measured by an employee's subjective evaluation of a situation, and an undesirable work situation does not, in itself, obviate the voluntariness of a resignation. *Barrett*, 40 Wn.App. at 638; *Molsness*, 84 Wn.App. at 399 (emphasis added).

Here, Ms. Storey-Howe relies in large part on *Haubry v. Snow* to support her claim for retaliation. However, *Haubry v. Snow* is far more egregious facts than vaguely laid out in Ms.

Storey-Howe's allegations. There, plaintiff's complaints were of continual and improper touching and comments, not simply a onetime event. *Haubry v. Snow*, 106 Wash. App. 666, 672-673, 31 P.3d 1186, 1190 (1991)

There are simply no facts by which a reasonable person could find that she was subjected to an intolerable workplace. As previously set forth Ms. Storey-Howe cannot establish that her working environment was so intolerable as to make a reasonable person quit. In fact, the undisputed evidence is she had limited to no contact with Mr. Messinger or Sgt. Steven following the Vegas incident. By Plaintiff's own admission, she worked only a two hour shift with Mr. Messinger (accidentally). (CP 44-46; 111-112; 113; 114-116) Further, all of the purported actions taken by Sgt. Stevens against her are a Sergeants responsibility. She also admitted that she did not work with Sgt. Stevens "very often," in her remaining three months of employment. (CP 46; 107-108)

## 6. Negligent Retention

An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries. *Betty Y. v. Al-Hellou*, 98 Wash. App. 146, 148-49, 988 P.2d 1031, 1032-33 (1999); *Carlsen v. Wackenhut Corp.*, 73 Wash.App. 247, 252, 868 P.2d 882 (1994) (citing *Peck v. Siau*, 65 Wash.App. 285, 288, 827 P.2d 1108 (1992); *Guild v. Saint Martin's College*, 64 Wash.App. 491, 498-99, 827 P.2d 286 (1992)). But the employer's duty is limited to foreseeable victims and then only “to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.” *Niece v. Elmview Group Home*, 131 Wash.2d 39, 48, 929 P.2d 420 (1997).

“An employer can be liable for negligently supervising an employee.” *Francom v. Costco Wholesale Corp.*, 98 Wash.

App. 845, 865, 991 P.2d 1182, 1192 (2000); *Herried v. Pierce County Pub. Transp. Benefit Auth. Corp.*, 90 Wash.App. 468, 475, 957 P.2d 767 (citing *Thompson v. Everett Clinic*, 71 Wash.App. 548, 555, 860 P.2d 1054 (1993), *review denied*, 123 Wash.2d 1027, 877 P.2d 694 (1994); *Peck v. Siau*, 65 Wash.App. 285, 827 P.2d 1108, *review denied*, 120 Wash.2d 1005, 838 P.2d 1142 (1992)), *review denied*, 136 Wash.2d 1005, 966 P.2d 901 (1998)

However, a plaintiff may also not make a duplicative claim. *See e.g., Francom v. Costco Wholesale Corp.*, 98 Wash. App. at 866, 991 P.2d at 1193 (Francoms relied on the same facts to support both discrimination claim and negligent supervision/retention claim and as with negligent infliction of emotional distress it is duplicative) As a matter of law, Ms. Storey-Howe's claim for negligent retention must be dismissed.

Regardless, the facts do not support a claim for negligent "retention." Ms. Storey-Howe alleged that Ms. Almont had discussed with her Mr. Messinger's behavior toward her

(Almont). (CP 40-41; 70) However, Ms. Storey-Howe did not know whether Ms. Almont had ever complained to a supervisor. (CP 41; 137) She admits that she did not make any complaints to a supervisor (CP 41; 71) There is simply no evidence in the record that Okanogan County "knew or should have known," of Mr. Messinger's allegedly dangerous propensities and this claim must be dismissed, either as a matter of law because it is a duplicative claim, or because there is no evidence that Okanogan County had any knowledge of Mr. Messinger's alleged potential for harassing behavior.

////

////

////

////

////

////

////

V. CONCLUSION

For the reasons stated above this court should uphold the trial court's ruling dismissing Okanogan County on Summary Judgment.

DATED THIS 12 day of November, 2014.

Respectfully Submitted,

EVANS, CRAVEN & LACKIE, P.S.

By 

HEATHER C. YAKELY #28848

Attorney for Respondent, Okanogan  
County

