NO. 45087-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARGARITA MENDOZA de SUGIYAMA,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTER STATEMENT OF THE ISSUES 3

III. COUNTER STATEMENT OF THE CASE 4

A. Relevant History 4

B. WSDOT Hires Shawn Murinko, A Disabled Lawyer, As The Agency's American With Disabilities Agency Coordinator 5

C. In Response To State-wide Budget Cuts, WSDOT Executive Management Propose Reorganizing The Internal Civil Rights Branch 6

D. Murinko Reports Mendoza Is Creating A Hostile Work Environment And Retaliating Against Him For Moving His Office Within HR 7

E. After Murinko Reports Her Behavior, Mendoza Disparages Murinko In Letters To The Governor And FHWA In An Effort To Defend Herself 8

F. Washington State Department Of Personnel Hires An Outside Investigator To Investigate Both Murinko And Mendoza's Claims 9

G. The Independent Investigation Reveals There is No Evidence To Support Mendoza's Claims But Confirms Murinko's Allegations 11

H. The Trial Court Limited Burdensome Discovery Requests 12

IV. ARGUMENT 15

A. Standard Of Review 15

TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTER STATEMENT OF THE ISSUES 3

III. COUNTER STATEMENT OF THE CASE 4

A. Relevant History 4

B. WSDOT Hires Shawn Murinko, A Disabled Lawyer, As The Agency's American With Disabilities Agency Coordinator 5

C. In Response To State-wide Budget Cuts, WSDOT Executive Management Propose Reorganizing The Internal Civil Rights Branch 6

D. Murinko Reports Mendoza Is Creating A Hostile Work Environment And Retaliating Against Him For Moving His Office Within HR 7

E. After Murinko Reports Her Behavior, Mendoza Disparages Murinko In Letters To The Governor And FHWA In An Effort To Defend Herself 8

F. Washington State Department Of Personnel Hires An Outside Investigator To Investigate Both Murinko And Mendoza's Claims 9

G. The Independent Investigation Reveals There is No Evidence To Support Mendoza's Claims But Confirms Murinko's Allegations 11

H. The Trial Court Limited Burdensome Discovery Requests 12

IV. ARGUMENT 15

A. Standard Of Review 15

B. The Trial Court Properly Found That Mendoza Failed To Establish A Prima Facie Case of Whistleblower Retaliation 17

1. Mendoza Did Not File A Complaint With The State Auditor Until After She Was Terminated 18

2. Mendoza's Complaint Covered Personnel Matters That Are Expressly Excluded In The Statutory Definition Of "Improper Governmental Action." 20

3. Mendoza Is Not A "Whistleblower" Because The State Auditor's Office Declined To Open An Investigation 22

C. The Trial Court Correctly Determined That Mendoza's Letters To The Governor And FHWA Were Not Whistleblower Complaints 24

1. Mendoza's Letters Describe Personnel Matters Outside The Scope Of RCW 42.40 25

D. Mendoza Was Terminated For Justifiable Reasons And Improper Motive Was Not A Factor 27

E. Mendoza's Hostile Work Environment And Gender And Race Discrimination Claims Were Properly Rejected By The Trial Court Because She Failed To Establish Gender Or Race Motivated Discrimination 33

1. Hostile Work Environment 33

2. There Is No Evidence Of Race-based Discrimination 36

3. The Alleged Hostile Environment Was In The Future 37

4. Mendoza Offers No Evidence That Either Race Or Gender Were Considerations In Her Termination 38

5. Mendoza Failed To Show That Any Comparators Were Treated Differently 39

F. The Trial Court Correctly Found That WSDOT Had Legitimate Non Discriminatory Reasons To Discharge Mendoza, And Mendoza Did Establish That WSDOT's Reasons Were Pre-textual 39

1. There Was No Evidence That WSDOT's Reasons Were Pretext 41

2. The Independent Investigation Was Thorough And Objective 41

G. The Trial Court Correctly Found That Mendoza's Claim Of Retaliation For Opposing Discrimination Is Unsupported In The Record 44

H. The Evidentiary Rulings Were Proper And All Mendoza's Letters Were Before The Court 47

I. The Trial Court Did Not Abuse Its Discretion In Limiting Overbroad Discovery Requests 47

V. CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Adams v. Able Bldg. Supply, Inc.,
114 Wn. App. 291, 57 P.3d 280 (2002) 34, 38

Augilar v. Immigrations & Customs Enforcement Div.,
255 F.R.D. 350 (S.D.N.Y. 2008) 49

Beltran v. State Dep't of Soc. & Health Servs.,
98 Wn. App. 245, 989 P.2d 604 (1999) 48

Cedell v. Farmers Ins. Co. of Washington,
176 Wn.2d 686, 295 P.3d 239 (2013) 16

Clarke v. State Attorney General's Office,
133 Wn. App. 767, 138 P.3d 144 (2006) 39

Crownover v. State Dep't of Transp.,
165 Wn. App. 131, 265 P.3d 971 (2011) 34

deLisle v. FMC Corp.,
57 Wn. App. 79, 786 P.2d 839 (1990) 15

Domingo v. Boeing Employees' Credit Union,
124 Wn. App. 71, 98 P.3d 1222 (2004) 34, 40, 41

Estevez v. Faculty Club,
129 Wn. App. 774, 120 P.3d 579 (2005) 18, 45

Francom v. Costco Wholesale Corp.,
98 Wn. App. 845, 991 P.2d 1182 (2000) 45

Glasgow v Georgia-Pacific Corp.,
103 Wn. 2d 401, 693 P.2d 708 (1985) 34, 36

Griffith v. Schnitzer Steel Industries, Inc.,
128 Wn. App. 438, 115 P.3d 1065 (2005) 40

Grimwood v. Puget Sound,
110 Wn.2d 355, 753 P.2d 517 (1988) 16

Hill v. BCTI Income Fund-I,
144 Wn.2d 172, 23 P.3d 440 (2001) 16, 18, 45

Kahn v. Salerno,
90 Wn. App. 110, 951 P.2d 321 (1998) 45

Keenan v. Allan,
889 F. Supp. 1320 (E.D. Wash. 1995), *aff'd*, 91 F.3d 1275
(9th Cir. 1996) 18

Keyser v. Sacramento City Unified Sch. Dist.,
265 F.3d 741 (9th Cir. 2001) 46

Mackay v. Acorn Custom Cabinetry,
127 Wn.2d 302, 898 P.2d 284 (1995) 40

Milligan v. Thompson,
110 Wn. App. 628, 42 P.3d 418 (2002) 18, 38

O'Neill v. City of Shoreline,
170 Wn.2d 138, 240 P.3d 1149 (2010) 49

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000),
overruled on other grounds by McClarty v. Totem Elec.,
157 Wn.2d 214, 137 P.3d 844 (2006) 16

Riehl v. Foodmaker, Inc.,
152 Wn.2d 138, 94 P.3d 930 (2004) 15

Sheikh v. Choe,
156 Wn.2d 441, 128 P.3d 574 (2006) 15

State v. Costich,
152 Wn.2d 463, 98 P.3d 795 (2004) 15

Staub v. Proctor Hosp.,
131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011) 42, 43, 44

Tiffany Family Trust Corp. v. City of Kent,
155 Wn.2d 225, 119 P.3d 325 (2005) 16

Torgerson v. City of Rochester,
643 F.3d 1031 (8th Cir. 2011) (*abrogating Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363 (8th Cir. 1987) 15

Washington v. Boeing Co.,
105 Wn. App. 1, 19 P.3d 1041 (2000) 34, 45

Wilmot v. Kaiser Aluminum & Chemical Corp.,
118 Wn.2d 46, 821 P.2d 18 (1991) 45

Young v. Key Pharms., Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989) 15

Zubulake v. UBS Warburg LLC,
217 F.R.D. 309 (S.D.N.Y. 2003) 48

Statutes

RCW 42.40 .... passim

RCW 42.40.020(6)(a) 20

RCW 42.40.020(6)(b) 21, 26

RCW 42.40.020(7) 17

RCW 42.40.020(10)(a) 23, 25, 26

RCW 42.40.020(10)(a)(i) 3, 17, 22

RCW 42.40.020(10)(a)(ii) 17, 22

RCW 42.40.050(2) 27

RCW 49.60 5

RCW 49.60.180(2) 38

Rules

CR 26(c)(1), (2), (4) 48

CR 56(e) 16

Fed. R. App. P. 32.1 .... 20, 23

Fed. R. Civ. P. 6 49

GR 14.1(b) 20, 23

Other Authorities

The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (2d ed. 2007) Sedona Conference Working Group on Electronic Document Retention & Production 49

I. INTRODUCTION

Appellant Margarita Mendoza de Sugiyama (Mendoza) was a high-level manager in charge of the department overseeing discrimination complaints and investigations for the Internal Civil Rights Branch of the Equal Employment Opportunity department at the Washington State Department of Transportation (WSDOT). WSDOT executive management expected that she would lead by example, follow all procedures and protocol, and would create a tolerant work environment for everyone. Instead, Mendoza created a hostile work environment for a disabled subordinate, retaliated against him for reporting her behavior, and proceeded to breach every code of conduct she was tasked with upholding. Mendoza laughingly belittled the "big head" of Shawn Murinko, who suffered from cerebral palsy, in front of other employees. After he complained about her behavior, she disparaged his qualifications in letters and intentionally sent his confidential employment application and other personnel documents to an outside agency. She interfered with the ensuing investigation conducted by an outside investigator, and as a result of her breach of managerial duties, gross misconduct and unprofessional behavior, WSDOT rightfully ended her employment.

Mendoza filed suit, alleging gender and race discrimination, but offered no evidence to support her claims, while WSDOT provided

numerous justified bases for the termination that were race and gender-neutral. Mendoza also filed a whistleblower retaliation claim, but despite her insistence that she filed the whistleblower complaint on her last day of work, the undisputed facts show that she had been fired two weeks earlier. The trial court granted WSDOT's motion for summary judgment on all claims and Mendoza now appeals.

Mendoza also appeals the trial court order limiting her discovery requests for production of electronically stored information (ESI) which included over 174,000 WSDOT e-mails. Despite her claim that the court prevented her from obtaining the documents she needed, the order found her requests overbroad and unduly burdensome and directed either a collaborative effort to develop search strategies or redrafting of the requests to ensure that they were "tailored to the issues in the case."

Respondent Washington State Department of Transportation respectfully requests that the Court of Appeals affirm the trial court's dismissal of all of Mendoza's claims because she offered no evidence to support any of her claims, and failed to show that WSDOT's legitimate reasons for firing her were pretext. Further, Respondent requests this Court to find that the trial court did not abuse its discretion by limiting burdensome discovery requests.

II. COUNTER STATEMENT OF THE ISSUES

1. Was the trial court correct in determining as a matter of law that the whistleblower complaint Mendoza filed with the State Auditor's Office could not be a basis for a retaliation claim when that complaint was filed thirteen days after she was notified of her termination?

2. Was the trial court correct in determining as a matter of law that Mendoza's letters to the Governor's Office and the Federal Highway Administration did not meet the statutory definition of a "whistleblower" complaint, nor did they allege "improper governmental action" as required by RCW 42.40.020(10)(a)(i)?

3. Was there sufficient evidence to find that Mendoza's actions were egregious events justifying termination or that WSDOT had justifiable reasons and improper motive was not a substantial factor?

4. Was the trial court correct in determining that Mendoza failed to establish any retaliation by WSDOT?

5. Was the trial court correct in determining that Mendoza had failed to make a prima facie showing of hostile work environment and gender and racial discrimination claims, finding that there was not a single comment or event in the record to establish either gender or race motivated discrimination?

6. Was the trial court correct in determining that WSDOT established a number of non-discriminatory reasons for Mendoza's termination, and that Mendoza failed to establish any evidence that her termination was for discriminatory reasons or that WSDOT's reasons were a pretext?

7. Did the trial court properly exercise its discretion and reject unauthenticated hearsay and Mendoza's opinion and legal conclusions as evidence?

8. Did the trial court properly exercise its broad discretion in discovery matters when it found Mendoza's request for 174,000 emails to be overly broad and unduly burdensome, and permitted either a collaborative effort by the parties or a redrafting of the requests by Mendoza to ensure that the requests were tailored to the issues in the case?

III. COUNTER STATEMENT OF THE CASE

The trial court properly granted summary judgment finding Mendoza had failed to present a prima facie case on any of her discrimination or whistleblower claims, and finding that WSDOT had shown a number of justifiable, non-discriminatory reasons for her termination. Additionally, the trial court did not abuse its discretion in limiting an overly broad and unduly burdensome discovery request.

A. Relevant History

From 2003 through 2010, Mendoza served as the Diversity Programs Administrator for the Internal Civil Rights Branch (ICRB) of the Department of Transportation Office of Equal Opportunity (OEO). Her job responsibilities included overseeing investigations into WSDOT employee complaints of discrimination, harassment, and retaliation, which required "knowledge of and demonstrated commitment to principles of confidentiality, civil rights and liability." CP at 695. Despite her position overseeing discrimination cases and civil rights management, Mendoza was vocal about her lack of respect for WSDOT's Human Resources (HR) Director Kermit Wooden and his staff. CP at 591, 640-43. Mendoza kept a self-titled "extinction list" of WSDOT employees that she openly discussed in front of her staff. CP at 562. The "extinction list" included not only Kermit Wooden, but WSDOT Chief of Staff Steve Reinmuth, and

one of Mendoza's subordinates, Shawn Murinko, who ultimately complained about her treatment of him. CP at 562-63.

B. WSDOT Hires Shawn Murinko, A Disabled Lawyer, As The Agency's American With Disabilities Agency Coordinator

In April 2007, WSDOT hired Murinko, a profoundly disabled person suffering from cerebral palsy, to work under Mendoza as the Affirmative Action and Americans with Disabilities Act (ADA) Coordinator. CP at 513-19, 589. Murinko is an attorney and member of the Washington State Human Rights Commission, which is responsible for enforcing and administering RCW 49.60, Washington's Laws Against Discrimination, a position he held when he was hired at WSDOT. CP at 513, 589. While under Mendoza's supervision, and with her support, Murinko was promoted to Disability Programs Manager in October 2007. CP at 524-26, 598-600. As Murinko's direct supervisor, Mendoza authored his annual performance evaluations and consistently found that Murinko met or exceeded all expectations. CP at 526-29, 613-19, 621-25. Murinko, who is confined to a wheelchair, worked on the building's second floor. CP at 517-20. He requires special accommodations to assist with communication, transportation, and egress in and out of the workplace. CP at 518-22.

In the summer of 2009, WSDOT held a fire drill in the Olympia office in which both Mendoza and Murinko worked. For purposes of the

drill, the building elevators were not to be used. Murinko's evacuation as a wheelchair user was overlooked, and no one came to assist Murinko with exiting down the stairwell. CP at 580-82. Consequently, WSDOT decided to move the physical location of Murinko's office to an available area within the HR office on the first floor. HR paid for the structural improvements needed to accommodate Murinko's disability. CP at 533-34.

C. In Response To State-wide Budget Cuts, WSDOT Executive Management Propose Reorganizing The Internal Civil Rights Branch

In 2009, the Legislature required WSDOT to make significant budgetary cuts. An organizational proposal was made to move the ICRB (Mendoza's department) from the OEO to HR. Several specific reasons for the proposed move were provided, none of which are discriminatory. In an email circulated to staff discussing the proposed changes under review, Chief of Staff Reinmuth noted WSDOT was the only state agency to have the current independent structure of internal civil rights investigations; there were economic benefits of consolidating ICRB into HR; and there was a lack of collaboration between Mendoza's department and HR that consolidation could remedy. CP at 649. This last reason Mendoza asserts as a discriminatory action targeted at her. In December 2009, OEO Director Brenda Nnambi advised Mendoza that, in an attempt to fulfill the Legislature's mandate, WSDOT was considering

moving the responsibility of overseeing internal civil rights investigations from OEO to HR. CP at 535. Ms. Nnambi also advised Mendoza that HR was considering putting Mr. Murinko in training to take over her position after Mendoza's previously announced retirement planned for October 2010. CP at 536-37.

D. Murinko Reports Mendoza Is Creating A Hostile Work Environment And Retaliating Against Him For Moving His Office Within HR

Murinko complained to Reinmuth that Mendoza had been mistreating him since he requested the office move. CP at 474, 590. He was concerned that she was retaliating against him for moving downstairs within the HR office space. CP at 594. Murinko had discussed his concerns with HR Labor Relations Manager Jessica Todorovich. CP at 629-30. He told her that after he requested the accommodation, Mendoza was tracking his time, micro-managing his work and making assumptions about his work that were inaccurate and hurtful, and was making him sign out to go to the bathroom. She had also ridiculed his physical appearance in public, despite her position in civil rights management. CP at 474, 630, 1178. Mendoza made fun of Murinko and laughed about his "large head" in front of his co-workers. CP at 563-65. Mendoza admitted to this, but continues to assert it was a positive exchange because everyone was laughing. CP at 563-64. Todorovich felt that Murinko had put the agency on notice

regarding a possible disability retaliation situation and asked him to discuss his concerns with management. CP at 629-30. She alerted HR Director Wooden to Mr. Murinko's concerns. CP at 631.

On January 22, 2010, Mendoza was directly informed by Nnambi that Murinko had lodged a retaliation claim against her. CP at 1225. On February 2, 2010, Reinmuth announced that Murinko would no longer be supervised by Mendoza, to remedy the alleged hostile and retaliatory situation, allowing WSDOT an opportunity to investigate. CP at 429.

E. After Murinko Reports Her Behavior, Mendoza Disparages Murinko In Letters To The Governor And FHWA In An Effort To Defend Herself

On February 2, 2012, directly after she learned of Murinko's complaint and the resulting change in supervision, Mendoza wrote to the Governor asserting that the proposed reorganization of ICRB was an attempt to remove authority from her and diminish the independent role of OEO functions, in what she perceived was a violation of federal law. Mendoza also described her "belief" of an alleged campaign by Reinmuth, Wooden, and Murinko to "target" her by questioning her integrity and the quality of the work performed by the OEO/ICRB office she oversaw. CP at 652-56. She attacked Murinko's credibility because he had not discussed his concerns directly with her. CP at 652-56. Mendoza criticized Murinko for, in her opinion, lacking "the fortitude, skill and ability to

communicate directly with anyone." CP at 654. In the letter, Mendoza also acknowledged that she was aware of Murinko's retaliation complaint against her and admits that she is making these serious assertions in order to defend herself. CP at 655. She also admitted to Hammond that she wrote the letters only to defend herself. CP at 1435.

WSDOT Secretary Paula Hammond contacted the Federal Highway Administration (FHWA), who advised that there was no legal impediment to moving ICRB under the HR department, contrary to Mendoza's claims. CP at 635-36, 658-59. Sensitive to Mendoza's allegations, WSDOT ordered an independent investigation into her claims. CP at 437, 1038-39. Less than a month later, on February 26, 2010, the Governor's Chief of Staff, Jay Manning, advised Mendoza of the investigation and also advised her that their attorneys confirmed there was no federal law violation in the proposed reorganization. CP at 658-59.

F. Washington State Department Of Personnel Hires An Outside Investigator To Investigate Both Murinko And Mendoza's Claims

On March 11, 2010, Claire Cordon, an independent employment attorney who previously served on the Equal Employment Opportunity Commission (EEOC), was contacted by the Office of the Attorney General to investigate both the Mendoza and Murinko allegations.

CP at 437. On March 19, 2010, Mendoza was directly advised of the investigation into Murinko's and her concerns. CP at 550.

While the investigation was on-going, Mendoza continued to disparage Murinko and other staff, and contacted several people she knew to be witnesses. On March 25, 2010, Mendoza authored and delivered a second letter to the Governor's Chief of Staff that contained a restatement of Mendoza's "belief of a concerted effort by Mr. Reinmuth, Mr. Wooden, and Mr. Murinko to discredit [her] personally and professionally." CP at 661-62. In addition, on March 29, 2010, Mendoza wrote a letter to Dan Mathis, Director of the Regional Office for the FHWA. CP at 664-66. Mr. Mathis was one of the witnesses Mendoza had identified to Cordon as relevant to an investigation of her claims. CP at 538-39. As such, Mendoza knew that communicating with him about her concerns, while the investigation into her complaints was pending, violated established department investigation procedures. CP at 500-04. Indeed, it was her job to ensure these protocols were followed. Mendoza's letter to Mr. Mathis repeated the previous allegations made to the Governor. CP at 665. On April 21, 2010, Mendoza complained to Mathis that Murinko "lacks a basic understanding of the external ADA process," and sent him confidential interview rating sheets prepared in connection with Murinko's 2009 application to become the WSDOT External Civil Rights Manager. CP at 681-82.

Furthermore, Mendoza repeatedly interfered with the investigation itself. Despite her specific expertise in conducting investigations, Mendoza openly discussed the contents of her letter to the Governor and her complaints at a meeting with several department employees in April 2010. This conduct was in violation of HR and OEO policy. She engaged in these conversations knowing that employees, Lea Schmidt, Maura Johnson, Margo Landreville and Jenny White, were witnesses she had asked Cordon to interview and Cordon had yet to speak with them. CP at 553-55. She also discussed her allegations about Wooden directly with Lea Schmidt and Diana Hendrickson, both witnesses she had named to Cordon. CP at 540-46. In doing so Mendoza deviated from the very confidentiality protocols that she herself emphasized when training staff on how to conduct investigations. CP at 500-04. She knew that complainants, respondents and witnesses are expected not to talk about matters under investigation, particularly while the investigation is proceeding. CP at 500-04.

G. The Independent Investigation Reveals There is No Evidence To Support Mendoza's Claims But Confirms Murinko's Allegations

In July 2010, Cordon completed her investigation. CP at 439. After exhaustive examination of Mendoza's claims and the numerous documents Mendoza provided to support those claims, the Cordon investigation found Mendoza's complaints to be wholly baseless. CP at 445-85.

Conversely, Murinko's allegations that Mendoza was retaliating against him were substantiated by the investigation. CP at 478-82. After review of the investigation findings, Mendoza was terminated by Secretary Hammond on September 10, 2010. CP at 694. Mendoza was provided with a pre-disciplinary letter and given the opportunity to explain her actions. CP at 1399-1408. Mendoza filed a written response, in which she disagreed with WSDOT's opinions about her actions, but did not deny the underlying facts. CP 1423-35. On September 10, 2010, Mendoza was given notice that her last day of employment would be September 25, 2010. CP at 694. On September 24, 2010, the day before Mendoza's last day of work, she submitted an online whistleblower complaint to the State Auditor's Office (SAO). CP at 556. The SAO declined to open an investigation as her concerns were outside the scope of the whistleblower statute. CP at 853.

H. The Trial Court Limited Burdensome Discovery Requests

Mendoza's discovery requests included 17 interrogatories and 62 requests for production. CP at 67-98. The definitions accompanying these discovery requests defined "document" to include electronically stored information (ESI) which in turn was defined as encompassing:

> [A]ny electronically stored data on magnetic or optical storage media as an "active" file or files (readily readable by one or more computer applications or forensics

> software); any "deleted" but recoverable electronic files on said media; any electronic file fragments (files that have been deleted and partially overwritten with new data); and slack (data fragments stored randomly from random access memory on a hard drive during the normal operation of a computer or residual data left on the hard drive after new data has overwritten some but not all of previously stored data).

CP at 71.

WSDOT objected to these requests as unduly burdensome, overly broad, vague, calling for speculation and seeking attorney work-product, insofar as they asked for an attorney's assessment of what is "relevant" or "related to" Mendoza's claims. CP at 26. WSDOT asked that Mendoza narrow her definition of "documents" and collaborate on the development of a key-word search strategy for reviewing ESI. CP at 26.

Mendoza agreed to limit the scope of review to all emails that were exchanged between 12 individuals. CP at 26. However, she refused to either narrow the scope of her definition of "document" or to cooperate in developing a key-word search strategy to filter email data. CP at 27. The 12 individuals included 10 WSDOT employees[1] and two individuals who are not WSDOT employees (and therefore WSDOT is not the

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[1] The 10 WSDOT employees include Paula Hammond, WSDOT Secretary; Dave Dye, WSDOT Assistant Secretary; Bill Ford, WSDOT Assistant Secretary; Steve Reinmuth; WSDOT Chief of Staff; Brenda Nnambi, WSDOT Office of Equal Opportunity Director; Kermit Wooden, former WSDOT Director of Human Resources; and Human Resources staff responsible for labor and personnel issues (Jessica Todorovich), reasonable accommodation and return to work issues (Kathy Dawley), and ADA compliance issues (Shawn Murinko). CP at 27.

custodian of their email files). CP at 27. Because of their management level positions, their email communications necessarily involved matters that are irrelevant to this case and include confidential and privileged material. CP at 26-27. The result of this search was over 174,000 emails, all of which needed to be reviewed for privilege.

Mendoza moved to compel production of the 174,000 e-mails. The trial court exercised its broad discretion and determined that Mendoza's request was overly broad and unduly burdensome, and advised a collaborative effort. CP at 397. Despite Mendoza's assertion, she was not prevented from obtaining relevant discovery:

> This *ruling is not intended to preclude plaintiff from seeking discovery of ESI*, either through a collaborative effort with WSDOT to develop and employ key- word search strategies that are tailored to the issues in this case, or through discovery requests that are tailored to the issues in the case and crafted in such a way that WSDOT can reasonably fashion a search strategy designed to gather the ESI plaintiff is seeking, in the absence of a collaborative effort. (Emphasis added).

CP at 397-98.

Rather than collaborate with the department, Mendoza filed a public records request for all of the emails. The trial court's ruling against her is the subject of a separate appeal.

IV. ARGUMENT

A. Standard Of Review

This Court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). The purpose of summary judgment is to avoid unnecessary trials. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). This Court may affirm a lower court's ruling on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). There is no exception to these standards for employment discrimination cases. While it has been stated that summary judgment is seldom appropriate in such cases, *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144, 94 P.3d 930 (2004) (citing *deLisle v. FMC Corp.*, 57 Wn. App. 79, 84, 786 P.2d 839 (1990)), the authority that originally made that statement has since been abrogated. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043, 1060 (8th Cir. 2011) (*abrogating Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364-65 (8th Cir. 1987) and holding that there "is no 'discrimination case exception' to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial"). Thus, as this Court has stated, "courts 'should not treat discrimination differently from other ultimate issues of fact.'" *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172,

185, 23 P.3d 440 (2001) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006).

As the party opposing summary judgment, Mendoza may not rely on "mere allegations or denials" set forth in pleadings, but rather "must set forth specific facts showing that there is a genuine issue for trial." *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 328-29, 119 P.3d 325 (2005) (quoting CR 56(e)). "The 'facts' required by CR 56(e) are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice." *Grimwood v. Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (citations omitted).

Trial Court discovery rulings are reviewed for manifest abuse of discretion. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 694, 295 P.3d 239 (2013). "We will reverse a trial court's discovery rulings only 'on a clear showing' that the court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*

B. The Trial Court Properly Found That Mendoza Failed To Establish A Prima Facie Case of Whistleblower Retaliation

Mendoza asserted a claim for whistleblower retaliation under RCW 42.40. The trial court did not err in finding that Mendoza failed to establish her prima facie case because she filed her whistleblower complaint *after* she had been terminated.

A 'whistleblower' is an employee who in good faith reports "alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, initiating an investigation by the auditor under RCW 42.40.040." RCW 42.40.020(10)(a)(i).[2] "'Public official' means the attorney general's designee or designees; the director, or equivalent thereof in the agency where the employee works; an appropriate number of individuals designated to receive whistleblower reports by the head of each agency; or the executive ethics board." RCW 42.40.020(7).

To establish a prima facie case of whistleblower retaliation or discrimination, an employee must show that (1) she engaged in a statutorily protected activity, (2) her employer took an adverse

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[2]A whistleblower is also defined as "[a]n employee who is perceived by the employer as reporting, whether they did or not, alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, initiating an investigation by the auditor under RCW 42.40.040[.]" RCW 42.40.020(10)(a)(ii)). *Both definitions expressly require an investigation by the auditor.*

employment action, and (3) the employee's activity caused the employer's adverse action. *See Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). If the employee establishes a prima facie case, the burden shifts to the employer to produce evidence of legitimate, non-retaliatory reasons for the employment action. *Keenan v. Allan*, 889 F. Supp. 1320, 1367 (E.D. Wash. 1995), *aff'd*, 91 F.3d 1275 (9th Cir. 1996); *Estevez v. Faculty Club*, 129 Wn. App. 774, 797–98, 120 P.3d 579 (2005). If the employer sets forth such reasons, the presumption of retaliation is rebutted. *Hill*, 144 Wn.2d at 182, *rev'd on other grounds by McClarty*, 157 Wn.2d 214.

The burden then shifts back to the employee to show that the proffered reasons are pre-textual or that the whistleblowing activity was a substantial motivating factor for the employer's action. *Keenan*, 889 F. Supp. at 1367; *Estevez*, 129 Wn. App. at 798. When the employee's evidence of pretext is weak or the employer's non-retaliatory evidence is strong, the employer is entitled to summary judgment. *Milligan*, 110 Wn. App. at 638–39.

1. Mendoza Did Not File A Complaint With The State Auditor Until After She Was Terminated

Mendoza identified a complaint she filed on September 24, 2010, online with the Washington State Auditor's Office (SAO) as her

"whistleblower complaint."[3] CP at 856-57, 861. On September 10, 2010 she was informed of her termination and given an effective date of September 25, 2010. CP at 694-707. She filed the complaint one day before her final day of employment.[4] CP at 848-51. There is no evidence in the record that she was subjected to any workplace reprisal or retaliatory action due to her complaint to the SAO during the one remaining day she worked at WSDOT. The trial court found that filing a whistleblower complaint after notification of the termination decision foreclosed the possibility of any whistleblower retaliatory motive for the termination decision. CP at 1532-33. While this finding is correct, and undisputed by the evidence, (notwithstanding Mendoza's argument that she was not terminated until her final day of work), Mendoza's whistleblower complaint fails on two additional grounds.

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[3] Mendoza has incorrectly stated in her declaration and in briefing that the date of her whistleblower complaint was September 23, 2010, and she was fired on September 24, 2010. CP at 1230; Br. Appellant at 5, 8, 13, 35-36. The record shows that the whistleblower complaint was filed on September 24, 2010. CP 848-49. Mendoza's last day at WSDOT was September 25, 2010, and she was given notice of her termination on September 10, 2010. CP 694. Mendoza acknowledged September 24th as the correct date in her deposition. CP at 556.

[4] Despite this factual certainty, Mendoza argues that the trial court erred in finding that she filed her whistleblower complaint with the state auditor's office *after* her termination. "This finding is simply wrong. Mendoza de Sugiyama filed her whistleblower complaint with the auditor on September 23, 2010; WSDOT terminated her on September 24, 2010." Br. Appellant at 35-36. (*See also* Br. Appellant at 5, 8, 13-14.) The record shows Mendoza was notified that she was terminated both in a meeting with Hammond and in writing on September 10, 2010, with an effective termination date of September 25, 2010. CP at 694-708. Mendoza acknowledged being given notice on September 10th in her deposition. CP at 1525.

2. Mendoza's Complaint Covered Personnel Matters That Are Expressly Excluded In The Statutory Definition Of "Improper Governmental Action"

As a matter of law, Mendoza's claim also fails because she cannot show that she complained of activity that is covered by the whistleblower statute. Summary judgment on RCW 42.40 claims is appropriate when the claimant fails to meet the statutory definition of whistleblower. *Marable v. Nitchman*, No. 06-35940, 2007 WL 4561144 (9th Cir. Dec. 26, 2007).[5] The whistleblower statute defines what constitutes "improper governmental action", and more relevantly, what it is not:

> "Improper governmental action" means any action by an employee undertaken in the performance of the employee's official duties:
> (i) Which is a gross waste of public funds or resources as defined in this section;
> (ii) Which is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature;
> (iii) Which is of substantial and specific danger to the public health or safety;
> (iv) Which is gross mismanagement; or
> (v) Which prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification.

RCW 42.40.020(6)(a).

> "Improper governmental action" ***does not include personnel actions***, for which other remedies exist, ***including but not limited to employee grievances, complaints, appointments, promotions, transfers,***

[5] Citation to unpublished federal opinions decided after January 1, 2007 is permitted by GR 14.1(b) and Fed. R. App. P. 32.1.

> ***assignments***, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the state civil service law, alleged labor agreement violations, reprimands, claims of discriminatory treatment, or any action which may be taken under chapter 41.06 RCW, or other disciplinary action except as provided in RCW 42.40.030.

RCW 42.40.020(6)(b) (emphasis added).

Mendoza's complaint to the SAO of "improper governmental action" was that WSDOT HR had spent considerable money on the remodel of Murinko's office in the HR department, and WSDOT had put Murinko, (an unqualified individual in her opinion), in charge of the external ADA matters. CP at 851. *See also* CP at 533-34. Mendoza's complaints about the remodel and Murinko's promotion are both exactly the type of personnel-related matters specifically excluded from the whistleblower statute. RCW 42.40.020(6)(b). The online complaint Mendoza submitted expressly informed her in the space she entered her complaint: "Please describe the Improper governmental action in detail. . . . <u>Improper governmental action cannot be related to personnel matters.</u>" CP at 851 (emphasis in original). The SAO said exactly that in its response. CP at 853.

Mendoza's grievances over Shawn Murinko's promotion and the reasonable accommodation of moving him to a ground floor office so he

could safely evacuate in the event of an emergency do not qualify as "improper governmental action" as they are both personnel matters and outside the scope of protection afforded by RCW 42.40. The court correctly found her complaint failed to allege "improper governmental action" covered by the statute.

3. Mendoza Is Not A "Whistleblower" Because The State Auditor's Office Declined To Open An Investigation

Mendoza's activity in filing a complaint fails to satisfy the statutory definition of a "whistleblower," which requires evidence that the auditor initiate an investigation in response to the complaint. A whistleblower is as "[a]n employee who in good faith reports alleged improper governmental action … *initiating an investigation by the auditor* under RCW 42.20.040." RCW 42.40.020(10)(a)(i). "Whistleblower" is also defined as "[a]n employee who is perceived by the employer as reporting, whether they did or not, alleged improper governmental action . . . *initiating an investigation by the auditor* under RCW 42.40.040." RCW 42.40.020(10)(a)(ii) (emphasis added). Under either definition, an investigation by the auditor is a required element.

The Ninth Circuit has confirmed that an investigation by the auditor is a required element of any whistleblower complaint:

> Moreover, neither of plaintiff's disclosures initiated or was in connection with an investigation by the auditor. Because

> plaintiff fails to present evidence on an essential element of his claim, namely that he qualifies as a "whistleblower," as to plaintiff's claim pursuant to RCW 49.60.210(2), the Court has granted defendants' motion for summary judgment and dismissed such claim with prejudice.

Chen v. City of Medina, No. C11-2119 TSZ, 2013 WL 392707, at 13 (W.D. Wash. 2013) (citing *Marable v. Nitchman*, 262 Fed. Appx. 17, 22 (9th Cir. 2007).[6]

The undisputed evidence is that the SAO reviewed Mendoza's complaint and determined that it would not open an investigation of either issue. Mendoza was informed by letter that the SAO determined the complaint involved issues outside the scope and authority of the Whistleblower program. CP at 853. Mendoza failed to make a prima facie case that she was terminated as a result of her status as a "whistleblower".

The trial court correctly dismissed Mendoza's whistleblower claim for a number of reasons. First, she filed the complaint after she was terminated and thus she is not a whistleblower. Second, her complaint fell outside the scope of the whistleblower statute as she cited personnel issues that are expressly excluded by the statute. And third, her complaint did not result in an investigation by the SAO, an essential element for any claim under the statute. RCW 42.40.020(10)(a). Mendoza cannot show that she

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[6] See GR 14.1(b) and Fed. R. App. P. 32.1.

is a whistleblower and her claim fails on all three grounds, all of which are sufficient to uphold the dismissal of her case.

C. The Trial Court Correctly Determined That Mendoza's Letters To The Governor And FHWA Were Not Whistleblower Complaints

Mendoza's First Amended complaint alleges "whistleblower" retaliation in violation of RCW 42.40. CP at 13. In all of her discovery responses, declarations, and in her deposition, she asserted that her whistleblower complaint was the online claim she filed on September 24, 2010. CP at 556-60, 856-58, 1230. In her response to the State's First Interrogatories, where she listed her whistleblower complaint, she listed her letters to the Governor and the FHA, and specifically identified them as types of complaints other than whistleblower complaints. CP 856-57.[7] In her response to WSDOT's motion for summary judgment for the first time she alleged her letters were also the basis of her whistleblower claim. CP at 839. Nonetheless, the court didn't rule against her on this basis; rather, the trial court correctly ruled that Mendoza's letters to the Governor and the FHWA did not allege improper government action as required under

[7] Mendoza argues that the trial court improperly held her to her discovery answers and claims she only identified the online complaint to the auditor in her response to the State's request for that specific document. Br. Appellant at 36. This is only half of the truth. Previous to the State's request for production, Mendoza specifically identified her September 23 (sic) online complaint as her "whistleblower" complaint. CP at 856-57. The Request for Production R was asking for the document she had already identified as her whistleblower complaint. ("In your response to Interrogatory #17 . . . you specifically reference a September 23, 2011, "whistleblower" complaint.") CP at 861.

RCW 42.40. CP at 1533. This court should affirm that finding, and can also affirm on other grounds. As with her actual whistleblower complaint, the auditor did not open an investigation into her concerns and thus she cannot claim whistleblower status on that basis. *See* RCW 42.40.020(10)(a).

1. Mendoza's Letters Describe Personnel Matters Outside The Scope Of RCW 42.40[8]

The court addressed her new argument and found her whistleblower claim legally failed, not because she knew how to correctly file one, but because she did not allege improper governmental action as required by statute. CP at 1533. Like her complaint to the auditor, they concerned personnel matters about Shawn Murinko, office reorganization, change in administrative reporting assignment, and questions by WSDOT personnel about her professionalism and quality of work. Mendoza did not agree with the proposed reorganization moving her department (ICRB) into HR. She did not like the promotion given to Shawn Murinko. Her complaints were not about "improper governmental actions" as a matter of law. "'Improper governmental

[8] Mendoza argues that the trial court improperly held her to a higher standard by noting that her job position and training required knowledge of the State Auditor's process. Br. Appellant at 32-33. Mendoza acknowledged in her deposition that she was well aware of WSDOT's internal "whistleblower" policy regarding filing a complaint with the internal designee or with the SAO. CP at 511-12. The court did not hold Mendoza to a higher standard, it merely responded to WSDOT's argument that Mendoza's job as the OEO Program Manager required her to know how to correctly file a complaint, which her testimony confirmed. Her argument that she intended these other letters to be whistleblower was not persuasive in the face of her deposition testimony.

action' ***does not*** include personnel actions . . . including but not limited to employee . . . transfers, assignments, reassignments . . . [or] claims of discriminatory treatment . . . ." RCW 42.40.020(6)(b) (emphasis added). The trial court correctly held that those letters did not meet the definition of whistleblower complaints. Furthermore, neither letter resulted in an investigation by the SAO, also an essential component of her claim of whistleblower retaliation. RCW 42.40.020(10)(a). *See Chen*, 2013 WL 392707, at 13.

Mendoza argues that her letters do qualify under the whistleblower statute because the proposed move of the unit she supervised to the HR department was a violation of federal regulations. Br. Appellant at 34. The auditor disagreed, as did the attorneys at the FHWA and the Governor's legal counsel. The Governor's Chief of Staff informed Mendoza that there was no federal law violation in his response to her. CP at 658. Mendoza's issues were clearly personnel-related, and she does not even attempt to explain how her complaint about personnel matters is not of the type of "personnel action" that the statute expressly excludes.

Mendoza was displeased with several personnel matters that affected her and her department, spurring her to complain. These matters are simply outside the jurisdiction of the whistleblower statute, as

explained to her by the response from the auditor's office when she did file an actual whistleblower complaint. CP at 853. Mendoza's letters failed to address "improper governmental action" and were not investigated by the SAO, and thus she fails to satisfy two essential elements. Summary judgment was therefore appropriate.

D. Mendoza Was Terminated For Justifiable Reasons And Improper Motive Was Not A Factor

Assuming that Mendoza had shown that she filed a complaint alleging improper governmental action, and even if the auditor had opened an investigation, WSDOT was still within its rights to fire her for her egregious breach of duties and misconduct. Summary judgment is still appropriate if WSDOT can establish Mendoza's termination was justified and improper motives were not a substantial factor.

> The agency presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor.

RCW 42.40.050(2).

Even though it found as a matter of law Mendoza did not qualify as a whistleblower, and thus did not need to get to this analysis, the court did determine that WSDOT established numerous justifiable

reasons for Mendoza's termination. CP at 1533. The State established that the agency's action was justified by reasons that were unrelated to her alleged status as a whistleblower, and improper motive was not at all a factor, let alone a substantial one.

Ms. Mendoza claims several times in her opening brief that Secretary Hammond admitted that Mendoza was terminated for contacting an outside agency. This is a blatant misrepresentation of the record. Hammond did not so testify; these are the words of Mendoza's attorney, that Hammond refused to adopt. Mendoza has tried numerous times to assert that this is an admission, but it completely misstates the record. Mendoza was fired because she retaliated against a disabled employee who lodged a discrimination and retaliation complaint about her, and she sent his confidential personnel records *to an outside agency* in violation of WSDOT policy. CP at 1041, 1047.

In her deposition, Hammond, was asked repeatedly if the letters to the Governor were the reason Mendoza was fired. She testified that Mendoza was fired because she retaliated against an employee.

> [T]he investigation that was completed and the findings that showed that I believed that **Margarita did retaliate against Shawn Murinko**, and the judgment of how she behaved in disclosing other information that was confidential in nature, and the trust that we put in our managers as an agency to have utmost ethical conduct had been severely violated.

CP at 1041. In a follow-up question asking about the confidential information, counsel for Mendoza asked Hammond if she was talking about the letter to the Governor, and she responded "No" and went on to discuss the breach of investigative protocol that Mendoza had engaged in by talking to witnesses during Cordon's investigation. CP at 1042. Counsel asked Hammond if "it was fair to say" Hammond was "distressed" by Mendoza's contact with the Governor, and Hammond responded that she was "surprised." CP at 1043. Immediately after her response Counsel suggested "[b]ut she, she put you on report in effect, right?" CP at 1043. Hammond responded "she tried." CP at 1043. This is neither a statement made by Hammond, nor one adopted by her. For Mendoza to argue repeatedly that Hammond admitted this was the reason for her termination is a gross misrepresentation of the record, especially in light of the direct answers that Mendoza was fired for retaliating against her subordinate and then attempting to undermine the outside investigation of her misconduct.

Later, Counsel tried again to get the answer he wanted: "And you said the primary reason was that Margarita was contacting externals and specifically naming contacting –that you specifically named the Federal Highway Administration about Shawn Murinko's qualification in the DOT process." Answer: "***As a form of retaliation,***

yes." CP at 1047 (emphasis added). Counsel tried one last time: "You also said words to the effect that you felt it was inappropriate for the internal information to be shared externally." Answer: "I don't remember that." CP at 1048.

Chief of Staff Reinmuth also testified that the letter to the Governor was not the basis for Mendoza's termination. CP at 1130. He gave numerous reasons for Mendoza's firing. "[T]hat an outside investigator, after speaking with a number of witnesses over several months, confirmed that the agency's diversity program administrator, the very person who was charged with insuring that we had a healthy work environment that respected people, had retaliated against a supervisor on her team." CP at 1126. Reinmuth testified that Mendoza was fired primarily because her job duties were to ensure a lack of discrimination in the workplace, and yet she retaliated against a disabled employee. CP at 1128. "Ms. Mendoza de Sugiyama failed to comply with our agency policy regarding retaliation, which prohibits a manager from retaliating against an employee for bringing forth a complaint or concern." CP at 1128.

In addition to the reasons outlined above and in her termination letter (CP at 694-707), WSDOT has established numerous bases that justified the termination, unrelated to any claimed status as a

whistleblower. Improper motives were not any factor, let alone a substantial factor. Here, WSDOT provided Mendoza with numerous non-discriminatory reasons underlying its decision to fire her, based solely on her actions considered to be misconduct and a breach of her duties as a WSDOT manager. CP at 697. Hammond outlined these reasons in a 15 page letter, and specified that the complaints she made to an outside agency were not the basis for her termination. CP at 697. The reasons included, but were not limited to, the following: Mendoza responded inappropriately to a disability reasonable accommodation request by her subordinate, Shawn Murinko, when it was ultimately her responsibility to ensure compliance. CP at 697-98. Mendoza retaliated against Murinko, subjecting him to heightened scrutiny following his reasonable accommodation request; she subjected him to unprofessional comments about his physical disability and failed to recognize the punitive nature of her comments. CP at 699-701. Mendoza disclosed confidential personnel information regarding Murinko's employment application after he complained of her retaliation; additionally she kept confidential employment documents that she should not have maintained in her files. CP at 703. Hammond summed up her decision:

> I understand you felt a need to address the possible transition of OEO's Internal Civil Rights Branch to Human Resources with the Governor's office, but I cannot find any

> credible reason why you publicly complained about Mr. Murinko in these communications. . . . [Y]ou have flagrantly disregarded your responsibilities as a manager and as the agency's Diversity Programs Administrator when you openly and continually engaged in behaviors that could be construed as retaliation against Mr. Murinko when he raised concerns of your treatment of him. . . . . ***I no longer have confidence that you have learned anything, or can effectively administer the programs assigned to you. You have lost your perspective, and have failed to demonstrate leadership skills which are critical for success in your position.***

CP at 705.

Mendoza simply cannot, and did not even try to, establish that any of WSDOT's reasons were not justifiable. She just disagreed with WSDOT's conclusions about her actions. Mendoza does not dispute any of the actions that resulted in her termination, she just appears to ignore the egregious breach of managerial duties these acts entailed, a further basis for the termination. CP at 702-05. She admits writing the letters which disparaged her colleagues after she learned of the proposed changes in her department. She admits enclosing and disseminating confidential material and information related to Murinko's applications after she learned he reported her behavior. CP at 655. She also admitted that she sent the letter to the Governor in response to Murinko's complaint about her. CP at 1435. She admits ridiculing Murinko's physical appearance, an individual with cerebral palsy, yet continues to assert it was "all in

good fun" and fails to see the harm in disparaging her subordinate in this manner. CP at 563-65.

Mendoza breached her duties, acted unprofessionally, and violated many of the rules she was training people to follow. She cannot show that she was wrongfully terminated, and her claims were rightfully dismissed.

E. Mendoza's Hostile Work Environment And Gender And Race Discrimination Claims Were Properly Rejected By The Trial Court Because She Failed To Establish Gender Or Race Motivated Discrimination

Mendoza's did not establish a prima facie case of hostile work environment, or gender and racial discrimination. Mendoza could provide no actual evidence (beyond her own speculation) that either the movement of her department to HR, or her firing, was directed at her because of her gender and/or race. Likewise, she offered no evidence of any other verbal or written action that was "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." Her "evidence" consisted of her perceptions that certain management decisions (that affected a large number of employees, not just Mendoza) were targeted at her due to her gender and race. There is no actual evidence to support her belief.

1. Hostile Work Environment

To establish a claim of hostile work environment based on any recognized protected status under federal or state law, an employee must

prove: (1) she was subjected to unwelcome hostile or abusive conduct; (2) that the conduct was based on the employee's protected status (*e.g.* race, gender, age, disability, religion or some other protected characteristic); (3) that the conduct was sufficiently severe to affect the terms and conditions of his/her employment, and (4) the hostile or abusive conduct is imputable to the employer. *Glasgow v Georgia-Pacific Corp.*, 103 Wn. 2d 401, 406-07, 693 P.2d 708 (1985); *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 84, 98 P.3d 1222 (2004). To satisfy the second element, the employee must show that she was singled out because of her sex. *Glasgow*, 103 Wn. 2d at 406. Gender must be the motivating factor of the discrimination. *Id.* To satisfy the third element, the harassment must be sufficiently pervasive so as to alter her working conditions. *Washington v. Boeing Co.*, 105 Wn. App. 1, 10, 19 P.3d 1041 (2000). It is not sufficient that the conduct is merely offensive. *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 296, 57 P.3d 280 (2002). Even "embarrassment, humiliation or mental anguish arising from nondiscriminatory harassment" is legally insufficient to support a hostile work environment claim. *Crownover v. State Dep't of Transp.*, 165 Wn. App. 131, 146, 265 P.3d 971 (2011) (citing *Adams*, 114 Wn. App. at 298).

Mendoza ignores evidence, including her own statement to Hammond, that men and women both complained about Wooden.[9] CP at 1434. The Cordon investigation revealed Wooden's "abrasive communications" were directed at individuals regardless of their race or gender. CP at 463-64.[10] The investigation also found no evidence that Mendoza had been mistreated by Wooden on account of her gender. CP at 463. In her August 27, 2010 letter to Hammond, Mendoza acknowledges that the workplace issues created by Wooden were not gender-based: "In my capacity as the diversity Programs Administrator my assessment of the unsolicited work place issue brought to me were descriptive of bullying, intimidation and retaliation that created a hostile work environment for *both female and male employees.*" CP at 1434 (emphasis added). Her own statements defeat her claim that she was subjected to a hostile work environment because she was a woman.

She also offered as evidence the fact that an "[i]ncreasing number of accusations brought to Nambi by Reinmuth against OEO, ICRB, and [herself] by the parties not identified by Reinmuth created a hostile, stressful, and fearful work environment." CP at 1232. The fact that upper management was displeased with her work and that of her department

[9] Mr. Wooden was disciplined for his behavior and ultimately fired in October 2010. CP at 1021, 1025.

[10] The investigation revealed that several employees considered Mendoza to be a bully when she disagrees with someone. CP at 464.

does not create a prima facie case for hostile work environment and does not meet the *Glasgow* requirement that she show she was singled out because of her sex. *Glasgow*, 103 Wn. 2d at 406.

2. There Is No Evidence Of Race-based Discrimination

Mendoza also claims she was subjected to disparate treatment in the workplace based upon her status as a Latina. There is simply no evidence of any comment, action or behavior by anyone at WSDOT that could be perceived as race-based treatment of Mendoza.

Mendoza cited as evidence of discrimination the length of time a position in her department was kept open before it was filled. CP at 565. When asked how this discriminated against her, she said because she was the supervisor. CP at 565. Despite her perceptions, Mendoza was well aware of the State's budget crisis and its effect on agencies, and she herself specifically noted reductions in force taking place throughout the agency. CP at 851. She further identifies as proof "the manner in which OEO Internal Civil Rights Branch was moved under HR, over my objection and that of Nnambi, knowing of Wooden's dysfunctional organization, is further evidence of the harassment and retaliation I experienced." CP 1234-35. Notwithstanding the fact that the proposed move did not happen while Mendoza was working at WSDOT, these are work-related complaints, not race-based hostilities, and while Mendoza

may have thought she was doing a good job managing the ICRB, others appear to have disagreed. The fact that she did not like the proposed reorganization doesn't make it discriminatory. She offers no evidence that it was based on racial animus.

3. The Alleged Hostile Environment Was In The Future

Her claim is further diminished by the fact that her alleged hostile work environment had yet to develop, and she cannot show that either Wooden's or Ford's conduct was "sufficiently severe to affect the terms and conditions of her employment."[11] Her declaration and legal briefing all admit that she was concerned that she "*would be* subjected to hostile work environment" if the ICRB were moved under HR and she reported to Wooden. CP at 1233; Br. Appellant at 15 (emphasis added). In her declaration in opposition to summary judgment, Mendoza admits she was not experiencing a hostile work environment, just anticipating one. "With the proposed move to place the ICRB within HR, under the direction of Wooden and ultimately under Ford, *I became increasingly concerned about the hostile work environment I would experience if the move took place*." CP at 1233 (emphasis added). WSDOT did not reorganize the

[11] Mendoza briefly refers to Bill Ford, at the time the Assistant Secretary of the Department, and Kermit Wooden's direct supervisor. Mendoza appeared to have limited contact with him, and offers no evidence that he had any impact on her work conditions, other than to note is the proposed department reorganization took place, she would ultimately have been in his chain of command.

structure of ICRB reporting to HR until April 2011, after Mendoza was gone. CP at 577 (emphasis added).[12]

4. Mendoza Offers No Evidence That Either Race Or Gender Were Considerations In Her Termination

The WLAD forbids employers from discharging employees based on protected status, including sex or race. RCW 49.60.180(2). In order to preclude summary judgment, a plaintiff asserting a claim of discrimination must, at the outset, make out a prima facie case. *Milligan*, 110 Wn. App. at 636. The elements of a prima facie case of discrimination are that the employee (1) belonged to a protected class, (2) was discharged or suffered adverse employment action, (3) had been doing satisfactory work, and (4) was replaced by someone not in the protected class. *Id.*

Even if it is assumed that there existed a personality conflict between Mendoza and Wooden and/or Reinmuth, that fact is not material unless Mendoza demonstrated that conduct by Wooden and/or Reinmuth was motivated by animus toward Mendoza because she is a woman and Latina. *Adams*, 114 Wn. App at 297. There is absolutely no evidence of such gender or racial animus. Mendoza has not offered a

[12] The Cordon investigation also determined Mendoza's complaint to be premature, and noted that an email from Reinmuth that predated Mendoza's February 2010 letter to the Governor indicated that the proposed reorganization of OEO/ICRB was deferred until December, 2010. CP at 465.

single fact to support her claim other than her speculation. The Court properly dismissed Mendoza's race and gender discrimination claims.

5. Mendoza Failed To Show That Any Comparators Were Treated Differently

In addition, Mendoza offered no evidence showing that if any other employee had the same charges (of retaliating against and harassing a disabled supervisee) brought against her that WSDOT would not have taken the same disciplinary actions. Such a failure of production warrants summary judgment in favor of WSDOT. *See Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 787-88, 138 P.3d 144 (2006). Mendoza tries to position the Wooden and Ford matters as comparable. First, as the Cordon investigation revealed, Mendoza had most if not all of the facts wrong about those situations, and was relying on unsubstantiated rumors and uncorroborated hearsay. CP at 452-55. More importantly, the record does show both individuals were disciplined in 2005 for having consensual relationships with employees who were not in their chain of command, five years earlier, under a different administration. CP at 452-55. They are not comparators as the facts and situation was entirely different. WSDOT was consequently entitled to summary judgment.

F. The Trial Court Correctly Found That WSDOT Had Legitimate Non Discriminatory Reasons To Discharge

Mendoza, And Mendoza Did Establish That WSDOT's Reasons Were Pre-textual

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to provide a nondiscriminatory explanation for the apparently discriminatory result. *Domingo*, 124 Wn. App. at 77. The plaintiff must then show that the employer's reasons are actually a pretext for discrimination. *Id.* If the plaintiff does not present evidence that the employer's reasons are mere pretext, then summary judgment is proper. *Id.* at 78.

To establish a genuine issue of material fact regarding whether WSDOT's stated reasons for firing her were pre-textual, Mendoza must present *evidence* that is more than conclusory allegations or opinions. *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284 (1995) (emphasis added). Pretext means deceit; the plaintiff must show that the employer's reason is unworthy of belief. *Griffith v. Schnitzer Steel Industries, Inc.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005). Thus, she must present *evidence* that the WSDOT's stated reasons are unworthy of belief because 1) they have no basis in fact; or 2) they were not motivated by those reasons; or 3) the stated reasons are insufficient to motivate the decision complained of; or 4) because Mendoza was treated differently from similarly situated employees who were outside of her protected

group. *Domingo*, 124 Wn. App. at 71. Mendoza satisfied none of these requirements.

1. There Was No Evidence That WSDOT's Reasons Were Pretext

In the complete absence of specific evidence of gender or racist animus, Mendoza's discrimination claims were properly dismissed. The trial court gave Mendoza the benefit that there had been some evidence of racial or gender discrimination, and looked for evidence that the reasons for Mendoza's termination were pre-textual. There was simply no evidence to show that the reasons for Mendoza's dismissal are unworthy of belief, contain no basis in fact, or were otherwise pre-textual.

2. The Independent Investigation Was Thorough And Objective

WSDOT took very seriously both Mendoza's complaints against Chief of Staff Steve Reinmuth and HR Director Kermit Wooden, as well as the allegations of hostile work environment and retaliation made by Shawn Murinko against Mendoza, and accordingly an outside investigator was retained. CP at 696. The Office of the Attorney General contacted Cordon, a former employment attorney with the EEOC whose credentials were unchallenged in the trial court. She has been conducting employment investigations for governmental and private corporations since 2003. CP at 436. Her investigation was overseen by the Department

of Personnel (DOP), and she reported to the Deputy Director of DOP to ensure an independent investigation. CP at 437. No one from WSDOT had any input in how she conducted the investigation, who she could interview or what documents she could review. CP at 439.

Mendoza's brief repeatedly asserts that the investigation into her claims and her conduct were biased, but the record shows the investigation was fair and thorough. She cites *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193, 179 L. Ed. 2d 144 (2011), and argues that the Cordon investigation relied on information from the allegedly biased Wooden, Reinmuth, and Murinko. Br. Appellant at 24, 25, 31, 32. Mendoza fails to inform the Court of the fact that Cordon spent considerable time interviewing Mendoza herself, multiple times at Mendoza's request, spoke to her on the phone and reviewed 44 e-mails and 53 accompanying attachments from Mendoza. CP at 439-40. The record also demonstrates that Cordon interviewed 47 current and former WSDOT employees and a representative of the FHWA, including 27 of 30 witnesses requested by Mendoza.[13] CP at 438. Obviously, among those interviewed in the investigation were executive management; Hammond, along with Reinmuth and Wooden, who were the subjects of Mendoza's complaints,

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[13] The three witnesses not interviewed were determined not to have any first-hand knowledge relative to any of the issues under investigation. CP at 440.

and Murinko, who was the source of the complaints against Mendoza. CP at 446-47. Mendoza offered no specific information or detail on what she thought was tainted; she merely disagreed with the results. The fact that the results of the independent investigation did not favor Mendoza neither taints the investigation nor verifies Mendoza's perception of a "biased investigation." There is no reasonable argument that the executive management, whose decision-making was at the heart of Mendoza's complaint, should not have been interviewed. The fact that they were able to establish that their motives for wanting to move the ICRB into the HR department had nothing to do with discriminating against Mendoza does not make the investigation biased. Likewise, Murinko, who complained about Mendoza, was an essential witness in any investigation of his claim. There is no reasonable argument that he should not have been interviewed, or that interviewing him creates bias.

In addition, Mendoza ignores much of the *Staub* opinion. The *Staub* Court simply, and sensibly, declined to adopt a "hard-and-fast rule" that the "decision maker's independent investigation (and rejection) of the employee's allegations of discriminatory animus" will always shield the decision maker from liability. *Staub*, 131 S. Ct. at 1193. However, "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be

liable." *Id.* Such is the case here as the investigation of Shawn Murinko's complaints, not the allegedly "biased" investigation of Mendoza's complaints, ultimately led to Mendoza's firing.

Mendoza imagined an unfounded conspiracy against her and tried to create a shield against the discrimination complaint lodged against her. Her complaints were thoroughly investigated, but the investigation revealed that it was actually Mendoza who was acting unprofessionally and unethically. Her course of action violated the policies against retaliation and unfair treatment that she was in charge of upholding. Having suffered such a loss of objectivity and perspective, Mendoza was no longer qualified to be WSDOT's Diversity Programs Administrator, and lost her job for that reason. The results of the investigation served as the rationale behind Mendoza's termination. She offers no evidence that WSDOT's rationale had no basis in fact or was a pretext and thus her claims were properly dismissed.

G. The Trial Court Correctly Found That Mendoza's Claim Of Retaliation For Opposing Discrimination Is Unsupported In The Record[14]

To establish WLAD retaliation, a plaintiff must show that (1) she engaged in statutorily protected activity, (2) an adverse employment action

[14] Mendoza did not assert a WLAD retaliation claim in either her original or First Amended Complaint. CP at 6-14. WSDOT addressed the "implied claim" at summary judgment without waiving any procedural objections, to ensure finality. CP at 423-24.

was taken, and (3) there is a causal link between the employee's activity and the employer's adverse action. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862, 991 P.2d 1182 (2000); *Kahn v. Salerno*, 90 Wn. App. 110, 129, 951 P.2d 321 (1998); *Estevez*, 129 Wn. App. at 797. As is the case with a discrimination claim, if the employee proves these elements, the employer may rebut the evidence by presenting evidence of a legitimate nondiscriminatory reason for the employment decision. *Hill*, 144 Wn.2d at 180-81. The burden then shifts back to the employee, who can attempt to prove the employer's explanation is actually a pretext for unlawful discrimination. *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 70, 821 P.2d 18 (1991). The evidentiary standards for establishing pretext in the retaliation context are the same as in the disparate treatment context. *Washington*, 105 Wn. App. at 14. Mendoza must offer evidence that her termination was a pre-text for retaliation in order to survive summary judgment. *Id.*

The trial court found that Mendoza had failed to show any evidence to support her claim. CP at 1533. Indeed, there is no evidence in the record that shows she was retaliated against, let alone for opposing discrimination. "Mere opinions and beliefs that [defendant's] actions were retaliatory, based on no specific or substantial evidence, are not enough to

create a genuine issue of material fact on the issue of pretext." *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 753 n.5 (9th Cir. 2001).

Mendoza assumed, without any basis in fact, that the relocation of the ICRB to HR was a personal attack against her. This belief caused her to make unsubstantiated allegations about WSDOT and its staff. Mendoza acknowledges in her second letter to the Governor's office that she had no proof to support her claims when she raised the issues in her first letter. ("I regret that no documents were available to me to enclose with my February 2, 2010 letter to the Governor to support my belief of a concerted effort by Mr. Reinmuth, Mr. Wooden, and Mr. Murinko to discredit me personally and professionally.") CP at 662. Although, she claimed to have later come into possession of such documentation, and provided what she alleged supported her claims to the investigator, no proof of any conspiracy against her exists. To the contrary, Cordon found, "there is no factual basis for crediting Mendoza's belief that Murinko, Chief of Staff Reinmuth, and HRO Director Wooden were conspiring against her or that Murinko has spoken ill of her in an effort to further his career aspirations." CP at 472.

H. The Evidentiary Rulings Were Proper And All Mendoza's Letters Were Before The Court

Mendoza incorrectly asserts that, in sustaining some of WSDOT's objections to her declaration, important pieces of evidence were improperly removed from consideration. Specifically, Mendoza believes that the trial court did not consider her February 2, 2010 letter to the Governor, her March 25, 2010 letter to Chief of Staff Manning, and her March 29, 2010 letter to FHA Division Administrator Mathis. Br. Appellant at 47-48. The court properly sustained objections to the legal conclusions, opinions and hearsay in certain paragraphs of Mendoza's declaration, but that did not remove the three referenced letters from consideration. CP at 1534. Those letters submitted by Mendoza remain part of the record. CP at 1245-49, 1365-66, 1368-70. Additionally, those three letters were offered as evidence by WSDOT in support of its motion for summary judgment. CP at 652-56, 661-62, 664-66. Mendoza's argument is without merit.

I. The Trial Court Did Not Abuse Its Discretion In Limiting Overbroad Discovery Requests

Courts may "make any order which justice requires to protect a party or person from . . . undue burden or expense, including . . . that the discovery not be had . . . be had only on specified terms and conditions . . . or that the scope of the discovery be limited to certain matters. . . ."

CR 26(c)(1), (2), (4). It is an appropriate exercise of discretion for a court to enter a protective order where an employee has refused to narrow discovery requests in response to legitimate employer concerns regarding confidentiality and undue burden. *Beltran v. State Dep't of Soc. & Health Servs.*, 98 Wn. App. 245, 989 P.2d 604 (1999).

Mendoza sought an order compelling WSDOT to turn over 174,000+ emails exchanged between high level WSDOT executives and managers, which had not been screened for content or privilege. WSDOT, moved for a protective order after its attempts to meet and confer with Mendoza on a strategy for ESI discovery failed. The court's conclusion that the request was overly broad is reasonable, and a protective order mandating cooperation was both necessary and appropriate.

> When balancing the cost, burden and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(c) and its state equivalents, which require consideration of the technological feasibility and realistic costs or preserving, retrieving, reviewing and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); *Augilar v. Immigrations & Customs Enforcement Div.*,

255 F.R.D. 350 (S.D.N.Y. 2008).[15] The requested emails totaled 174,754 emails, in excess of 36GB of electronic information. CP at 41. This ESI request was grossly overbroad: the request is 144 times more than the level at which the federal courts consider an ESI request presumptively overbroad. The Model Agreement Regarding Discovery Of Electronically Stored Information encourages collaboration to avoid over broad discovery and "[a]bsent a showing of good cause, *search terms returning more than 250 megabytes of data are presumed to be overbroad.*" (Emphasis added.) Mendoza failed to demonstrate good cause for her requests.

The court's ruling did not deprive Mendoza of an opportunity to conduct electronic discovery pertinent to the issues in this case. It found the requests overly broad and unduly burdensome as worded. CP at 397. The court ordered collaboration or gave Mendoza the opportunity to independently narrow search terms. CP at 397. The record demonstrated that WSDOT was willing to collaborate with Mendoza to develop a key word search strategy that would identify relevant emails within the data

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[15] Most, if not all, of the cases discussing electronic discovery are federal, and the federal rules mandate cooperation and consultation on e-discovery. Fed. R. Civ. P. 26. In *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 145, 240 P.3d 1149 (2010) the Washington Supreme Court cited to the Sedona Conference Working Group on Electronic Document Retention & Production publication, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2d ed. 2007), as authority.

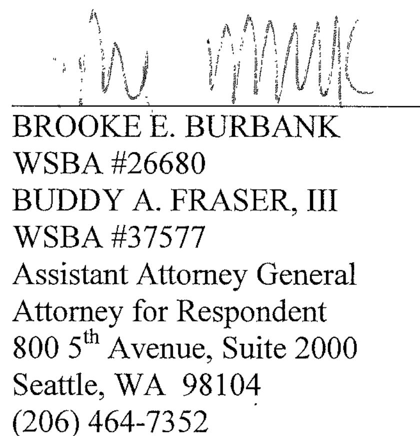
set of 175,000, yet she refused. The court's conclusion is reasonable in light of the record and was not an abuse of discretion.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the summary dismissal of Margarita Mendoza de Sugiyama's employment discrimination claims. Even when viewed in the light most favorable to her, none of the evidence establishes anything other than that WSDOT rightfully and lawfully terminated Mendoza based on her own egregious conduct and breach of managerial duties. Furthermore, the trial court did not abuse its discretion in directing the parties to collaborate to limit unduly burdensome discovery requests.

RESPECTFULLY SUBMITTED this 12 day of February, 2014.

ROBERT FERGUSON
Attorney General



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DECLARATION OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the undersigned date the original of the preceding Brief of Respondent was filed in the Washington State Court of Appeals, Division II, by electronic filing.

And, I further certify that a copy of the preceding Brief of Respondent was served on Appellant's Counsel via electronic mail to:

John (Jack) P. Sheridan: jack@mhb.com; BethT@mhb.com; WindyW@mhb.com; AshaleeM@mhb.com

DATED this 12th day of February, 2014, at Seattle, Washington.

TONI KEMP
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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