No. 45087-9-II

No. 91735-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARGARITA MENDOZA DE SUGIYAMA,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. William T. McPhee)
(Hon. Gary R. Tabor)
Thurston County Superior Court No. 11-2-01374-7

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Appellant Margarita Mendoza de Sugiyama is a Mexican-American woman who identifies as Latina. CP 1220. She has over 25-years of service working for various Washington State agencies. *Id.* She brings this petition because the appeal raises issues of substantial public interest, and because the Court of Appeals' decision is in conflict with this Court's decision in Scrivener v. Clark College, 181 Wn.2d 439, 334 P.3d 541 (2014).

II. CITATION TO THE COURT OF APPEALS DECISION

At trial, Ms. Mendoza de Sugiyama alleged whistleblower retaliation under RCW 42.40, a hostile work environment, discrimination, and retaliation under the Washington Law Against Discrimination (WLAD), all of which were dismissed at summary judgment. On appeal, she alleged error in dismissing her claims and also alleged that the trial court erred by denying her motion to compel discovery. CP 13-14.

On February 10, 2015, the Court of Appeals issued an unpublished decision affirming the trial court, which ignored this Court's decision in Scrivener (relegating it to a footnote). The court stated facts in the light most favorable to the State, and never even mentioned that in her deposition, WSDOT Secretary Paula Hammond admitted that in her view, Ms. Mendoza de Sugiyama tried to put Hammond on report, and she

admitted, and then retracted, the statement that she felt it was inappropriate for the internal information to be shared externally. A copy of the decision is in the Appendix at pages A-011 through A-033.

A copy of the order denying petitioner's motion for reconsideration is in the Appendix at page A-034. A copy of the order denying petitioner's motion to publish is in the Appendix at page A-035.

III. ISSUES PRESENTED FOR REVIEW

Issue #1: Whether it is reversible error for an appellate court to affirm a trial court's decision to deny discovery of emails on the grounds that the request was overbroad and burdensome, even though at the time the applicable motion to compel was filed the emails had already been assembled by the producing party and placed in an electronic file on one desktop computer, especially when that same appellate court had previously ruled that the same trial judge could not deny the same party the same emails, which had been separately requested by appellant during the same time frame under the Public Records Act (see Wash. State Dep't of Transp.v. Mendoza de Sugiyama, 182 Wn. App. 588, 330 P.3d 209 (2014)), and when the net effect was that the requesting party, the appellant here, did not have those emails for use in discovery or for summary judgment in this case?

Issue #2: Under RCW 42.40.050, to prevail at trial, a state whistleblower must prove that she is a whistleblower; that she has been terminated (which brings a presumption of retaliation); and that the State cannot 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. In light of the defined elements delineated in the statute, is it reversible error for a trial court and a court of appeals to ignore the statutory elements and instead choose to apply the WLAD retaliation shifting burden standard to the facts presented by the nonmoving party at summary judgment as was done here?

Issue #3: RCW 42.40.020(6)(a)(ii) provides that improper governmental action "means any action by an employee undertaken in the performance of the employee's official duties ... which is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature." Under subpart 6(b), "personnel actions, for which other remedies exist," are not improper governmental actions. Contrary to the ruling by the Court of Appeals, for summary judgment purposes, is a state employee a whistleblower if that employee submits a letter to a public

official in good faith reporting violations of federal laws and rules, which among other things, includes an allegation that one of the violations was placement of an unqualified employee into a position of responsibility?

Issue #4: Under RCW 42.40.020(10)(a)(i), a whistleblower includes: "An employee who in good faith reports alleged improper governmental action to the auditor or other public official . . . initiating an investigation by the auditor." Under RCW 42.40.040(1)(a), "[t]he public official . . . receiving an assertion of improper governmental action must report the assertion to the auditor within fifteen calendar days of receipt of the assertion. ... A failure of the public official to report the assertion to the auditor within fifteen days does not impair the rights of the whistleblower." Under RCW 42.40.020(7), a 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." Contrary to the ruling by the Court of Appeals, for summary judgment purposes, is a state employee a whistleblower if the letter she wrote reporting improper governmental action was read by a public official, thus providing notice, whether or not the letter was specifically addressed to that public official?

Issue #5: In considering issues pertaining to claims brought under

the WLAD after the appeal of a summary judgment dismissal of those claims, does the Court of Appeals commit reversible error when it ignores Supreme Court precedent that would admonish against such a dismissal, even though the Supreme Court opinion was published after oral argument in the case, but before the Court of Appeals issued its ruling?

IV. STATEMENT OF THE CASE

A. Procedural Background

In discovery, appellant asked for all documents, including emails, correspondence, and notes, between or among specific individuals and "defendant relating to the issues identified in plaintiff's Complaint." CP 90-94. After the State objected, Mendoza de Sugiyama agreed to narrow the scope of her requests to emails exchanged between twelve key individuals in the case. CP 47-48.

On February 14, 2012, appellant conducted the deposition of WSDOT's CR 30(b)(6) designee, Joanna K. Jones, who was employed by WSDOT in the Information Technology field. CP 289, CP 292. She testified that she was asked to find emails exchanged between the individuals identified in Mendoza de Sugiyama's discovery dating back from January 1, 2007 to the date of the request. CP 294. Jones stated that she had already completed the email searches for ten identified individuals. CP 298-300, 302. She further testified that the emails were

ready to be produced on an external hard drive, which would take up to one hour. CP 308, CP 316. The emails, however, had not been reviewed for privilege. CP 317.

Following the CR 30(b)(6) deposition, on February 16, 2012, appellant proposed providing the State with an external hard drive for copying the emails and offered to convert the documents at appellant's expense so that it would not cost the State any money to provide these documents. CP 281. In response, the State persisted that it was unduly burdensome for the State to review 174,000 emails for privilege. CP 27. The parties filed corresponding motions to compel and for a protective order on March 9, 2012. CP 23, 45.

The trial court denied appellant's motion to compel regarding the emails, finding that the requests for production were overbroad and unduly burdensome, and that appellant should employ key-word searches for the emails. RP 4/27/13 at 33-36, CP 397-98.

Mendoza de Sugiyama then requested the same emails under the Public Records Act, RCW 42.56, and the State sued her to prevent disclosure. See Wash. State Dep't of Transp.v. Mendoza de Sugiyama, 182 Wn. App. 588, 330 P.3d 209 (2014). The very same trial judge was assigned to the PRA litigation, and after initially denying the production, on reconsideration ordered disclosure of the emails under the PRA. *Id.*

Rather than disclose the emails, the State appealed and the trial court granted a stipulated stay pending appeal, preventing disclosure. *Id.*[1] The PRA claim was resolved in favor of Ms. Mendoza de Sugiyama, but not in time to provide the documents in this litigation. Mendoza de Sugiyama, 182 Wn. App. at 604 ("we conclude that public records should not be exempt under the PRA merely because producing the records is unduly burdensome").

In this case, the State moved for summary judgment on all of appellant's claims. CP 402. After oral argument, CP 1532, RP 4/12/13 at 1-21, a newly-assigned judge dismissed all of appellant's claims by letter dated May 22, 2013 and order dated June 7, 2013. CP 1532, 1535. The court also denied appellant's motion for reconsideration. CP 1537, CP 1583, RP 7/12/13 at 1-17. This timely appeal followed.

B. Factual Background Leading to Discrimination and Retaliation

Mendoza de Sugiyama is a Mexican-American woman and identifies as Latina. CP 1220. She has over 25-years of service working for various Washington State agencies. *Id.* Prior to working for WSDOT, she gained civil rights experience in the affirmative action, discrimination,

[1] Appellant moved to consolidate the PRA litigation with this appeal, but the Appeals Court Commissioner denied that request.

and disability accommodation fields with the Office of Financial Management, as the Governor's Senior Executive Policy Coordinator for Affirmative Action, and with the Department of Labor and Industries as the Office of Human Resources' Diversity Program Manager. CP 1221. From 2000-2003, Mendoza de Sugiyama worked for the Attorney General's Office as the Director of Consumer Services. *Id.*

WSDOT had a long history of discrimination. In 1991, a WSDOT consultant recommended reorganization of the OEO office to combat discrimination. CP 1281. The recommendation was designed to implement a "culture change." *Id.* The plan envisioned an internal and external office and a director who would report to the WSDOT Secretary, and specifically rejected the notion that HR would monitor the internal organization to avoid the inherent conflicts of having an organization investigate itself. CP 1282, 1226-27.

In June 2003, Mendoza de Sugiyama began working as the Diversity Programs Administrator for WSDOT's Office of Equal Opportunity ("OEO"), reporting to OEO Director Brenda Nnambi. CP 1221. During that time, the OEO managed and monitored WSDOT's Equal Opportunity, Affirmative Action, Contract Compliance, and Non-Discrimination programs. *Id.* The OEO had two basic departments: (1) the External Civil Rights Branch ("ECRB"), which handled issues pertaining

to non-WSDOT employees, and (2) the Internal Civil Rights Branch ("ICRB"), which handled WSDOT employee civil rights issues. *Id.* The OEO was its own independent department, separate from HR. *Id.*, CP 1221.

In the years before she was terminated on September 24, 2010, WSDOT Director Nnambi consistently gave Mendoza de Sugiyama positive employee evaluations. CP 1412. Appellant served as an inspiration to her peers in the ECRB, including direct report Shawn Murinko, who later claimed she retaliated against him even though she had supported his hiring. CP 915, 1222.

C. WSDOT Chief of Staff Reinmuth Sought to Return to the Days Where the OEO Was Controlled by HR and Appellant Actively Opposed Those Efforts

In 2005, WSDOT hired Steve Reinmuth as its Director of Government Relations reporting to Paula Hammond, then Chief of Staff. CP 1056-57. Reinmuth became Chief of Staff in 2007 when Hammond became Secretary of WSDOT. *Id.* From the outset, Reinmuth wanted to end OEO independence. In his view, ICRB (appellant's internal OEO group) was "notoriously insular in the way that they did their work." CP 1068. He claimed that "it became more and more apparent...that the insulation around [Plaintiff's] work and her particular organization and team was a liability and risk to the agency." CP 1069-70.

Around August 2009, Nnambi learned of Reinmuth's plans to move the ICRB under the authority of the HR Office. CP 1224. In December 2009, at the WSDOT Human Resources Managers' meeting, HR Director Kermit Wooden and HR Labor Relations Manager Jessica Todorovich announced that the OEO would move to HR. *Id.* Reinmuth pitched the move to Wooden and Nnambi, stating in part:

> - I believe that our current Human Resources Division is very different from the Personnel Division from twenty years ago that prompted the creation of the...current structure.
>
> . . . .
>
> - Our current structure has posed the risk of legal liability for WSDOT, due to poor communication and the unnecessary sense of independence on internal civil rights matters.

CP 649. Mendoza de Sugiyama opposed relocation of the ICRB from its independent position, to Wooden's HR organization, which reported to Administrative Services Division Assistant Secretary Bill Ford. CP 1224. Appellant complained to OEO Director Nnambi that the proposed move of OEO/ICRB would violate the Code of Federal Regulations applicable to state transportation agencies, as well as the requirements of the Baseline Assessment prepared by the Federal Highways Administration Office of Civil Rights. *Id.* Nnambi agreed and opposed the move for the same reasons, that it was inconsistent with federal regulations, and in her words, was like the "fox guarding the hen house." CP 980-81. Appellant also objected because Wooden and Ford had engaged in sexual improprieties

with subordinate women, creating a sexually-hostile work environment for appellant and other women. CP 901, 1008, 1012, 1020, 1030, 1245.

In January 2010, at the Northwest Region HR meeting, Wooden announced that OEO Disability Program Manager/ADA Compliance Officer Murinko would be transferring to Human Resources, and would oversee the ECRB. CP 1224. Appellant opposed Murinko's promotion because he lacked the qualifications and experience to do the job. *Id.* She also felt Wooden's actions constituted gross mismanagement and were potential violations of federal laws and rules. *Id.* She began opposing and reporting improper governmental actions to the superiors in her chain of command, primarily through verbal complaints to OEO Director Nnambi. CP 1224-25. Throughout January 2010, Appellant tried to work within her chain of command to address these issues. *Id.*

After making no progress using informal channels, appellant wrote a letter to Governor Gregoire on February 2, 2010 and copied Attorney General McKenna, raising concerns about WSDOT's decentralization of the civil rights functions of the OEO and explaining that it was contrary to the Code of Federal Regulations required of state transportation agencies and the Federal Highways Administration Office of Civil Rights National Baseline Assessment. CP 1244-49. Appellant outlined the national standard and risks associated with not having an independent OEO office,

and raised specific concerns about moving the OEO functions under the supervision of HR in light of the record of sexual impropriety of Wooden and Ford.[2] *Id.* Finally, appellant reported false accusations, hostility and discrimination by Reinmuth, Wooden, and Murinko. *Id.*

On March 25, 2010, appellant reiterated her complaints by letter to Governor Gregoire's Chief of Staff about the OEO consolidation and employment discrimination issues. CP 1228, 1365.

When Governor Gregoire's office failed to respond favorably, on March 29, 2010, appellant wrote to the Federal Highway Administration, submitting a Title VI complaint. CP 1368-70. She again stated that WSDOT's proposed plan would not comply with the federal regulatory civil rights mandate for state transportation agencies, and reiterated her concerns about Murinko's lack of qualifications and limited practical experience in external ADA issues. CP 1229.

Paula Hammond testified that Ms. Mendoza de Sugiyama tried to put her on report. CP 1043. And she admitted, then retracted, that she felt that it was inappropriate for the internal information to be shared

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[2] In separate incidents, subordinates brought sexual harassment lawsuits against Ford and Wooden. Reinmuth testified WSDOT paid $100,000 to settle Ford's case, and Hammond testified that Wooden was required to repay some of the attorney's fees. CP 1040-41, 1146-48. The State did not terminate or demote Ford or Wooden based on these incidents. *Id.*

externally. CP 1048. She admitted she received and read both whistleblower letters. CP 1037-38.

On September 23, 2010, just before her termination, Mendoza de Sugiyama filed a whistleblower complaint with the State Auditor's Office through the SAO website. CP 1161, 1230. She identified her letter to the Governor, her letter to the FHWA, her SAO complaint, and one other complaint in discovery responses. CP 1168-69.

D. Wooden and Reinmuth Created a Hostile Work Environment Based on Appellant's Race and Gender, and Discriminated Against Appellant on the Basis of Race and Gender

Reinmuth and Murinko are Caucasian men. CP 1230. Nnambi is an African-American woman. *Id.* Wooden is an African-American man, and Hammond and Todorovich are Caucasian women. *Id.*

Wooden frequently questioned the work of OEO, and the ICBR in particular, and was demeaning to appellant, refusing to meet with her, and criticized her work, which was confirmed by Reinmuth. CP 1230, 1230, 1385, 1031, 1014. Reinmuth testified that he understood appellant believed Wooden was a "sexual predator" and that "moving the internal civil rights branch to a sexual predator would be problem." CP 1140. Additionally, her letter to the Governor put Reinmuth on notice of a hostile work environment, which was supported by other witnesses. CP

1015, 901-03, 1023-24, 1397, 1008, 1016-17, 1026. Hammond terminated Wooden on October 4, 2010, less than two weeks after she terminated appellant without identifying his misconduct as discrimination. CP 1027.[3]

Reinmuth would not meet one-on-one with the appellant, whose comportment was proper, but would meet with her Caucasian counterparts. CP 1087-94, 1082-83, 1090-92, 1115-16, 1120, 1188, 1194, 1196-97, 1119-21. He allowed Murinko, appellant's direct report, to meet with him and to criticize Mendoza de Sugiyama's work performance, undermining her in the eyes of her boss. CP 1121-23. In contrast, Nnambi testified that Mendoza de Sugiyama was competent and a good performer in all ways, and Reinmuth was difficult. CP 934-35, 947-952. Nnambi testified that after she expressed her support for appellant, Reinmuth began giving her less favorable and negative performance evaluations. CP 978, 984-87, 976-77.

Reinmuth further testified that he hired at least nine employees while serving as Chief of Staff, but eight of the hires into high-level management positions were Caucasian and only one was a person of color. CP 1057-60. He admitted that the agency had an affirmative action plan,

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[3] In contrast to Wooden's treatment of women, Mr. Murinko testified that he had no complaints about working with Wooden and that he liked working with HR. CP 1183, 1188.

yet was not meeting its diversity goals. CP 1061-62, 1392. There was an "underutilization"[4] of Latinos/Hispanics in management positions, and appellant was the highest-ranking Hispanic employee at WSDOT. CP 1234. An underutilization could affect federal funding, and after WSDOT terminated appellant, HR took over that analysis. CP 942-43, 1234.

V. ARGUMENT

A. The Petition Involves Issues Of Substantial Public Interest That Should Be Determined By The Supreme Court

This Court should accept review because the trial court and the State circumvented the PRA and the discovery rules to prevent the appellant from obtaining relevant discovery during the litigation, which is an injustice that cannot be ignored. Overbroad and burdensome discovery requests may be denied. CR 26. But here, the emails were already assembled and available to the State to defend the action. They only needed review for privilege. The judge abused his discretion in requiring appellant to implement the "Sedona principles" using word searches for documents already assembled, which were separately subject to production under the PRA. CP 29-30, 392, RP 4/27/13 at 33-4. The Court

[4] An underutilization occurs where the percentage of persons of color in a particular job description is less than the percentage of persons of color in the local community. CP 939-43.

of Appeals stated, "Mendoza de Sugiyama's ability to obtain the documents under the PRA has no bearing on whether the trial court manifestly abused its discretion by denying Mendoza de Sugiyama's motion to compel discovery," but refused to combine the appeals, and ignored the prejudice of the end result—no access by appellant to documents for which the AG had full access. Justice and the appearance of fair dealing are issues of substantial public interest.

This Court should accept review because it is an issue of substantial public interest that a trial court and court of appeals failed to follow the legal standard set out by the legislature in proving state whistleblower claims. Summary judgment should have been denied because under RCW 42.40.050, appellant only had to prove that she was a whistleblower; she had been terminated (which brings a presumption of retaliation); and that the State could not 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. The contested elements contain contradictory evidence, so this must be left for the finder of fact. The adoption of the more complex WLAD retaliation standard is unwarranted. See opinion at n.6.

This Court should accept review because it is an issue of substantial public interest that appellant is a whistleblower reporting in good faith improper governmental action—it should not matter to whom she addressed the whistleblower letter—what matters is who read it, and it is uncontradicted that Hammond was a public official (as is the attorney general who was copied on the letter), and that she admitted to having received and read both whistleblower letters. Her failure to forward them to the auditor is irrelevant. RCW 42.40.040(1)(a). The fact that the report contained personnel issues as well as allegations of violation of federals laws and rules cannot exclude appellant from the whistleblower definition.

B. The Court Of Appeals Decision Is In Conflict With Scrivener

The decision below followed Scrivener in time, but the Court ignored Scrivener's strong admonition that "summary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation," and affirmed the trial court's summary judgment dismissal of the case. Scrivener v. Clark College, 181 Wn.2d 439, 445, 334 P.3d 541 (2014). The unpublished decision stated facts in the light most favorable to the State, and never even mentioned that in her deposition, WSDOT Secretary Paula Hammond admitted that Ms. Margarita Mendoza de Sugiyama tried to put

Hammond on report, and she admitted, and then retracted, the statement that she felt that it was inappropriate for the internal information to be shared externally.

Ms. Mendoza de Sugiyama presented evidence that she was treated differently than others working there, but this Court in one short paragraph, without analysis, affirmed the dismissal of the claim stating, "Mendoza de Sugiyama cannot identify comparators that support her claim of disparate treatment." Again, this is not the law. First, one need not have a comparator to prevail at summary judgment or at trial. "Johnson was required to prove only that his race or disability was a substantial factor in Chevron's decisions. Proof of different treatment by way of comparator evidence is relevant and admissible but not required, and in many cases is not obtainable." Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33, 244 P.3d 438 (2010). Second, Ms. Mendoza de Sugiyama presented evidence of different treatment and of comparators. *See* Appellant's opening brief at 48-49.

As to WLAD retaliation, the court below affirmed the dismissal on the ground that "Secretary Hammond based her decision to terminate Mendoza de Sugiyama on Mendoza de Sugiyama's actions toward Murinko and her disclosure of confidential interview and employment documents to other agencies." In reaching this holding, this Court ignored

important facts and the law. First, the Court ignored the evidence of retaliation set forth above and in the brief. See Appellant's opening brief at 35-37. Second, Hammond based her decision in part on Ms. Mendoza de Sugiyama's publication to third parties of Wooden's and Ford's indiscretions. CP 1041-42. It is undisputed that such information would be available to the public under the Public Records Act, and thus not a valid basis for termination. See Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405, 164 Wn.2d 199, 213, 189 P.3d 139 (2008) (right to privacy is not violated when a complaint about a specific instance of misconduct, substantiated after an internal investigation, is disclosed).

Third, the Court ignored Scrivener: "although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." Scrivener, 181 Wn.2d at 446-47. Even if disclosure of confidential information was a violation of a policy, under Scrivener, "[a]n employee does not *need* to disprove each of the employer's articulated reasons to satisfy the pretext burden of production . . . . An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD." *Id.* at 447. Here, the Court simply relegates Scrivener to a footnote. Opinion at 13-14 n.5. The evidence set forth above satisfies Scrivener.

As to hostile work environment, the court below adopted the State's facts that "Wooden's behavior was universally unprofessional and hostile" as a means of characterizing Wooden's actions as something other than discriminatory. The Court's view is not supported by any legal authority. In fact, the opposite view is the prevailing view.

> Nor was Swinton required to prove that white employees were not subject to similar harassment. To suggest, as Potomac does, that it might escape liability because it equally harassed whites and blacks would give new meaning to equal opportunity. Potomac's status as a purported "**equal opportunity harasser**" provides no escape hatch for liability. The fact that Fosdick may have told jokes about racial or ethnic groups other than African–Americans does not excuse the fact that he racially harassed Swinton.

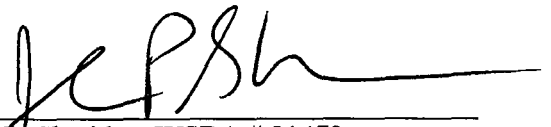
Swinton v. Potomac Corp., 270 F.3d 794, 807 (9th Cir. 2001) (bold added). As to Reinmuth, the Court simply ignored the evidence presented. See Appellant's opening brief at 19-22. This is an abdication of the Court's responsibility at summary judgment, and must be rejected.

VI. CONCLUSION

The petition should be granted.

RESPECTFULLY SUBMITTED this 20th day of May, 2015.

THE SHERIDAN LAW FIRM, P.S.

By: 

John P. Sheridan, WSBA # 21473
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DECLARATION OF SERVICE

Patti Lane states and declares as follows:

1. I am over the age of 18. I am competent to testify in this matter, and am a legal assistant for the Petitioners' attorney of record. I make this declaration based on my personal knowledge and belief.

2. On May 20, 2015, I caused to be delivered via email by agreement to the following attorneys:

Richard Fraser, III
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a copy of PETITION FOR REVIEW TO SUPREME COURT.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of May, 2015, at Seattle, King County, Washington.

s/Patti Lane
Patti Lane, Legal Assistant

APPENDIX

Chapter 42.40 RCW
STATE EMPLOYEE WHISTLEBLOWER PROTECTION

RCW Sections

42.40.010
Policy.

It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

[1995 c 403 § 508; 1982 c 208 § 1.]

Notes:

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW 34.05.328.

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

42.40.020
Definitions.

As used in this chapter, the terms defined in this section shall have the meanings indicated unless the context clearly requires otherwise.

(1) "Auditor" means the office of the state auditor.

(2) "Employee" means any individual employed or holding office in any department or agency of state government.

(3) "Good faith" means the individual providing the information or report of improper governmental activity has a reasonable basis in fact for reporting or providing the information. An individual who knowingly provides or reports, or who reasonably ought to know he or she is providing or reporting, malicious, false, or frivolous information, or information that is provided with reckless disregard for the truth, or who knowingly omits relevant information is not acting in good faith.

(4) "Gross mismanagement" means the exercise of management responsibilities in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(5) "Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(6)(a) "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, unless state law or a common law privilege prohibits disclosure. This provision is not meant to preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or technical findings to the exclusion of other scientific opinions or technical findings. Nothing in this subsection prevents or impairs a state agency's or public official's ability to manage its public resources or its employees in the performance of their official job duties. This subsection does not apply to de minimis, technical disagreements that are not relevant for otherwise improper governmental activity. Nothing in this provision requires the auditor to contract or consult with external experts regarding the scientific validity, invalidity, or justification of a finding or opinion.

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

(7) "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.

(8) "Substantial and specific danger" means a risk of serious injury, illness, peril, or loss, to which the exposure of the public is a gross deviation from the standard of care or competence which a reasonable person would observe in the same situation.

(9) "Use of official authority or influence" includes threatening, taking, directing others to take, recommending, processing, or approving any personnel action such as an appointment, promotion, transfer, assignment including but not limited to duties and office location, reassignment, reinstatement, restoration,

reemployment, performance evaluation, determining any material changes in pay, provision of training or benefits, tolerance of a hostile work environment, or any adverse action under chapter 41.06 RCW, or other disciplinary action.

(10)(a) "Whistleblower" means:

(i) 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; or

(ii) An 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.

(b) For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means:

(i) An employee who in good faith provides information to the auditor or other public official, as defined in subsection (7) of this section, in connection with an investigation under RCW 42.40.040 and an employee who is believed to have reported asserted improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, or to have provided information to the auditor or other public official, as defined in subsection (7) of this section, in connection with an investigation under RCW 42.40.040 but who, in fact, has not reported such action or provided such information; or

(ii) An employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

[2008 c 266 § 2; 1999 c 361 § 1; 1995 c 403 § 509; 1992 c 118 § 1; 1989 c 284 § 1; 1982 c 208 § 2.]

Notes:

Findings -- Intent -- 2008 c 266: "The legislature finds and declares that government exists to conduct the people's business, and the people remaining informed about the actions of government contributes to the oversight of how the people's business is conducted. The legislature further finds that many public servants who expose actions of their government that are contrary to the law or public interest face the potential loss of their careers and livelihoods.

It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

This act shall be broadly construed in order to effectuate the purpose of this act." [2008 c 266 § 1.]

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW 34.05.328.

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

42.40.030
Right to disclose improper governmental actions — Interference prohibited.

(1) An employee shall not directly or indirectly use or attempt to use the employee's official authority or

influence for the purpose of intimidating, threatening, coercing, commanding, influencing, or attempting to intimidate, threaten, coerce, command, or influence any individual for the purpose of interfering with the right of the individual to: (a) Disclose to the auditor (or representative thereof) or other public official, as defined in RCW 42.40.020, information concerning improper governmental action; or (b) identify rules warranting review or provide information to the rules review committee.

(2) Nothing in this section authorizes an individual to disclose information otherwise prohibited by law, except to the extent that information is necessary to substantiate the whistleblower complaint, in which case information may be disclosed to the auditor or public official, as defined in RCW 42.40.020, by the whistleblower for the limited purpose of providing information related to the complaint. Any information provided to the auditor or public official under the authority of this subsection may not be further disclosed.

[2008 c 266 § 3; 1995 c 403 § 510; 1989 c 284 § 2; 1982 c 208 § 3.]

Notes:

Findings -- Intent -- 2008 c 266: See note following RCW 42.40.020.

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW 34.05.328.

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

42.40.035
Duty of correctness — Penalties for false information.

An employee must make a reasonable attempt to ascertain the correctness of the information furnished and may be subject to disciplinary actions, including, but not limited to, suspension or termination, for knowingly furnishing false information as determined by the employee's appointing authority.

[1999 c 361 § 2.]

42.40.040
Report of improper governmental action — Investigations and reports by auditor, agency.

(1)(a) In order to be investigated, an assertion of improper governmental action must be provided to the auditor or other public official within one year after the occurrence of the asserted improper governmental action. The public official, as defined in RCW 42.40.020, receiving an assertion of improper governmental action must report the assertion to the auditor within fifteen calendar days of receipt of the assertion. The auditor retains sole authority to investigate an assertion of improper governmental action including those made to a public official. A failure of the public official to report the assertion to the auditor within fifteen days does not impair the rights of the whistleblower.

(b) Except as provided under RCW 42.40.910 for legislative and judicial branches of government, the auditor has the authority to determine whether to investigate any assertions received. In determining whether to conduct either a preliminary or further investigation, the auditor shall consider factors including, but not limited to: The nature and quality of evidence and the existence of relevant laws and rules; whether the action was isolated or systematic; the history of previous assertions regarding the same subject or subjects or subject matter; whether other avenues are available for addressing the matter; whether the matter has already been investigated or is in litigation; the seriousness or significance of the asserted improper governmental action; and the cost and benefit of the investigation. The auditor has the sole discretion to determine the priority and weight given to these and other relevant factors and to decide whether a matter is

to be investigated. The auditor shall document the factors considered and the analysis applied.

(c) The auditor also has the authority to investigate assertions of improper governmental actions as part of an audit conducted under chapter 43.09 RCW. The auditor shall document the reasons for handling the matter as part of such an audit.

(2) Subject to subsection (5)(c) of this section, the identity or identifying characteristics of a whistleblower is confidential at all times unless the whistleblower consents to disclosure by written waiver or by acknowledging his or her identity in a claim against the state for retaliation. In addition, the identity or identifying characteristics of any person who in good faith provides information in an investigation under this section is confidential at all times, unless the person consents to disclosure by written waiver or by acknowledging his or her identity as a witness who provides information in an investigation.

(3) Upon receiving specific information that an employee has engaged in improper governmental action, the auditor shall, within fifteen working days of receipt of the information, mail written acknowledgment to the whistleblower at the address provided stating whether a preliminary investigation will be conducted. For a period not to exceed sixty working days from receipt of the assertion, the auditor shall conduct such preliminary investigation of the matter as the auditor deems appropriate.

(4) In addition to the authority under subsection (3) of this section, the auditor may, on its own initiative, investigate incidents of improper state governmental action.

(5)(a) If it appears to the auditor, upon completion of the preliminary investigation, that the matter is so unsubstantiated that no further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower summarizing where the allegations are deficient, and provide a reasonable opportunity to reply. Such notification may be by electronic means.

(b) The written notification shall contain a summary of the information received and of the results of the preliminary investigation with regard to each assertion of improper governmental action.

(c) In any case to which this section applies, the identity or identifying characteristics of the whistleblower shall be kept confidential unless the auditor determines that the information has been provided other than in good faith. If the auditor makes such a determination, the auditor shall provide reasonable advance notice to the employee.

(d) With the agency's consent, the auditor may forward the assertions to an appropriate agency to investigate and report back to the auditor no later than sixty working days after the assertions are received from the auditor. The auditor is entitled to all investigative records resulting from such a referral. All procedural and confidentiality provisions of this chapter apply to investigations conducted under this subsection. The auditor shall document the reasons the assertions were referred.

(6) During the preliminary investigation, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts and laws known at the time and the procedure for the subject or subjects of the investigation and the agency head to respond to the assertions and information obtained during the investigation. This notification does not limit the auditor from considering additional facts or laws which become known during further investigation.

(a) If it appears to the auditor after completion of the preliminary investigation that further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower, the subject or subjects of the investigation, and the agency head and either conduct a further investigation or issue a report under subsection (9) of this section.

(b) If the preliminary investigation resulted from an anonymous assertion, a decision to conduct further investigation shall be subject to review by a three-person panel convened as necessary by the auditor prior to the commencement of any additional investigation. The panel shall include a state auditor representative knowledgeable of the subject agency operations, a citizen volunteer, and a representative of the attorney

general's office. This group shall be briefed on the preliminary investigation and shall recommend whether the auditor should proceed with further investigation.

(c) If further investigation is to occur, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts known at the time and the procedure to be used by the subject or subjects of the investigation and the agency head to respond to the assertions and information obtained during the investigation.

(7) Within sixty working days after the preliminary investigation period in subsection (3) of this section, the auditor shall complete the investigation and report its findings to the whistleblower unless written justification for the delay is furnished to the whistleblower, agency head, and subject or subjects of the investigation. In all such cases, the report of the auditor's investigation and findings shall be sent to the whistleblower within one year after the information was filed under subsection (3) of this section.

(8)(a) At any stage of an investigation under this section the auditor may require by subpoena the attendance and testimony of witnesses and the production of documentary or other evidence relating to the investigation at any designated place in the state. The auditor may issue subpoenas, administer oaths, examine witnesses, and receive evidence. In the case of contumacy or failure to obey a subpoena, the superior court for the county in which the person to whom the subpoena is addressed resides or is served may issue an order requiring the person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(b) The auditor may order the taking of depositions at any stage of a proceeding or investigation under this chapter. Depositions shall be taken before an individual designated by the auditor and having the power to administer oaths. Testimony shall be reduced to writing by or under the direction of the individual taking the deposition and shall be subscribed by the deponent.

(c) Agencies shall cooperate fully in the investigation and shall take appropriate action to preclude the destruction of any evidence during the course of the investigation.

(d) During the investigation the auditor shall interview each subject of the investigation. If it is determined there is reasonable cause to believe improper governmental action has occurred, the subject or subjects and the agency head shall be given fifteen working days to respond to the assertions prior to the issuance of the final report.

(9)(a) If the auditor determines there is reasonable cause to believe an employee has engaged in improper governmental action, the auditor shall report, to the extent allowable under existing public disclosure laws, the nature and details of the activity to:

(i) The subject or subjects of the investigation and the head of the employing agency;

(ii) If appropriate, the attorney general or such other authority as the auditor determines appropriate;

(iii) Electronically to the governor, secretary of the senate, and chief clerk of the house of representatives; and

(iv) Except for information whose release is specifically prohibited by statute or executive order, the public through the public file of whistleblower reports maintained by the auditor.

(b) The auditor has no enforcement power except that in any case in which the auditor submits an investigative report containing reasonable cause determinations to the agency, the agency shall send its plan for resolution to the auditor within fifteen working days of having received the report. The agency is encouraged to consult with the subject or subjects of the investigation in establishing the resolution plan. The auditor may require periodic reports of agency action until all resolution has occurred. If the auditor determines that appropriate action has not been taken, the auditor shall report the determination to the

governor and to the legislature and may include this determination in the agency audit under chapter 43.09 RCW.

(10) Once the auditor concludes that appropriate action has been taken to resolve the matter, the auditor shall so notify the whistleblower, the agency head, and the subject or subjects of the investigation. If the resolution takes more than one year, the auditor shall provide annual notification of its status to the whistleblower, agency head, and subject or subjects of the investigation.

(11) Failure to cooperate with such audit or investigation, or retaliation against anyone who assists the auditor by engaging in activity protected by this chapter shall be reported as a separate finding with recommendations for corrective action in the associated report whenever it occurs.

(12) This section does not limit any authority conferred upon the attorney general or any other agency of government to investigate any matter.

[2008 c 266 § 4; 1999 c 361 § 3; 1992 c 118 § 2; 1989 c 284 § 3; 1982 c 208 § 4.]

Notes:

Findings -- Intent -- 2008 c 266: See note following RCW 42.40.020.

42.40.050
Retaliatory action against whistleblower — Remedies.

(1)(a) Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW.

(b) For the purpose of this section, "reprisal or retaliatory action" means, but is not limited to, any of the following:

(i) Denial of adequate staff to perform duties;

(ii) Frequent staff changes;

(iii) Frequent and undesirable office changes;

(iv) Refusal to assign meaningful work;

(v) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations;

(vi) Demotion;

(vii) Reduction in pay;

(viii) Denial of promotion;

(ix) Suspension;

(x) Dismissal;

(xi) Denial of employment;

(xii) A supervisor or superior behaving in or encouraging coworkers to behave in a hostile manner toward

the whistleblower;

(xiii) A change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish;

(xiv) Issuance of or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice; or

(xv) Any other action that is inconsistent compared to actions taken before the employee engaged in conduct protected by this chapter, or compared to other employees who have not engaged in conduct protected by this chapter.

(2) 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.

(3) Nothing in this section prohibits an agency from making any decision exercising its authority to terminate, suspend, or discipline an employee who engages in workplace reprisal or retaliatory action against a whistleblower. However, the agency also shall implement any order under chapter 49.60 RCW (other than an order of suspension if the agency has terminated the retaliator).

[2008 c 266 § 6; 1999 c 283 § 1; 1992 c 118 § 3; 1989 c 284 § 4; 1982 c 208 § 5.]

Notes:

Findings -- Intent -- 2008 c 266: See note following RCW 42.40.020.

42.40.070
Summary of chapter available to employees.

A written summary of this chapter and procedures for reporting improper governmental actions established by the auditor's office shall be made available by each department or agency of state government to each employee upon entering public employment. Such notices may be in agency internal newsletters, included with paychecks or stubs, sent via electronic mail to all employees, or sent by other means that are cost-effective and reach all employees of the government level, division, or subdivision. Employees shall be notified by each department or agency of state government each year of the procedures and protections under this chapter. The annual notices shall include a list of public officials, as defined in RCW 42.40.020, authorized to receive whistleblower reports. The list of public officials authorized to receive whistleblower reports shall also be prominently displayed in all agency offices.

[2008 c 266 § 5; 1989 c 284 § 5; 1982 c 208 § 7.]

Notes:

Findings -- Intent -- 2008 c 266: See note following RCW 42.40.020.

42.40.080
Contracting for assistance.

The auditor has the authority to contract for any assistance necessary to carry out the provisions of this chapter.

[1999 c 361 § 4.]

42.40.090
Administrative costs.

The cost of administering this chapter is funded through the auditing services revolving account created in RCW 43.09.410.

[1999 c 361 § 5.]

42.40.100
Assertions against auditor.

A whistleblower wishing to provide information under this chapter regarding asserted improper governmental action against the state auditor or an employee of that office shall provide the information to the attorney general who shall act in place of the auditor in investigating and reporting the matter.

[1999 c 361 § 6.]

42.40.110
Performance audit.

The office of financial management shall contract for a performance audit of the state employee whistleblower program on a cycle to be determined by the office of financial management. The audit shall be done in accordance with generally accepted government auditing standards beginning with the fiscal year ending June 30, 2001. The audit shall determine at a minimum: Whether the program is acquiring, protecting, and using its resources such as personnel, property, and space economically and efficiently; the causes of inefficiencies or uneconomical practices; and whether the program has complied with laws and rules on matters of economy and efficiency. The audit shall also at a minimum determine the extent to which the desired results or benefits established by the legislature are being achieved, the effectiveness of the program, and whether the auditor has complied with significant laws and rules applicable to the program.

The cost of the audit is a cost of operating the program and shall be funded by the auditing services revolving account created by RCW 43.09.410.

[1999 c 361 § 8.]

42.40.900
Severability — 1982 c 208.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1982 c 208 § 14.]

42.40.901
Severability — 2008 c 266.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[2008 c 266 § 10.]

42.40.910
Application of chapter.

Chapter 266, Laws of 2008 and chapter 361, Laws of 1999 do not affect the jurisdiction of the legislative ethics board, the executive ethics board, or the commission on judicial conduct, as set forth in chapter 42.52 RCW. The senate, the house of representatives, and the supreme court shall adopt policies regarding the applicability of chapter 42.40 RCW to the senate, house of representatives, and judicial branch.

[2008 c 266 § 9; 1999 c 361 § 7.]

Notes:

Findings -- Intent -- 2008 c 266: See note following RCW 42.40.020.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARGARITA MENDOZA de SUGIYAMA, Appellant. v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Respondent.	No. 45087-9-II UNPUBLISHED OPINION

LEE, J. — Margarita Mendoza de Sugiyama appeals the trial court's order granting summary judgment in favor of the Department of Transportation (Department), arguing there are genuine issues of material fact as to her whistleblower retaliation claim, her hostile work environment claim, her discrimination claim, and her retaliation claim under the Washington Law Against Discrimination (WLAD). She also argues that the trial court erred by striking portions of her declaration and denying her motion to compel discovery.

We hold that the trial court properly granted summary judgment as to all of Mendoza de Sugiyama's claims. We also hold that the trial court did not abuse its discretion by striking portions of her declaration, and the trial court did not manifestly abuse its discretion in denying the motion to compel. Accordingly, we affirm.

FACTS

Mendoza de Sugiyama is a Mexican-American woman who was terminated from her position as the Department's diversity programs administrator. In June 2003, she was appointed as the diversity programs administrator for the Department's Office of Equal Opportunity (OEO).

At the time, OEO was responsible for both internal and external civil rights programs. The internal civil rights branch (ICRB) addressed civil rights issues regarding state employees while the external civil rights branch addressed civil rights issues with state contractors. Mendoza de Sugiyama was responsible for supervising the ICRB and reported to OEO Director Brenda Nnambi.

In April 2007, Shawn Murinko began working for OEO as the Americans with Disabilities Act/affirmative action coordinator. Murinko has cerebral palsy and is confined to a wheelchair. Sometime in 2009, there was a fire drill in the building where Mendoza de Sugiyama, Nnambi, and Murinko worked. During the fire drill, Murinko was told to wait by the stairs, but no one came to help him evacuate the building. As a result, Murinko's office was moved from OEO offices on the second floor to a human resources (HR) office on the first floor.

After the office relocation, Murinko began to feel as though Mendoza de Sugiyama was retaliating against him. He noted that she referred to him as HR's "golden boy." Clerk's Papers (CP) at 592. He also alleged that she was micromanaging him. On one occasion, she saw him eating lunch in the second floor conference room and told him he was not supposed to be there. She also made a joke about the size of Murinko's head. Murinko believed that Mendoza de Sugiyama's hostility toward HR was being directed toward him because his office was relocated to HR's floor of the building. Murinko complained about Mendoza de Sugiyama's behavior to the Department's chief of staff, Steven Reinmuth. In February 2010, Murinko transferred to a new position within HR, handling external disability matters.

In December 2009, Mendoza de Sugiyama learned that Reinmuth was considering reorganizing OEO so that the ICRB would be moved within HR. Nnambi and Mendoza de

Sugiyama objected to the proposed reorganization. In January 2010, Reinmuth notified Nnambi and HR Director Kermit Wooden that no final decision on the reorganization would be made until December 31, 2010.

On February 2, 2010, Mendoza de Sugiyama wrote a letter to the governor. In her letter, Mendoza de Sugiyama objected to the proposed reorganization of OEO and ICRB, stating that it violated the Code of Federal Regulations from the Federal Highway Administration. Mendoza de Sugiyama also stated that she was "personally and professionally offended and disappointed" that ICRB would be transferred to HR because Wooden, and his supervisor, Assistant Secretary Bill Ford, had a history of sexual relationships with subordinates and sexual harassment. CP at 652. She also accused Wooden of being openly hostile toward her. In addition to her objections to the reorganization of OEO, Mendoza de Sugiyama complained about Murinko's move to the position in HR and the accusations Murinko made about her treatment of him. Ultimately, Mendoza de Sugiyama accused Reinmuth, Wooden, and Murinko of conspiring to undermine her personal integrity and professionalism.

The governor's chief of staff, Jay Manning, responded to Mendoza de Sugiyama's letter on February 26, 2010. In the letter, Manning stated the governor's counsel had reviewed the federal regulations and determined that there was no legal impediment to moving the ICRB to HR, but that he would advise Secretary of Transportation Paula Hammond, to discuss any move with the Federal Highway Administration. Manning also stated that the letter had been discussed with Secretary Hammond, and they decided to begin an independent investigation into the accusations made by Mendoza de Sugiyama and the complaints made by Murinko.

After receiving Chief of Staff Manning's response to her letter, Mendoza de Sugiyama sent a letter to the Federal Highway Administration. Mendoza de Sugiyama reiterated her concerns about moving the ICRB to HR. As evidence of her concern, she pointed out that Reinmuth was attempting to place unqualified people (Murinko) in charge of civil rights issues and was obstructing OEO's ability to report to Secretary Hammond. When Mendoza de Sugiyama was notified that Federal Highway Administration received her complaint, she responded with an additional e-mail containing documents supporting her assertion that Murinko was unqualified for his position. She included confidential documents such as resumes, scores from interview panels, and draft documents that contained Murinko's edits and comments.

In March 2010, Claire Cordon was retained to perform an independent investigation into Mendoza de Sugiyama's and Murinko's complaints. To ensure the independence of the investigation, Cordon was retained by, and reported to, the Department of Personnel, rather than the Transportation Department. In the course of her investigation, Cordon interviewed 47 witnesses and reviewed several hundred pages of documents. Cordon performed three interviews with Mendoza de Sugiyama, exchanged numerous phone calls and e-mails with Mendoza de Sugiyama, reviewed 44 e-mails with 53 accompanying attachments from Mendoza de Sugiyama, and interviewed 28 of Mendoza de Sugiyama's 31 identified witnesses.

Cordon completed her report on July 21, 2010. Cordon determined that Mendoza de Sugiyama's claim that Wooden discriminated against her based on sex was unsubstantiated. Cordon noted that some of Wooden's conduct was unprofessional and inappropriate, but that there was no evidence on discriminatory intent. Cordon also noted that both female and male witnesses accused Wooden of bullying or abusive language or behavior. Cordon concluded that there was

no evidence to support Mendoza de Sugiyama's assertion that Reinmuth, Wooden, and Murinko were conspiring against her.

Cordon did, however, conclude that Murinko's complaints regarding retaliation from Mendoza de Sugiyama were substantiated. Specifically, she determined that evidence supported Murinko's contention that Mendoza de Sugiyama treated him differently by subjecting him to greater scrutiny after his move to the first floor. She also determined that Mendoza de Sugiyama engaged in retaliatory activity by criticizing Murinko's qualifications and position to outside parties such as the governor, attorney general, and Federal Highway Administration. Cordon observed that Mendoza de Sugiyama's current actions demonstrated a loss of objectivity and perspective by Mendoza de Sugiyama and a lack of oversight by Nnambi.

Cordon also addressed Mendoza de Sugiyama's allegations of two instances of sexual misconduct by Wooden and Ford against other employees. In a 2005 complaint against Ford, the complainant alleged that she lost her temporary position because she refused to engage in group sex with Ford. Ford and the complainant had been in a consensual relationship prior to the complainant coming to work at the Department. Cordon's report did not identify any action taken by the Department in response to the allegations against Ford. Also in 2005, a complainant alleged that Wooden had sexually harassed her; however, Wooden claimed that the complainant was actually the person who initiated the sexual contact. There were three additional alleged "victims" that Mendoza de Sugiyama identified based on rumors: one alleged victim denied the rumor, one alleged victim stated that Wooden once asked her to show him the cool places in town, and one alleged victim admitted to starting a consensual committed relationship with Wooden after she left the Department.

On August 13, 2010, Secretary Hammond issued a predisciplinary letter to Mendoza de Sugiyama. The letter outlined the charges against Mendoza de Sugiyama and specifically stated: "The charges are based solely upon acts considered to be misconduct and breach of your duties as a manager in WSDOT, and are not based upon the complaints you have made about agency actions you consider to be improper." CP at 1402. The charges were generally related to Mendoza de Sugiyama's actions toward Murinko and conduct during the investigation.

On August 27, Mendoza de Sugiyama provided a written response to Secretary Hammond's predisciplinary letter. Mendoza de Sugiyama disputed all of the charges articulated in Hammond's letter. Mendoza de Sugiyama also stated that she believed the investigation and allegations in the predisciplinary letter were because she was "a Hispanic women over 40" and she reported her concerns to the governor. CP at 745.

On September 10, Mendoza de Sugiyama was notified of her termination effective September 25. The termination notice listed three specific reasons for the termination;

> 1. You responded inappropriately to a disability reasonable accommodation proposal, and in spite of your expertise, failed to direct others to appropriate considerations.
> . . . .
> 2. You subjected your subordinate to unprofessional comments and heightened scrutiny, following consideration of his relocation to another floor. The relocation had been initiated in response to workplace safety and disability accommodation concerns.
> . . . .
> 3. You publicly criticized Mr. Murinko in written documents, even though you were on notice of a complaint of retaliation.

CP at 697, 699, 701. In explaining the level of discipline to be imposed, Secretary Hammond explained:

> Your actions of sending critical letters and confidential information to outside parties cannot be tolerated. You possess the expertise to know how to navigate a complaint and work toward a resolution, yet you intentionally worked to repeatedly undermine Mr. Murinko's reputation, subjected him to increased scrutiny after a reasonable accommodation request was made, and released documents that were confidential—all without any recognition that he was a protected complainant. In taking these actions, you personally created risk for the agency, and your actions could be viewed as efforts to undermine Mr. Murinko's reputation with people with whom and for whom he works.
>
> 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. . . . I find the timeline of events and information you shared about him disturbing. Your actions were repeated and malicious, and appear to be a calculated campaign to attack individuals in the agency. What has occurred is not a single incident that could be explained as a lack of judgment or a mistake.

CP at 704-05 (emphasis omitted). Based on Mendoza de Sugiyama's actions, Secretary Hammond determined the only appropriate disciplinary action would be termination.

On September 24, Mendoza de Sugiyama submitted an online whistleblower complaint to the Washington State Auditor's Office. Her complaint alleged that the Department spent $100,000 remodeling the HR area and created a "risk to legal and civil rights of members of the public with disabilities by placing an unqualified person as the lead for all WSDOT external ADA matters." CP at 851. The auditor's office declined to open a whistleblower investigation into Mendoza de Sugiyama's complaint.

After Cordon's report, Secretary Hammond and Reinmuth also took action to address the "clear pattern of abusive behavior and unprofessional conduct by Mr. Wooden toward people regardless of their race, gender, or age." CP at 1016. But even after Secretary Hammond and Reinmuth took corrective action, three managers in HR brought Reinmuth a two page list of

complaints regarding Wooden's generally unprofessional management. As a result, Secretary Hammond terminated Wooden's employment.

On July 26, 2011, Mendoza de Sugiyama filed an amended complaint[1] in Thurston County Superior Court against the Department. In her complaint, she alleged claims for whistleblower retaliation, race and gender discrimination, hostile work environment, and retaliation for opposing discrimination.

During discovery, the Department filed a motion for a protective order to limit Mendoza de Sugiyama's discovery request for e-mails and other electronically stored information. The same day, Mendoza de Sugiyama filed a motion to compel the Department to disclose the same e-mails and electronically stored information. Mendoza de Sugiyama had requested that the Department disclose all e-mails exchanged between 12 identified individuals. The Department identified 174,754 e-mails that were exchanged between the 12 identified individuals. The Department presented evidence that it would take approximately 62 days and cost approximately $1,000,000 to review all the e-mails for responsiveness and privilege. Mendoza de Sugiyama responded that the Department had already compiled all the e-mails and simply had to electronically transfer them; therefore, the request was not overly broad or unduly burdensome.

On May 18, 2012, the trial court denied Mendoza de Sugiyama's motion to compel stating:

> With regard to plaintiff's motion to compel discovery of electronically stored information ("ESI"), including but not limited to e[-]mails, RFP Nos. 27-42, the Court finds that plaintiff's requests are overly broad and unduly burdensome. The request would require WSDOT to produce 175,000 e[-]mails, which is too many. Therefore, the request is denied. 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

[1] The original complaint was filed on June 22, 2011.

> 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.

CP at 397-98.

On October 19, the Department filed a motion for summary judgment. Both parties submitted extensive affidavits, depositions, and exhibits. On June 7, 2013, the trial court granted the Department's motion for summary judgment and dismissed Mendoza de Sugiyama's claims with prejudice. Mendoza de Sugiyama appeals.

ANALYSIS

A. DISCOVERY AND EVIDENTIARY ISSUES

Mendoza de Sugiyama argues that the trial court erred by (1) denying her motion to compel discovery and (2) striking portions of her declaration. As a result, she argues, the trial court considered an incomplete record on summary judgment. The trial court did not abuse its broad discretion to manage discovery, and any error the trial court may have made in striking portions of Mendoza de Sugiyama's declaration is harmless.

1. Order Denying Motion to Compel Discovery

Mendoza de Sugiyama argues that the trial court erred by denying her motion to compel the Department to provide all 174,000 e-mails between the people identified in her request for production. Specifically, she asserts that the request was not overly broad or burdensome because the e-mails had already been identified and could easily be transferred to an external hard drive. Mendoza de Sugiyama's assertion misses the salient point in both the Department's argument and the trial court's decision—that the Department could not determine whether the 174,000 e-mails

and attached documents were responsive to her request without reviewing each individually. Accordingly, the trial court did not manifestly abuse its discretion by denying Mendoza de Sugiyama's motion to compel.[2]

The decision to grant or deny a motion to compel is within the discretion of the trial court, and we will not reverse the decision absent an abuse of discretion. *Clarke v. Office of the Attorney General*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006), *review denied*, 160 Wn.2d 1006 (2007). The court abuses its discretion when its decision is based on untenable grounds or reasons. *Clarke*, 133 Wn. App. at 777. CR 26(b)(1) allows the trial court to limit the scope of discovery if "the discovery is unduly burdensome or expensive." And, the trial court may grant a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." CR 26(c).

Here, the trial court recognized that Mendoza de Sugiyama's request would require the Department to individually review over 174,000 e-mails and corresponding attachments. The Department presented evidence establishing that this review could cost approximately $1,000,000. Contrary to Mendoza de Sugiyama's assertion, compliance with the discovery request was not as

[2] Both parties note that Mendoza de Sugiyama has a pending public records request which we recently addressed and resolved in Mendoza de Sugiyama's favor. *Wash. State Dep't of Transp. v. Mendoza de Sugiyama*, 182 Wn. App. 588, 599-600, 330 P.3d 209 (2014). Neither party appears to argue that the Public Records Act (PRA) request has any bearing on the propriety of the trial court's ruling on the motion to compel, and with good reason. The scope of the PRA, ch. 42.56 RCW is significantly broader than the rules governing discovery in a civil case. The exceptions and exemptions under the PRA are narrowly construed, and a public records request is not limited by considerations such as relevance or breadth. *See* RCW 42.56.080. Because of the significant differences between the PRA and the civil discovery rules, Mendoza de Sugiyama's ability to obtain the documents under the PRA has no bearing on whether the trial court manifestly abused its discretion by denying Mendoza de Sugiyama's motion to compel discovery based on the determination Mendoza de Sugiyama's request was overly broad and burdensome.

simple as transferring the e-mails to an external hard drive. And, the trial court's order did not preclude Mendoza de Sugiyama from ever obtaining the e-mails. Rather, the trial court's order required Mendoza de Sugiyama to take reasonable steps to help narrow the scope of her discovery request. The trial court did not abuse its discretion in denying Mendoza de Sugiyama's motion to compel discovery.

2. Order Striking Portions of Mendoza de Sugiyama's Declaration

Mendoza de Sugiyama argues that the trial court erred by striking entire portions of her declaration. The trial court struck a total of 20 paragraphs from Mendoza de Sugiyama's declaration because "they lack foundation, offer only opinion or legal conclusions, or are hearsay." CP at 1534. However, Mendoza de Sugiyama limits her argument to "paragraphs containing her letter to the governor as an exhibit (par. 20), her letter to the governor's chief of staff (par. 32), and her letter to the [Federal Highway Administration] (par. 30)." Br. of Appellant at 47. Mendoza de Sugiyama argues that the trial court erred because her letters are properly admitted as exhibits. Because Mendoza de Sugiyama's letters to the governor, the governor's chief of staff, and the Federal Highway Administration were already properly part of the record before the trial court on summary judgment, any error resulting from the trial court striking the paragraphs in Mendoza de Sugiyama's declaration containing these documents is harmless. *See Milligan v. Thompson*, 110 Wn. App. 628, 634-35, 42 P.3d 418 (2002).

B. SUMMARY JUDGMENT

We review a trial court's order on summary judgment de novo. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); *Domingo v. Boeing Emps' Credit Union*, 124 Wn. App. 71, 78, 98 P.3d 1222 (2004). Therefore, we must determine whether, based

on the record before the trial court on summary judgment, Mendoza de Sugiyama has demonstrated that there is a genuine issue of material fact that precludes summary judgment. We conclude that she has not and, thus, affirm the trial court's order granting the Department's motion for summary judgment.

A trial court's order granting summary judgment is proper when the pleadings and affidavits before the court show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CrR 56(c). "'[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

All of Mendoza de Sugiyama's claims require her to establish discriminatory or retaliatory intent. *See* RCW 49.60.030(1), .210(1), .210(2). A plaintiff may establish a prima facie case of discrimination by either offering direct evidence of an employer's discriminatory intent, or by satisfying the *McDonnell Douglas*[3] burden-shifting test that gives rise to an inference of discrimination. *Kastanis v. Educ. Emps. Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993). Here, Mendoza de Sugiyama does not argue that there is direct evidence of discriminatory intent.[4] Therefore, we apply the *McDonnell Douglas* burden shifting test to

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[4] An employer's discriminatory remarks are generally considered direct evidence of discriminatory intent. *See Johnson v. Express Rent & Own, Inc.*, 113 Wn. App. 858, 862-63, 56 P.3d 567 (2002). Here, there is nothing in the record demonstrating that any discriminatory remarks were made to, or about, Mexican-Americans or women in the Department.

determine whether Mendoza de Sugiyama presented evidence supporting an inference of discriminatory intent that created a genuine issue of material fact.

Under the *McDonnell Douglas* burden shifting test, the plaintiff must first establish a prima facie case of discrimination. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 354, 172 P.3d 688 (2007) (citing *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001)). If the plaintiff establishes a prima facie case under *McDonnell Douglas*, then a legally mandatory, rebuttable presumption of discrimination temporarily takes hold, and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action. *Hegwine*, 162 Wn.2d at 354. If the employer meets this intermediate production burden, the presumption established by having the prima facie evidence is rebutted and the presumption simply drops out of the picture. *Hegwine*, 162 Wn.2d at 354. Once the presumption is removed, the plaintiff is then afforded a fair opportunity to show a defendant's stated reason for the adverse action was in fact pretext. *Hegwine*, 162 Wn.2d at 354. If a plaintiff cannot present evidence that the defendant's reasons for the adverse employment action are untrue or pretext, summary judgment is proper. *Domingo*, 124 Wn. App. at 78.[5]

[5] We recognize that our Supreme Court recently clarified the different ways to prove that the employers' legitimate, nondiscriminatory reason for the adverse employment action is a pretext for discrimination. *Scrivener v. Clark College*, 181 Wn.2d 439, 441-42, 334 P.3d 541 (2014). Our Supreme Court stated that there are five ways for a plaintiff to demonstrate pretext, rather than the four ways previously articulated by the Court of Appeals. *Scrivener*, 181 Wn.2d at 447. The plaintiff can demonstrate pretext by showing the allegedly legitimate basis for the employment action (1) had no basis in fact, (2) was not really the motivating factor for the decision, (3) was not temporally connected to the adverse employment action, (4) was not a motivating factor in employment decisions for similarly situated employees, or that (5) discrimination was a substantially motivating factor in the employment action. *Scrivener*, 181 Wn.2d at 447-48. However, Mendoza de Sugiyama baldly asserts that she has rebutted the Department's "pretextual reason," and she makes no attempt to demonstrate that the Department's legitimate,

Here, Mendoza de Sugiyama fails to establish a genuine issue of material fact under the *McDonnell-Douglas* burden-shifting test. Therefore, the trial court's order granting the Department's motion for summary judgment was proper.

1. Whistleblower Retaliation Claim

RCW 42.40.050 and RCW 49.60.210(2) prohibit retaliation against a whistleblower. To establish a prima facie case of retaliation, an employee must show that (1) she engaged in a statutorily protected activity (filing a whistleblower complaint), (2) the employer took an adverse employment action, and (3) the adverse action was caused by the employee's activity. *Milligan*, 110 Wn. App. at 638.[6] The Department argues that Mendoza de Sugiyama cannot establish a prima facie case of whistleblower retaliation because (1) she filed a whistleblower complaint after she was terminated from her employment and (2) the letters to the governor and the Federal Highway Administration are not whistleblower complaints for the purposes of establishing a cause of action under RCW 42.40.050 and RCW 49.60.210(2). The Department is correct.

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nondiscriminatory reasons for her termination were a pretext for discrimination. Reply Br. of Appellant at 3, Br. of Appellant at 30. Therefore, our Supreme Court's opinion in *Scrivener* does not affect our analysis here.

[6] Although *Milligan* addresses the standard for establishing a prima facie case for retaliation for opposing discriminatory practices, the standard is equally applicable to whistleblower retaliation because a whistleblower retaliation claim is derived from the same statute, RCW 49.60.210. *See* RCW 42.40.050(1)(a) ("Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW.").

a. Mendoza de Sugiyama's September 24, 2010 Complaint to the Auditor's Office

Secretary Hammond sent Mendoza de Sugiyama "official notification of [her] termination" on September 10, 2010. CP at 694. Mendoza de Sugiyama filed her whistleblower's complaint with the State Auditor's Office on September 24, 2010. Because Mendoza de Sugiyama filed her whistleblower complaint with the auditor's office *after* she was notified of her termination, her termination could not be caused by her whistleblower complaint.

However, Mendoza de Sugiyama argues that her whistleblower complaint was filed before her termination because Mendoza de Sugiyama's last day of employment was September 24, the same day she filed the whistleblower complaint with the auditor's office. Even if this were an accurate determination of the date on which Mendoza de Sugiyama was terminated, it does not establish that Mendoza de Sugiyama was terminated because of the whistleblower complaint. Regardless of what date Mendoza de Sugiyama was "terminated," the decision to terminate her employment was made and communicated to her well before she filed a whistleblower complaint with the auditor's office. Mendoza de Sugiyama cannot establish a prima facie case of retaliation based on the whistleblower complaint she filed with the auditor's office.

b. Mendoza de Sugiyama's Letters to the Governor and the Federal Highway Administration

Mendoza de Sugiyama also argues that she meets the definition of a whistleblower based on the letters she wrote to the governor and the Federal Highway Administration. We disagree.

Under RCW 42.40.020(10)(a)(i), a whistleblower is "[a]n 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." RCW 42.40.020(7) defines "public official" as

> 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.

Improper government action includes, but is not limited to, gross waste of public funds, violation of federal or state law, or gross mismanagement. RCW 42.40.020(6)(a). However, improper governmental action does not include issues related to personnel actions such as promotions, demotions, or claims of discriminatory behavior. RCW 42.40.020(6)(b). Based on the definitions in RCW 42.40.020, Mendoza de Sugiyama cannot be considered a whistleblower based on her letters to the governor and the Federal Highway Administration.

Mendoza de Sugiyama's alleged whistleblower complaints were not sent to the correct person designated in the whistleblower statute. The statute clearly states to whom a whistleblower complaint can be made. RCW 42.40.020(7) does not include the governor or employees of a federal agency. We will not look beyond the plain language of the statute and read words into a statute that are not there. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). Therefore, Mendoza de Sugiyama's letters to the governor and the Federal Highway Administration are not whistleblower complaints under the statute.

Similarly, Mendoza de Sugiyama's claim that a letter becomes a whistleblower complaint if a designated person ultimately receives it or learns of it fails. The statute explicitly requires that a whistleblower complaint be reported to the state auditor or a designated public official. Therefore, Mendoza de Sugiyama's letters are not transformed into whistleblower complaints simply because Secretary Hammond ultimately learned of them.

Moreover, even if Mendoza de Sugiyama's complaints were reported to a public official as defined in RCW 42.40.020(7), Mendoza de Sugiyama's complaints about Murinko's position and qualifications are personnel issues and are clearly outside the scope of the whistleblower statute. RCW 42.40.020(6)(b). Secretary Hammond repeatedly stated that, to the extent Mendoza de Sugiyama's communications to outside agencies played a factor in her termination, it was due to Mendoza de Sugiyama's inappropriate criticisms of Murinko knowing that there was a pending retaliation complaint and her improper disclosures of Murinko's confidential interview and application materials. Because the activities that resulted in Mendoza de Sugiyama's termination were not protected activities, she cannot make a prima facie case for whistleblower retaliation, and the trial court properly granted the Department's motion for summary judgment.

2. WLAD Claim: Hostile Work Environment

To support a claim of a hostile work environment, Mendoza de Sugiyama is required to make a prima facie case that the actions (1) were unwelcome, (2) were because of the plaintiff's status as a member of a protected class, (3) affected the terms or conditions of employment, and (4) could be imputed to the employer. *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406-08, 693 P.2d 708 (1985). "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." *Glasgow*, 103 Wn.2d at 406.

Here, Mendoza de Sugiyama cannot establish that she was subject to a hostile work environment due to either her race or gender. She alleges that she was subjected to a hostile work environment because of Wooden's hostile behavior. But, the evidence establishes that Wooden's behavior was universally unprofessional and hostile. Although Mendoza de Sugiyama may be

able to demonstrate that Wooden's behavior was hostile toward her, she cannot demonstrate that Wooden's behavior was based on her race or her gender. Accordingly, Mendoza de Sugiyama cannot establish a prima facie claim of a hostile work environment.

Mendoza de Sugiyama also alleges that Reinmuth created a hostile work environment. She states that Reinmuth required Nnambi to attend meetings with her and that Reinmuth repeatedly criticized her. She contends that Reinmuth sought to move the ICRB to HR despite Mendoza de Sugiyama's complaints about Wooden and that Reinmuth interjected his opinions about Mendoza de Sugiyama to Cordon during her investigation. These claims fail to show that Reinmuth created a hostile work environment.

First, ICRB's potential move to HR is irrelevant. Reinmuth was clear that no final decision would be made until December 2010, well after Mendoza de Sugiyama was terminated. Also, Mendoza de Sugiyama fails to explain how this potential move created a hostile work environment based on her race or gender. Second, Reinmuth was interviewed for Cordon's report because of his position in the Department and because of his involvement with all the parties in this situation. There is no basis for Mendoza de Sugiyama's assertion that Reinmuth's participation in Cordon's investigation contributed to creating a hostile work environment based on her race or gender. Third, even assuming Reinmuth's decision to have Nnambi attend meetings with Mendoza de Sugiyama and his criticism of Mendoza de Sugiyama's work was done with discriminatory intent, Mendoza de Sugiyama fails to demonstrate how this conduct was so pervasive that it altered the terms and conditions of her employment. Therefore, Mendoza de Sugiyama has failed to present a prima facie case that Reinmuth created a hostile work environment. Because Mendoza de

Sugiyama has failed to demonstrate a prima facie case establishing her hostile work environment claim, the trial court properly granted the Department's motion for summary judgment.

3. WLAD Claim: Disparate Treatment

To establish a prima facie case of disparate treatment, Mendoza de Sugiyama must show that she (1) belongs to a protected class; (2) was treated less favorably in the terms and conditions of his employment than a similarly situated, nonprotected employee; and (3) the nonprotected "comparator" was doing substantially the same work. *Domingo*, 124 Wn. App. at 81. It is undisputed that as a Hispanic woman, Mendoza de Sugiyama belongs to a protected class. However, Mendoza de Sugiyama cannot identify comparators that support her claim of disparate treatment.

a. During Employment

Mendoza de Sugiyama claims that both Wooden and Reinmuth treated her differently during her employment based on her race and gender. She alleges that Wooden discriminated against her because Wooden "spoke to her in a demeaning way, cancelled meetings with her and, when he did attend meetings, he refused to interact with her." Br. of Appellant at 41. In her brief, Mendoza de Sugiyama states that other women complained of similar behavior, but to establish a prima facie case of disparate treatment, Mendoza de Sugiyama must demonstrate that Wooden behaved differently toward a nonprotected employee. *Domingo*, 124 Wn. App. at 81. Mendoza de Sugiyama has not demonstrated that Wooden regularly spoke respectfully to nonprotected employees or never cancelled meetings with nonprotected employees. In fact, the record establishes that Wooden treated everyone poorly and with disrespect. Mendoza de Sugiyama has not established a prima facie case of disparate treatment based on Wooden's treatment of her.

Mendoza de Sugiyama also claims that Reinmuth discriminated against her based on her race and gender by treating her differently. However, as with Wooden, she has failed to identify appropriate comparators to support her disparate treatment claim. She alleges that Reinmuth treated her differently because nonprotected employees had direct access to him through an open-door policy, but Mendoza de Sugiyama has not alleged that she attempted to take advantage of his open-door policy or that she tried to exercise the same type of direct access as others but was denied. Therefore, whatever access nonprotected employees may have had to Reinmuth has no bearing on Mendoza de Sugiyama's disparate treatment claim against Reinmuth.

Mendoza de Sugiyama also alleges that Reinmuth was quick to criticize her in response to a Caucasian male's (Murinko) complaint, but failed to act on her complaint about Wooden. She does not specify what complaint or complaints Reinmuth failed to act on. When the Department was informed of both Murinko's complaint against her and her complaint against Wooden, the same action was taken—an independent investigation. Therefore, there is no evidence supporting a claim of disparate treatment.

b. Termination

Mendoza de Sugiyama asserts that "her race and/or gender was a substantial factor in her termination." Br. of Appellant at 43. Mendoza de Sugiyama's claim fails because she cannot present a prima facie case of disparate treatment in regard to her termination.

Mendoza de Sugiyama attempts to use Wooden and Assistant Secretary Bill Ford as comparators because they had been accused of sexual harassment in the past but were not terminated. She argues that, in contrast, she was accused of retaliation and then terminated. But Wooden's and Ford's prior cases are not comparable, primarily because Reinmuth was not

responsible for the action that was or was not taken against Wooden and Ford. The sexual harassment cases against Wooden and Ford occurred five years earlier and Reinmuth was not chief of staff at the time.[7] Therefore, how Wooden's and Ford's cases were handled cannot establish Reinmuth treated Mendoza de Sugiyama differently.

Mendoza de Sugiyama also attempts to designate Nnambi and Colleen Jollie as comparators because they were both women of color who had their authority allegedly reduced or undermined by Reinmuth. But a comparator must be a nonprotected person. As Nnambi and Jollie are both women of color, they fall within the same protected class as Mendoza de Sugiyama. Therefore, Nnambi and Jollie are not appropriate comparators for a disparate treatment claim.

Mendoza de Sugiyama cannot make a prima facie showing of disparate treatment because she has failed to identify how she was treated differently than a nonprotected employee. Mendoza de Sugiyama fails to establish a prima facie case of disparate treatment either during her employment or as a substantial factor in her termination. Therefore, Mendoza de Sugiyama has failed to establish a genuine issue of material fact under the *McDonnell Douglas* burden shifting test. The trial court properly granted the Department's motion for summary judgment on Mendoza de Sugiyama's disparate treatment claim.

4. WLAD Claim: Retaliation for Opposing Discrimination Claim

To establish a prima facie case of retaliation, the employee must show that (1) he or she engaged in a statutorily protected activity, (2) the employer to adverse employment action, and (3)

[7] Hammond was chief of staff at the time and, in fact, did recommend Wooden's termination. However, the then Secretary of Transportation, Mr. MacDonald, decided that no action would be taken.

there was a causal link between the employee's activity and the employer's adverse action. *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005). Mendoza de Sugiyama alleges that her termination was in retaliation for her complaints about "her own gender and race discrimination by Reinmuth and Wooden." Br. of Appellant at 44. Mendoza de Sugiyama asserts that she has presented a prima facie case because she was terminated after she complained. Even assuming that temporal proximity is sufficient to establish a prima facie case of retaliation, the Department has presented a legitimate, nondiscriminatory reason for Mendoza de Sugiyama's termination and Mendoza de Sugiyama makes only conclusory, unsupported assertions that the Department's legitimate reason for her termination is pretext.

Here, Secretary Hammond based her decision to terminate Mendoza de Sugiyama on Mendoza de Sugiyama's actions toward Murinko and her disclosure of confidential interview and employment documents to other agencies. Mendoza de Sugiyama argues that she can demonstrate pretext because she stated she did not retaliate against Murinko. But, it is undisputed that she improperly disclosed confidential interview and employment documents to the Federal Highway Administration. To the extent that Mendoza de Sugiyama asserts that her termination based on her own improper actions toward Murinko and her improper disclosure of confidential documents was pretext for retaliation, she has not provided any evidence or argument supporting that argument. Thus, Mendoza de Sugiyama's claim for retaliation for opposing discrimination does not establish a genuine issue of material fact under the *McDonnell-Douglas* burden shifting test. Accordingly, the trial court properly granted the Department's motion for summary judgment.

C. ATTORNEY FEES

Mendoza de Sugiyama also requests attorney fees. RAP 18.1(a) allows this court to award attorney fees "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses." "Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees." *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC*, 138 Wn. App. 443, 462, 158 P.3d 1183 (2007) (citing *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404, *review denied*, 124 Wn.2d 1015 (1994)).

Mendoza de Sugiyama has not cited to any legal authority for awarding her attorney fees in this case. Therefore, we do not consider Mendoza de Sugiyama's request for attorney fees.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will instead be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARGARITA MENDOZA de SUGIYAMA,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

No. 45087-9-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **February 10, 2015** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Maxa, Lee

DATED this 20th day of April, 2015.

FOR THE COURT:

Worswick J
PRESIDING JUDGE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARGARITA MENDOZA de SUGIYAMA, Appellant, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Respondent.	No. 45087-9-II ORDER DENYING MOTION TO PUPLISH OPINION

APPELLANT moves to publish the Court's **February 10, 2015** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Maxa, Lee

DATED this 20th day of April, 2015.

FOR THE COURT:

Worswick J
PRESIDING JUDGE

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