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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 74367-8-I

DEBI O'BRIEN,

Petitioner,

v.

LEONARD CARDER AND JANE DOE CARDER and the marital community thereof, and ABM INDUSTRIES ("ABMI") and ABM PARKING SERVICES (d/b/a "Ampco" or "ABM Onsite Services West").

Respondents.

AMENDED PETITION FOR REVIEW

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A. *IDENTITY OF PETITIONERS*

Petitioner Debi O'Brien is "plaintiff" in the trial court and "appellant" in the Court of Appeals.[1] Petitioners Sandra Ferguson and Margaret Boyle are "appellants" in the Court of Appeals—as to the trial court's order imposing CR 11 sanctions.

B. *CITATION TO COURT OF APPEALS DECISION*

Petitioners seeks review of the "Unpublished Opinion" of Division I of the Court of Appeals in *O'Brien v. Carder, et al*, No. 74367-8-I. Appendix 1 is a copy of the Court of Appeals' opinion (filed April 3, 2015). Appendix 2 is copies of trial court orders: *(a)* Order On Defendants' Motions For Summary Judgment (entered 11/16/15);[2] *(b)* Order On Defendants' Motion For Sanctions (entered 9/14/15);[3] and *(c)* 2nd Order On Defendants' Motion For Sanctions (entered 11/ 16/15).[4] Appendix 3 is a copy of the Record of Proceedings from the Summary Judgment Hearing, 11/13/2015.

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[1] When the petitioner Debi O'Brien is referred to by name, it will be by her surname ("O'Brien"). Likewise, the respondent, Leonard Carder, will be referred to by his surname ("Carder"). No disrespect is intended by this device, the goal is clarity and brevity.

[2] CP 2152-2156.

[3] CP 655-657.

[4] CP 2157-2158.

C. *ISSUES PRESENTED FOR REVIEW*

1. Are the lower courts required to follow the "reasonable woman" standard under Title VII[5] when deciding whether hostile work environment claims are actionable under the WLAD?[6]

2. Should this Court enforce the "substantial factor" rule enunciated in *Scrivener*[7] because the trial court erred by requiring O'Brien to *disprove* the employer's assertion that she was terminated as part of a lawful reduction-in-force?[8]

3. Did the trial court abuse its discretion by denying O'Brien's CR 56(f) motion, thus, denying O'Brien the opportunity to amend the complaint and to depose the defendants?

4. Should this Court reverse the order imposing CR 11 sanctions because under the facts of this case, the imposition of CR 11 sanctions is contrary to Washington authority and undermines public policy?

D. *STATEMENT OF THE CASE*

1. Relevant Procedural Facts— Federal Court

Lawsuit Filed in State Court—October 2013. O'Brien filed against "ABM" in King County Superior Court— alleging state law claims.

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[5] Title VII of the Civil Rights Act of 1964, as amended (CFR 2000e, *et seq*.)
[6] RCW § 49.60, et seq. (the Washington Law Against Discrimination or "WLAD").
[7] *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014).
[8] *See*, Appendix 2 (CP 2154).

Defendants' First Removal to Federal Court. ABM removed to federal court. O'Brien amended the complaint to add her former boss, Leonard Carder. Defendants filed a motion to sever Carder—which was granted.

District Court Rejects Defendants' Claim that Carder is Sham Defendant—Preserves O'Brien's Right to Sue Carder Separately.

The order dismissing Carder is significant and therefore, is quoted in relevant part, below:

> "[A]s the case against Mr. Carder will be dismissed *without prejudice*, ***Plaintiff will not be prevented from filing a suit against Mr. Carder in state court***, meaning that any prejudice accruing to her is minimal. The Court gives little weight to Plaintiff's sole argument for why the Court should not drop Mr. Carder."
>
> "All claims against Mr. Carder are DISMISSED ***without prejudice to Plaintiff filing claims against him in state court***…"
>
> [CP 516-520.] [Emphasis added.]

Thus, there is no question of O'Brien's right to sue Carder in state court as an "employer".[9] However, O'Brien must sue Carder *separately from the ABM defendants*—or forfeit the right to sue Carder. Eventually, O'Brien would sue Carder, but *only* after

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[9] See, *Brown v. Scott Paper Worldwide Co*., 143 Wn.2d 349 (2001) (individual managers may be sued as "employers" under the WLAD), and Judge Coughenour's Order dismissing Carder (CP 516-520).

discovery in the federal case provided strong support for O'Brien's allegation that Carder orchestrated the hostile work environment.

The District Court Dismisses Public Policy Claim Under Cudney.

ABM successfully moved for dismissal of this claim on the pleadings under FRCP 12(c). The Court granted ABM's motion based on the "adequacy" test, set forth in *Cudney v. ALSCO, Inc*., 172 Wash.2d 524, 537, 259 P.3d 244, 250 (2011).

District Court Grants Leave for Voluntary Dismissal— FRCP 41

O'Brien's case was tirelessly litigated in District Court—right up until Judge Coughenour granted O'Brien's Motion for Voluntary Dismissal under FRCP 41. The discovery process was very contentious.[10] During the last two weeks of the discovery period, O'Brien finally managed to depose three ABM managers (i.e., Madeline Kwan, Hugh Koskinen, and Matt Purvis). Other managers' depositions were noted by mutual agreement, and would have been taken just before the discovery cut-off date. However, Defense counsel withdrew all cooperation at the 11th hour, then sought and obtained a protective order, preventing these depositions. O'Brien

[10] CP 95-108 (USDC docket).

was out of time, the clock had run out, there was no choice but to dismiss the case under Rule 41. The Court granted O'Brien's motion to dismiss the case without prejudice. Defendants asked the Court to impose conditions, arguing that the voluntary dismissal was in bad faith or for an improper motive. Judge Coughenour disagreed, stating:

> "Plaintiff completed some depositions after the second continuance was granted, but also cancelled five scheduled depositions, *apparently after concluding that there was insufficient time to complete necessary discovery*."

CP 113-116 (emphasis added). The ABMs hastily filed summary judgment motions and asked the Court to consider them, rather than allow dismissal. Judge Coughenour declined to do this, stating:

> "Most notably, Defendants ask the Court to rule on the pending motions for summary judgment because it would 'be unjust for Plaintiff to escape ruling on the merits of these motions. *This presumes a favorable result for Defendants.* The Court declines to impose the requested conditions."
> Id. [Emphasis added]

2. Relevant Procedural Facts—State Court

Lawsuit Filed Against Carder, et al—March 19, 2015.

On March 19, 2015, O'Brien exercised her right to sue Carder in state court. In addition to Carder, she sued four other managers who engaged in the alleged harassment (Koskinen, Lawson, Purvis, Ketza) .

Second Amended Complaint Adds ABMs as Defendants.

The federal action was dismissed without prejudice on April 23, 2015. Therefore, O'Brien sought and was granted leave to amend the complaint to add the ABMs as defendant. "Plaintiff's Second Amended Complaint" was filed, and contained 77 paragraphs of fact-allegations. CP 1265-1286 (Second Am. Comp.). This level of detail was possible, in large part, because of the testimony obtained by O'Brien in the final weeks of the federal case. including depositions of O'Brien's former managers, Madeline Kwan (CP1518-1580), Matt Purvis (CP 1449-1516), Hugh Koskinen (CP 1582-1611), and of Debi O'Brien, herself (CP 183-227), O'Brien's daughter, Bernadette Stickle (CP 1759-1841), and comparators, Melody Dillon (CP 1613-1750), and Jason Reidt (1752-55).

"Notice of Rule 11 Violations"—March 30, 2015.[11]

Defense counsel asserted that because two of the individual defendants —Koskinen and Lawson— left their employment at ABM Parking in 2010, O'Brien's hostile environment claim (as to these two defendants) was barred by the 3-year statute of limitations applicable

[11] CP 594-595.

to WLAD claims. The letter warned that if these two managers were not dismissed, a motion for CR 11 sanctions would follow.

Response to Notice of Rule 11 Violations.[12]

O'Brien's attorneys responded that *Antonius v. King County* provided the legal basis for suing these two managers under the WLAD (assuming *arguendo*, that the statute of limitations had in fact run). In *Antonius*, the Court held that the employer can be liable for acts committed outside of the limitations period if there are acts that occurred within the limitations period which are part of a hostile work environment. In other words, the acts contributing to a hostile work environment are to be viewed in the aggregate, as one act, for purposes of determining whether the statute of limitations has expired.[13] Before Koskinen and Lawson left ABM in 2010, they allegedly engaged in acts that were part of a concerted effort—orchestrated by Carder—to create a hostile work environment in retaliation for O'Brien's protected activity. These acts by O'Brien's managers (including Koskinen and Lawson) began in 2009 and continued until O'Brien was terminated in February 2013. Thus,

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[12] CP 597-598.
[13] *Antonius v. King Co*. 153 Wn.2d 256, 103 P.3d 729 (2004).

under *Antonius*—Koskinen and Lawson could be liable for the acts they personally committed, since their acts were part of, and in furtherance of the hostile work environment. The defendants argued that under *Antonius*, only the ABM companies can be liable for acts outside the limitations period; not individual managers. It is a question of first impression.

Stipulated Dismissal of Individual Managers (except Carder).

After receiving the Notice of CR 11 Violation, O'Brien's attorneys made a calculation of risks/benefits. They decided to agree to dismiss the individual managers without prejudice (except for the alleged ringleader, Carder). This was accomplished pursuant to a stipulated order.[14]

Defendant's Second Removal to Federal Court—June 11, 2015.

As soon as the stipulated order was entered, the defendants *improperly* removed the case to federal court. Carder and O'Brien were both Washington residents. Thus, there existed no basis for federal jurisdiction.

Judge Zilly's Order of Remand—August 25, 2015.

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[14] CP 446-48 (Stipulated Order, entered June 8, 2015).

O'Brien promptly moved for remand—which was granted. However, it took 2.5 months for the case to be remanded. No discovery was possible during this interval. Like Judge Coughenour before him, Judge Zilly *rejected* the defendants' claim that Carder was a *sham* defendant. Judge Zilly made this finding explicit—stating:

> "The Court… finds that *Mr. Carder is not a sham defendant* as plaintiff has stated a theoretically plausible claim against him. See *Brown v. Scott Paper Worldwide Co*., 143 Was.2d 349, 353 (2001) (stating that supervisors may be held liable under Washington law for their discriminatory acts.)."[15]

Trial Court Imposes CR 11 sanctions b/c four managers were "unnecessary" to the lawsuit—September 14, 2015.[16] After remand, the defendants filed a motion for CR 11 sanctions which then had to be litigated, preventing discovery progress. The trial court imposed CR 11 sanctions because the four managers were "unnecessary" to the lawsuit—as evidenced by O'Brien's recent decision to dismiss them.

The Order states:

> "[T]he bringing of claims against these four individual defendants (Koskinen, Lawson, Purvis and Ketza and their marital communities) was in clear violation of CR 11.

[15] CP 459-460 (Minute Order, entered 8/25/15).
[16] See App. 2 (CP 655-657.)

Once leave was granted in May to add plaintiff's former [corporate] employer[s] to this lawsuit…these four individuals were promptly dropped from the suit. That their involvement was so quickly proclaimed to be unnecessary is a compelling demonstration that it had always been unnecessary."
"[There was] no defensible reason for treating these individuals in the manner they were."

O'Brien's Motion for Reconsideration—Denied.

O'Brien moved for reconsideration of the sanctions order as legal error since it is not sanctionable conduct to sue a defendant who is *unnecessary* to the case, provided there is a factual and legal basis warranting the suit. O'Brien's motion was denied. CP 2159-2160.

2nd Order Imposing Sanctions—November 16, 2015.[17]

This order imposed sanctions of $6,500. The court attempts to clarify (or recast) its rationale, stating:

a. Many of the claims against these individuals were not well-grounded in fact or warranted by existing law and a reasonable inquiry would have made this clear; there has not been offered any way in which these individuals could have been found liable under the plaintiff's contract with her employer nor has there been any explanation of why the statute of limitations would not bar a 2015 lawsuit based on action taken no later than 2010.

b. By its previous reference to the 'procedural machinations in which these four individuals were ill-used as unwilling

[17] App. 2 (CP 2157-2158).

and unfortunate pawns,' the Court meant to indicate that their inclusion in the lawsuit was in service of a concerted effort at *forum shopping* and, therefore, was "for an *improper purpose*.'"

"These are the specific findings upon which the conclusion of a CR 11 violation is based." [Id., Emphasis added.]

Order Denying CR 56(f) Motion—November 16, 2015.

After months of procedural gamesmanship, the defendants filed motions for summary judgment. Pursuant to CR 56(f), O'Brien sought a continuance, in part, to amend the complaint based on a recent change in the law, and to allege the public policy tort claim earlier dismissed by the District Court under *Cudney*.[18] Also, in order to depose Leonard Carder, to take 30(b)(6) depositions of the ABMs, to depose Rod Howery (the manager ABM claims was the decision-maker in O'Brien's termination), and to depose Vivian Smith (O'Brien's HR manager who was an ABM Industries employee, and who gave final written approval for O'Brien's termination from ABM Parking). The trial

[18] After O'Brien filed the state court action, the adequacy test of *Cudney* was abrogated by: *Rose v. Anderson Hay and Grain Co*., 184 Wn.2d 268, 358 P.3d 1139 (2015), 358 P.3d 1139 (2015), *Becker v. Community Health Systems, Inc*., 184 Wn.2d 252 (2015), *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015).

court denied O'Brien's CR 56(f) motion. Thus, O'Brien was not allowed to amend the complaint, nor to take any discovery.[19]

Summary Judgment Granted—November 16, 2015. The summary judgment hearing took place on November 13, 2015. However, the court did not allow oral argument on the question of CR 11 sanctions. Three days later, the motions for summary judgment were granted.[20]

2nd Sanctions Order Entered—November 16, 2015. [21]

3. Facts of O'Brien's Hostile Environment Claim.

Melody Dillon's Sexual Harassment Complaint.

In March 2009, O'Brien engaged in protected "opposition" activity under the WLAD when she assisted HR with handling a sexual harassment complaint lodged by a female employee—Melody Dillon. Dillon was deposed during the federal case. To summarize, she testified that she was initially hired by ABM Parking to work in a garage, she was quickly promoted to the position of bookkeeper, after her promotion, she complained

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[19] CP 2153.
[20] See Apps. 1, and 3 (SJ Order and RP, 11/13/2015).
[21] App. 2, CP 2157-2158 (Order on Def's Mot. for Sanctions, 11/16/15- based on Court's finding of "improper purpose" of "forum-shopping).

about sexual harassment by two male co-workers (valets), then was harassed by the male co-workers *and* by her supervisors in retaliation for making the complaint. Due to the harassment, she resigned. CP 1613-1750.

Retaliation Against Dillon Similar to O'Brien.

Koskinen (Carder's right-hand man) harassed Dillon. The other harasser was Dillon's direct supervisor—Livermore—who reported to Hugh Koskinen. Also, a "fancy guy" (probably Carder) intimidated Dillon after she complained. CP 1616:14-25. After Dillon lodged the sexual harassment complaint about her two co-workers (both valets) Dillon was required to spend more time (not less) with the valets. CP 1623-1624. In a write-up which was placed in Dillon's personnel file, it was stated that Dillon needed to spend more time working with the valets *to gain their respect.* CP 1654. Before she reported the sexual harassment, Dillon received a very positive performance evaluation. CP 1621. After she reported the harassment, Dillon's supervisor gave her a series of unwarranted write-ups and a "final warning". CP 1627-1629.

Dillon Experiences Fear and Intimidation When Performing Daily Garage Inspections. After reporting sexual harassment,

Dillon was given a new assignment, which was to conduct ***daily walking inspections of the Expedia Garage*** **(**where she was a bookkeeper). ***Dillon testified that she felt frightened and intimidated when she performed these inspections, that she was afraid of being attacked ("jumped").*** Dillon testified that the garage was dark, she was alone, and she was aware that her male co-workers were angry at her for the sexual harassment complaint. Dillon was repeatedly criticized by her manager—Livermore—for not being fast enough at performing these "walk throughs". CP 1649-1690. Dillon resigned because of the harassment she experienced after she complained about sexual harassment complaint. She testified, **"I found another job because I needed to leave".** CP 1639:17.

O'Brien is Harassed After Handling Dillon's Complaint.

O'Brien was an HR Coordinator/Operations Manager. She wrote up Dillon's male harassers in her HR role. Then, she began to have problems with her managers on the "Operations" side. Koskinen instructed O'Brien to *write up Melody Dillon*, instead, to document blame of Dillon for causing the sexual harassment. CP 779-781. Koskinen angrily criticized O'Brien for forwarding an e-mail to Dillon's

manager—Livermore—advising to stop interrogating Dillon about confidential medical issues when she requested sick leave. CP 1609-1611. Koskinen instigated a confrontation with O'Brien, demanding to know about O'Brien's relationship with Dillon's *mother*, Koskinen yelled at O'Brien, and wrote her up for insubordination. CP 1602. O'Brien was subjected to increased scrutiny, falsely accused of malingering. CP 1604-1606. Koskinen called her in to work over Labor Day weekend after approving the time off, forcing her to cut short a fishing vacation; O'Brien was denied reasonable accommodation and thus, was required to work 12-hour days standing in the hot sun at the Spokane Fair in 2012 (CP 207-211); Koskinen recorded O'Brien's private telephone conversation with her sister, then played it for the amusement of other employees, telling them it was a conversation between O'Brien and her psychiatrist. O'Brien reported this incident to Vivian Smith (Vice President of HR), but Smith took no corrective action and the retaliation escalated. CP 195: 1-5. Meanwhile, O'Brien learned from Koskinen that Melody Dillon was about to be fired. CP 781:21.

O'Brien Experiences Fear and Intimidation When She Performs Garage Inspections under Carder's CSI Program.

After O'Brien assisted HR with Dillon's sexual harassment complaint, her boss on the "Operations" side, Leonard Carder, invented a newprogram which came to be called "Customer Service Initiative" ("CSI"). He put O'Brien in charge of the CSI program, which required her to conduct regular, frequent walking inspections of all parking garages managed and operated by ABM Parking in the Seattle-Bellevue area. O'Brien was to walk through each floor of each garage, take photographs and note the conditions in each garage, then submit a "CSI Report" for each garage. CP 212-222.

Carder, Koskinen, and Lawson regularly reviewed the CSI Reports O'Brien submitted. CP 216-222. As the CSI Reports describe, the conditions O'Brien encountered in the garages frightened and intimidated her. She testified: **"I didn't feel safe."** CP 218:5. And she testified about the reasons that she did not feel safe. For example, one time, she was pushed into bushes at the Expedia garage. CP 218:10-12. While inspecting other garages, she came upon the denizens of the garages while they were having sex, doing drugs, or transacting drug deals. CP 221: 1-6. Then, O'Brien was told that she would have to perform at least 10 inspections per week, an unrealistic goal. CP 214:18-25, 215:1-10.

When she could not achieve this goal, she was repeatedly written up and criticized by Koskinen, Lawson, and then, Purvis. CP 1603, 1608; CP 1468-1474,

Tim O'Brien's Letter to Leonard Carder Warns of Danger

Plaintiff's husband wrote a letter to Leonard Carder notifying him about the dangerous conditions, and asking Carder to take steps to ensure O'Brien's future safety. CP 1142-1143. Leonard Carder and Madeline Kwan received Tim's letter. CP 1920. No one responded. CP 215:22-25, CP 216: 1-11. Indeed, after Tim sent the letter, the expectation was ratcheted up to 10 garage inspections per week. CP 213.

Koskinen's Testimony Implicates Carder *As Harasser-in-Chief*

Hugh Koskinen was deposed in the federal case. He testified that the "mandate came down from Leonard" that O'Brien needed to perform 10 inspections per week, and that "[t]he whole idea of the CSI program was Leonard's idea." CP 1591:18-25. Koskinen testified that he invariably reported sexual harassment complaints to Carder. CP 1588. Koskinen also testified to Carder's animus toward O'Brien, when he stated that he had to "defend [O'Brien] routinely" to Carder. CP 1588-1592.

<u>Managers Have Notice of O'Brien's Fear</u>. The CSI reports placed all of O'Brien's managers on notice of the hazardous conditions in the garages and of O'Brien's fears. CP 216-222. Koskinen and Purvis, both testified that they were aware of the dangerous conditions O'Brien encountered on a regular basis in some of the garages. Purvis testified (inter alia) that he was in frequent communication with the Seattle Police Department about one or two of the downtown garages O'Brien regularly inspected. CP 1475-80. Notably, Purvis also testified that the CSI program was abolished after O'Brien was terminated from ABM Parking. CP 1474:20-25.

<u>Pacific Place Garage Assignment Sets O'Brien up to Fail</u>. After O'Brien assisted with handling Dillon's sexual harassment complaint, she was assigned to resolve accounts receivables problems that were ongoing at the Pacific Place Garage—owned by the City of Seattle and managed by ABM Parking. CP 329. Matt Purvis testified that it was Leonard Carder's decision to give the Pacific Place Garage assignment to O'Brien. CP 1459-63. After she went there, O'Brien reported her findings of mismanagement, and possible fraud or theft, to Matt Purvis directly, and Leonard Carder, indirectly. CP 1486-1493. She did not receive the support from her bosses that she needed to be

effective; therefore, she began to suspect that the assignment might be another way to set her up for failure. CP 1846-1847. CP 223:18-24, CP 1459-1463, CP 1486-1494.

Media Coverage of Fraud at Pacific Place Garage Causes O'Brien to Be Suddenly Fired. In October 2012, ABM lost its contract to manage the Garage for the City. The public contract was awarded to ABM's competitor, "Impark". As a result, it was discovered that approximately $30,000/month of unexplained revenue losses had been occurring under ABM's watch. The City was poised to sell the garage to a group of private developers at a loss, without putting it up for public bid. The Seattle Times published several stories about the controversial sale and about the recent discovery of fraud involving public funds. The Seattle Police Department was called in to investigate. CP 224-227. CP 229-231, CP 233, CP 235-237, CP 239-240, CP 242-243.

O'Brien Terminated W/In Hours of Call from Times' Reporter.

On February 6, 2013, O'Brien was at work when she received an e-mail from Matt Purvis, a directive from Carder about how to handle potential inquiries from the media. CP 1509-10. Later that day, O'Brien received a call from a reporter at *The Seattle Times*, asking

her to comment on the *fraud at the Pacific Place Garage*. She reported the call to Purvis. Purvis promptly informed Carder. Hours later, O'Brien was fired. CP 1480-1485. It is ABMI's Vice President of HR, Vivian Smith, who is required to approve all termination decisions of "ABM" companies. CP 1564, 1570. Notably, Smith's signature on O'Brien's termination paperwork is dated February 7, 2013 (which was the day *after* the termination occurred). CP 1573-74.

Hostile Environment Claim Dismissed as a Matter of Law.

The trial court below concluded that O'Brien's fact-allegations do not satisfy the legal test for a hostile work environment claim; that O'Brien's experience of a hostile and abusive work environment is **"purely subjective and insufficient",** and the **"parking lot inspections do not seem to be outside the scope of anticipatable duties."**[22]

The Court of Appeals' affirmed, stating in relevant part as follows:

> "In addition to O'Brien***, other ABM Parking managers were also asked to conduct these inspections***. At the time, O'Brien stated that she ***believed*** that the parking locations managed by ABM Parking were unsafe."[23]

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[22] CP 2154

[23] App.1, "Unpub. Op.", p. 3

[Emphasis added.]. The Court of Appeals' affirmance is the reason for this Petition for Review. First, it must be noted, the record does not support the statement that other employees were required to perform garage inspections. No other employees were assigned to carry out comparable inspections of the garages.[24] Tellingly, the record shows that there was one other employee who was assigned a *somewhat* similar task to O'Brien, and that was Melody Dillon (after she complained about sexual harassment).[25] Second, whether other employees were required to inspect the garages is not dispositive of the legal question—i.e., was O'Brien's (and Dillon's) experience of fear and intimidation objectively reasonable? Third, the Court of Appeals clearly applied a *less* protective standard than Title VII law requires, when it affirmed the trial court's holding that O'Brien's *belief* that the garages were "unsafe", was not objectively reasonable as a matter of law.

E. *ARGUMENT FOR ACCEPTANCE OF REVIEW*

1. Review Should Be Taken Under RAP 13.4(b)(4).

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[24] Purvis merely testified that some ABM employees *parked* in the dangerous garages. CP 1475:23-25, 1476:23-25, 1477:1-2.

[25] See D. 3, supra. (discussing Dillon's testimony).

The Court should accept review to answer the following question:

> Under the WLAD, what is the proper standard for the lower courts to use when deciding whether a plaintiff's perception of a hostile and abusive work environment is objectively reasonable, and therefore, legally cognizable? Is it the same standard as the federal courts have established for Title VII cases (i.e., the "reasonable woman" standard)?

The Ninth Circuit first enunciated the "reasonable woman" standard in *Ellison v. Brady*[26]. In *Harris v. Forklift Systems, Inc*.,[27] the U.S. Supreme Court approved the *Ellison* standard. Long before *Ellison*, this Court approved the use of a similar standard in the criminal self-defense context involving a female defendant. See *State v. Wanrow,* 88 Wn 2d 221, 235, 559 P.2d 548 (1977). Post-*Ellison*, the Ninth Circuit used the "reasonable woman standard" to decide an Eighth Amendment challenge to searches of female inmates by the Washington Department of Corrections. See, *Jordan, et al v. Gardner,* et al, 986 F.2d 1521 (1993).

Yet, in WLAD cases, the lower courts lack a clear standard for deciding whether hostile work environment claims survive summary judgment. To be sure, Washington law recognizes that harassment

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[26] *Ellison v. Brady*, 924 F.2d 872 (1991).

[27] *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 114 S. Ct. 367 (1993). See also, *Oncale v. Sundowner Offshore Services*, Inc. (holding that same sex hostile work environment is actionable under Title VII, discussing *Harris*).

can be a very effective tool for discrimination and unlawful retaliation. However, as O'Brien's case so starkly demonstrates, plaintiffs in hostile environment cases are not receiving the protection to which they are entitled by law. By their very nature, hostile environment cases are challenging for the trial courts. Typically, plaintiffs are alleging many facts which— if viewed in isolation from one another—can be misconstrued as the airing of a litany of petty grievances. Busy trial court judges cannot be faulted for suffering from "compassion fatigue" when dealing with these heavily fact-laden cases. However, this situation is detrimental to plaintiffs as a group, many of whom have— in fact—suffered unlawful discrimination or retaliation by harassment, and are entitled to WLAD protection. By the same token, the absence of a clear legal standard to guide the trial courts at summary judgment, redounds to the benefit of retaliatory employers. This is at cross-purposes with the WLAD.

In Title VII cases, the "reasonable woman" standard is the law. It was first enunciated in *Ellison* v. *Brady*, as follows:

> "[M]any women share common concerns which men do not necessarily share. For example, because women are

> disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior…Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."
>
> We adopt the perspective of a *reasonable woman* primarily because we believe that *a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.*
> *Id*., at 879. [Emphasis added.]

In *Harris v. Forklift Systems, Inc.,* the Supreme Court adopted the *Ellison* standard, stating:

> "Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the *frequency* of the discriminatory conduct; its *severity*, whether it is *physically threatening* or humiliating, or a mere offensive utterance; and whether it *unreasonably interferes with an employee's work performance*. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id., at 23. [Emphasis added]. Thus, in Title VII cases, the "sex-blind [or color-blind] reasonable person standard which "systematically ignores the experiences of women [or minorities]", is no longer an acceptable approach for deciding as a matter of law,

whether a plaintiff's experience of the work environment as hostile or abusive is objectively "reasonable".[28]

Certainly, a *less* protective standard in WLAD cases is inconsistent with the liberal construction mandate, which makes the WLAD broader in scope than Title VII. Yet, the trial court obviously used a less protective standard when it held that O'Brien's (and Dillon's) experience of fear and intimidation was not objectively reasonable (i.e., was "purely subjective and insufficient").[29] Because of the garages inspections, alone, the result that was reached in this case would have been impossible using the Title VII "reasonable woman" standard.

2. Review of CR 11 Sanctions Should be Taken Under RAP 13.4(b)(1) and (b)(4).

The trial court's decision to impose CR 11 sanctions (aside from being unfair to the petitioners) is disturbing due to its public policy implications—as discussed below.

First, the trial court's assumptions about O'Brien's "improper motive" of "forum-shopping" is wholly unsupported and illogical.

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[28] Quoting, *Ellison*, at 879.
[29] App. 2, SJ Order (CP 655-657).

Suing the four managers did *nothing* to advance O'Brien's presumed choice of forum. Nor did *dismissing* the managers have any effect on the forum. Recall, Carder and O'Brien are residents of Washington. Thus, there was no need or motive to join the four managers for an illicit "forum shopping" purpose. Once this is clearly understood, it becomes obvious that O'Brien and her attorneys are *actually* being sanctioned because O'Brien exercised her right under the WLAD to sue the manager, Carder, as an "employer".

Second, parties are required under Washington law to provide Notices of CR 11 violations before seeking sanctions, and the purpose of this rule is to allow the offending party to mitigate the harm of *meritless* filings.[30] This public policy goal is defeated if the trial courts may then *punish* the party who dismisses claims, on the *sole* basis that the dismissal is proof of an "improper purpose"—*particularly,* where (as in this case) the dismissed claims had merit.

Third, under the facts of this case, the CR 11 sanctions have a "chilling effect" on parties and their attorneys who argue in good faith for the extension of existing law. The application of *Antonius*

[30] *Biggs v. Vail*, 124 Wn.2d 193,198, 876 P.2d 448 (1994).

with respect to the individual managers (as opposed to the corporate defendants) is an issue of first impression. It is not frivolous

3. *Scrivener* Should Be Enforced—RAP 13.4(b)(1),(4).

The summary judgment order concludes, in relevant part:

> "The defendants have put forth an entirely *plausible explanation* for the elimination of plaintiff's position (loss of business revenues leading to the necessity for cutbacks) as well as evidence of how, when, why and by whom the decision was made."

Under *Scrivener*, O'Brien did not have the burden to *disprove* the employer's proffered reason at summary judgment, or at trial, as long an unlawful motive is shown to be a substantial factor in the adverse decision. O'Brien met this burden at summary judgment.[31]

F. *CONCLUSION*

For the foregoing reasons, the Court should accept review.

Dated this 30th day of May, 2017.

Respectfully submitted,

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[31] The other problem is that in hostile environment cases, the employer's actions must be evaluated in the aggregate. See e.g., *Antonius*. The trial court and the court of appeals clearly took the opposite approach, thus, disregarding the *entire body of law* that has developed in the "hostile environment" arena.

DECLARATION OF SERVICE

On said day below, I caused to be served on the following, a true and accurate copy of the Petitioners' Amended Petition for Review in Supreme Court Cause No. 94486-5 (appeal from Court of Appeals Cause No. 743678-I) on the following individuals in the manner set forth below:

Counsel for Respondents, Shannon Phillips
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Method of Delivery
☒ via Electronic Mail

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

Executed this 30th day of May 2017 at Seattle, Washington.

By: */s/ Sandra L. Ferguson*
Sandra L. Ferguson