No. 94486-5

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Petitioners seeks review of the "Unpublished Opinion" of Division I of the Court of Appeals in *O'Brien v. Carder, et al*, No. 74367-8-I. Appendix 1 is a copy of the Court of Appeals' opinion (filed April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

[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.

[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.

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[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.

Managers Have Notice of O'Brien's Fear. 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.

Pacific Place Garage Assignment Sets O'Brien up to Fail. 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).

[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*

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[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
Summit Law Group, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104-2682
ShannonP@summitlawgroup.com
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

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, May 30, 2017 3:32 PM
To: 'Sandra Ferguson'
Cc: 'shannonp@summitlaw.com'
Subject: RE: O'Brien v. Carder, et al--Amended Pet. for Review Case No. 95586-5

Rec'd 5/30/17

ATTENTION COURT FILERS: The Supreme Court and the Court of Appeals now have a web portal to use for filing documents. As a result, the Supreme Court will discontinue accepting filings by e-mail effective June 30, 2017. We encourage you to register for and begin using the appellate courts web portal for all your filings as soon as possible.
Here is a link to the website where you can register to use the web portal: https://ac.courts.wa.gov/
A help page for the site is at: https://ac.courts.wa.gov/index.cfm?fa=home.showPage&page=portalHelp
Registration FAQs: https://ac.courts.wa.gov/content/help/registrationFAQs.pdf
Registration for and use of the web portal is free and allows you to file in any of the divisions of the Court of Appeals as well as the Supreme Court. The portal will automatically serve other parties who have an e-mail address listed for the case. In addition, you will receive an automated message confirming that your filing was received.

From: Sandra Ferguson [mailto:sandra@slfergusonlaw.com]
Sent: Tuesday, May 30, 2017 3:27 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'shannonp@summitlaw.com' <shannonp@summitlaw.com>
Subject: O'Brien v. Carder, et al--Amended Pet. for Review Case No. 95586-5

To the Supreme Court Clerk:

Attached, please find O'Brien's Amended Petition for Review, due today, in O'Brien v. Carder, et al, Supreme Court Case No. 95586-5 (Court of Appeals No. 74367-8-I).

Please confirm receipt.

Your attention to this matter is greatly appreciated.

Kind Regards,

Sandra L. Ferguson (Petitioner and Attorney for Petitioner)

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APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEBI O'BRIEN, a married woman, Appellant, v. HUGH KOSKINEN, a single man, MATT PURVIS and JANE DOE PURVIS, and the marital community thereof, DAN LAWSON and JANE DOE LAWSON, and the marital community thereof, PAULETTE KETZA and JOHN DOE KETZA, and the marital community thereof, ROD HOWERY and JANE DOE HOWERY, and the marital community thereof, and VIVIAN SMITH and JOHN DOE SMITH, and the marital community thereof, Defendants, LEONARD CARDER and JANE DOE CARDER, and the marital community thereof, and ABM INDUSTRIES ("ABMI") and ABM PARKING SERVICES (d/b/a "Ampco" and ABM Onsite Services West), Respondents.	DIVISION ONE No. 74367-8-I UNPUBLISHED OPINION FILED: April 3, 2017

DWYER, J. — Debi O'Brien appeals from orders entered in the King County Superior Court sanctioning, pursuant to Civil Rule (CR) 11, her and her attorneys and dismissing, pursuant to CR 56(c), her claims against Leonard Carder, ABM

Parking Services, Inc., and ABM Industries Incorporated (ABMI). O'Brien contends that the superior court erred by imposing sanctions on the basis that she had not brought her claims against four individuals in a good faith effort to extend the law but, rather, for the improper purpose of forum shopping. O'Brien also contends that the superior court erred by denying her motion for a continuance of the summary judgment hearing and by dismissing her claims.

There was no error. We affirm.

I

A

O'Brien was hired by ABM Parking in 2007. ABM Parking is a corporation providing parking management services nationwide to owners of office complexes and surface lots. O'Brien was tasked with human resources coordination and operations management for the Seattle/Bellevue branch. In 2009, pursuant to her responsibilities as a human resources coordinator, O'Brien was asked by Hugh Koskinen, senior branch manager for the Seattle/Bellevue branch, to investigate a complaint made by Melody Dillon regarding sexually inappropriate conduct by two ABM Parking valets and, later, to discipline the valets for their conduct. O'Brien complied.

In 2010, as part of an ABM Parking customer service initiative and pursuant to her responsibilities as operations manager, O'Brien was asked to regularly visit parking locations managed by the Seattle/Bellevue branch of ABM Parking, conduct a "walk-through" inspection of those locations, and document improvements needed to be made thereto. This request was made by Koskinen

and Leonard Carder, then-regional vice president of ABM Parking. 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. Over several months, O'Brien failed to complete the assigned number of inspections and Dan Lawson, her direct supervisor, wrote two disciplinary memoranda regarding her conduct.[1]

Beginning in 2012, pursuant to her responsibilities as operations manager, O'Brien was asked by Carder and Matt Purvis, assistant branch manager for ABM Parking's Seattle/Bellevue branch, to help with concerns regarding one of their client's parking locations, the Pacific Place Garage (PPG). They requested that O'Brien assist in investigating PPG's unusually high balance for its accounts receivable as well as reports from clients that they were not being billed for their customers' parking validations. O'Brien found several issues with the operation of PPG, including a validation stamp in the billing system without a name assigned to it and numerous individuals with outstanding balances for their monthly parking permits. Purvis instructed O'Brien to attempt to collect the unpaid balances but her efforts to coordinate such action with the manager of the PPG were unsuccessful.

[1] During the course of her employment, O'Brien was also disciplined for other conduct: for becoming angry with Koskinen when he asked her about a potential conflict of interest regarding a coworker with whom she had a personal relationship, for leaving the office frequently at 2 p.m. without explanation, for spending too much time speaking with her coworkers during the work week, for failing in her responsibility to assign valets to work an event—resulting in a "tremendously unhappy" client—and for making disparaging comments about Koskinen to co-workers.

In August 2012, O'Brien was assigned to work at the Spokane Fair. As part of its yearly contract with the Fair, ABM Parking assigned a group of salaried employees to assist with parking. O'Brien had last been assigned to work at the fair in 2009.[2] After learning that she was assigned to work the fair in 2012, O'Brien sent an e-mail to Paulette Kezta, manager of ABM Parking's operations at the Spokane Fair. In her e-mail, O'Brien expressed her apprehension about standing on her feet for the long shifts, explaining that she was "not young anymore" and that "[t]he older I get the more issues I get with standing long hours." Ketza responded to O'Brien, saying that ABM Parking was trying to avoid having its employees work the 15-hour shifts that had been worked in the past and was hoping to avoid those long hours by increasing its staffing for the fair. O'Brien thanked Ketza, replying that "all of my needs have been met!" At the fair, O'Brien worked 8 hours on one day and 12 hours on two other days. While there, O'Brien did not communicate additional concerns about standing and, afterward, explained only that she worked pretty long hours and was tired when she got back.

B

Starting in 2012, ABM Parking began to see revenues from its Seattle/Bellevue branch decline. It lost several bids to renew parking contracts in the Seattle and Bellevue area. The City of Seattle notified ABM Parking that it was not renewing its contract for the PPG—a contract worth $20,000 per month

[2] When O'Brien was assigned to work at the Spokane Fair in 2009, she requested to be excused from doing so. ABM Parking complied.

in revenue. In addition, due to advances in automation at the branch's clients' parking locations, it became less necessary for ABM Parking to have employees "out in the field."

Consequently, Rod Howery, the new regional vice president for ABM Parking,[3] began to look for ways to reduce the Seattle/Bellevue branch's administrative expenses. He discussed the potential elimination of positions with Madeline Kwan, human resources director for ABM Parking. They identified two positions: O'Brien's human resources and operations management position and the position of Ken Eichner, an auditor. Both worked at the Seattle/Bellevue branch. They determined that O'Brien's human resources duties could be performed by human resources employees at the San Francisco branch and that her operations management duties could be assigned to hourly employees at specific parking locations. O'Brien's parking location inspection duties were not re-assigned to another manager.[4]

Howery and Kwan planned to proceed with the layoffs in October 2012. However, they did not do so until the following year. They desired to notify O'Brien and Eichner in person but were unable to coordinate a time prior to December when both would be in the Seattle/Bellevue branch office. Then, because they wished to avoid giving a termination notice during the holiday season, they waited until early February 2013 to do so.

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[3] In 2012, Carder, the previous regional vice president, was promoted to the position of executive vice president, with nationwide duties.

[4] Eichner's audit duties were to be taken on by the San Francisco branch's audit manager.

In January 2013, Kwan discussed the termination decision for O'Brien's and Eichner's positions with Vivian Smith, vice president of human resources for ABMI.[5] Smith's services were part of a human resources support agreement between ABM Parking and ABMI in which ABM Parking could submit to ABMI facts and information pertaining to a termination decision and have ABMI's human resources personnel review the decision for red flags. Smith and Kwan discussed the termination decision during a telephone conversation and Smith approved the decision.

On February 6, 2013, Howery and Kwan met with Eichner and O'Brien in Seattle and informed them that their positions were being eliminated. O'Brien recalled that Kwan told her "[t]hat we had lost some locations, and so they were reorganizing and had to eliminate my position." As planned, ABM Parking did not hire a new employee to replace O'Brien and her duties were either eliminated or taken on by other employees.

C

In October 2013, O'Brien sued ABM Parking and ABMI (ABM Defendants) in the King County Superior Court alleging age discrimination, retaliation, and associational discrimination pursuant to Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW, as well as wrongful termination, breach of contract, and intentional infliction of emotional distress. One month later, the ABM Defendants removed the case to federal court. United States District Court Judge John C. Coughenour was assigned to the case. As their

[5] ABM Parking is an indirect wholly owned subsidiary of ABMI.

reason for removal, the ABM Defendants cited complete diversity of citizenship between the parties[6] and an alleged amount in controversy exceeding the federal jurisdictional minimum.

O'Brien then amended her complaint to join a Washington resident, Carder, as a defendant. O'Brien then moved to remand the case back to the King County Superior Court, asserting that Carder's residential status destroyed the federal district court's diversity jurisdiction. In response, the ABM Defendants filed a motion to dismiss the claim against Carder, arguing that he was not an indispensable party to the litigation. The district court granted the ABM Defendants' motion and Carder was dismissed from the case.

For the next year and a half, between November 2013 and March 2015, the federal lawsuit continued with the parties conducting discovery.[7] During that time, O'Brien requested and received two trial continuances.

Then, in March 2015, with four depositions scheduled and less than a month remaining until discovery was set to close, O'Brien moved to voluntarily dismiss her federal action against the ABM Defendants. O'Brien explained that she had discovered grounds to bring an action in state court against several of the ABM Defendants' individual managers and supervisors. Meanwhile, ABM

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[6] O'Brien is a Washington resident, ABMI is a New York-based corporation, organized under Delaware law, and ABM Parking is an Ohio-based company, organized under California law.

[7] O'Brien propounded 17 interrogatories, submitted 52 requests for production, and conducted 7 depositions. Also during this period, O'Brien twice requested that sanctions be imposed against the ABM Defendants due to alleged "discovery abuse" in their responses to her discovery requests. The district court denied O'Brien's sanction requests. Also during this time, the ABM Defendants moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure (FRCP) 12(c). The district court resultantly dismissed with prejudice O'Brien's claims of retaliation, associational discrimination, and wrongful termination in violation of public policy.

Parking and ABMI each moved for summary judgment as to O'Brien's remaining claims. The district court granted O'Brien's motion and dismissed her action without prejudice.[8] It thus did not entertain the summary judgment motions.

D

In the same month that O'Brien moved to dismiss her federal action against the ABM Defendants, O'Brien filed a new lawsuit in the King County Superior Court against five individuals associated with ABM Parking: Carder, Koskinen, Purvis, Ketza, and Lawson, along with each of their marital communities. Shortly thereafter, the five individual defendants notified O'Brien that they intended to seek CR 11 sanctions unless O'Brien withdrew her claims against Lawson and Koskinen and her claims for breach of contract and promissory estoppel. They alleged that O'Brien's claims against Lawson and Koskinen were barred by the applicable statute of limitations[9] and that her breach of contract and promissory estoppel claims against each of the individuals were baseless because they had no involvement in establishing ABM Parking's policies. O'Brien responded to the CR 11 notice, denied the individual defendants' arguments, and, one week later, amended her new complaint to add two more individuals, Howery and Smith, and their marital communities, as defendants.[10]

One month later, the now seven individual defendants moved to dismiss O'Brien's action against them pursuant to CR 12(b)(6), with a hearing set for July

[8] In May 2015, O'Brien filed an appeal of the district court's FRCP 12(c) order and its discovery sanction order. She dismissed her appeal shortly thereafter.

[9] Both Lawson and Koskinen had left their employment with ABM Parking in 2010.

[10] O'Brien also amended her complaint to add a claim for tortious interference.

2, 2015. In response, O'Brien moved to amend her complaint a second time, seeking to add ABM Parking and ABMI as defendants. Her request was granted, but the superior court interlineated on its order that, "Permission to amend does not mean the Court may not later dismiss some or all of these claims on the bases argued -- and the Court may, in fact, even ask itself 'What Would Judge Coughenour Do?'"

O'Brien then amended her complaint to include ABM Parking and ABMI as defendants. Five days after that, and nearly a month before the upcoming hearing on the motions to dismiss, O'Brien voluntarily dismissed all claims against six of the individual defendants—Koskinen, Lawson, Purvis, Howery, Smith, and Ketza.[11] At this point, the remaining defendants in the superior court case were Carder, ABM Parking, and ABMI.

Those defendants then removed the case to federal court, again identifying Carder as a sham, not indispensable, defendant who was sued only to defeat diversity jurisdiction and seeking his dismissal as a defendant. However, United States District Court Judge Thomas S. Zilly denied the defendants' motion to dismiss the claims against Carder, determining that O'Brien "stated a theoretically plausible claim against him" and remanded the case to the King County Superior Court.

One week later, the defendants moved in superior court for sanctions based on O'Brien asserting claims against the individual defendants, averring

[11] Howery and Smith were dismissed from the case without ever having been personally served with a summons and complaint.

that the individuals "were but mere pawns in [O'Brien's] counsel's improper forum shopping scheme." This was so, the defendants argued, because the individuals were included in the 2015 superior court litigation only to enable O'Brien to litigate against ABM Parking and ABMI in the state court forum notwithstanding that the companies had, in 2013, successfully removed O'Brien's first state court action to the federal district court. O'Brien opposed the motion for sanctions. In her opposition pleadings, however, she did not proffer factual allegations implicating the four individual defendants or legal analysis to support her assertion that the claims alleged against the individual defendants were made in compliance with CR 11.

The superior court granted the defendants' motion for sanctions. The superior court found that O'Brien never submitted any factual allegations or legal analysis in support of her claims against Lawson, Koskinen, Purvis, and Ketza. The superior court also found that O'Brien dismissed these defendants several days after she was granted permission to add ABM Parking and ABMI as defendants in the second state court action. From this and the procedural history in the federal court action, the superior court concluded that the four individuals had been sued in state court for the improper purpose of forum shopping. The superior court ordered that O'Brien and her attorneys pay sanctions in the amount of legal costs incurred by the individual defendants in defending in the second state court lawsuit. The superior court indicated that it would issue a further order upon written submissions.

O'Brien requested that the superior court reconsider its sanctions ruling, and, for the first time in a legal filing to the court, made legal arguments in support of her claims against the individual defendants. Her request for reconsideration was denied.

Carder, ABM Parking, and ABMI each then filed a motion for summary judgment. O'Brien filed a brief in opposition to summary judgment, supported by a declaration from O'Brien, and moved for a continuance of the summary judgment hearing so that she could conduct additional discovery. The defendants, meanwhile, filed a motion to strike O'Brien's declaration. After oral argument, the superior court issued an order striking portions of O'Brien's declaration, denying O'Brien's motion for a continuance, and granting each defendant's summary judgment motion.

The superior court next issued a second order on the defendants' motion for sanctions. It imposed a sanction of $6,500 on O'Brien and her attorneys. The superior court re-emphasized that it was granting sanctions on the basis that, by failing to submit factual allegations and legal argument in defense of its claims against the four individual defendants, O'Brien never attempted to make a good faith argument to extend existing law.[12] Instead, the superior court noted, O'Brien's inclusion of those individual defendants in the lawsuit was "in service of a concerted effort at forum shopping and, therefore, was 'for an improper purpose.'"

[12] Indeed, prior to the order granting summary judgment dismissal of all claims against all remaining defendants, O'Brien had never asked the court to rule that the existing law should be modified or extended.

O'Brien now appeals from both the CR 11 rulings and the grants of summary judgment.

II

O'Brien asserts that the superior court erred by imposing sanctions on her and her attorneys on the basis that the claims alleged in the pleadings filed against Lawson, Koskinen, Purvis, and Ketza were filed for an improper purpose. O'Brien is wrong.

We review a superior court's sanction decision for abuse of discretion. Engstrom v. Goodman, 166 Wn. App. 905, 917, 271 P.3d 959 (2012) (citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." Fisons, 122 Wn.2d at 339. "The purpose of [CR 11] is to deter baseless filings and curb abuses of the judicial system."[13] Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) (citing Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)). "A filing is 'baseless' when it is '(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.'" MacDonald v. Korum Ford, 80 Wn. App. 877, 883-84, 912 P.2d 1052 (1996) (quoting Hicks v. Edwards, 75 Wn. App. 156, 163, 876 P.2d 953 (1994)).

[13] This rule establishes that the signature of a party or attorney on a pleading constitutes a certificate by that party or attorney that the pleading is well grounded in fact, warranted by existing law, or by a good faith argument for a change to existing law, is not interposed for an improper purpose, and contains only factual contentions or denials warranted by the evidence. CR 11(a). When a pleading is signed in violation of the rule, "the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction," which may include reasonable attorney fees and expenses. CR 11(a).

Here, the superior court's first order granting the request for sanctions read, in pertinent part:

> A review of the history of this litigation in both state and federal court, leaves it readily apparent that there was no defensible reason for treating these individuals in the manner they were. It is particularly noteworthy that no facts or legal theory have even been put forth in response to this motion. . . .
>
> . . . [A] just resolution of the dispute between plaintiff and the employer should have been reached by now in federal court. Any such resolution was prevented by the procedural machinations in which these four individuals were ill-used as unwilling and unfortunate pawns. Once leave was granted in May to add plaintiff's former employer to this lawsuit (accomplishing the desired – but previously thwarted – result of a transfer of the primary case against the corporate defendants from federal to state court), these four individuals (as well as Howrey [sic] and Smith who were never served) 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.
>
> This Court concludes that the bringing of claims against these four individual defendants (Koskinen, Lawson, Purvis and Ketza and their marital communities) was in clear violation of CR 11.

In its second order, the court re-emphasized:

> 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 upon actions taken no later than 2010.
> b. By its previous reference to the "procedural machinations in which these four individuals were ill-used as unwilling 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."

The superior court's sanctions decision was tenable. Because O'Brien had never submitted factual allegations or legal argument in support of her

claims against Lawson, Koskinen, Purvis, and Ketza, the superior court could reasonably infer that the claims against those individual defendants were not made in a good faith effort to extend the law but, rather, for some other purpose. In addition, because of O'Brien's voluntary dismissal of the four individual defendants after she had added ABM Parking and ABMI to her second state court action, the superior court could reasonably infer that O'Brien's actual purpose for initially suing the individual defendants was forum shopping and was thus improper.[14]

Nonetheless, in her appellate briefing, O'Brien contends that her claims against the four dismissed individual defendants were made for a proper purpose and in a good faith attempt to extend the law because, although no case authority exists in support of her claims, existing case law could be modified so as to justify the claims. But O'Brien misses the point. As discussed, the superior court's imposition of sanctions was premised on its finding that, *by the time that it issued its sanctions order*, O'Brien had failed to provide factual allegations and legal argument in support of her claims against the four dismissed individual defendants. That O'Brien has on appeal brought forth allegations and argument

[14] O'Brien asserts that the presence of Carder, a Washington resident, in the second state court action demonstrates that she had included the four individual defendants for a proper purpose, rather than for forum shopping. This is so, O'Brien contends, because Carder's inclusion in the action, by itself, defeated federal diversity jurisdiction. This argument is unconvincing. Carder's inclusion as a defendant had not prevented the federal court from maintaining jurisdiction over the first lawsuit. Thus, the superior court judge could reasonably conclude that O'Brien had included the four individual defendants in a further attempt to anchor her claim in the state forum. There was no error.

is of no moment. The superior court did not abuse its discretion.[15] There was no error.

O'Brien also contends that the superior court erred by denying her motion for reconsideration of its sanction order. We disagree. As discussed, the premise for the superior court's sanction order was that—*prior to the court's sanction order*—O'Brien had never actually requested a ruling that would have extended the law. Instead, she dismissed the claims. From this, the court concluded that she had named these defendants for the improper purpose of forum shopping. The logic is inescapable: to litigate in a good faith attempt to modify the law, a party must actually ask the court to modify the law. This never happened. There was no abuse of discretion. Kleyer v. Harborview Med. Ctr. of Univ. of Wash., 76 Wn. App. 542, 545, 887 P.2d 468 (1995) (citing Meridian Minerals Co. v. King County, 61 Wn. App. 195, 203-04, 810 P.2d 31 (1991)).

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[15] O'Brien contends that the superior court erred by failing to consider the least severe alternative in imposing its sanction against her and her attorneys, by failing to specify how it calculated the sanction award, and by failing to explain the relationship between the sanction and the conduct being sanctioned. O'Brien is wrong. The superior court determined that, in light of O'Brien's improper allegations against the four individuals, sanctions tied to the cost of defending those individuals against O'Brien's claims were appropriate. In addition, the superior court, citing Biggs, 124 Wn.2d at 197, recognized that CR 11 is not "meant to act as a fee shifting mechanism" and explicitly reduced the sanction award from the actual costs of defending these four individuals, $38,237.50, to a lesser amount that the superior court deemed was more appropriate, $6,500.00, nearly one-sixth of the estimated costs. This was well within the superior court's discretion. Thus, the superior court did not err.

O'Brien also asserts that the superior court did not have the authority to impose CR 11 sanctions on the basis of "improper purpose" alone. Again, she is wrong. Indeed, the authority on which she relies for this proposition plainly supports just the opposite—that improper purpose is one of several grounds that can, standing alone, justify the imposition of sanctions. Biggs, 124 Wn.2d at 201.

III

O'Brien next contends that the superior court erred by denying her motion for a continuance of the summary judgment hearing in order to conduct additional discovery. A review of the record reveals no such error.

"Whether a motion for continuance should be granted or denied is a matter of discretion with the trial court, reviewable on appeal for manifest abuse of discretion." Trummel v. Mitchell, 156 Wn.2d 653, 670, 131 P.3d 305 (2006) (citing Balandzich v. Demeroto, 10 Wn. App. 718, 720, 519 P.2d 994 (1974)). A court abuses its discretion when its decision is based on clearly untenable or manifestly unreasonable grounds. Trummel, 156 Wn.2d at 671 (quoting Balandzich, 10 Wn. App. at 721). In exercising its discretion, a trial court may consider several factors, including the prior history of the litigation and any prior continuances granted to the moving party. Trummel, 156 Wn.2d 670-71 (citing Balanzdich, 10 Wn. App. at 720).

Here, the superior court denied O'Brien's motion for continuance, stating:

> [T]he case has been pending for over two years, there has been active discovery and motions practice with certain things left undone seemingly by choice (such as a deposition of Leonard Carder). In those matters not diligently pursued, there is no indication of specific evidence that is likely to be found and likely to create material issues of fact.

The superior court's decision was tenable. Given that O'Brien's 2013 action and the present action involved predominantly the same actors and allegations, the superior court's determination was reasonable. Moreover, in light of the two continuances granted to O'Brien during the federal action, which

allowed her to pursue additional discovery, the superior court clearly acted within its discretion. There was no error.[16]

IV

O'Brien next asserts that the superior court erred by granting summary judgment on behalf of ABMI, ABM Parking, and Carder as to her employment discrimination, retaliation, and breach of contract claims. We disagree.

"When reviewing an order of summary judgment, we engage in the same inquiry as the trial court." Clarke v. Office of the Attorney General, 133 Wn. App. 767, 784, 138 P.3d 144 (2006) (citing Grundy v. Thurston County, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005)). "All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party." Washington v. Boeing Co., 105 Wn. App. 1, 7, 19 P.3d 1041 (2000) (citing Mountain Park Homeowners Ass'n, Inc. v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)). "Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." Clarke, 133 Wn. App. at 784-85 (citing CR 56(c)).

A

As a preliminary matter, O'Brien contends that the superior court erred by striking her declaration in support of her opposition to the motions for summary

[16] O'Brien asserts that the superior court erred by denying her request for a continuance because she was not permitted to amend her complaint to include a wrongful termination in violation of public policy claim. O'Brien offers no elaboration or legal argument in her briefing to support this assignment of error. Thus, we decline to consider it. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

judgment. The court determined that the declaration was, in part, conclusory, unsubstantiated, and lacking in foundation.

This issue was raised for the first time on appeal in O'Brien's reply brief. Carder, ABM Parking, and ABMI were thus not afforded a fair opportunity to respond. Accordingly, we do not consider O'Brien's claim. RAP 10.3(c); Kirby v. Emp't Sec. Dep't, 185 Wn. App. 706, 727, 342 P.3d 1151 (2014), review denied, 183 Wn.2d 1010 (2015); accord Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

B

O'Brien asserts that the superior court erred by granting summary judgment on behalf of ABMI because, as evidenced by Smith's review of ABM Parking's termination decision, ABMI was also her employer, thereby allowing her to bring her employment discrimination claims against ABMI.

An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6); Cowiche Canyon Conservancy, 118 Wn.2d at 809. O'Brien fails to provide citation to legal authority establishing an employment relationship between her and ABMI. Accordingly, we decline to further consider this claim.

C

O'Brien next contends that the superior court erred by dismissing her claims against ABM Parking as to her hostile work environment, retaliation, age

discrimination, failure to accommodate, and breach of contract claims. Each is addressed in turn.

1

O'Brien contends that the superior court erred by dismissing her claim that ABM Parking subjected her to a hostile work environment. This is so, she asserts, because she was unnecessarily disciplined, required to report to work while on vacation, assigned to inspect parking locations, and assigned to work without reasonable accommodation at the Spokane Fair.

In order to withstand summary judgment on a hostile work environment claim, a plaintiff must make a prima facie showing that "(1) the harassment was unwelcome, (2) the harassment was because of [a protected classification], (3) the harassment affected the terms or conditions of employment, and (4) the harassment is imputed to the employer." Boeing Co., 105 Wn. App. at 12-13 (citing Fisher v. Tacoma Sch. Dist. No. 10, 53 Wn. App. 591, 595-96, 769 P.2d 318 (1989)). Whether allegedly discriminatory conduct is sufficiently severe and pervasive so as to affect the terms and conditions of employment is a question of fact. Adams v. Able Bldg. Supply, Inc., 114 Wn. App. 291, 296, 57 P.3d 280 (2002) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)). However, a grant of summary judgment dismissing a hostile work environment claim is appropriate when the plaintiff's submissions demonstrate nothing more than "[c]asual, isolated or trivial manifestations of a discriminatory environment" because such manifestations do not affect the conditions of employment "to a sufficiently significant degree to violate the law."

Boeing Co., 105 Wn. App. at 10 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); Glasgow v. Ga.-Pac. Corp., 103 Wn.2d 401, 406, 693 P.2d 708 (1985); Korum Ford, 80 Wn. App. at 886).

O'Brien fails to establish that the allegedly harassing conduct was sufficiently severe and pervasive so as to alter the terms of her employment. As the superior court observed, her assignments to inspect ABM Parking's client locations and assist with parking at the Spokane Fair were reasonably within the scope of her duties as operations manager. Moreover, the grounds on which O'Brien was disciplined were reasonable and her other allegations constitute isolated incidents that do not rise to the requisite level of severity and pervasiveness to support a claim.[17] There was no error.

2

O'Brien next asserts that the superior court erred by granting ABM Parking's motion for summary judgment as to her retaliation claim. This is so, she asserts, because she engaged in opposition activity by assisting with Dillon's sexually inappropriate conduct complaint and with Koskinen's termination decision regarding Jason Reidt, another ABM employee.

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[17] O'Brien asserts that she was subjected to a hostile work environment when a manager recorded a private telephone conversation and played the conversation to her coworkers. O'Brien's citation to the record in her briefing does not, in actuality, reference this conduct. Thus, we do not further consider this assertion.

O'Brien next relies on her allegation that she was granted vacation time over a weekend and subsequently asked to work a shift during that time. However, without more, this allegation is clearly insufficient to establish severe and pervasive harassment that altered the terms of her employment. O'Brien also contends that the superior court usurped the role of the jury by concluding that "the parking lot inspections do not seem to be outside the scope of anticipatable duties." She fails to submit legal argument in support of this claim and thus we do not further consider it.

"To show retaliation based on protected activity, a plaintiff must provide evidence that the individuals [s]he alleges retaliated against [her] knew of [her] protected activity." Marin v. King County, 194 Wn. App. 795, 818, 378 P.3d 203 (citing Currier v. Northland Servs., Inc., 182 Wn. App. 733, 746-47, 332 P.3d 1006 (2014), review denied, 182 Wn.2d 1006 (2015)), review denied, 186 Wn.2d 1028 (2016).

There is an absence of evidence that the individuals who terminated O'Brien's employment were aware that she had engaged in the alleged protected activity. O'Brien established that Koskinen was aware that she had engaged in the alleged protected activity. But Koskinen left his employment with ABM Parking in 2010 and Howery and Kwan made the decision to terminate O'Brien's employment in 2012. Moreover, Howery and Kwan denied knowing that O'Brien engaged in the activities that she described. O'Brien failed to provide evidence rebutting their denials. Thus, O'Brien's retaliation claim fails.[18]

3

O'Brien alleges that the superior court erred by granting summary judgment on her age discrimination claim because she and Eichner, the individuals whose positions were terminated, were both over 40 years old and, therefore, ABM Parking's reason for terminating her employment was pretextual.

[18] O'Brien argues that she engaged in protected opposition activity in 2010 when she forwarded an e-mail by Koskinen advising an employee not to ask another employee about confidential and personal medical issues. However, O'Brien again fails to establish that Howery and Kwan were aware that she had engaged in this allegedly protected conduct. Marin, 194 Wn. App. at 818.

To survive summary judgment on an age discrimination claim when an employer presents "'admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to raise[ ] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff,'" the employee must "'show that [defendant's] stated reason for [the adverse action] was in fact pretext.'" Dumont v. City of Seattle, 148 Wn. App. 850, 862, 200 P.3d 764 (2009) (internal quotation marks omitted) (alterations in original) (quoting Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 181-82, 23 P.3d 440 (2001), overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006)). However, an employee cannot create a question of fact on the pretext issue in the absence of some evidence that the employer's reasons for termination are unworthy of belief. Kuyper v. Dep't of Wildlife, 79 Wn. App. 732, 738, 904 P.2d 793 (1995) (citing Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 859, 851 P.2d 716 (1993)).

O'Brien fails to show that ABM Parking's stated reason for the adverse action—that O'Brien's position was terminated as part of a workforce reduction in response to losses in revenue and automation at their parking locations—was, in fact, pretext. O'Brien presents no evidence to rebut ABM Parking's stated reasons for terminating the positions she and Eichner held in the Seattle/Bellevue branch. She offers no evidence rebutting the evidence presented by ABM Parking regarding the timing of its decision. Indeed, O'Brien offers no evidence to support her claim other than her own speculation that age was the reason for her termination. Such statements are "not enough to survive

summary judgment." Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 85, 98 P.3d 1222 (2004). Thus, O'Brien's claim was properly dismissed.

4

O'Brien contends that she was discriminated against by ABM Parking because it failed to reasonably accommodate her claimed medical condition when she was assigned to work three days at the Spokane Fair in 2012.

To establish a prima facie case for failure to accommodate a disability, the employee must show:

> "(1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality."

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145-46, 94 P.3d 930 (2004) (quoting Hill, 144 Wn.2d at 192-93; citing Davis v. Microsoft Corp., 149 Wn.2d 521, 532, 70 P.3d 126 (2003)). "A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee's capabilities and available positions." Frisino v. Seattle Sch. Dist. No. 1, 160 Wn. App. 765, 779, 249 P.3d 1044 (2011).

O'Brien fails to show that ABM Parking failed to reasonably accommodate her alleged medical condition. As discussed, in prior years, ABM Parking employees had worked shifts at the Spokane Fair lasting from 8:00 a.m. to 11:00

p.m., a total of 15 hours. In response to O'Brien's e-mail that she was concerned about working such long hours, Ketza responded that the plan was to increase staffing at the Spokane Fair in order to reduce shift lengths. O'Brien replied, "all of my needs have been met!" At the fair, O'Brien worked for 8 and 12 hour shifts. She did not request to stop working the shifts nor did she request further accommodation while at the fair.

Thus, to the extent that O'Brien articulated her concern about her medical condition, ABM Parking reasonably accommodated her. The shifts assigned at the fair were shorter than they had been in the past and O'Brien affirmatively communicated that her needs had been met. She conveyed no other message to her supervisors. Accordingly, O'Brien has failed to show that ABM Parking failed to meet a reasonable accommodation duty.

5

O'Brien next contends that the superior court erred by dismissing her breach of contract claim against ABM Parking based on the provisions of the ABM Code of Business Conduct (Code). O'Brien's claim fails.

When an employer's handbook states "in a conspicuous manner that nothing contained therein is intended to be part of the employment relationship," an employee cannot establish that the employer made an enforceable promise through statements in the handbook. Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230, 685 P.2d 1081 (1984).

Here, the Code did not create an employment contract between O'Brien and ABM Parking. In fact, the Code contains a conspicuous certification

provision whereby employees "agree that neither this Code nor any part thereof shall constitute a contract for employment between me and the Company." Furthermore, in her briefing, O'Brien conceded that, every year, she received and reviewed a copy of the Code and acknowledged that she had received it. There was no error.[19]

Accordingly, the superior court did not err by dismissing O'Brien's breach of contract claim against ABM Parking.

D

O'Brien further asserts that the superior court erred by granting summary judgment on behalf of Carder. This is so, she asserts, because genuine issues of material fact remain regarding her hostile work environment and retaliation claims against him. We disagree.

To hold a manager or supervisor individually liable under the WLAD, the plaintiff must show that the manager or supervisor "*affirmatively* engage[d] in discriminatory conduct." Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 360 n.3, 20 P.3d 921 (2001) (citing Tyson v. CIGNA Corp., 918 F. Supp. 836, 841-42 (D.N.J. 1996), aff'd, 149 F.3d 1165 (3d Cir. 1998)).

O'Brien avers that Carder retaliated against her after she assisted with Dillon's sexually inappropriate conduct complaint. However, O'Brien fails to rebut, without resorting to unsubstantiated and speculative allegations, Carder's declaration establishing that he was not personally aware of any complaint by

[19] O'Brien references in her briefing to the ABM Employee Handbook, but she provides no citation to the record for this handbook.

Melody Dillon of sexually inappropriate conduct during her employment with ABM Parking.[20] Thus, O'Brien's claim fails.

O'Brien next suggests that Carder retaliated against her because, on the day that she was fired, she had notified her supervisor that she had received a telephone call from a newspaper reporter inquiring into fraud at an ABM Parking location, and that her supervisor had then forwarded her notification to Carder. Thus, O'Brien contends, she was terminated because she had spoken with a media member about accounting irregularities. But, as discussed herein, the decision to terminate O'Brien's position was made by Howery and Kwan several months earlier and, significantly, O'Brien presents no evidence that Carder was involved in that decision.[21] Again, O'Brien's claim fails.

O'Brien also contends that Carder had subjected to her a hostile work environment by assigning her to inspect ABM Parking's client locations and investigate the accounts receivable at Pacific Place Garage. As discussed herein, these tasks were within the scope of her employment as operations manager at ABM Parking and cannot be said to have altered the terms and

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[20] The evidence presented by O'Brien in support of her allegation that Carder was affirmatively engaged in conduct in violation of the WLAD is based primarily on portions of her declaration and deposition testimony that are unsubstantiated, conclusory, and lacking in foundation. Specifically, O'Brien alleged that Carder retaliated against her because of her involvement in Dillon's complaint. As circumstantial evidence to support her allegation, O'Brien points out that Dillon testified in her deposition that she went to a "fancy guy's office" for a meeting and felt intimidated there. Significantly, however, Dillon further testified that she did not know whether Carder was the individual whose office she visited, did not "remember who the guy was," or even what the meeting was about. Thus, O'Brien's claim that Carder was involved in Dillon's complaint is unsubstantiated.

[21] O'Brien speculates that Carder was the "true decision-maker," that her position was terminated to keep her "from disclosing what she knew about the fraud or mismanagement" at the ABM Parking location, and that the decision to eliminate O'Brien's position "had to be approved by Carder" because he had allegedly created her position in 2007 and retained control over the operating budget for ABM Parking. The superior court properly gave these speculative contentions no evidentiary significance.

conditions of her employment. Her claim fails.[22] Thus, the superior court did not err by dismissing O'Brien's claims against Carder.[23]

Affirmed.

We concur:

[22] O'Brien fails to present facts or legal analysis connecting Carder to her age and disability discrimination claims as well as her breach of contract claim. Accordingly, we decline to further consider these claims as they pertain to Carder.

[23] O'Brien also contends that the trial court erred by granting summary judgment as to her negligent infliction of emotional distress and intentional infliction of emotional distress claims against Carder, ABM Parking, and ABMI. However, she fails to present any factual allegations or legal argument. Accordingly, we decline to further consider these claims. Cowiche Canyon Conservancy, 118 Wn.2d at 809.

APPENDIX 2

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEBI O'BRIEN, a married woman, Plaintiff, v. LEONARD CARDER, HUGH KOSKINEN, MATT PURVIS, DAN LAWSON, PAULETTE KETZA, ROD HOWREY, VIVIAN SMITH, ABMI, ABM PARKING SERVICES; et al., Defendants.	NO. 15-2-06791-5 SEA ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The three remaining defendants in this case have each brought a Motion for Summary Judgment seeking dismissal of the employment-related claims the plaintiff has brought in this lawsuit. Those defendants are ABM Industries ("ABMI"), ABM Parking Services ("ABM Parking") and Leonard Carder (and his marital community). The Court has considered all of the written submissions in connection with the present motions. If there is a perceived need to more precisely catalogue those submissions, this may be accomplished by entry of an

agreed order supplementing this order. The Court has also heard oral argument of counsel and reviewed their evidentiary submissions. Having considered all of the foregoing, the Court would now rule as follows:

There are two preliminary matters. First, the defendants filed a Motion to Strike directed at the Declaration of Debi O'Brien. As the Court observed at the hearing, much in that 34 page document is accurately characterized as "conclusory" and "speculative" and "lacking in foundation." Without going through the declaration line-by-line, portions falling into those categories have been disregarded by the Court. To that extent, the Motion to Strike is GRANTED.

Second, the plaintiff, along with her arguments against entry of summary judgment, has asked that the motions be continued pursuant to CR 56(f) so that more discovery could be conducted. However, the case has been pending for over two years, there has been active discovery and motions practice with certain things left undone seemingly by choice (such as a deposition of Leonard Carder). In those matters not diligently pursued, there is no indication of specific evidence that is likely to be found and likely to create material issues of fact. The Motion for Continuance is DENIED.

ABMI's Motion for Summary Judgment is premised on the circumstance that it was never the employer of the plaintiff who worked for its wholly owned subsidiary ABM Parking at the relevant times. There is no evidence that employees, officers or agents of ABMI were responsible for any adverse employment action against the plaintiff and no basis for any inference that ABMI

acted with any discriminatory motivation. ABMI's Motion for Summary Judgment is GRANTED.

The various claims against Leonard Carder and ABM Parking must be examined by considering whether there is available evidence in support of each of the requisite elements of each claim. Some elements are common to multiple claims and others are more limited. For each discrimination claim, the plaintiff must have evidence that an adverse employment action was taken against her. She asserts two such actions: her termination in February of 2013 and her being subjected to a work environment that was purportedly hostile. Certainly termination of employment is an adverse employment action but the asserted hostility does not seem sufficiently "severe and pervasive" to meet the requirements of the law. The purported "ostracism" and being "glared at" are uncorroborated, purely subjective and insufficient; the parking lot inspections do not seem to be outside the scope of anticipatable duties.

Next, plaintiff must produce evidence that would at least support a reasonable inference that a discriminatory intent (based on age or a disability or in retaliation for some WLAD protected activity) was a substantial motivating factor in the decision to take the adverse employment action. At this time, the plaintiff gives voice to suspicions about the motivation for her termination but there exists a striking absence of evidence to support the posited inference. 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. The plaintiff has not met her burden of showing there is admissible evidence which, if believed, would establish the employer's explanation as a pretext for discrimination.

As to the age discrimination claim, there is an absence of evidence that the plaintiff was treated in a disparate manner from younger employees, similarly situated to her. There is no valid "comparator;" she was not replaced with a younger person; and her duties were reassigned to existing personnel. As to the disability claim, there is an absence of evidence that the plaintiff suffered from a cognizable disability, that she had made the employer aware of it, and had requested, but not received, a reasonable accommodation. Finally, as to the retaliation claim, there is an absence of evidence that the decision-makers were aware of (much less motivated by) the plaintiff's having engaged in any WLAD protected activity sometime in the past.

Often a contract claim based on terms contained in an employee handbook will be asserted by an at-will employee (like the plaintiff) with respect to the way in which disciplinary matters will be handled. This is not a discipline case. The ABM "Code of Business Conduct" evidently contains an anti-retaliation policy and it is this provision that the plaintiff claims was breached. However, this Court has concluded she lacks sufficient evidence to go forward on her retaliation claim. In addition, this document contained an express disclaimer that it was not to be considered as creating any contractual rights.

The plaintiff has brought claims for the intentional and negligent infliction of emotional distress. These claims are really subsumed in her discrimination

claims rather than existing independently. Clearly the allegations in this case fall far short of what could be considered the "extreme and outrageous" conduct required for an outrage claim. In addition, it must be noted that the plaintiff has no evidence that her understandable emotional distress at the elimination of her job resulted in the necessary "objective symptomology" susceptible to a medical diagnosis. Both the tort of outrage and NIED claims must be dismissed.

Each of the remaining defendants' Motions for Summary Judgment will be GRANTED and all of the plaintiff's claims DISMISSED WITH PREJUDICE.

DATED this 16th day of November, 2015.

HON. WILLIAM L. DOWNING

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEBI O'BRIEN, a married woman,

Plaintiff,

v.

LEONARD CARDER, HUGH KOSKINEN, MATT PURVIS, DAN LAWSON, PAULETTE KETZA, ROD HOWREY, VIVIAN SMITH, ABMI, ABM PARKING SERVICES; et al.,

Defendants.

NO. 15-2-06791-5 SEA

ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

To its May 13, 2015 Order, this Court appended language cautioning that although a motion to amend a complaint may be viewed liberally, such an attitude would not prevail when the anticipated subsequent motions were brought asking the Court to more closely scrutinize the bases for the plaintiff's claims. That foreshadowed day has arrived.

This is an employment law case. It was brought by a plaintiff who had worked in Washington for a corporation headquartered in New York. Her action

was pending in federal court and getting close to trial, when, in March of this year, Hugh Koskinen, Dan Lawson, Matt Purvis and Paulette Ketza (and their respective spouses as applicable) were formally served with a state court civil complaint informing them they were defendants against whom plaintiff was seeking a monetary judgment. It was alleged that they aided, abetted, encouraged and incited discriminatory acts and, perhaps, had breached a contract as well. For a couple of months, then, these individuals lived with the unease that comes with the status of having claims against their assets (and their virtue) and may even have had to inform lending institutions of this fact. If the decision to subject them to this fate was consistent with the requirements of Civil Rule 11 (i.e., a complaint well-grounded in fact, warranted by existing law and not interposed for any improper purpose), then so be it. On the other hand, if the decision was not made in conformance with that rule, then by application of the rule, these individuals should be compensated.

A review of the history of this litigation in both state and federal court, leaves it readily apparent that there was no defensible reason for treating these individuals in the manner they were. It is particularly noteworthy that no facts or legal theory have even been put forth in response to this motion. There is no hint of any cognizable theory of contractual or quasi-contractual liability for these individuals nor is there any suggestion of how the statute of limitations would not bar all claims against Mr. Koskinen and Mr. Lawson who were off the scene some five years before they were sued.

Whatever that might be, a just resolution of the dispute between plaintiff and the employer should have been reached by now in federal court. Any such resolution was prevented by the procedural machinations in which these four individuals were ill-used as unwilling and unfortunate pawns. Once leave was granted in May to add plaintiff's former employer to this lawsuit (accomplishing the desired – but previously thwarted – result of a transfer of the primary case against the corporate defendants from federal to state court), these four individuals (as well as Howrey and Smith who were never served) 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.

This Court concludes that the bringing of claims against these four individual defendants (Koskinen, Lawson, Purvis and Ketza and their marital communities) was in clear violation of CR 11. These defendants' motions for sanctions are hereby GRANTED.

As a sanction, the Court would require plaintiff or plaintiff's counsel to pay for all legal costs attributable to inclusion of these four individuals in the state court action. (To be clear, this would exclude any costs incurred in defending either the corporate defendants or Mr. Carder and any costs associated with the federal proceeding; it would include costs of research and writing on the subject of these four individuals' defenses.) The Court will issue a further Order upon written submissions.

DATED this 14th day of September, 2015.

HON. WILLIAM L. DOWNING

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEBI O'BRIEN, a married woman,

Plaintiff,

v.

LEONARD CARDER, HUGH KOSKINEN, MATT PURVIS, DAN LAWSON, PAULETTE KETZA, ROD HOWREY, VIVIAN SMITH, ABMI, ABM PARKING SERVICES; et al.,

Defendants.

NO. 15-2-06791-5 SEA

2nd ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

By entry of an Order dated September 14, 2015, this Court has previously found that plaintiff's counsel violated CR 11 in bringing claims against four individual defendants in this cause – Koskinen, Purvis, Lawson and Ketza – and then dismissing them. To be abundantly clear, the Court should now indicate its specific findings in this regard:

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 upon actions taken no later than 2010.

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

In its previous Order, the Court stated that a sanction would include payment "for all legal costs attributable to inclusion of these four individuals in the state court action." That Order would now be modified to the extent that it suggested rigid adherence to the measure of "all" legal costs. The Court has now had a chance to review defense counsel's billing records and to give further consideration to the purposes to be served by a CR 11 sanction. See, Biggs v. Vail, 124 Wn. 2d 193, 876 P. 2d 448 (1994). The defendants have requested an award in the amount of $38,237.50 and if this award were being made pursuant to a fee-shifting provision, that number appears to be well supported. As a CR 11 sanction, the Court would now direct that the defendants be awarded the sum of $6500.00.

DATED this 16th day of November, 2015.

HON. WILLIAM L. DOWNING

APPENDIX 3

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

DEBI O'BRIEN, a married woman, Plaintiff, vs. LEONARD CARDER AND JANE DOE CARDER, and the marital community thereof, and the corporations ABM INDUSTRIES ("ABMI") and ABM PARKING SERVICES (d/b/a "Ampco" and "ABM Onsite Services West," Defendants.	No. 15-2-06791-5 SEA Appeal No. 74367-8-I

HEARING ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

November 13, 2015

Judge William L. Downing Presiding

TRANSCRIBED BY: Reed Jackson Watkins

Court-Approved Transcription

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November 13, 2015

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THE COURT: Good morning. Go ahead and be seated.

Let's see. Ms. O'Brien? And Mr. Carder?

MR. CARDER: Yes.

THE COURT: Pleased to meet both of you. Counsel, good to see all of you as well.

We're here on the case involving three defendants, Mr. Carder for one. ABM Parking, Number Two. And ABM Industries, Number Three. Each of those three defendants has a Motion for Summary Judgment asking the Court to dismiss the employment discrimination claims that are contained in the plaintiff's lawsuit, as well as the contract claim, I guess. And perhaps a tort claim, as well, involving the infliction of emotional distress.

We'll turn our attention to those three motions in just a minute. There are a couple of preliminary things I wanted to mention at the outset. First of all, there was a previous ruling from the Court that CR 11 was violated in the naming of other individual defendants in the lawsuit, for improper purposes. And then dismissing those subsequently.

I had indicated that an award of sanctions would be made. I had left that matter open. Quite frankly, I had had some hopes that you all might sit down with a mediator sometime

between then and today's hearing on the motions to dismiss by all of the remaining defendants. And that somehow that might get folded into the negotiations that took place with a view to resolving all issues between the parties. So I've held off on that.

But I do have an order that will address that subject. And assuming we get through all of this today, then at some point before the end of the day, barring unforeseen developments, I'll get this filed and copies of it sent to all of you as well.

The second preliminary matter or procedural matter is that there was a motion to strike. Ms. O'Brien submitted, through counsel, I think, a 34-page declaration. About four pages of it were substance, and about 30 pages were something other than substance, I guess. I don't intend to go line-by-line addressing those things that are improper, a conclusion or a speculation or otherwise improper.

But I'll simply say that I would disregard all the things that are stated, all of the sentences that begin with, "I have reason to believe X,Y,Z," for instance, because those aren't evidence in the case. There are many places also where the term "hostile work environment" is tossed around, but with no further description of what is meant by that or what actual facts occurred that constituted that. And that also would be improper.

So those are the two primary points of focus in identifying the problems with that declaration. But, again, there are some underlying facts, about four or five pages worth, maybe out of that document. And that's what I hope we'll talk about today, the actual facts that are before the Court. Not the suspicions or speculation or spin. Reasonable inferences certainly are necessarily drawn, particularly in a case involving allegations of discrimination. But they have to be based on something. And so that's what we really need to talk about here today.

So let's turn our attention to three motions for summary judgment. Mr. Carder, ABM Parking, and ABM Industries.

How are you intending to address those?

MS. PHILLIPS: So, Ms. Terwilliger will be addressing the ABMI motion.

THE COURT: Okay.

MS. PHILLIPS: And also responding to the 56(f) motion to the extent the Court is considering that. And then I'll be responding on behalf of Mr. Carder and ABM Parking.

THE COURT: Okay. All right. Well, we'll just talk about the motions themselves, disregarding the continuance, the 56(f) at this point. If it's something to be addressed by Ms. Boyle, then certainly we can discuss it further.

MS. TERWILLIGER: Okay. And would you like me to argue from here or from the --

THE COURT: Well, I'd like you to be audible to me --

MS. TERWILLIGER: Okay.

THE COURT: -- and to those in the back of the room as well.

MS. TERWILLIGER: Okay.

THE COURT: So wherever you can stand and project. That's great.

MS. TERWILLIGER: Okay.

So I think I can be fairly brief here. Your Honor has correctly focused in on the issue here, which is, you know, what are the facts. And the facts here show that ABMI is entitled to summary judgment on all of Ms. O'Brien's claims, because there's no evidence that ABMI employed Ms. O'Brien. There's no evidence of discrimination by ABMI or any of its employees. And she identifies no other basis to impose liability upon ABMI.

There is simply no evidence that ABMI ever employed Ms. O'Brien. There's no evidence that ABMI controlled her work. There's no evidence that ABMI payed her for work, or that ABMI treated her as an employee for tax purposes. In fact, the undisputed evidence shows that Ms. O'Brien was employed originally by ABM Janitorial and later by ABM Parking Services.

Even Ms. O'Brien concedes that she does not know whether she was ever employed by ABMI. And her subjective belief or

misunderstanding is not sufficient to avoid summary judgment in the face of the evidence put forward by ABMI. There's no evidence that ABMI or its employees took any actions against Ms. O'Brien that she claims were discriminatory. None of the alleged wrongdoers were employed by ABMI. Not Mr. Carder, not Mr. Howrey, not Mr. Koskinen, not Paulette Ketza, not Dan Lawson, not Matt Purvis.

THE COURT: But was Ms. Kwan an ABMI employee?

MS. TERWILLIGER: She was not an ABMI employee, no.

THE COURT: Okay.

MS. TERWILLIGER: And she's not an ABMI employee now.

THE COURT: Okay.

MS. TERWILLIGER: She was employed by ABM Parking Services.

THE COURT: Okay.

MS. TERWILLIGER: Ms. O'Brien tries to involve ABMI by pointing to Vivian Smith, who became an ABMI employee in 2011. And according to Ms. O'Brien, Ms. Smith's approval of ABM Parking's decision to eliminate Ms. O'Brien's position is evidence that ABMI controlled or otherwise employed her. And the fact that Ms. Smith provided advice and approval to ABM Parking as part of a services agreement between ABM Parking Services and ABMI, does not mean that she was Ms. O'Brien's supervisor or that ABMI was her employer.

We've cited two cases in our brief, and they indicate that providing back office services just isn't enough to reach the

conclusion that the entity that provides those services is an employer. It doesn't suggest day-to-day control over the employer's employment decisions, and doesn't suggest that the entity is exercising any control with regard to that employee.

It's just like hiring a law firm to provide employment advice. By providing advice to an employer, the law firm or the lawyer does not become a supervisor or employer.

In the absence of evidence suggesting that ABMI was her employer, Ms. O'Brien's claims under the WLAD must be dismissed.

Now, because ABMI was not Ms. O'Brien's employer, the only conceivable basis for imposing liability upon ABMI would be by virtue of its relationship with ABM Parking Services, its wholly owned subsidiary. Now we start from the proposition that a parent corporation is not liable for the actions of its subsidiaries. And there is no evidence to overcome that presumption. There's, frankly, not even an allegation that ABMI is somehow responsible for ABM Parking.

Under the Scoperud (ph) case, an allegation saying the parent is liable for what the sub did is not sufficient to survive summary judgment. You need actual facts and evidence.

THE COURT: The sins of the children are not visited upon the parent?

MS. TERWILLIGER: Exactly. And the declarations that we submitted from ABMI and from ABM Parking Services that describe that relationship are sufficient to counter any claim, even if there were one, that their relationship gives rise to liability on behalf of ABMI.

We, therefore, request that you grant summary judgment on behalf of ABMI and dismiss her claims with prejudice. I'm not sure I have a lot more to say on the ABMI motion, unless you'd like me to talk about Rule 56(f) as it relates to ABMI or anyone else.

THE COURT: No, not at this point.

MS. TERWILLIGER: Okay. Thank you.

THE COURT: Thanks. Thanks very much.

Ms. Phillips, you're going to address the remaining two?

MS. PHILLIPS: So do you want us to address all the motions on our side before they respond?

THE COURT: I do. I do.

MS. PHILLIPS: Okay. I'd first like to respond on behalf of Mr. Carder.

THE COURT: Mm-hmm.

MS. PHILLIPS: Mr. Carder first came into this broader ongoing litigation when Plaintiff amended their claim to try and create a lack of diversity in federal court. So since 2013, Mr. Carder and his marital community have been either in this litigation or under the threat of litigation.

The claims against him are age discrimination against the Washington Law Against Discrimination; unlawful retaliation; aiding and abetting discrimination; disability discrimination; interference with contract; negligent intentional infliction of emotional distress.

We have spent two years in litigation, seven depositions, thousands of pages of documents and written discovery. There is no more evidence against Mr. Carder than there was when the claim was first asserted against him in 2013.

First, the age discrimination and retaliation claims. Under the Washington Law Against Discrimination, the Brown v. Scott Paper case, he can only be personally liable as a manager if he affirmatively engaged in discriminatory conduct. He cannot be liable as a manager because someone somewhere else in the company did something.

Ms. O'Brien claims that the decision to terminate her employment was substantially motivated by age discrimination. Now, there's no evidence that age was a motivating factor for anyone. But the undisputed evidence is that Mr. Carder was not involved in making the discharge decision. As of early 2011 -- the discharge decision was made in late 2012, this is outside the statute of limitations, he moved from his position as Vice President of the Northwest Region of ABM Parking to being Executive of ABM Parking, where he no longer had day-to-day management control over the Northwest region

of ABM Parking. Rod Howrey was the person who had that, and the undisputed evidence is that Rod Howrey, in consultation with Madeline Kwan, made the decision.

Now, Ms. O'Brien tries to overcome that by saying, "Well, I just believed that Mr. Carder did it." And as Your Honor said, beliefs are not a basis to overcome summary judgment. Not to make light of this, because this is very serious, but this is almost like the All Powerful Oz, who controls everything in a five-state region, thousands and thousands of employees, that anything anyone does while Mr. Carder, even when he was not in a position of direct management, he must have been behind it. That is arguably not enough to assert a complaint. It's certainly not enough to overcome summary judgment.

THE COURT: Were there depositions of the various employees who would have been under Mr. Carder, who might have either confirmed or denied the assertion that nothing happened in the Northwest without his say so?

MS. PHILLIPS: Well, there were depositions of Hugh Koskinen and Dan Lawson. I'm sorry, Hugh Koskinen. So Hugh Koskinen is the person who was her direct manager in 2009. So there was a deposition of him, and this is the basis Ms. O'Brien uses, saying, "Well, Mr. Koskinen says he always reported sensitive matters." Now no direct evidence that he reported any particular sensitive matters, but he said he

always tried to keep Leonard in the loop.

So now again, this is back in 2009. Mr. Koskinen left the company in 2010, and Mr. Carder after 2011 was no longer in that position. So to leap from there to 2013, when the decision was implemented, and say, "Well, Mr. Carder still must have been in the loop then," again, there's no evidence.

And now the deposition of Rod Howrey was not taken. It was scheduled, it was scheduled at the end of the discovery period in federal court, and Plaintiff's counsel voluntarily cancelled that on their own. Since this litigation was filed, there's been no effort to take Mr. Howrey's deposition.

This case came back to state court in August. Our summary judgment motion was first filed, it's the same summary judgment motion filed in federal court in April. It was filed again here September 18th. We've had eight weeks since then. There's been no effort to take Mr. Howrey's deposition.

So there's no evidence. There's been thousands and thousands of pages of e-mails. There's nothing in those e-mails to contradict and say that Mr. Carder was behind this decision. There is no evidence, and there's been no effort to try to find additional evidence.

Again, on the retaliation claim, that claim is untimely and there's no evidence connecting Mr. Carder to it. Now again,

the retaliation claim is that Ms. O'Brien in 2009 was told by her managers to, when some low level employees had shared an inappropriate text message, she was told, "You should impose corrective action." She now has tried to tie that action in 2009 to say, "Well, anything bad that happened to me in the workplace since 2009 is all because of that."

Mr. Carder has filed a declaration under oath --

THE COURT: Saying that he wasn't involved.

MS. PHILLIPS: Yeah, he wasn't aware of Melody Dillon's complaint.

THE COURT: Right.

MS. PHILLIPS: He wasn't aware of Ms. O'Brien's. And again, this idea that Ms. Dillon under oath testified that she went to some meeting with some executive at ABM and she found it to be intimidating. She didn't say that it was a meeting about her complaint. She didn't say that Ms. O'Brien was in any way involved. And again, there is nothing beyond we've had repeated speculation from Ms. O'Brien and counsel that, "Well, I think that was Leonard Carder." There's no evidence and that's not evidence.

So if this 2009 action was protected conduct that caused some adverse action, there's no evidence to tie that to Mr. Carder.

The disability discrimination. Now that all stems from a 2012 assignment at the Spokane Fair. Again, Mr. Carder was

not in the position any more in which he would have any direct involvement in the Northwest region and its day-to-day management. Ms. O'Brien does not even allege that Mr. Carder is one of the people that failed to accommodate her disability.

Now with respect to ABM Parking, we'll talk about the many other problems with that complaint. But there is nothing to tie Mr. Carder to that claim of supposed failure to accommodate a disability.

Now we have negligent and intentional infliction of emotional distress. As the Court probably knows, there is a very high standard for establishing these tort claims.

THE COURT: And they actually weren't addressed in the opposition paper, so I'm assuming that they're abandoned?

MS. BOYLE: They are, Your Honor.

THE COURT: Yeah.

MS. PHILLIPS: Okay. All right. Then I don't need to talk about that.

The final one is the interference with contract. Now again, there wasn't a really meaningful response to the argument that the handbooks that ABM Parking used were not enforceable, specific promises of specific treatment, on behalf of ABM Parking. That they are mere guidelines, and that the case law says, "These are guidelines for behavior." There is a disclaimer in them. There was no response to that

disclaimer.

But again, leaving all of that aside, there is no evidence that Mr. Carder did anything to interfere with any specific promise of specific treatment. Ms. O'Brien's theory is that, "It says here that I should report any sort of malfeasance. I reported irregularities that I saw at the Pacific Place Garage. And then I was fired because of that."

Well, again, Mr. Carder wasn't involved in the firing decision. But the undisputed evidence is the decision to terminate Ms. O'Brien was made by Rod Howrey in consultation with Madeline Kwan months before the supposed call that she says on the day that she was terminated, she got a call from a reporter saying, "Hey, what's going on? Is there some fraud at Pacific Place?" She told her boss, Matt Purvis, about it. She assumes that Matt Purvis told Leonard Carder about it and then she got fired.

Well, again, the decision had been made months before. We know as an undisputed fact that Rod Howrey and Madeline Kwan flew to Seattle from San Francisco the day before this call came in. So through this long convoluted theory that somehow Leonard Carder retaliated against her for a complaint at Pacific Place and that violates a handbook promise, you can't get there because of causation. Because the decision was made by someone else before the supposed trigger that would have allowed Leonard Carder to know about this protected

activity.

Those are the claims against Leonard Carder. And again, these have been hanging over his head and his wife's head for two years. There is no evidence to support any of these claims against Mr. Carder and he deserves to be dismissed from this action with prejudice.

THE COURT: Which brings us to the third and final motion, which is on behalf of the entity that unlike ABMI, was the employer of Ms. O'Brien. And unlike Mr. Carder, does involve some more specific allegations of an adverse employment action.

MS. PHILLIPS: Right. Now again, Ms. O'Brien's claims against ABM Parking do largely rest on Mr. Carder. If you read through the two declarations, again, it is all this vast conspiracy that Mr. Carder was controlling.

But again, if you look over the -- first of all, the opposition brief is devoid of almost any citation to authority. The entire fact section of the brief says, "See Ms. O'Brien's declaration." Now, we have pointed out the many failings in that declaration in terms of being admissible evidence. But even if Your Honor wants to parse through those, there is not sufficient evidence to support any of these claims.

Now again, on the age discrimination claim, she claims that age was the substantially motivating factor with respect to

the discharge decision. There is no direct evidence of age discrimination. She has to be able to show for her prima facie case that she was let go and similarly situated employees were retained. And to be similarly situated, a comparator must be doing substantially the same work.

It is undisputed she was the only person in her position. She was an Operations Manager/Hiring Coordinator. The undisputed evidence is in the entire Northwest region of ABM Parking, which includes multiple states, there was no one else performing this function that was happening in the Seattle-Bellevue area, where Ms. O'Brien would go to one of these work sites that ABM ran for these garages. And when they were new employees, she would help them with their hiring paperwork, get them to fill it out. She would then transmit it to ABM Parking's San Francisco office, where they have an HR staff, who does this.

The undisputed evidence is all around the region, the way this was done is the onsite management does that paperwork and gets it to San Francisco. It's also undisputed that ABM Parking, at the end of 2012, lost significant contracts in the Seattle area, the Pacific Place Garage and other ones, and that's the reality of their business. When they lose something like Pacific Place Garage, all those hourly employees are laid off. The next day they become employees, most of them, of the new parking entity. And ABM Parking has

to be able to adjust the level of its administrative support staff to be at a reasonable level in relation to these hourly employees, who are the ones bringing in the money through the contracts.

And so it's undisputed that she was the only person doing this and ABM Parking made a decision that, "We don't need somebody. That's something we can do without as we're trying to reduce our overhead costs." She identifies, "Well, the only other employee who was laid off, he was also an older employee." Well, he was a part-time accountant and ABM Parking said, "Look. We've got a full accounting staff in San Francisco. We don't need to have a part-time accountant. That's another position we can do without."

But she's identified no similarly situated employees to those employees who were retained. There was no other part-time accountant in the Seattle area. There was no other person doing her job. ABM made the legitimate, nondiscriminatory decision that it could reduce certain positions in order to maintain its profitability as a company.

In addition, Ms. O'Brien's entire age discrimination theory is based on a misunderstanding of age discrimination law. She testified that she thinks because, "When people get older, their premiums for medical insurance goes up." And she thought that, you know, "Well, that could be a reason."

Now as we've cited the U.S. Supreme Court, interpreting comparable federal law and other courts, have recognized that higher costs associated with older employees, that's not age discrimination.

Now, again, there's no evidence that anybody even had that as a rationale. But if that were a rationale, that doesn't support her age discrimination claim. Ms. O'Brien admitted in her deposition that her belief that it was age discrimination is based on nothing more than her own assumption. Her own assumption is not enough to overcome the undisputed evidence of legitimate nondiscriminatory reasons for her discharge.

Now on her disability she claims, "I had a disability and they failed to accommodate that. And that's a violation of the Washington Law Against Discrimination." Now she has to show that she has medical evidence that she had a disability, and that it was medically necessary to accommodate that disability. Or that not accommodating that disability would lead to an aggravation.

There is no medical evidence to support her claim she had a disability in 2012, when she said she needed accommodation. What she has offered is an unauthenticated document showing she took a leave of absence for medical reasons for a short period in 2009.

THE COURT: And that letter was from a maxillofacial

surgeon?

MS. PHILLIPS: Again, it's a document in the file --

THE COURT: Right.

MS. PHILLIPS: -- for something that happened. We don't know what the issue was, we don't know what the limitations were, aside from the fact that she was off work. We don't know if they were ongoing. We all know that she continued working.

THE COURT: The letter was from a maxillofacial surgeon.

MS. PHILLIPS: Okay. Yeah. I don't know how that relates to the knees.

THE COURT: Okay.

MS. PHILLIPS: I mean, again, there's no medical evidence in the record to support that she had a disability that would have limited her ability to do the short term work at the Spokane Fair, or that doing the short term work at the Spokane Fair would have aggravated her condition.

That is a fatal blow to her disability claim. You cannot establish disability discrimination based on a plaintiff's statement that, "I had a medical condition and this is the kind of work that aggravates that." That is just not sufficient as a matter of law to support a disability discrimination claim.

And if it's necessary to go on, her claim -- she was accommodated as she said she needed to be. She told them, "I

can't," she didn't say she had a condition. She failed to give notice. What she said was, "I can't do those long hours in the sun." And they said, "We've shifted things around this year so people won't have to do as long of hours." And she sent an e-mail message saying, "All my needs have been met," exclamation point.

And under oath in her deposition when asked, "Well, when you got to the fair, did that work for you?" And she said, "Well, no, it didn't. But I didn't want to be a whiner. Everybody was doing the work." Under disability law, that is a failure on her part to engage in the interactive process. When she is -- if she had asked for an accommodation and she asked for something and they gave it to her. If that accommodation is not sufficient to meet her needs, she is then obligated to give notice that she needs an additional accommodation. And she failed to do that.

Again, the retaliation claim. It's untimely. The facts underlying it occurred in 2009. The people who are involved, Hugh Koskinen and Dan Lawson, left employment in 2010. This case was filed in 2015, so going back three years to March 2012, there is nobody, there is no evidence in the record that anybody within that limitations period -- so to connect this back, two things that happened back then, she needs to show that some adverse actions happened within the limitations period and that they are from the same causation,

the same unlawful motivation as the actions outside of the limitation period that she is claiming are unlawful.

There is nothing she has offered to do that. Again, those people left. There is no evidence that anybody she says did something adverse, her discharge. Rod Howrey has said under oath he has no idea what this Melody Dillon complaint is. He doesn't know who Melody Dillon is. He doesn't know anything about her involvement. Madeline Kwan testified in deposition under oath that she doesn't know about anything to do with it.

There is no evidence that anybody within the limitations period knows anything about it. And there's no evidence that it in any way motivated anything that happened after that. Again, even with Leonard Carder, he has said under oath, he wasn't aware of the Melody Dillon situation. And he didn't meet with her. He wasn't aware of Ms. O'Brien's involvement.

The only adverse action even offered involving Mr. Carder is that she was required to go and inspect parking garages. ABM Parking is on the record saying, "Being asked to do your job for a parking company is not an adverse employment action." The fact is, parking garages are not always the most pleasant places to be. Every ABM Parking employee has to be in those garages. They park in them. One of the ones she identified at Second and Union is where ABM Parking administrative employees parked. All the employees, you

know, they're employees who worked there day in and day out. Every management employee is expected to go and inspect those garages when they're there. That's not an adverse employment action.

There is just nothing to connect to some sort of adverse action that somebody knew about this 2009 supposed protected conduct and retaliated against her.

Again, as I already mentioned on the breach of contract claim, the Code of Conduct she relies on is not a legally enforceable promise of specific treatment and specific situations. As the court said in Quedado v. Boeing, "It is merely general statements of company policy, and thus, is not binding." It also contains a disclaimer. There was no response to that from plaintiffs about these aspects of the policy.

And again, as I already articulated with respect to Mr. Carder, there's no evidence of the breach of this policy. She claims she was fired in retaliation for reporting financial irregularities at the Pacific Place Garage. Her theory is she reported her violation to Matt Purvis, who told Leonard Carder. As I've gone over, that can't work in terms of timing.

Mr. Howrey has said under oath, he was not aware of anything she was doing at the Pacific Place Garage. He wasn't aware that she reported any irregularities. So there

is no evidence to establish the breach of the supposed policy, even if it were an enforceable contract.

Again, no response to the intentional and negligent infliction of emotional distress and the facts just do not support those claims.

And for all these reasons, a summary judgment should be granted in favor of both Mr. Carder, ABM Parking, and ABMI.

THE COURT: Okay. All right. Thank you very much.

Ms. Boyle?

MS. BOYLE: Thank you very much, Your Honor. Good morning.

You know, it's amazing how many defendants assert a vast conspiracy in these types of cases when multiple employees are involved in the treatment or alleged treatment of a particular employee.

This is just reality, that oftentimes coworkers pick up on management's dislike or favorable treatment of an employee and act similarly. And oftentimes, things start from the top and flow down, so that Mr. Carder has an opinion of Ms. O'Brien that then is picked up by his subordinates, his direct reports. And then other coworkers. And it just all flows down to the employee.

So the vast conspiracy is nothing more than a recognition of what goes on in a day-to-day work environment where there's supervisors and coworkers interacting on a daily basis. And sometimes in unfavorable ways.

And as new people come in, it doesn't take long for people to learn who's some disfavored employee. We've all had those situations. And we've all experienced to varying degrees, either personally or seen a coworker or a manager even suddenly treated with disfavor. And that's what happened in this case.

The defense tries to make it appear as though Ms. O'Brien was first hired in 2007. This is just simply not true. She was first hired in 2000. She had a stellar job performance history. She was given an increased title and increase in pay and increased duties and increased responsibilities. Why does an employer do that? They do that because they trust them to do the job.

And then all of the sudden, she falls out of favor. And I think anybody in this room would say, "Well, what happened? Did she suddenly become a bad employee?" Well, they've not alleged that. In fact, they've not alleged any performance deficiency by Ms. O'Brien that led to her termination.

What they do allege is that they had this, what they have variously termed to be a "RIF" or a "reduction in force" or a "reorganization." Well, clearly, it's not a reorganization. Two people were fired. Ms. O'Brien and a part-time, 70-year-old auditor, who apparently is very good friends with Mr. Carder, admittedly.

So I just want to first distinguish it from the case that

the defense has cited in support of their position that this type of reorganization or RIF or whatever you want to call it cannot possibly be an adverse action or some type of pretextual situation. The case they cite, Your Honor, I think is a great case for contrasting what occurred here and what occurred in that case and what looks like a normal reorganization or RIF.

In the James case, the employer reduced their overall staff by 11 percent. They decreased their overall payroll by 12.5 percent. In this situation, you can look at the org chart, Your Honor, that's at Exhibit 11 of Ms. Phillips' declaration. There's a lot of people in that org chart, and a lot of people that are lower on the totem pole than Ms. O'Brien. A lot of people with less seniority than Ms. O'Brien.

But she is selected, oddly, three hours after she gets a call from the press on what we all who read "The Seattle Times" back in that day know full well was this huge weird incident about the Pacific Place Garage --

MS. PHILLIPS: Your Honor, can I object to --

THE COURT: Well, let me just ask, what sense would that make? I mean if she --

MS. BOYLE: You know --

THE COURT: -- gets a call from the press and does exactly what she's supposed to do --

MS. BOYLE: I agree.

THE COURT: Which is refer them on to somebody else, it seems to me that human nature, you talk about reality and real life, the employer would want to keep her close to the bosom of the company, rather than to fire her.

MS. BOYLE: Judge, you know, I always say that just as a, it's a weird coincidence. I think it's odd. Do I think that it's something that we should base this case on? No, I don't.

THE COURT: No.

MS. BOYLE: But I do think it's odd. And I do think that what went on at the Pacific Place Garage entirely is odd.

THE COURT: Mm-hmm.

MS. BOYLE: That Ms. O'Brien is asked to go and take care of something. But then when she actually tries to do it, she absolutely gets no backing from the person who gave her that job. So that it almost without the backing of management in the face of employees openly disregarding what she's asking them to do, how does that make her look to coworkers?

So I think the whole Pacific Place Garage incident is just, it's a weird event. I think it's indicative of a dysfunctional work relationship between Mr. Carder and Ms. O'Brien. So while I don't think it's exactly evidence that is supportive of the other claims in this, I do think that it lends a flavor to the overall work relationship

between this individual and Ms. O'Brien.

So I think that just looking at this alleged legitimate nondiscriminatory reason for the adverse action, which is termination ultimately, I think that contrasting it with the case that the defense relies upon, Your Honor, it just highlights how suspicious and suspect and frankly why a jury could find that it's pretextual.

So we've got Ms. O'Brien, who's a great employee. She's given increased duties, she's given increased responsibilities. And she claims, Your Honor, that Mr. Carder just, you know, admittedly, he has filed a declaration, as have many individuals in support of this motion to dismiss. He claims, "I never directly supervised her." That's in direct contrast to what she says, that he regularly gave her job duties, in fact, specific job duties and crafted some of her job responsibilities.

So I think that you've got an issue of fact as to whether or not his declaration is accurate, and whether or not the job relationship or the employment relationship between Ms. O'Brien and Mr. Carder is as he claims it to be, or Ms. O'Brien claims it to be.

And this is important because what she claims occurred. After this Melody Dillon incident, which, Your Honor, the defense repeatedly claims, in fact it's actually a cornerstone of their argument, that Mr. Kostinen [sic] is the

individual who directed Ms. O'Brien to write up the two valets. This is just not true. Ms. O'Brien makes clear in her declaration that she was directed by her HR chain of command, which was not Mr. Carder. Mr. Carder was the Operational chain of command.

So and they cite to the plaintiff's second amended complaint that was filed in June of this year. That complaint is silent as to that fact. So it's curious. Why would the defense want that fact? Why would the defense make that allegation, which is clearly unfounded?

It's because they want to try and make it appear that Mr. Kostinen wouldn't be upset about her doing what he directed her to do. So why would he create a hostile work environment for her? That's the reason.

But the reality is that as Ms. O'Brien alleges in her declaration, that once she did what she was told to do by her HR chain of command, her work environment changed. That suddenly she was ostracized by her management. She was glared at, treated differently, and that Mr. Carder then suddenly asked her to do what I think any one of us would have to agree is a dangerous job. And certainly the evidence bears that out. That Ms. O'Brien was told to go and do what basically security guards, who are trained, who have back-up, and perhaps even a weapon, are asked to do. And probably still encounter problems. She's asked to go and patrol these

parking garages, multiple stories of parking, stairwells, by herself without back-up.

Her husband was so afraid for her safety that he would accompany her. And then ultimately he writes Mr. Carder a letter, saying, "This isn't fair. It's not safe." That letter is ignored. They've not -- and it's undisputed it was ignored. The defense has not claimed that they didn't get the letter. Did not claim that they responded. They ignored it. It's undisputed. Why would they ignore that?

And not only did they ignore it, as Ms. O'Brien alleges in her declaration, the duties were increased, as was the scrutiny. So now was she not only required to do a dangerous job by Mr. Carder, she was then told to do it in a different, more increased way. And then she was disciplined when she allegedly didn't do it properly.

From that point forward, Ms. O'Brien's work environment, up until the date that she was fired as she goes into detail, and I understand, Judge, there's a lot in her declaration that I probably wouldn't have put in there, frankly. But there is a lot of information in there that creates a picture of what this person lived for the final three-and-a-half years of her employment. And that's what this case is about.

Is that treatment that she experienced and her ultimate termination as she alleges it, and as inflicted or imposed by her various chain of command, unlawful?

So looking through the various claims, and I understand there's a lot of them, Your Honor, and the infliction of emotional distress claims, I understand, was not addressed in the summary judgment. And honestly, I don't know why. I'm only assuming that it was meant to be abandoned and I've made that representation to the Court this morning.

As to the other claims, regarding the age, it's simply undisputed that the only individuals that were even considered for termination in this RIF or reorg were over the age of 40. And again, I draw you attention to Exhibit 11. There were a lot of other people. And in addition, Your Honor, this is the Seattle branch. There is a lot of employees, but only three individuals in the age protected status were even considered for this RIF.

And the defense would have you believe that, well, Ms. O'Brien was in a unique position, Judge, so she can't even make a prima facie case of age discrimination, because she's got no one similarly situated. How would that work? That doesn't work.

Instead, you look at her chain of command. Is she similarly situated in the chain of command with other employees who were not terminated, who were outside of protected class? They've not alleged that she was not. It's undisputed she was not. Or that she is similarly situated with those individuals. It's undisputed.

THE COURT: Is there a suggestion that other individuals with different job titles and job descriptions could be regarded as comparators for the basis of an inference that there was discrimination?

MS. BOYLE: I would say absolutely, Your Honor. Because otherwise an employer could give somebody a promotion or a change of job title, slightly alter their duties from their previously similarly situated employees, and then a year later fire them. And claim that they cannot even for any type of discrimination of the basis is disparate treatment. Because the employee always has to show, "I was treated differently." There's comparators.

So if you create an island for this employee, the defense would have you believe that the employer can act with impunity. And that simply cannot be the case. And it's not the case.

Regarding the breach of contract claim, Your Honor, those policies that the defense has alleged Ms. O'Brien not only acknowledged when she was first employed, but then had to acknowledge every year. And it's undisputed that she acknowledged them initially and then she had to acknowledge them every year. Those promised specific treatment.

If you complain about unlawful conduct, you will not be retaliated against. She alleges that she engaged in protected conduct. She complained of unlawful conduct. And

she alleges she was retaliated against. So in this situation, under these types of facts, that promise of specific treatment in the employee manual can sustain or support a claim for breach of contract. And if the Court finds sufficient the plaintiff's evidence to raise an issue of fact as to any one of her other claims, that breach of contract claim should go forward.

Regarding disability, I agree that it appears that there is not in the record exactly what disability Ms. O'Brien had while employed by ABMI and ABM. But I would have the Court look to the communications between Ms. O'Brien and her chain of command regarding the August 2012 Spokane Fair work.

Ms. O'Brien says, "As you know, this will aggravate my condition." That chain of command doesn't say, "What condition?" And again, the definition of disability under Washington law is simply an abnormality. They don't say, "What are you talking about, Debi?" In fact, the defense argues in their brief, and here this morning, they accommodated her.

And when she got there, she didn't complain about the accommodation. She didn't further engage in the interactive process. What does Ms. O'Brien say happened? And what do the e-mail communications establish? She said, "As you know, I have this condition. Standing in the hot sun can aggravate it." What did they say, "Listen, we've made arrangements so

that that's not going to occur this year." And Ms. O'Brien says, "Great. I'm glad to hear that."

Then what happens? She gets there and their offered accommodation, which is, "You're not going to have to stand there in the sun all day," doesn't happen. This was a woman who is already in battle, Your Honor. And she says, "You know what? I did it. I didn't want to be a whiner."

Seems like a Catch-22 for Ms. O'Brien. She either whines and just adds to the stack of complaints that she has made over the previous four years, or three-and-a-half years. Or she sucks it up and she does it. The fact that she tried to do it, she didn't want to be a whiner, now they're trying to use against her and say that, "Oh, you should have complained more."

The reality is, Your Honor, is they knew she had a disability as defined by Washington law at a minimum. They offered her an accommodation and then they just didn't follow through. That's what happened.

THE COURT: Can you help me understand? I ask both sides this, without going outside the record.

MS. BOYLE: Mm-hmm.

THE COURT: I'm just having a little difficulty reconstructing what exactly happens.

I think what I'm picturing is that the company takes all employees at all levels of management and whatnot in the

Seattle office, regardless of age, and sends them over to Spokane to hold a flashlight and direct traffic into parking spaces at the fair?

MS. PHILLIPS: May I respond to that, Your Honor? Or do you want me to?

THE COURT: Either way.

MS. PHILLIPS: Yeah.

THE COURT: I'm just trying to understand the facts.

MS. PHILLIPS: Yeah. It's just for certain big events.

THE COURT: Yeah.

MS. PHILLIPS: And I think there were other ones that we've heard evidence about.

So for certain big events, it is kind of a command performance to help with the giant parking out in the field that you might have experienced at some kind of event.

THE COURT: Right.

MS. PHILLIPS: Is that they have people, people are sort of assigned to go and do that. They try and make it fun. There was testimony about that, even though it is standing up in the hot sun directing traffic and helping manage that traffic, the parking of people at these big events.

THE COURT: Mm-hmm.

MS. PHILLIPS: Yeah. So that's just something that is done as part of working for a parking --

THE COURT: Okay.

MS. PHILLIPS: There's also evidence in the record that at times, administrative management employees, you know, fill in with other aspects of parking, you know, like doing valet parking when needed. So it's kind of a "You're a manager administrator, but there are times when your boot's on the ground."

THE COURT: Okay. Sort of like Disneyland requiring the management employees to play Mickey Mouse some of the time? Which I guess they do.

MS. BOYLE: I went many times, and I would have enjoyed knowing that that was a management person behind that mask.

THE COURT: Yeah.

MS. BOYLE: But Ms. O'Brien is not alleging, Your Honor, that this was somehow, asking her to do that was somehow odd.

THE COURT: Right. Right.

MS. BOYLE: No. She's not.

THE COURT: Right.

MS. BOYLE: So it's simply that she wasn't accommodated in the way that they told her she would be. That is the issue there.

THE COURT: Is there any room for sort of a hybrid between the age and disability when it comes to this function, however? Because it seems to me in looking at the communications, it really had more to do with age, not wanting to stand up in the hot sun all day without sitting,

resting, eating fruit and some vegetables and all of that. Rather than anything that we would usually call a "disability."

It seems to be more age-related than disability-related?

MS. BOYLE: No. Actually, Judge, and I believe that it's contained in admissible testimony in her declaration that she was in a car accident.

THE COURT: Difficulty standing.

MS. BOYLE: Yes. To suffer a certain condition.

THE COURT: That's right.

MS. BOYLE: And it's aggravated --

THE COURT: Had been a hairdresser before with her arms up in the air --

MS. BOYLE: Yes.

THE COURT: And that's difficult. Got it.

MS. BOYLE: So that was the issue there.

THE COURT: Right.

MS. BOYLE: Certainly, we're all getting older. And I doubt, it's probably been a while for her since she left that work and got in the car accident. But I imagine it's probably as you get older less -- it's not as easy to bounce back.

THE COURT: Sure.

MS. BOYLE: In regards to the -- actually, you know, Judge, before I get to the hostile work environment and retaliation,

I'm going to briefly jump ahead to the argument regarding ABMI not being an employer.

The definition of employer under WLAD is broad. It's anyone who acts in the interests of the employer. That's why managers can be named, such as Mr. Carder, as opposed to just the actual entity that is the name on the paycheck.

And it's in this capacity that ABMI has been implicated, as well as there's multiple joint employer, integrated employer situations. And for this particular matter, the defense wants you to believe that ABMI is somehow as, you know, they've tried to characterize it as just a parent corporation that provides some back office services. And, therefore, it shouldn't be viewed as -- and in fact, they allege it is not involved in the day-to-day and as Nedy Warren's declaration, Your Honor, which is at Exhibit 24, claims that it's not involved in firing decisions.

Well, that's just not true. First of all, the policies that Ms. O'Brien had to sign initially and the policies that she reviewed and acknowledged every year are ABMI policies. These are not ABM policies. In addition, if you look at the service agreements that are attached as exhibits to Ms. Phillips' declaration and then also to I believe it's Mr. Howrey's declaration, those are extensive.

I mean, essentially if you took the work that an employer must do on a daily basis, regarding its work force, ABMI is

involved in every single aspect of it. But most importantly, they're involved in terminations. There's no question but that Vivian Smith was an employee of ABMI at the time that Ms. O'Brien was terminated. That's just simply not disputed.

And what also can't be disputed is that she has to approve terminations. This isn't as the defense wants you to believe, you know, like a law firm offering advice. This is a box that must be checked in order for someone at ABM to be terminated. And that box is checked by Ms. Smith, and Ms. Smith is an employee of ABMI.

The deposition of Madeline Kwan makes clear Vivian Smith must approve it. That Madeline Kwan merely prepares the paperwork and forwards it to Ms. Smith for her consideration and her approval.

In the case law discussing what is employer, in this type of situation, there is no more significant fact about who is an employer than who has the ability to fire an employee. And in this case, it's ABMI.

So this isn't a situation, Judge, where, you know, the sins of the children can't be visited on the parent. That's not always true. We know that.

THE COURT: Yeah.

MS. BOYLE: And in regards to Ms. O'Brien admitting she doesn't even know if she was employed by ABMI, I would think that's a pretty good indication that, you know, if an

employee doesn't know who actually employs them, she was employed by them for 13 years in various capacities. And if this individual under oath says, "You know, frankly, I don't know." I think that's circumstantial evidence, Your Honor, that if ABMI, ABM, Ampco Parking, Janitorial, whatever business organization or name that's attached, and I think ABM has changed now yet again, it's clear that this is a chess game. And ABMI is the one moving the pieces.

But most importantly, ABMI, through Ms. Smith, terminated Ms. O'Brien.

In regards to Mr. Carder, Mr. Carder says, "I had no idea about Melody Dillon. I'm not involved, I didn't meet with her, I never heard about her. I don't know anything about Melody Dillon." Mr. Kostinen, and it's undisputed, says that he tried to keep Mr. Carder, his boss, in the loop. Always. On things such as unlawful treatment in the workplace.

Defense says, "Well, you know, he says always, but he doesn't say well, in this particular situation he would have." Well, I think always kind of means always. Certainly, no need to go any further.

In addition, Ms. Kwan in her deposition talks about that Ms. O'Brien was on Mr. Carder's budget, in his department, and he would be involved in her termination decision, in the termination decision. And, in fact, the e-mails that are contained in the record show communication between Mr. Carder

and Madeline Kwan and Mr. Howrey regarding Ms. O'Brien's termination.

So I think in regards to ABMI and Mr. Carder, again, should the Court find that there is a claim that goes forward and that Mr. Carder is implicated individually sufficiently, then I do believe that there is sufficient evidence to raise an issue of fact as to whether or not he and ABMI were, in fact, the employer at the time of Ms. O'Brien's termination as that term is defined by the WLAD, Your Honor.

In regards to the hostile work environment and retaliation, I think that these frankly go hand in hand, Judge. Because looking through this record, looking through the brief and Ms. O'Brien's declaration, this situation just built on itself. And she has a starting point, the Melody Dillon incident, and she says that, "My boss, Hugh Kostinen, was angry at me. Visibly." And that, I know that she avers in her declaration and I think that, you know, at trial would it be admissible that even at his deposition, Ms. O'Brien --

THE COURT: (Inaudible).

MS. BOYLE: But I'm not certain, but I do --

MS. TERWILLIGER: We would certainly object vigorously to the admission of that sort of evidence.

THE COURT: It might be an interesting cross-examination of him at trial. I could envision it.

MS. TERWILLIGER: Apparently, I'll be taking the stand as

well, right, as the other person who was there.

THE COURT: It wasn't videotaped, I take it.

MS. TERWILLIGER: No.

MS. BOYLE: Unfortunately not.

THE COURT: Yeah.

MS. BOYLE: But I think that it's, again, you know, plaintiffs, we have to build these cases, Judge. Sometimes off of thin strands that form together to make a strong rope. We're not going to get smoking guns anymore. Those days are long gone.

The case law is replete with trial judges and appellate judges recognizing the difficulties that employment discrimination plaintiffs face in proving their case. Which is why summary judgment should be rarely granted. It's hard. I get a case, I'd love to find a smoking gun. First thing I do is look for e-mails. But you're not, just, it's rare.

I mean, you've been on the bench a long time, and I bet you can count on one hand where you've actually seen proof, direct proof. So it is these little things that you have to add up. So I do think that it's an interesting fact. I hope that we'll be able to argue its admissibility at trial. That Mr. Kostinen still was so angry with Ms. O'Brien that even at his deposition he couldn't contain it.

But that's what she experienced in the workplace. And she complains about having to do this job that Mr. Carder gave

her and it gets worse. And it stays in that same hostile, degrading, unsafe environment until she's terminated. When she lets them know in 2012, "You know I have this disability. It'll be aggravated by standing in the sun for long hours." And they don't say, "What do you mean?" They say, "We'll accommodate you." But they don't.

This is all consistent with that this employee is out of favor. She's viewed as a complainer. Her daughter, and I understand that the tangential nature at this point, Your Honor --

THE COURT: Mm-hmm.

MS. BOYLE: I understand there's been some, in addition, some reference to amending the complaint to add a claim for public policy, which given the recent Supreme Court decisions, appears to have basis now. At least the basis for Judge Coughenour's dismissal of the public policy claim in federal court has now been eliminated by the recent decisions.

But at this stage, for what we're looking at, the Pacific Place Garage is somewhat tangential, but not entirely. Because again, her daughter is raising issues of impropriety. But also Ms. O'Brien is raising issues of impropriety. I understand that the defense has argued, she never said exactly what she thought was going on there. That's just simply not true.

Ms. O'Brien said that she thought something fraudulent was going on. And with $30,000 a month going missing, it seems as though she had a good basis for it. And she's tasked with going and supposedly fixing it. Yet, she's not given the tools or the support. So she's basically given, you know, some corner office just to go and do something.

Again, I think this is -- or just setting her up for the ire of her coworkers. Or the humiliation of actually not having any power when you're supposed to be fixing something. I believe this is all a consistent pattern that this person experienced in her final years working at ABM.

So in regards to the hostile work environment claim, I'm not certain that the defense has actually really challenged Ms. O'Brien's ability to meet the prima facie case, instead simply saying that her statute of limitations has run on that. And in that regard, Your Honor, the continuing course doctrine, it only requires that one act that's in a continuing course of conduct occur. And in this case, we have a very clear act: that's her termination in 2013.

And if you look at the Morgan case, which is Ninth Circuit case, and I think both parties have cited it, Mr. Morgan, the plaintiff, had experienced a hostile work environment, lack of promotion, ostracism by his coworkers, over a period of about seven or eight years. So this is not, this situation is not unusual at all. And the court, in fact says, you

know, the hostile work environment plaintiff, oftentimes they don't -- they have a sense they're being treated hostilely, of course, but it's not a tangible action that they can actually act upon.

In fact, what do we know? It has to be severe and pervasive. It has to accumulate over time. Very few cases involving hostile work environment actually involve a singular event. In fact, I think it would be hard pressed, unless it was a significant thing and I think we can all think of a few things that might occur in the workplace that would be significant enough.

But the facts of this case would not have supported her bringing her claim, at least until about 2010, '11, '12, in there. But I think, certainly, Your Honor, there's sufficient facts in this case for you to find that there are issues of fact regarding whether or not she experienced a hostile work environment. And certainly sufficient facts to allow you to find that there's a continuing course that brings Ms. O'Brien's hostile work environment claim timely.

Regarding retaliation, I think that Ms. O'Brien's declaration indisputable, even parts that are not challenged, established that she has engaged in protected conduct.

In regards to adverse action, adverse action is defined as anything that would cause a reasonable employee to feel like it's not a good idea to complaint about unlawful conduct. In

other words, it's not any longer some tangible action, like a demotion, decrease in pay, suspension, termination. But instead, it's a busy employer engaging in conduct that would lead a reasonable employee to be dissuaded from engaging in protected conduct.

And in this case, I think that having your boss tell you, "You're going to now go and patrol garages on your own, including the stairwells. And then we're going to increase your responsibilities at those locations. And we're going to scrutinize you and discipline you for such things as insubordination," as is in the record. Mr. Kostinen disciplined her for insubordination.

It's sufficient conduct to allow an issue of fact as to whether or not Ms. O'Brien suffered adverse action. And certainly, termination is adverse action.

I do want to point out just briefly, Judge, that the defense's brief, ABM's brief, references Mr. Kostinen going and doing similar inspections. That's just not correct. Mr. Kostinen's testimony, which is contained in the exhibit to Ms. Ferguson's declaration, he makes clear that when he went to garages he drove in, acted like a regular customer, and, you know, maybe pointed out a thing or two to the staff. He clearly was not doing the type of work that was required of Ms. O'Brien.

And then finally, Your Honor, in regards to the pretext, I

think that I at the opening of my argument pointed out multiple reasons why ultimately Ms. O'Brien's termination was pretextual. You know, there's one other point that allegedly they lost garages and parking facilities, and that that was the basis for the need to eliminate her position.

And I believe Mr. Howrey says that they were losing $20,000 a month. They only fire Ms. O'Brien and then a part-time auditor. That's not going to make up for that.

But the other point that Mr. Howrey makes is that on layoffs, that management employees are offered an opportunity to move to vacant positions. She was not offered that. Why not? Why was Ms. O'Brien not given what Mr. Howrey says is typically given to management employees?

The other thing is is that the required approval by Ms. Smith, undisputedly did not occur until the day after Ms. O'Brien's termination. It's simply not disputed she was terminated on the sixth, and that Ms. Smith's approval did not occur until the seventh.

And regarding the other pretexts, Judge, they've not offered any explanation substantively for why Ms. O'Brien would be required to go and tour these garages. Why suddenly Mr. Carder would feel it appropriate or necessary, I suppose, would be the better question, to have this woman go and do that work.

So I think I've addressed my primary points, Judge, and I

appreciate you giving me the time to do it.

THE COURT: Good. All right. Good. Well, thanks, I appreciate the argument.

MS. BOYLE: And in regards to the 56(f) motion, Your Honor?

THE COURT: Yeah.

MS. BOYLE: I've been doing this a long time and I have to say for the defense to say that Ms. Ferguson, who is the lead attorney, should have taken Mr. Carder's deposition sooner and that she voluntarily decided not to depose him in federal court, is simply not consistent with what actually went on and what has gone on in this case since the matter was filed in superior court.

The defense immediately removed the case, I mean, as they have to. You know, it has to be done within 30 days. So that's not my complaint. But the defense immediately removes to federal court a case that clearly should not have gone to federal court, as we know, because it was remanded. There was no diversity. There was no basis. There was diversity.

And that took two-and-a-half months. So in that period of time, when was Ms. Ferguson supposed to note Mr. Carder's dep? The matter came back and there was a pending motion to dismiss. That was addressed. Their pending motion for sanctions and fees that Ms. Ferguson had to respond to. And then this motion for summary judgment.

So in all of that, Ms. O'Brien has really not been allowed

the time period that's provided for in the case schedule for discovery. She should be given that. I mean, this case really should be about her, not what Ms. Ferguson did not did not do. Although I agree, and I understand, the responsibility.

But again, I think that plaintiffs are given eight-and-a-half months now, nine months, to do discovery. The facts of the federal court, what went on in the last month-and-a-half there, Ms. O'Brien has given you in her declaration an account of that final month-and-a-half. She's provided you the docket that shows you what was going on in that month-and-a-half.

And I have to say, Judge, you know, it's not unusual that attorneys do a lot of discovery in the last month of the discovery period. It's just not unusual. But, you know, Ms. Ferguson was consistently having to face hurdles in federal court, which she describes in her declaration.

I think the deposition of Mr. Carder should occur. I think it's fair that it occur. I think it's just that it occur. And this isn't to say that defense can't move for summary judgment when they feel it's appropriate. But the plaintiff should not be funneled into a grossly exaggerated discovery period because of the timing of their summary judgment motion.

And I think the docket reflects, from federal court, Judge,

I encourage you to look at it if you haven't already. That Ms. Ferguson was hardly dilatory. She was actively pursuing discovery in that case.

So with that, Your Honor, unless you have any questions, I have nothing else to add.

THE COURT: All right. Good. Thank you very much.

MS. BOYLE: Thank you.

THE COURT: All right. Some brief rebuttal comments first from ABMI?

MS. TERWILLIGER: Yes, Your Honor. Would you like me to begin with ABMI or the 56(f) request?

THE COURT: ABMI?

MS. TERWILLIGER: Okay, just very briefly on the ABMI, we agree that the definition of an employer under the WLAD is very broad; however, I'm not aware of any authority that says, "An entity becomes an employer by virtue of its subsidiary's employment relationship with an individual." And there's no evidence that provided -- or there's no authority for the provision that offering back office services makes somebody your employee.

And, in fact, to the contrary, the evidence shows that providing that sort of assistance does not involve the day-to-day control that is necessary to find that someone is an employer.

Ms. O'Brien has not previously argued either the joint

employer or the integrated employer theories, but both the Rhodes and Ruiz cases that we cite for the proposition that back office services don't make you an employee are actually cases brought under those theories. So we think that that issue is dispositive.

THE COURT: Suppose Ms. Smith thought it was not a good idea --

MS. TERWILLIGER: Right.

THE COURT: -- to terminate Ms. O'Brien, but Mr. Howrey said, "Well, I'm going to do it anyway." Where would that leave them?

MS. TERWILLIGER: That's where we are. That's where it leaves them and that's where we are. If you look at, I encourage you to look specifically at Ms. Smith's declaration to see what she says.

THE COURT: Mm-hmm.

MS. TERWILLIGER: She says that she reviews the information and informs a subsidiary whether it's approved, but beyond that input, ABMI is not involved with identifying employees for layoff, not involved in implementing the layoff decision, or even monitoring whether the subsidiary acts in accordance with ABMI's opinions.

So the actual facts before the Court show that ABMI was providing advice and that's sort of the end of the story.

THE COURT: Mm-hmm.

MS. TERWILLIGER: If ABM Parking decided they were going to fire her no matter what, that's on ABM Parking, ABM Parking's decision.

So Vivian Smith's declaration at Paragraph Four is particularly instructive on this.

What the evidence shows relating to Madeline Kwan's testimony is that it was ABM Parking's policy and practice to take these sorts of decisions to ABMI to get their input. That is not evidence that ABMI is the entity making this decision. And I think, you know, our point would be that the undisputed evidence shows that Rod Howrey, an employee of ABM Parking, made the decision to eliminate the position after consulting with Madeline Kwan, also an employee of ABM Parking.

And the claim that ABMI is involved in all aspects of ABM Parking's business is simply contrary to the sworn testimony in the record. I would refer the Court to the declarations of Rod Howrey, Alison Nelson, and Nedy Warren on that point. And Vivian Smith.

And unless you have further questions on ABMI --

THE COURT: No.

MS. TERWILLIGER: We would request that those claims be dismissed.

THE COURT: Did you want to talk briefly about the 56(f) motion?

MS. TERWILLIGER: Yes, please.

THE COURT: Okay.

MS. TERWILLIGER: I think it's helpful, I actually put together a timeline that talks about the past several years. May I approach?

We have to start from the position that Ms. O'Brien is asking for additional time to respond to motions that were filed in March and April of this year. I don't see how she can demonstrate diligence when she has had these motions in her possession for months.

As you know, she originally filed these claims more than two years ago, and her failure to complete discovery was based on her decision to voluntarily dismiss and cancel the remaining depositions, depositions that she was able to schedule only asking Judge Coughenour for additional time.

Now her claim that the defendants are somehow responsible for this failure is preposterous and it's an abuse of the judicial system. It is supported entirely and solely by arguments that Ms. Ferguson made repeatedly to Judge Coughenour, and which Judge Coughenour repeatedly denied.

And, you know, Ms. Boyle has been counsel of record on this case since the very beginning. She signed the original complaint, so this lack of diligence does not fall, I'm sorry, just to Ms. Ferguson.

And we could even leave the federal case aside. This case

was filed eight months ago, and the matter was remanded by the federal court on August 4th, more than three months ago. During that time she has not noted a single deposition or served any written discovery. These summary judgment motions have been pending since September. And as I said previously, she had copies of them from March and April. So she hasn't conducted any discovery in the eight weeks the summary judgment motions have been pending.

She falls far short of diligence, even without consideration of the 18 months in federal court. She has no valid reason for failing to complete discovery. These are people and issues that Ms. O'Brien has known about for months, if not years. She tried to name Leonard Carder as a defendant two years ago. We identified Rod Howrey as the decision-maker relating to her termination in May of 2014.

We think that the diligence issue is dispositive on this, and, therefore, request that her request for a continuance be denied.

THE COURT: All right. Thank you.

Ms. Phillips, on the ABM Parking you may want to address several things.

MS. PHILLIPS: Sure.

THE COURT: I had a couple of specific questions.

MS. PHILLIPS: First, just briefly on --

THE COURT: Go ahead, go ahead.

MS. PHILLIPS: Go ahead. Yes.

THE COURT: No, you go ahead.

MS. PHILLIPS: No, no, I'm happy to answer your questions first.

THE COURT: One has to do with the proposition that other job descriptions could be used as comparators. And the second has to do with whether there's anything in the record regarding the extent of ABM Parking's knowledge of a motor vehicle accident resulting in a difficulty standing.

MS. PHILLIPS: So it is the prima facie responsibility of the plaintiff to show that any comparators are similarly situated in all the relevant respects.

THE COURT: Right. Mm-hmm.

MS. PHILLIPS: So they need to show that they are in the same position, performing the same job duty.

THE COURT: Mm-hmm.

MS. PHILLIPS: If you go outside that and say, "Well, but I think there are other people you could have terminated. I know that I was an Operations Manager/HR Coordinator, but I don't think that guy up there, who's the President, does very much." The case law is clear, that's your attempt to intervene in the business judgment of the employer. The employer gets to make those business judgments when its deciding to reduce its forces about what are the most valuable positions. And you don't get to say, "Oh, but I

think you could have done fewer copies and fired this guy over here. I don't care if he's in a different job."

This is not the kind of case where we have 10 baristas in a Starbucks store and we say, "Well, we need to cut costs. Not selling enough coffee. Let's get rid of one of those baristas." They're in the same job, well, why did you pick that one? That's not this case.

ABM looked at its workforce, its administrative support workforce in relation to these cuts in the hourly, these contracts, and said, "What are the positions we can do without?" And by the same token, the plaintiff doesn't get to say, "Well, that's not a reduction in force unless you cut 10 percent of your workforce, or 20 percent. That's not a reorganization."

The fact is ABM didn't just cut lots of people. It has to decide how to run its business. If it's trying to cut costs, it gets to make business decisions about what are the things we can do without when times are tight? There is no requirement that a reduction in force has to implicate a certain percentage of the workforce and that that somehow is nefarious if you only reduce a couple of people.

And your second question?

THE COURT: Whether there's anything in the record about the motor vehicle accident and difficulty standing?

MS. PHILLIPS: The only thing we have in the record is this

document that she -- oh, I'm not aware of anything, that anyone was aware of the motor vehicle accident.

THE COURT: Okay. All right.

MS. PHILLIPS: I mean, what Ms. O'Brien says is that when she first applied for a job at ABM Janitorial, and again, the evidence is clear, that's a wholly owned subsidiary, completely separate during the relevant time period, from ABM Parking, different management, it's separate, that she communicated to them that she wanted to switch from her prior job as a hairdresser because she didn't want to be standing on her feet.

But I'm not aware of any evidence in the record that anyone was aware of this parking [sic] until it appeared in Ms. O'Brien's declaration.

THE COURT: Okay. You've responded to my questions. You can go ahead.

MS. PHILLIPS: So just briefly about Mr. Carder. You know, Counsel during her discussion about the Pacific Place Garage kept pointing at Mr. Carder, saying, you know, "Mr. Carder sent my client over there and it's Mr. Carder who did that."

I would direct Your Honor to our reply brief on behalf of Mr. Carder, Page Three, there's a footnote. That is in direct contradiction to her deposition testimony, where she said that Hugh Koskinen is the one who first directed her to do work at Pacific Place, and that Matt Purvis is the person

that she talked to. And she testified that she never talked to Mr. Carder about doing work at Pacific Place.

So, you know, those gestures of Counsel and attempts to implicate Mr. Carder that are not based on evidence cannot support a claim against him.

Also with respect to Mr. Carder, again, generalized testimony that "I always try and keep my boss in the loop." Mr. Koskinen had his deposition taken. Mr. Koskinen did not say under oath that he told Mr. Carter anything about the Melody Dillon situation. They had the opportunity to ask him. They don't have the evidence from him on that.

So there is nothing to contradict Mr. Carder's testimony in his declaration that he was not aware of the situation.

And finally this idea that, you know, these questions that are being asked about, you know, these rhetorical questions about "Why would they form a customer service initiative?" Again, we're at the point of summary judgment, not at the point of deciding whether to file a claim. But there's abundance evidence in the record that Mr. Carder decided to form the customer service initiative because he wants his garages to be pleasant places. When he was in that management position until early 2011.

And again, this is very dated, but he told Ms. O'Brien, "I would like you," and again, this patrolling. That's rhetoric, you know, look at the record. She was told she

should go inspect them. And he said, "I would like this to be a place where I could bring my family to have a picnic."

So she was supposed to inspect them and then give guidance to the people there about how they could improve the cleanliness and safety of those environments where the public is parking. There's nothing nefarious about that.

THE COURT: And is the evidence that other employees were asked to do that same?

MS. PHILLIPS: Well, again, Ms. O'Brien was in a unique position.

THE COURT: Mm-hmm.

MS. PHILLIPS: So other employees who were Operations Managers, were actually -- you know, they are employees who are actually managing that garage.

THE COURT: Mm-hmm.

MS. PHILLIPS: And yes, the evidence is those employees are expected to inspect the garage when they are assigned to work at a location. The other evidence is that people like Mr. Koskinen, who are in management, you know, he would go and do that whenever he went to a garage.

But this is the whole issue is Ms. O'Brien was in a unique position where she was doing this kind of floater HR support where she would go around to locations. And management thought, "Well, this would be another, as you're going out to these places, we'd like you to inspect them as well and give

feedback to people."

So no, this is part of why it was reasonable to eliminate her position is she was in a unique position.

With respect to ABM Parking, Counsel said, you know, we have to string together these facts to form this thread. But the string actually has to connect. You know, there is a theory, the cat's paw theory that I'm sure Your Honor is aware of, where if you have a manager who is motivated by bias, and then does things to an employee and also recommends things to others.

So, you know, if her direct supervisor was motivated by bias and then said to Rod Howrey, "Well, you should definitely fire this O'Brien person. We should definitely get rid of her." Okay, that bias can go up the chain.

What we have here is this supposed bias by Mr. Carder based on something that happened in 2011 and then this theory that other people throughout the organization, where there's no evidence that they were aware of it or that Mr. Carder directed them in any of these activities, that that somehow forms this rope.

The plaintiff does have to, in response to summary judgment, actually show awareness by people of the protected conduct. Or that there's some connection that somebody was involved in the decision. You know, you can say you don't have to have that smoking gun of "I'm firing this person to

retaliate. I'm firing her because I don't like old people." But you do have to at least show that the people making the decision are somehow aware of the protected conduct. Or you have to show that the person actually was involved in making the decision. You can't leap from, "You've got this bias and so, therefore, the decision is biased," when the undisputed evidence is there's no connection.

There's comments again about the reduction in force, why wasn't she offered a vacant position? What they said is, "When a contract location closes, when we lose a contract, like Pacific Place, we lay off all the hourly people and we try and find for people assigned to that location, we try and find a vacant position for them." There's no evidence that there was this vacant position.

Again, they already laid off those people. And the evidence is that people who are onsite, the management there, you know, people did get laid off at the time the Pacific Place Garage closed. But Ms. O'Brien's was a administrative layoff, not connected directly to a specific location closing. But again, where's the evidence in the record of this vacant position that they left unfilled while laying Ms. O'Brien off? It's not there.

So, you know, that's not something nefarious. They decided to trim the fat, cut their spending, and unfortunately, that required layoffs.

Again, on the disability claim, it might be enough to file the complaint for Ms. O'Brien to say, "I have a medical condition and my medical condition I've been told is aggravated if I do certain activities." When you're filing a complaint, that is good enough for allegations in a complaint.

We're at the point of summary judgment. You know, again, this summary judgment has been as my colleague said, known since March, pending in this court since September. Ms. O'Brien cannot establish a disability. She cannot establish a medical condition. She is not a doctor, who is here offering an opinion on what would aggravate that condition.

So that claim is wholly lacking in evidence. And so we never get to whether they accommodated adequately, because it doesn't exist as a matter of record.

Again, the issue of age and disability, Your Honor, raises this more age, because she didn't communicate. And her communication, you know, and again look at the e-mails, was not, "I have a medical condition from my car injury that I can't do it." It was, "I don't think I can take these long hours at my age."

You know, an employer can't act on that. You know, an employer would be walking into an age discrimination claim if it decided that employees can't do something because of their

age. That's not a disability claim.

Again, with this hostile work environment, to have the claim, you know, it's all being tied back to this 2009 --

THE COURT: Mm-hmm.

MS. PHILLIPS: To sort of say that anything that happened in the workplace from then on is tied, you've got to link it. If you look at her declaration, "Well, after that, I wasn't invited to parties." Where's the evidence? Whose parties? Who went to the party? Who organized the party? Who didn't invite you? Who did invite you before? And what do they know about this? How is that connected to supposed Leonard Carder?

You have to connect something. I mean, what we have here at the stage of summary judgment are allegations that are really no different than what's in the complaint. They are not supported by evidence that is adequate to establish, from which a jury could find on any of these claims. And that's the standard at summary judgment. Thank you.

THE COURT: Okay. All right. Thank you all. I really appreciate the quality of the briefing and particularly the argument here this morning.

There are a lot of issues. I've taken a lot of notes. I need to go back and work through them and spend some more time with the record, as well as the case authority and the law. I'll prepare a written order over the weekend and have

it for you Monday of next week I expect. Okay.

MS. BOYLE: Thank you very much, Your Honor.

MS. TERWILLIGER: Thank you.

THE COURT: Yeah?

MS. PHILLIPS: Your Honor, did you want to address the order on the sanctions --

THE COURT: No.

MS. PHILLIPS: -- that you had mentioned?

THE COURT: No.

MS. PHILLIPS: Oh, you had mentioned at the beginning you were perhaps going to do that or no?

THE COURT: No.

MS. PHILLIPS: Okay.

THE COURT: I said that I would take care of that as well.

MS. PHILLIPS: Oh, I see. Okay.

THE COURT: I have it written, unsigned at this point.

MS. PHILLIPS: Okay.

THE COURT: Because I was holding out the possibility of resolution of all of the issues by agreement without a need to enter that order. But that not happening, between now and Monday, on Monday I'll enter two separate orders, one on the motions for summary judgment, and one on the sanctions. Okay.

MS. PHILLIPS: Okay. Thank you, Your Honor.

MS. BOYLE: The plaintiff is always open to discussing

resolution.

THE COURT: You're welcome to stay.

MS. BOYLE: Thank you very much, Your Honor. I appreciate it.

THE COURT: Okay. We'll be at recess.

MS. TERWILLIGER: Thank you, Your Honor.

THE CLERK: Please rise.

(Conclusion of hearing)

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of January, 2016.

_____

Bonnie Reed, CETD