

74265-5

74265-5

NO. 74265-5

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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DENISE SMITH, a single woman,

Plaintiff-Appellant,

v.

SONITROL PACIFIC,

Defendant-Respondent.

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RESPONSE TO OPENING BRIEF OF APPELLANT

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## INTRODUCTION

Plaintiff-Appellant Denise Smith (“Smith”) filed a lawsuit against her former employer, Defendant-Respondent Sonitrol Pacific (“Sonitrol”) alleging sexual orientation discrimination, harassment and retaliation in violation of the *Washington* laws against discrimination. The Complaint made clear, and Smith later admitted under oath, that the *sole* basis for her retaliation claim was her belief that she was terminated in retaliation for complaining about her managers’ alleged drinking during workday lunch breaks. Sonitrol moved for summary judgment, arguing (among other things) that complaining about drinking during the workday is not a statutorily protected activity under Washington law, and as such Smith’s retaliation claim should be dismissed. In response to Sonitrol’s summary judgment motion, Smith raised, for the first time, arguments that she was retaliated against in three additional ways: (a) for complaining about a co-worker’s alleged criminal history, which was, according to Smith, a violation of *Oregon* law; (b) for complaining about sexual harassment; and (c) for complaining about workday drinking which was, according to Smith, statutorily protected activity under *Oregon* law. The trial court dismissed Smith’s retaliation claim because the claim Smith actually pled in her Complaint was not cognizable under Washington law, and because the law is clear that Smith could not use her opposition to Sonitrol’s

summary judgment motion to amend her Complaint. Smith's sex discrimination and harassment claims went to trial. A jury returned a unanimous verdict in Sonitrol's favor on all counts.

Smith now appeals the trial court's dismissal of her retaliation claim only, arguing in essence that Sonitrol should have known Smith intended to pursue legal theories not pled in her Complaint and, in some cases, based on law from another state. Smith is wrong. The law in Washington is clear that a plaintiff cannot raise new claims or legal theories in opposition to a motion for summary judgment, even if the new theory is an alternate form of a category of claims (such as retaliation) that has already been pled and even if the plaintiff has given some indication that other claims are contemplated. Instead, to avoid prejudice and unfair surprise, a plaintiff must adhere to Civil Rule 15 and expressly amend her Complaint, which amendments are liberally permitted as facts are discovered in the course of litigation. Smith chose not to amend her complaint, even after her retaliation claim, as pled, was dismissed on summary judgment. Smith must now live with her choice. As such, Sonitrol respectfully requests that Smith's appeal be denied and the trial court's dismissal of Smith's retaliation claim be upheld.

## STATEMENT OF THE CASE

### A. The Business of Sonitrol.

Beau Bradley is Sonitrol's Founder, President, and Co-Owner. He has grown his Everett-based company to approximately 100 employees in five locations: Everett, Bellevue, Tacoma, Portland, and Boise.

Mr. Bradley is a hands-on manager who visits each Sonitrol location on a regular basis and makes sure that all employees know that he is available to speak with them at any time about anything. Clerk's Papers ("CP") 1493, ¶¶ 1-2.

All alarms installed by Sonitrol are monitored by Sonitrol Operators at Sonitrol's Central Verification Center at the Company's Everett Branch. CP 1529, ¶ 2. Michelle Evans is the Verification Center Manager and reports directly to the Everett Branch General Manager and Sonitrol Vice President of Operations, Joe Bullis. *Id.*

Operators respond to alarms by, among other things, dispatching emergency services when an alarm is activated. CP 1529-30, ¶ 3; CP 1537-39. The Verification Center has three Operator workstations, or consoles, which allow Sonitrol Operators to continuously monitor customer alarms over three separate shifts. CP 1529-30, ¶¶ 3 & 4. Operators are each responsible for ensuring that their assigned console is covered in the event the Operator needs to step away from his or her

assigned workstation. This can be done by temporarily directing all alarm activity to another Operator's console or by asking another employee, such as the Shift Supervisor, to staff the vacated console. *Id.*

As Smith admits, fire alarms are the most critical type of alarm Sonitrol monitors. CP 529:8-17.<sup>1</sup> As a category, fire threatens life and property to a greater extent than any other kind of emergency covered by Sonitrol alarms. CP 1500-01, ¶ 3. Further, if Sonitrol fails to respond to a fire alarm in a timely manner, it risks losing its certification to monitor fire alarms, which would in turn foreclose Sonitrol from the fire alarm line of business. CP 561:22-563:2; CP 1500-01, ¶ 3.

Sonitrol's written policies and practices require that when a fire alarm activates, the Operator must take the following steps in the following order: (1) dispatch the appropriate fire department in 90 seconds or less; (2) after dispatching the fire department, contact the customer; (3) document all actions taken regarding the fire alarm in Sonitrol's activity log; and (4) complete and submit an incident report to the Shift Supervisor detailing the circumstances of the dispatch. CP 497:9-12; CP 527:11-16; CP 543:25-544:14; CP 568:12-18; CP 1540-45. Smith has repeatedly admitted that she was aware of this policy. *Id.*

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<sup>1</sup> References to deposition testimony herein refer to the line numbers in the deposition transcript and the page numbers as they appear in the Clerk's Papers, not the original deposition transcript page numbers.

**B. Smith's Employment at Sonitrol.**

Sonitrol hired Smith as an Operator. CP 1500-03. Smith was initially a very good employee, and Verification Center Manager Evans recommended Smith for promotion to Shift Supervisor in June 2005, which promotion Smith received. CP 1531.

Unfortunately, during the last three years of her employment, Smith allowed her personal problems to take precedence over her job duties and her performance began to deteriorate. *See* CP 473:2-474:1; CP 707:11-708:5; CP 718:16-21. Beginning in 2010 and continuing into 2011, Smith had 20 unexcused absences, substantially more than any other Verification Center employee. CP 1531, ¶ 9. During that same time, multiple employees complained to Ms. Evans about Smith's performance. CP 1350:23-1351:13; CP 1531, ¶ 10.

By early 2012, Smith informed Ms. Evans that she was considering quitting rather than continuing as Shift Supervisor and asked to be demoted back to Operator. CP 533:24-534:18; CP 537:2-15; CP 754:4-9. Convinced that Smith was no longer the right fit for the Shift Supervisor position, Ms. Evans granted Smith's request and returned Smith to the Operator position. CP 1531, ¶ 10; *see also* CP 1473-74.

Unfortunately, Smith's performance continued to decline through the remainder of 2012. Between April and December of that year, Smith

received *five different* written Employee Warning Notices (“Warning Notices”). CP 1531, ¶ 11; CP 1568-79. Two of the Warning Notices were for unauthorized attendance problems. CP 1531, ¶ 11; CP 1568-71.<sup>2</sup> The remaining three Warning Notices documented instances where Smith failed to properly respond to *at least five customer alarm issues*, resulting in two customer complaints. CP 1531, ¶ 11; CP 1572-79. Smith contested *none* of these Warning Notices, and in fact agreed, in writing, to four of them. CP 1531, ¶ 11; CP 1568-79. The last Warning Notice that Smith received—dated October 1, 2012—informed her that she would be suspended or terminated if she violated policy again, “depending on the severity of the incident.” CP 1531, ¶ 11; CP 1578-79. Smith signed the Warning Notice and indicated that she “agree[d] with the Employer’s Statement.” CP 1578-79.

As Smith struggled with personal problems and policy violations during 2012, Mr. Bullis, Ms. Evans, and Smith’s Shift Supervisor, Jeff LaMont, tried to work with Smith to make her successful once again. They repeatedly met with Smith to discuss her performance issues; granted her request for time off to deal with personal issues that she admitted were interfering with work; and switched her from Swing to Day Shift in an

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<sup>2</sup> In 2012, Smith had a total of 15 unexcused absences—again, the most out of all Verification Center employees during this period. These absences did not include L&I related or doctor-excused absences. CP 1531, ¶ 9. Smith did not feel that this number of absences was excessive. CP 696:1-8.

attempt to help alleviate her attendance problems. *See* CP 703:24-704:5; CP 704:22-705:10; CP 707:11-708:8; CP 1532, ¶¶ 12-13; CP 1581.

Unfortunately, nothing that Mr. Bullis, Ms. Evans, or Mr. LaMont tried helped correct Smith's performance.

Fearful that she may, in fact, be terminated for poor performance, Smith contacted Sonitrol HR Representative Mattie MacKenzie in early January 2013. CP 629:22-630:4; CP 1488-89; CP 1491-92. Smith alleges that during that conversation she complained to Ms. MacKenzie that Mr. Bullis and Ms. Evans were consuming alcohol during the workday and working while intoxicated. CP 629:22-630:4; CP 630:23-631:4. Smith admits she has never complained to Ms. MacKenzie about any alleged sexual harassment, including during her January 2013 conversation. CP 632:6-15; CP 634:25-636:13.

Ms. MacKenzie contacted Mr. Bradley, who called Mr. Bullis that same day. CP 1493-94, ¶ 3. Mr. Bradley told Mr. Bullis that he had heard reports that Mr. Bullis might be drinking alcohol during the workday and that any such conduct must immediately stop. *Id.*

**C. Smith is Terminated for Failing to Dispatch the Fire Department to an Elementary School with an Active Fire Alarm for Seventeen Minutes, then Attempting to Cover Up Her Misconduct.**

On the afternoon of January 15, 2013, Mr. Bradley arrived at the Everett Branch and met with Smith to discuss both her complaint to HR about drinking during the workday, and Smith's poor performance the past year. CP 637:2-17; CP 1494, ¶ 6; CP 1498-99. Smith made no mention of any alleged sexual harassment during her conversation with Mr. Bradley. CP 641:24-642:24. Instead, Mr. Bradley discussed Smith's allegations concerning the drinking, listened to her, and thanked her for raising her concerns with him. CP 637:12-17; CP 640:12-20; CP 1494, ¶ 6.<sup>3</sup>

Shortly after Smith finished meeting with Mr. Bradley, a fire alarm activated on Smith's console. CP 677:6-13; CP 1532, ¶ 14; CP 1584. The fire alarm originated from Central Elementary, a public elementary school, while students were still in class. CP 1532, ¶ 14-15; CP 1584; CP 1589-91. For the next seventeen minutes, Smith responded to two other alarms at her console (neither of which were active fire alarms and thus were a lower priority), but she did not respond to the fire alarm at Central

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<sup>3</sup> Although her Complaint is silent regarding the issue, in her opposition to Sonitrol's motion for summary judgment, Smith argued, for the first time, that she complained to Mr. Bradley during this meeting that her supervisor, Mr. LaMont, had a criminal conviction that prevented Mr. LaMont from possessing the required license to monitor alarms for customers in Oregon. CP 1174. Smith further argued, again for the first time, that she had raised this issue "on several previous occasions" with both her manager Ms. Evans and HR Rep Ms. MacKenzie. *Id.*

Elementary. CP 677:24-680:9; CP 680:16-681:11; CP 683:12-15. *See also* CP 1532, ¶ 14; CP1585-86. Finally, about seventeen minutes after the alarm triggered, Smith responded to the fire alarm by calling the school. CP 683:8-19. Smith asked the school representative whether the fire department had been dispatched, and the school representative responded that she believed that was Sonitrol's responsibility. Smith agreed, hung up the phone, and then called the fire department. CP 338:10-339:16; CP 341:1-13. Smith then made an entry into her operator log that she "*Received FIRE ALARM. Dispatched FD. Called premise and spoke to Receptionist,*"—thus, making it appear as if she had followed the proper policy for responding to fire alarms by calling the fire department first and then calling the customer. CP 682:3-11; CP 1587.

Smith reported to work at least 3 days during the next week. Yet she never informed any manager, including Mr. LaMont, Ms. Evans, Mr. Bullis, and Mr. Bradley, about the fact that she had missed a fire alarm the previous week. CP 684:4-686:8. Instead of completing an incident report *accurately* describing her actions and submitting it to Mr. LaMont, as policy required and as she had done dozens of times before, she created an Incident Report that contained the same misleading information that she entered into her operator log: "*Received FIRE ALARM. Dispatched FD. Called premise and spoke to Receptionist.*" And,

Smith wrote “*valid*” on the incident report and put it in the stack of the day’s incident reports that had already been reviewed by the shift supervisors.<sup>4</sup> CP 1515, ¶¶ 4-6; CP 1533, ¶ 18; CP 1593.

Smith’s missed fire alarm remained a secret for a week, until January 22, 2013, when a representative of Central Elementary contacted Sonitrol and asked them to explain the reason for the seventeen minute delay in dispatching the fire department on January 15. CP 1532; CP 1588-91. The e-mail that the Central Elementary representative sent on January 22 was the first time that Mr. Bullis, Ms. Evans or any other supervisor or manager had heard about a missed fire alarm at Central Elementary. *See* CP 1466:13-18; CP 1532, ¶ 15.

Mr. Bullis investigated the customer’s complaint by reviewing Sonitrol’s activity logs, phone logs, and video records. CP 1466:19-1467:18; CP 1502, ¶ 14. The activity and phone logs confirmed that Smith failed to respond to the fire alarm for approximately seventeen minutes and contacted the school before dispatching the fire department. CP 336:7-CP341:9; CP 1532, ¶ 14; CP 1584; CP 1587. Mr. Bullis and another Verification Center employee viewed the Verification Center video recordings, which confirmed that Smith was at her console for the majority of the seventeen minutes after Central elementary school’s fire

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<sup>4</sup> Operators earn points for certain tasks, including valid fire department dispatches that count towards a possible monthly bonus. CP 1533, ¶17.

alarm activated. CP 1503, ¶ 15; CP1518, ¶ 7. During the limited periods of time that Smith was away from her console helping another Operator at the console immediately adjacent to hers, Smith did not ask her Shift Supervisor or another Operator for help covering her alarms. CP 670:8-23. At her deposition, Smith admitted her conduct regarding the Central Elementary fire alarm constituted multiple violations of Sonitrol policy:

Q: All of what you did with respect to Central Elementary were violations of standard policy for Sonitrol, correct?

A: Correct.

CP 683:25-684:3.

Mr. Bullis contacted Mr. Bradley and informed him about the missed fire alarm and that Sonitrol learned of it from its customer, not Smith. CP 1467:21-1468:2; CP 1494. In light of the seriousness of the error and Smith's failure to reveal it to Sonitrol, as well as her multiple performance problems the previous year, Mr. Bradley made the decision to terminate Smith. CP 1494, ¶ 7.

**D. Smith Files Her Lawsuit, Raising Multiple Claims, Including a Retaliation Claim Expressly Limited to Complaints About Alleged Workday Drinking.**

Smith filed her Complaint in Snohomish County Superior Court on March 6, 2014. CP 1642; CP 1644. This Complaint provided detailed factual allegations and raised claims of discrimination and harassment under the Washington Law Against Discrimination (WLAD) and two

negligence claims. CP 1648-51. Smith also raised a retaliation claim alleging she was terminated for reporting Mr. Bullis's and Ms. Evans' alleged workday drinking. Specifically, Smith's retaliation claim alleges that Smith "*brought to the attention of HR the fact that several managers at this office location were consuming alcohol during the workday. She brought to the attention of HR that the consumption of alcohol was a widely tolerated practice within this office,*" and "*Plaintiffs [sic] employment was terminated shortly after bringing these concerns to the attention of HR as well as having a personal conversation with the owner of this Sonitrol business.*" CP 1649.

Smith's Complaint is silent regarding any allegation of criminal conduct, by Mr. LaMont or anyone else, under the laws of any jurisdiction and makes no mention of Oregon law. Her Complaint is further void of any allegation that Mr. Bullis or Ms. Evans had created an unsafe work environment or had been convicted of any DUI offense. And unlike the majority of her claims that clearly relate to Smith's sexual orientation, her retaliation claim contains no allegation pertaining to sexual orientation or complaining about sexual orientation harassment.

During her deposition, Smith testified that she believed that the *only* reason she believed she was retaliated against was for telling HR and

Beau Bradley about Mr. Bullis' and Ms. Evan's alleged drinking while at work:

Q: Ms. Smith, in your complaint you allege that you were terminated in retaliation for telling HR and Beau Bradley that managers Joe Bullis and Michelle Evans were consuming alcohol during the day; is that correct?

A: That is correct.

Q: And we have seen –we have established yesterday that in the nine months before you were terminated you received at least five write-ups. ***Is there any other reason why you believe you were terminated, other than in retaliation for telling HR and Beau Bradley about Mr. Bullis's and Ms. Evans' alleged drinking?***

A: I believe that was – that is the reason I was terminated.

CP 275:6-20 (emphasis added). Significantly, during her deposition, Smith expressly denied that she was retaliated against for raising claims of sexual harassment, repeating her belief that she was terminated for “going to human resources and whistleblowing on Michelle and Joe for their consumption of alcohol....” CP 331:1-22. Smith ***never*** sought to amend her Complaint. Instead, after Sonitrol filed its motion for summary judgment arguing that the retaliation claim Smith pled was not cognizable under Washington law, Smith introduced new legal theories in her opposition brief: that she was terminated in retaliation for complaining about a co-worker's alleged criminal history in violation of Oregon law; that she was terminated in retaliation for complaining about workplace

drinking in violation of Oregon law; and that she was terminated in retaliation for complaining about sexual harassment.

The trial court dismissed Smith's retaliation claim, *as it was pled in her Complaint*, as not cognizable under Washington law and rejected her newly raised retaliation theories in her opposition to Sonitrol's motion for summary judgment. The court also dismissed one of Smith's negligence claims. Significantly, after the order on summary judgment, but before trial, *Smith never attempted to amend her complaint* under Civil Rule 15. Trial was held, and Smith's second negligence claim was dismissed on directed verdict. The remaining claims, sexual orientation discrimination and harassment, were rejected by the jury.

Smith now appeals the trial court's refusal to allow Smith to amend her Complaint through her opposition to Sonitrol's summary judgment motion. Smith also raises yet another new legal theory, that she was terminated in retaliation for reporting safety concerns in violation of the Washington Industrial Safety and Health Act of 1973 (WISHA). For all of the reasons set forth below, Smith's arguments should be rejected and the trial court's ruling should be affirmed.

## ARGUMENT

### A. Summary Judgment Standard

When reviewing a decision on summary judgment, the Court of Appeals “engage[s] in the same inquiry as the trial court.” *Funk v. City of Duvall*, 126 Wn.App. 920, 925 (2005). Once the moving party shows that there is no genuine issue of fact and judgment is appropriate as a matter of law, the “nonmoving party must set forth *specific facts* showing a genuine issue and *cannot rest on mere allegations.*” *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132 (1989) (emphasis added); CR 56(e). Put differently, “[u]ltimate facts or conclusions of fact are insufficient,” and “conclusory statements of fact will not suffice.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359 (1988). *Accord Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66 (1992) (nonmoving party “must do more than express an opinion or make conclusory statements”); *Chen v. State*, 86 Wn.App. 183, 190 (1997) (same). Summary judgment is proper if the plaintiff cannot meet this burden. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70 (2007) (citation omitted).

**B. Smith's New Legal Theories Are Not Cognizable Because She Did Not Plead Them and Failed to Properly Amend Her Complaint.**

Smith's appeal is limited to the simple issue of whether she can raise new legal theories for the first time in opposition to a summary judgment motion without seeking to amend her complaint. Washington law is long-standing and well-established: no, she cannot. Smith's new theories raised in her opposition to summary judgment (or, as with one of her claims, raised for the first time on appeal) must therefore be rejected. This issue is dispositive to Smith's appeal.

"Under the liberal rules of procedure, pleadings are intended to give notice to the court and the opponent of the general nature of the claim asserted. Although inexpert pleading is permitted, insufficient pleading is not." *Dewey v. Tacoma School Dist. No. 10*, 95 Wn.App. 18, 23 (1999) (citing *Lewis v. Bell*, 45 Wn.App. 192, 197 (1986)). "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is **and the ground upon which it rests.**" *Id.* (citing *Lewis*, 45 Wn.App. at 197) (emphasis added); *see also Molloy v. City of Bellevue*, 71 Wn.App. 382, 385 (1993) ("A complaint must apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest."); *Camp Finance, LLC v. Brazington*, 133 Wn.App. 156, 162 (2006) (new claims or legal theories cannot be raised in opposition to

summary judgment because “an opposing party is entitled to fair notice of the claims he must defend against.”). If a plaintiff discovers new legal theories relevant to the pending lawsuit, the plaintiff should amend her complaint under Civil Rule 15 to identify and incorporate such new legal theories, including the grounds that those theories rest on. *See Kirby v. City of Tacoma*, 124 Wn.App. 454, 470 (2004) (plaintiff’s attempt to raise new legal theories “did not follow the proper procedure” under CR 15, which “specifically provides for amendment to add or remove claims from an action.”).

On appeal, Smith raises three new legal theories that appeared for the first time in her opposition to Sonitrol’s motion for summary judgment. Thus, Smith now argues that, contrary to what she pled in her complaint, she was terminated in retaliation for complaining about: (1) alleged workday drinking, which purportedly is protected under Oregon law; (2) alleged criminal conduct that also is purportedly protected under Oregon law; and (3) alleged sexual harassment protected under the WLAD. Smith also raises a new legal theory for the first time on this appeal—that she was terminated in retaliation for complaining about threats to workplace safety that are protected under WISHA. But Smith’s Complaint is clear that her retaliation claim is based *solely* on her reporting alleged drinking during the workday. CP 1649. Her stated

retaliation claim is utterly void of any reference to criminal conduct, DUIs, Oregon law, WISHA, the WLAD, or mistreatment based on Smith's sexual orientation. Because these legal theories and the "grounds upon which [they] rest[]" are absent from her Complaint, which Smith was the master of, they are improper and cannot form the basis of a summary judgment denial. *Dewey*, 95 Wn.App. at 23.

Smith argues that her various retaliation theories are nonetheless permitted under Washington's notice pleading standards embodied in Civil Rule 8. This is supposedly so because (1) her new legal theories are all forms of retaliation, a category she already alleged, and (2) because Smith initially raised the criminal conviction theory in a deposition of a Sonitrol employee (Jeff LaMont) that occurred over a year after she filed her Complaint, but about one month before Sonitrol filed its motion for summary judgment. CP 1237; CP 1594; CP 1642 (Complaint filed March 2014; LaMont deposition taken July 2015, summary judgment filed August 2015). But this Court has already rejected these arguments, including in the employment context, which arguments violate Civil Rules 8 and 15 at any rate.

This Court first rejected Smith's position in *Dewey v. Tacoma School Dist. No. 10*, which Smith cites in her Opening Brief. In *Dewey*, the plaintiff alleged he was terminated in retaliation for reporting his

supervisor's alleged misconduct and threatening to report alleged misconduct by other employees. 95 Wn.App. at 20. The defendant moved to dismiss plaintiff's claims, and in response, plaintiff raised "for the first time" a new retaliation theory, that he had been terminated for "the exercise of First Amendment rights." *Id.* at 23-24. The plaintiff argued that this new retaliation theory was valid "under the principle of 'notice pleading'" because he had already "pled facts to support such a claim." *Id.* at 23. The Court of Appeals rejected this argument, holding:

A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery. Dewey's amended complaint explicitly identifies seven separate causes of action. But Dewey's complaint does not identify a free speech or First Amendment theory, nor does it fairly imply such a theory.

*Id.* at 25 (internal citations omitted). The Court further noted that, if litigants were permitted to advance legal theories without specifically identifying the source of law on which the legal theories rested, "a litigant could simply await trial and surprise their adversary with a [] claim so long as enough facts were intermixed in the complaint." *Id.* (quoting *Trask v. Butler*, 123 Wn.2d 835, 846 (1994)). "In hindsight it is easy to view facts and agree they support a [] claim. It is a much more difficult, if not an impossible task, to predict whether a plaintiff will raise such a claim

when it is not alleged in the complaint.” *Id.* (quoting *Trask*, 123 Wn.2d at 846).

This Court subsequently decided *Kirby v. City of Tacoma*, where the plaintiff alleged age and disability employment discrimination. 124 Wn.App. at 459. The Defendant moved for summary judgment and plaintiff argued, again for the first time in opposition to a motion for summary judgment, that he had also been discriminated against on the basis of his union activity, in violation of his constitutional rights. 124 Wn.App. at 469. The Court of Appeals acknowledged that, prior to the defendant’s filing of the summary judgment motion, the plaintiff had filed a “Notice of Claims” stating his intention to pursue constitutional claims and had referenced this administrative claim in his Complaint. *Id.* at 469-70 & n. 12. But the Notice of Claims was not an amended complaint, and the plaintiff “never pleaded below that the City discriminated against him” based on his union activity. *Id.* at 470. Thus, notwithstanding (1) the plaintiff had already pled discrimination claims and (2) the defendant had some notice that plaintiff may have intended to raise some additional legal theory of discrimination, the variation of possible additional claims was “significant,” and this variation “presented myriad ways of proceeding with a defense and conducting discovery, resulting in actual prejudice” to

the defendant. *Id.* The Court concluded that a defendant “should not be required to guess against which claims they will have to defend.” *Id.*

*Dewey* and *Kirby* control the outcome of this appeal. They reject the notion that pleading a claim in one general category, such as retaliation (*Dewey*) or discrimination (*Kirby*), gives a plaintiff carte blanche to assert any other type of claim within that category in opposition to a motion for summary judgment. Likewise, *Kirby* makes clear that providing some suggestion of other possible claims or legal theories short of an amended complaint is insufficient. Smith’s arguments that (1) she raised one form of retaliation in her Complaint and therefore can raise other forms of retaliation at any time, and (2) questioning in a deposition one month prior to the summary judgment deadline somehow satisfies Washington’s pleading requirements are meritless and fail.

*Dewey* and *Kirby* likewise reinforce the purposes of Civil Rules 8 and 15. Civil Rule 8 requires a “short and plain statement of the claim showing that the pleader is entitled to relief,” CR8(a), including “the grounds upon which [the] claim rests.” *Dewey*, 95 Wn.App. at 23; *Molloy*, 71 Wn.App. at 385 (complaint must state “the legal grounds upon which the claims rest.”). If a plaintiff develops a new legal theory, through discovery or otherwise, the proper course is to seek leave of the court to amend the complaint, which “leave shall be freely given.” CR 15(a). Like

the plaintiffs in *Dewey* and *Kirby*, Smith failed to properly amend her Complaint to identify her new legal theories and the laws they rested on. Like *Dewey* and *Kirby*, Smith's claim was properly dismissed, and this Court should affirm that dismissal.

Although Smith's failure to amend her Complaint is dispositive and the Court need conduct no further analyses of Smith's arguments, Smith's new legal theories also fail under their own weight for independent reasons, as discussed below.

**C. Smith's New WISHA Claim Independently Fails Because Smith Never Raised the Claim in Any Form Before the Trial Court and Because She Failed to File a Complaint with the Department of Labor and Industries.**

Smith newest legal theory, alleged for the first time on appeal, asserts that her allegations related to drinking during the workday are protected by WISHA, specifically RCW 49.17.160.<sup>5</sup> As an initial matter, Smith cites no paper or statement before the trial court that references this statutory cause of action, because there is none. Because this claim is raised for the first time on appeal, it is improper and should be dismissed. *Whaley v. State, Dep't of Social and Health Serv.*, 90 Wn.App. 658, 671 (1998) (new negligence theory raised for the first time on appeal

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<sup>5</sup> Smith's opening brief at page 10 mistakenly cites RCW 19.17.160, a chapter and section that do not exist. She corrects this error on page 17 of her brief.

“cannot...provide a basis for reversing the order of summary judgment dismissing [plaintiff’s pled] negligence claims”).

But regardless, even if Smith had properly pled this cause of action, her claim would fail because she never filed a complaint with the Washington State Department of Labor and Industries, a necessary statutory prerequisite. Smith omits the language of RCW 49.17.160 from her Opening Brief, which reads in pertinent part:

**Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such violation occurs, file a complaint with the director alleging such discrimination.** Upon receipt of such complaint, the director shall cause such investigation to be made as he or she deems appropriate. If upon such investigation, the director determines that the provisions of this section have been violated, he of [or] she shall bring an action in the superior court of the county wherein the violation is alleged to have occurred against the person or persons who is alleged to have violated the provisions of this section. **If the director determines that the provisions of this section have not been violated, the employee may institute the action on his or her own behalf within thirty days of such determination.** In any such action the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.

RCW 49.17.160(2) (emphasis added). Thus, any claim brought under the statute must be filed within 30 days of the date of Labor and Industries’ non-merit determination. *See Cudney v. AlSCO, Inc.*, 172 Wn.2d 524, 531

(2011) (under RCW 49.17.160, “the employee is allowed to bring a suit himself or herself within 30 days of the director’s determination”) (overruled on other grounds by *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268 (2015)); *Morrison v. Kroger Company, Inc.*, No. C09-5183-BHS, 2010 WL 959938 at \*4 (W.D. Wash., March 12, 2010) (dismissing claim that was filed “more than thirty days after the department’s determination that RCW 49.17.160 had not been violated”).

Smith never filed a complaint with Labor and Industries regarding alleged alcohol consumption or to complain that she was terminated for reporting the same. *See* CP 609:17-610:7. Her claim for retaliation under RCW 49.17.160 therefore fails and should be dismissed.

**D. Smith’s New Retaliation Claims Arising under Oregon Regulations Independently Fail Because the Statute of Limitations Has Passed, Because the Claims Were Brought in the Wrong Court, and Because, By Their Terms, the Regulations Do Not Apply to This Case.**

Smith alleges she was terminated in retaliation for complaining to Mr. Bradley that Mr. LaMont had a prior misdemeanor conviction and that Mr. Bullis and Ms. Evans were drinking during the workday. Smith alleged, for the first time in her opposition to Sonitrol’s summary judgment motion, that these complaints are protected activity under Oregon law, and thus form the basis of a prima facie retaliation claim. No.

***1. Smith's Oregon law claims are time-barred and were raised in the wrong court.***

Smith's Oregon law claims arise under ORS 659A.199(1).

Opening Br. at 20-21. Claims arising under ORS 659A.199(1) are authorized by ORS 659A.885(1)-(2), and thus are subject to a one year statute of limitations. ORS 659A.875(1). The alleged retaliation occurred when Smith was terminated in January 2013. CP 1647. Smith filed her Complaint approximately fourteen months later, in March 2014. CP 1642. Smith's theories under Oregon law are time-barred because she waited over a year to file her Complaint.

Smith's Oregon law claims are further improper because she raises them in the wrong court. Claims under ORS 659.199(1) are only authorized to proceed in "circuit court." ORS 659A.885(1). Circuit courts are Oregon State trial courts established under Article VII, Section 9 of the Oregon State Constitution. Smith brought her lawsuit in Washington State court, not Oregon State court. Because the only courts statutorily authorized to hear Smith's Oregon law claims are Oregon State courts, Smith's attempts to inject new Oregon law claims into this case by way of

her summary judgment opposition is legally improper.<sup>6</sup> The trial court's dismissal should be affirmed.

**2. *The record does not support Smith's Oregon law claims on the merits.***

Smith's Oregon law claims fail for additional, independent reasons. The Oregon regulations Smith relies on turn on whether Smith had a good faith belief that Mr. Bullis or Ms. Evans were convicted of DUI in Washington and whether Mr. LaMont was convicted of criminal activity that occurred while he was "on duty" as a security provider. The record is utterly void of any evidence to support either allegation, because no such evidence exists. Smith's last-ditch effort to save her retaliation claim by any means necessary is legally improper, and her baseless accusations against her co-workers are nothing short of harassment.

Smith's new Oregon law retaliation claim stems from Oregon Administrative Rule 259-060-0300(2)(c)(E), which may trigger revocation of an alarm monitoring license if an individual is *convicted* of a misdemeanor "*while on duty* as a private security provider." (Emphasis added). Smith asserts in her Opening Brief that Mr. Bullis and Ms. Evans were "arguably" committing misdemeanors by consuming alcohol and driving during the workday. But there is zero evidence that Smith raised

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<sup>6</sup> Sonitrol notes that it is unable to locate any reported or unreported cases of Washington state courts or the Federal District Courts for the Western or Eastern Districts of Washington ever adjudicating claims under ORS 659A.199 or ORS 659A.885.

any concern that Mr. Bullis or Ms. Evans may have been convicted of driving under the influence during the workday to Mr. Bradley, Ms. MacKenzie, or anyone else. There is not even evidence that Mr. Bullis or Ms. Evans was ever questioned, arrested, or convicted of DUI, and Smith never asserted such evidence exists or even that she believes such evidence exists.<sup>7</sup> Her alleged complaint to Ms. MacKenzie and Mr. Bradley regarding workday drinking thus falls entirely outside the scope of the Oregon regulation and is based entirely on conclusory opinions, which cannot defeat summary judgment.

Smith's new claim regarding Mr. LaMont's alleged misdemeanor conviction fails for the same reason. To trigger the Oregon regulation, Mr. LaMont must have engaged in conduct resulting in a misdemeanor conviction "while on duty" at Sonitrol. OAR 259-060-0300(2)(c)(E). Smith never alleged Mr. LaMont engaged in criminal activity *while on duty* to Mr. Bradley, Ms. MacKenzie, or anyone else. Again, the record contains no such evidence, because none exists.<sup>8</sup>

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<sup>7</sup> Had Smith raised this new legal theory before her opposition to summary judgment, Sonitrol would have had notice to include declarations from Mr. Bullis and Ms. Evans stating that they have no such DUI record. Sonitrol's lack of opportunity to do so underscores the unfair prejudice warned against by *Dewey and Kirby*, as well as the policies of CR 8 and 15.

<sup>8</sup> Smith cites CP 1295-96 as evidence that Smith discussed Mr. LaMont's alleged criminal history with Mr. Bradley. Opening Br. at 6. As with many of Smith's cites to the record, the cited pages do not appear to support Smith's statement. But even if it did, for reasons discussed herein, Smith's Oregon law claim still fails.

In addition, the thrust of Smith's new claim regarding Mr. LaMont is that he was improperly monitoring Oregon alarms without a license (or with a license that allegedly should have been revoked). But Smith does not dispute that Mr. LaMont *did not monitor Oregon alarms during the time in question*, and can point to no evidence to the contrary. CP 1242:25-1243:2. Smith did not raise Mr. LaMont's alleged criminal history to voice any reasonable concern that Mr. LaMont or Sonitrol was acting contrary to Oregon law; she was attempting to divert blame to others and protect herself from termination for her poor performance.

Smith's reliance on speculation and conclusory allegations instead of actual evidence is improper and cannot form the basis of a summary judgment denial. *Hiatt*, 120 Wn.2d at 66; *Grimwood*, 110 Wn.2d at 359; *Chen*, 86 Wn.App. at 190. The trial court's dismissal should be affirmed.

**E. Smith's New Sexual Orientation Retaliation Claim Fails Because She Consciously Decided Not to Raise It in Her Complaint and, As An Independent Basis, Because Smith Demonstrates No Nexus Between Her Alleged Statements and Termination.**

Smith's Complaint plainly alleges facts related to alleged sexual orientation harassment, which claim she expressly raised. She also plainly alleged that she was terminated on account of her sexual orientation, which discrimination claim the jury dismissed. But while Smith was careful to discuss sexual orientation (as well as explicitly referencing the

WLAD, codified at chapter 49.60 RCW) in her discrimination and harassment claims, her retaliation claim is utterly silent in this regard. Smith consciously chose *not* to raise a retaliation claim pertaining to sexual orientation under the WLAD. She did so because she knows no such claim exists.

A prima facie claim of retaliation under the WLAD requires a plaintiff to demonstrate that: (1) she engaged in statutorily protected activity; (2) her employer took an adverse employment action against her; and (3) a causal link between the protected activity and the adverse action exists. *Alonso v. Qwest Communications Co., LLC*, 178 Wn.App. 734, 754-55 (2013). Smith alleges she meets this burden because she complained to Ms. Evans at some point of sexual orientation harassment and was fired for it. No.

To survive summary judgment, the Plaintiff must demonstrate that the employee's activity "was a substantial factor motivating the adverse employment action." *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 96 (1991); accord *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 862-63 (2000) (causation requires a nexus between plaintiff's complaint and the employer's action). Mere temporal proximity between the employer's action and any protected activity is not enough to defeat summary judgment. See *Tyner v. State*, 137 Wn.App. 545, 565

(2007) (without more, plaintiff's assertion of temporal proximity was "insufficient to defeat summary judgment"); *Campbell v. State*, 129 Wn.App. 10, 23 (2005) (close temporal proximity, without more, insufficient to survive summary judgment). Even Smith admits that she must at least show evidence that she was performing satisfactorily **and** that she was terminated in close temporal proximity to her statutorily protected complaint. Opening Br. at 11. Notably, Smith testified under oath that she did not believe that the alleged harassment she suffered had anything to do with the retaliation that she allegedly suffered. CP 331:1-22.

Smith cannot demonstrate the required nexus between her alleged complaints (which Sonitrol has always denied but must accept as true for purposes of this appeal) and her termination. Smith does not identify when these alleged complaints occurred, other than the fact that they occurred during the course of her employment. As such, there is no basis to determine the required nexus between her alleged complaints and her termination. *See Francom*, 98 Wn.App. at 862-63 (15 month span between protected activity and retaliatory act insufficient to demonstrate causation). Further, Smith presents no evidence, other than her employment itself, that she was performing satisfactorily. To the contrary,

as discussed in detail in Section F below, her performance as an employee was sorely lacking.

More fundamentally, Smith does not dispute that Mr. Bradley made the decision to terminate her, and Smith points to no evidence suggesting that Ms. Evans shared the alleged sexual orientation complaints with Mr. Bradley or even had any role in her termination. It is self-evident that Mr. Bradley could not terminate Smith in retaliation for a complaint that he knew nothing about. *See Kirby*, 124 Wn.App. at 467 (conduct by manager who was not involved in employment decision “cannot impute discriminatory intent” to the employer).

While the record is void of any evidence, including Smith’s testimony, that she was terminated in retaliation for complaining of harassment, the record is clear that Smith always believed (until her opposition to Sonitrol’s summary judgment motion) that ***the sole reason*** she was terminated was because she allegedly complained about workplace drinking to Ms. MacKenzie and Mr. Bradley. CP 330:9-331:19; CP 1437:15-1438:21; CP 1478-81. Now that she is aware that her alcohol consumption claim is not actionable, Smith raises allegations that flatly contradict her prior unambiguous testimony, without explanation. Such self-serving testimony is insufficient to survive a motion for summary judgment. *Taylor v. Bell*, 185 Wn.App. 270, 294 (2014).

Smith points to no evidence that Mr. Bradley terminated her in retaliation for sexual orientation harassment complaints, because none exists, and speculative allegations or “conclusory statements of fact will not suffice.” *Grimwood*, 110 Wn.2d at 359. She therefore cannot meet her burden to point to specific evidence demonstrating an issue of material fact, and dismissal of this claim should be affirmed.

**F. Smith Cannot Demonstrate that Sonitrol’s Legitimate Business Reason for Her Termination—Poor Performance Culminating in a Significant Policy Violation and Cover-Up—Is Pretext for Unlawful Retaliation.**

Smith’s retaliation claims fail for yet another independent reason. Even if Smith could show a prima facie case for retaliation (she cannot), she must also demonstrate that Sonitrol’s legitimate business reason for terminating her is pretext for a retaliatory motive. *Short v. Battle Ground Sch. Dist.*, 169 Wn.App. 188, 204-05 (2012) (overruled on other grounds by *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481 (2014)). She cannot do so.

Smith was an experienced Operator and former Supervisor. She understood Sonitrol policies, including the proper procedure for responding to fire alarms, as well as how to fill out reports, how to submit reports, and the importance of turning one’s alarms over to another Operator if she was going to be occupied with other tasks. She understood

that fire alarms were the most important type of alarm Sonitrol monitors, and also understood that Sonitrol's ability to operate a fire alarm monitoring line of business depends on properly and *timely* responding to all fire alarms.

Despite this, Smith took *seventeen minutes* to respond to a fire alarm at an elementary school that had children in the classrooms, not 90 seconds or less as required. During that seventeen minute period, Smith responded to two other alarm issues (neither of which were active fire alarms) and left her desk on several occasions without asking anyone to cover for her. Even worse, she attempted to hide her error; she logged her actions as first dispatching the fire department and then contacting the client when the reverse was true; she failed to notify anyone about what she fully understood were serious, multiple policy violations; and she wrote "valid" on her incident report form and placed it among reports that had already been reviewed instead of giving it to her Shift Supervisor. Had a school representative not called to complain, Sonitrol never would have learned of Smith's failures. Smith admits these facts constitute Sonitrol policy violations, as she must. CP 675:8-22; CP 683:25-684:3; CP 684:15-685:12.

To be clear, Smith was not fired just for missing a fire alarm. She was fired because: she had received multiple written-warnings for policy

violations, including regarding improper or inadequate responses to customer alarms; she was warned that her next violation could result in termination; she missed an alarm at a school with children in class for seventeen minutes; she did not dispatch the fire department until asked by the customer to do so; she put misleading or false information about the missed school fire alarm in two written reports; and she failed to notify anyone at Sonitrol of her errors for a week, despite knowing how important proper responses to fire alarms are. Sonitrol is unaware of any other employee ever engaging in such extreme, egregious behavior, and Smith identifies none.

Sonitrol tried to work with Smith for over a year, but after her conduct on January 15, 2013, Sonitrol could no longer trust Smith to do her job. She was terminated for her performance, and for no other reason. The trial court's dismissal of her retaliation claim should be affirmed.

### **CONCLUSION**

This Court has already decided the issue that is dispositive to this case—a plaintiff cannot use her opposition to a summary judgment motion to amend her Complaint. If a plaintiff wishes to advance new claims or legal theories during the course of litigation, basic fairness dictates that the plaintiff must do so under Civil Rule 15, which allows for liberal amendments.

Smith *chose* not to amend her Complaint and now seeks to correct this deficiency by re-casting the issue on appeal as one of notice pleading under Civil Rule 8. This Court has routinely rejected this argument before and should do so now. For all of the foregoing reasons, Sonitrol respectfully requests that this Court affirm the trial court's dismissal of Smith's retaliation claim.

RESPECTFULLY SUBMITTED this 17th day of May, 2016.

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 years and not a party to the within cause.

2. I am employed by the law firm of Davis Wright Tremaine LLP. My business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101.

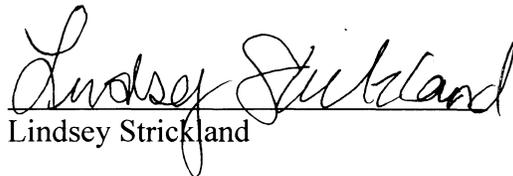
3. On the 17<sup>th</sup> day of May, 2016, I caused true copies of the following documents:

***Response To Opening Brief Of Appellant*** to be served via e-mail and by U.S. mail on counsel for the Appellant at the following address:

Rodney R. Moody  
Attorney at Law  
2825 Colby Avenue, Ste 302  
Everett, WA 98201-3558

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

Executed this 17<sup>th</sup> day of May, 2016, at Seattle, WA.

  
Lindsey Strickland