

74367-8

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Court of Appeals No. 74367-8
King County Superior Court No. 15-2-06791-5 SEA

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

DEBI O'BRIEN,

APPELLANT,

v.

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"),

RESPONDENTS.

AMENDED BRIEF OF RESPONDENTS

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I. INTRODUCTION

Plaintiff Debi O'Brien first asserted claims against her employer, ABM Parking, and ABM Industries Incorporated in 2013. She identified Leonard Carder as an individual manager who allegedly engaged in unlawful conduct, and tried to add him as a party. That case was removed to federal court, where the parties engaged in discovery for a year and a half. Then, when the defendants were poised to seek summary judgment dismissal of her claims, Ms. O'Brien voluntarily dismissed her claims, telling the federal court that she had decided instead to pursue claims against individual managers in state court. Although some of those claims were clearly time-barred and legally baseless, she refused to withdraw them until after the federal court had dismissed her case. She then promptly added the companies to her new state court case and dismissed all individual managers except Mr. Carder.

Defendants sought to remove the case in the face of what appeared to be clear forum-shopping. After the federal court granted Ms. O'Brien's motion to remand, Ms. O'Brien made no effort to conduct discovery, even after the defendants' motions for summary judgment were pending for approximately two months.

After nearly two years of litigation, Ms. O'Brien has nothing more than unsubstantiated allegations to support her legal claims. No evidence supports her claims that she was the victim of a vast, multi-year conspiracy, as she offered nothing to show unlawful motives, or that the various players had shared knowledge or were involved in challenged

decisions. Finally, she offered no evidence to counter the legitimate, non-discriminatory and non-retaliatory reasons for employment actions that impacted her. As just one example, she had no evidence to challenge the fact that the decision to lay her off was made months before she engaged in supposedly protected action, and by managers who had no knowledge of that action. Accordingly, the trial court's decision to dismiss her claims should be upheld.

In addition, the trial court appropriately imposed CR 11 sanctions, as Ms. O'Brien and her counsel asserted claims that a reasonable attorney would have recognized as baseless, and where their conduct with respect to the baseless claims demonstrated an improper purpose.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Respondents are not seeking review of any decisions of the trial court. Respondents provide the following restatement of the issues pertaining to the assignments of error.

1. CR 11 Sanctions (Assignments of Error 1-7)

Did the trial court act within its discretion when it imposed CR 11 sanctions upon Ms. O'Brien and her counsel, where they asserted factually and legally baseless claims against individual managers (and refused to withdraw them until after a motion to dismiss was filed, despite a CR 11 warning), and where the facts demonstrated that they did so for an improper purpose?

2. CR 56(f) Motion (Assignment of Error 8)

Did the trial court act within its discretion in denying Ms. O'Brien's motion for additional discovery pursuant to CR 56(f), where she demonstrated a lack of diligence in pursuing the discovery she claimed was necessary; and where she failed to indicate what evidence would be established by further discovery and how the new evidence would raise a genuine issue of fact?

3. Summary Judgment (Assignment of Error 9)

Did the trial court appropriately grant the defendants' motions for summary judgment, where Ms. O'Brien failed to present sufficient evidence to demonstrate a genuine issue of material fact with respect to any of her claims?

III. STATEMENT OF THE CASE

A. Background Facts Regarding Ms. O'Brien's Employment by ABM Parking.

ABM Parking¹ provides parking management services to owners of office complexes and surface lots. CP 694. It is an indirect, wholly-owned subsidiary of ABM Industries Incorporated ("ABMI"). CP 690. Between 2007 and 2013, ABM Parking's operational employees in the Puget Sound region were assigned to the Seattle/Bellevue "Branch" office. CP 695. ABM Parking's operational employees work on the premises of

¹ ABM Parking Services was formerly known as "Ampco System Parking." CP 690. In March 2013, the name was changed to ABM Parking Services, Inc. *Id.* To avoid confusion, we will use the name "ABM Parking" to refer to this entity. As of January 1, 2014, ABM Parking Services is known on the West Coast as ABM On-Site Services – West, Inc. CP 916-17.

ABM Parking's clients, managing locations, supervising hourly employees, collecting payment, and performing valet parking. *Id.* ABM Parking also employs administrative employees whose functions include assisting with safety compliance, human resources, payroll processing, administrative/clerical work, and overall Branch management. *Id.*.

In 2005 or 2006, ABM Parking eliminated the Human Resources department in the Seattle/Bellevue Branch, after which human resources support was provided by ABM Parking employees in the San Francisco Branch office, which also supported operations in Northern California and Hawaii. CP 715-17, 722-23. ABM Parking then hired Ms. O'Brien in 2007 as an "Operations Manager/HR Coordinator" to provide local human resources support, largely to coordinate getting paperwork to San Francisco. CP 723-25; 742; 784. Her job included responsibilities in Operations Management, Human Resources, and Safety and Risk. *Id.*

Ms. O'Brien originally reported to Assistant Branch Manager Dan Lawson, with a "dotted line on the organization chart" to the Senior Branch Manager, Hugh Koskinen. CP 744-47; 797. From 2007 to 2011, Defendant Leonard Carder was the Vice President for ABM Parking for the Northwest Region, which includes the Seattle/Bellevue Branch. CP 913. In that position, Mr. Carder had overall management and budgetary responsibility for the Northwest Region of ABM Parking. *Id.* Mr. Carder's duties did not include supervising operational employees below the branch manager level, and Ms. O'Brien never reported to Mr. Carder; he was never her direct supervisor. *Id.* From February 2011 on, Mr.

Carder served as an Executive Vice President of ABM Parking with responsibility for national oversight. CP 912-13.

Ms. O'Brien's initial supervisor, Mr. Lawson, left ABM in October 2010. CP 918. Mr. Koskinen left in April 2010, and Assistant Branch Manager Matt Purvis became Ms. O'Brien's direct supervisor. *Id.*; CP 800, 804. As of May 2011, Mr. Purvis reported to Rod Howery. CP 831.

B. In 2009, Ms. O'Brien's Manager Directs Her To Take Action In Response To A Complaint of Sexually Inappropriate Conduct.

Ms. O'Brien alleges that in approximately March or April of 2009, in her capacity as a Human Resources representative, she was asked by Mr. Koskinen to assist in responding to a complaint made by employee Melody Dillon. CP 432; 779-81. After Ms. Dillon reported to her supervisor that two male valets had shared with her a sexually explicit text, Mr. Koskinen instructed Ms. O'Brien to write up the two male valets, which she did. CP 432-33; 781. There is no evidence that Mr. Carder knew about Ms. Dillon's complaint; in fact, he was not aware of the complaint by Ms. Dillon, or of Ms. O'Brien's involvement in responding to the complaint. CP 913-14.

Although it was Mr. Koskinen who directed Ms. O'Brien to write up the two valets, Ms. O'Brien alleges that in 2009 and 2010 Mr. Koskinen, as well as Mr. Lawson and Mr. Carder, subjected her to a "hostile work environment" because of her actions in writing up the two valets at Mr. Koskinen's direction. CP 434. Ms. O'Brien vaguely accuses

Mr. Carder of becoming “increasingly confrontational and critical” of her, and alleges that he assigned her new duties that she considered unsavory and unsafe. CP 434-36. Specifically, Ms. O’Brien alleges that after she was involved in responding to the Dillon complaint, in 2009 Mr. Carder asked her to regularly inspect ABM Parking’s locations and document improvements to be made, as part of a “Customer Service Initiative” (“CSI”). CP 435. Although other branch and location managers also performed “walk-through” inspections (CP 834-35), Ms. O’Brien contends this was retaliatory because she felt that doing “walk-throughs” of the parking lots managed by ABM Parking was unsafe. CP 434-36.

C. Ms. O’Brien’s Work at the Pacific Place Garage.

In April 2012, Regional Vice President Rod Howery notified Ms. O’Brien’s manager, Mr. Purvis, that the accounts receivables (“AR”) at some of his locations were very large. CP 807; 838-40. Mr. Purvis told Mr. Howery that the Pacific Place Garage (“PPG”) was one location with a large AR balance, and that he had assigned Ms. O’Brien to assist the location manager, Jaja Drew, in his collection efforts. *Id.* Mr. Purvis had been working with Mr. Drew to try to get him to improve his monthly parking collections. CP 809-10. In addition to the AR issue, Steve Carlson had alerted Mr. Purvis that some businesses were not getting billed for customer parking validations. CP 811-12 Mr. Purvis asked Ms. O’Brien to assist Mr. Drew with the validation billing and AR issues, and to help improve customer service at the location. CP 812-15.

While she was helping out at PPG, Ms. O'Brien noticed and reported to Mr. Purvis that there was one validation stamp that did not have a name in the billing system. CP 750-51. Mr. Purvis asked her to find out why and if anyone had been billed for that number. *Id.* Ms. O'Brien was unable to find any billings associated with that validation. CP 751. Mr. Purvis also ran an AR report with respect to monthly parking at PPG, which showed monthly parkers owing money. CP 752. Mr. Purvis suggested that Ms. O'Brien instruct Mr. Drew to shut off the key cards of persons who had invoices more than 30 days past due. *Id.* Ms. O'Brien's efforts to get Mr. Drew to turn off delinquent parkers' card keys were not successful. CP 753-58. Although Mr. Purvis told her to "[d]o whatever it takes to get it [payment of the account receivables]," Ms. O'Brien eventually "just gave up." CP 757-59.

By her own admission, Ms. O'Brien never reported any concerns about what she observed at PPG to anyone other than her supervisor, Matt Purvis. CP 761, 772-73. She never told Mr. Purvis that she believed there was "probable theft" occurring; rather, she "just told him that there's something wrong." CP 773. Ms. O'Brien never reported any concerns about accounting issues at PPG through the ABM Hotline. CP 750.

D. Ms. O'Brien and Other Salaried Employees Work at the Spokane Fair.

As part of its business, ABM Parking contracts to manage visitor parking at special events. CP 698. Every year, ABM Parking assigns a group of salaried employees to help with the Spokane Fair. *Id.* In 2012,

Mr. Howery assigned this duty to Ms. O'Brien and others. *Id.* Paulette Ketza, ABM Parking's Spokane Branch Manager, was in charge of assigning work to and overseeing employees at the fair. *Id.* Ms. O'Brien alleges that she told HR Manager Madeline Kwan that she did not think she was physically capable of working at the fair because she could not do long hours in the hot sun. CP 765-66. Ms. O'Brien provided no evidence that she has a medical condition requiring a workplace accommodation, or that she gave notice to ABM Parking that she had a condition requiring accommodation.

Nevertheless, Ms. O'Brien was told that Ms. Ketza "would try to work with me on my hours." CP 766-67. Ms. Ketza informed Ms. O'Brien that they were hoping to avoid long hours through increased staffing. CP 842-45. Ms. O'Brien thanked Ms. Ketza and stated that "all my needs have been met!" *Id.* (emphasis added).

Ms. O'Brien's actual experience at the fair was that she "worked pretty long hours" and "was tired when I got back." CP 767. She never communicated any concerns about any physical problems because "[e]veryone had a hard time working there I'm sure." CP 768. She never told anyone that she needed to quit earlier than scheduled. CP 119-20.

E. After Contract Losses and Other Economic Pressures, ABM Parking Decides to Eliminate Several Administrative Positions.

Because ABM Parking's business is contract-based in a competitive industry, the size of its workforce fluctuates based on economic factors and the outcome of bidding for service contracts. CP

695. Hourly operational employees are paid via the client contract. *Id.* When a client does not renew a contract, hourly employees generally are laid off and then offered the opportunity to continue their employment at the location with the new parking service provider. *Id.* When demand for parking employees declines, ABM Parking reduces administrative support functions to a level consistent with the size of the operational workforce, and even closes Branch offices. *Id.*

In 2012, ABM Parking was unsuccessful in bidding for renewal of several parking contracts in the Seattle/Bellevue area. In mid-to-late September, the City of Seattle notified ABM Parking that it was not renewing the contract for ABM Parking to operate the PPG, which meant a revenue loss of approximately \$20,000 per month.² CP 704-05; 819. In addition, automation had contributed to fewer employees “out in the field.” CP 803. Rod Howery immediately looked for ways to reduce Seattle/Bellevue Branch administrative expenditures. CP 695-96. He discussed possible position eliminations with Ms. Kwan, who evaluated proposed terminations to make sure there was a valid reason. CP 696; 714, 728-29. The two Seattle positions identified were Debi O’Brien’s Operations Manager/HR Coordinator position and Ken Eichner’s Auditor position. CP 696-97; 727.

Mr. Howery, in consultation with Ms. Kwan, decided that Ms. O’Brien’s duties could be performed by San Francisco Human Resources employees and Operations Managers assigned responsibility for the

² In addition, all of the employees assigned to that location were laid off. CP 816-18.

parking locations where hourly employees would be hired. CP 696; 730-31. This was consistent with the way hiring functions were performed at all other branches in the Northwest Region, as well as in Northern California and Hawaii.³ CP 696. Ms. O'Brien's operational responsibilities, such as conducting CSI inspections, were to be eliminated. *Id.* The audit duties of Mr. Eichner were to be folded into the duties of San Francisco Audit Manager Tommy Chan. CP 697.

The reduction-in-force was not implemented in October 2012 as planned. The delay was initially due to scheduling issues, as Ms. Kwan and Mr. Howery wanted to travel to Seattle together to deliver the reduction-in-force news.⁴ CP 697-98; 731-32. As Ms. O'Brien and Mr. Eichner were on planned vacations through December 3, Ms. Kwan and Mr. Howery decided to wait until after the Christmas holiday and implement the layoffs in the New Year. CP 731-32. Ultimately, they were available to travel to Seattle during the week of February 4, 2013. CP 697-98; 733.

On January 29, 2013, Ms. Kwan sent "Termination Review" paperwork to Vivian Smith at ABMI. CP 732-33. Ms. Kwan traveled to Seattle on Tuesday, February 5, and met with Ms. O'Brien and Mr. Eichner on February 6. CP 737-38. Ms. Kwan told Ms. O'Brien "[t]hat we had lost some locations, and so they were reorganizing and had to

³ The only other Human Resources employees outside of the San Francisco office were two Human Resources Managers employed at airport locations at the request of the customer. CP 716.

⁴ Meanwhile, ABM Parking learned that it was losing another contract at the end of the year—the University of Washington Medical Center account. CP 801-02, 821-21.

eliminate my position.” CP 774. Ms. O’Brien was terminated effective February 6, 2013. CP 718. ABM Parking did not hire any new employees to perform Ms. O’Brien’s duties. CP 698. Her ongoing job duties were absorbed by existing employees. *Id.*; CP 824-27. Some duties, like the CSI, were simply dropped. CP 827-28.

F. Relationship Between ABM Parking Services ABMI.

ABM Parking is an indirect, wholly-owned subsidiary of ABMI. CP 945. ABM Parking is its own corporate entity, and as such, manages its own employment matters and makes all decisions regarding the hiring, firing, promotion, work assignments, salaries, performance evaluations, and discipline of its employees. CP 986. ABM Parking maintains separate finances that are not commingled with ABMI, and ABM Parking is entirely responsible for claims asserted by its employees, former employees, or any other third party. *Id.* ABMI is headquartered in New York, and has no employees in Washington. CP 946. ABMI provides limited assistance with certain “back office” services to ABM Parking (and other subsidiaries) through a Service Agreement. CP 986, 989-95. These services include the provision of administrative, financial, and legal support. *Id.* ABMI does not participate in the day-to-day operations or finances of ABM Parking. CP 986. ABMI did not make any employment decisions for ABM Parking.⁵ *Id.* ABMI does not compensate the

⁵ ABM Parking Services is currently known as ABM On-Site Services—West; ABMI does not make any employment decisions for ABM On-Site Services—West, either. CP 945; 985-86.

employees of ABM Parking for their work performed as an employee of ABM Parking. *Id.*

In the Northwest Region of ABM Parking in which Ms. O'Brien was employed, ABM Parking management requires its managers to use the human resources support services available via the Service Agreement when implementing any layoff decisions made by ABM Parking. CP 950. Specifically, ABM Parking fills out "reduction in force" paperwork providing factual information regarding the planned layoff decision. *Id.* Once the ABMI Human Resources representative "approves" the planned layoff decision, the ABM Parking manager is free to move forward with implementing the decision. *See* CP 950, 952; 959; 1001.

G. Procedural Background.

1. Ms. O'Brien has 1.5 Years of Discovery in *O'Brien I.*

This matter was originally filed in King County Superior Court on October 10, 2013. KCSC, Case No. 13-2-35546-9. Defendants removed the case to federal court on November 8, 2013. *Id.*; CP 851-57 ("*O'Brien I*"). Plaintiff requested and was granted two extensions of the discovery period during the federal litigation. CP 402-04, 1432-33, 1436. Plaintiff propounded 17 interrogatories and 52 requests for production; seven depositions were taken. CP 684. She had four more depositions scheduled when, in March 2015, she abruptly moved to voluntarily dismiss her federal action less than a month before the close of discovery. CP 859-68. Ms. O'Brien claimed to have discovered grounds to assert claims against several individual managers of ABM Parking and ABMI,

including Mr. Carder (“Individual Defendants”). CP 859-68. After the federal court granted the motion to dismiss, Ms. O’Brien amended her new state complaint a second time to add ABM Parking and ABMI. CP 426. Because this case is substantively identical to *O’Brien I*, Ms. O’Brien has already had the benefit of almost 1.5 years of discovery to attempt to support her claims.

2. Plaintiff Refuses To Drop Invalid Claims Against the Individual Defendants Until After She Has Added the Corporate Defendants.

Immediately after Plaintiff filed her complaint, counsel for Defendants notified Plaintiff’s counsel of Rule 11 violations in the complaint. CP 594-95. The letter put Plaintiff’s counsel on notice that the claims against Defendants Lawson and Koskinen were plainly outside the statute of limitations, and that the claims for breach of contract/promissory estoppel against the Individual Defendants based on written *employer* policies were unsupported by existing law. *Id.* Defense counsel requested that Plaintiff withdraw the baseless claims. *Id.*

On April 6, 2015, Plaintiff’s counsel responded to Defendants’ Rule 11 Notice (at the same time that Plaintiff amended the complaint to name Defendants Rod Howery and Vivian Smith). CP 597-98. Plaintiff’s counsel denied that the complaint violated Rule 11, and denied that allegations in the complaint were not well grounded in fact. *Id.* Plaintiff did not dismiss her breach of contract/promissory estoppel claims against the other Individual Defendants; instead, her Amended Complaint added a claim for tortious interference. *Id.*

Defendants then filed a Motion to Dismiss based upon arguments set forth in their Rule 11 notice to Plaintiff's counsel. CP 600-14. The Motion to Dismiss was set for hearing on July 2, 2015. After receiving Defendants' Motion to Dismiss, Plaintiff sought leave to again amend her complaint, this time to name ABM Parking and ABMI, the "Corporate Defendants" recently dismissed from the federal matter. This motion was granted on May 13, 2015. Once Plaintiff was allowed add the Corporate Defendants, she no longer needed to maintain the pretense that she now wanted to sue the individual managers instead of the companies. Accordingly, on May 22, 2015, Plaintiff's counsel informed defense counsel that she now planned to voluntarily dismiss all of the Individual Defendants except for Mr. Carder. CP 616. The trial court approved Plaintiff's request to dismiss those Individual Defendants. CP 618-19.

3. The Trial Court Grants Defendants' Motions for Summary Judgment and Motion for Sanctions.

Mr. Carder, ABM Parking, and ABMI each separately filed motions for summary judgment. CP 658-83; 927-40; 1004-25. Defendants also filed a Motion for Sanctions. CP 470-82. By Order dated September 14, 2015, the court granted Defendants' Motion for Sanctions. CP 655-57. Plaintiff filed a motion for reconsideration, which was denied. CP 1290-1303; 1382-83. Counsel participated in oral argument with respect to the summary judgment motions on November 13, 2015. CP 2129. The trial court granted the three motions for summary judgment. CP 2130-34. The court also issued a Second Order on Defendants'

Motion for Sanctions in which it detailed the specific facts supporting its order. CP 2135-36.

IV. ARGUMENT

A. The Trial Court Did Not Abuse its Discretion in Imposing CR 11 Sanctions.

The imposition of sanctions is reviewed for abuse of discretion. *Engstrom v. Goodman*, 166 Wn. App. 905, 916–17, 271 P.3d 959, 965 (2012), *as amended* (Apr. 16, 2012) (citing *Wash. State Physicians Ins. Exch. & Ass'n*, 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.” *Washington State Physicians Ins. Exh. & Assn. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

CR 11 deals with baseless filings and filings made for an improper purpose. *West v. Wash. Ass'n of Cty. Officials*, 162 Wn. App. 120, 135, 252 P.3d 406 (2011); *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996). “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*, 80 Wn. App. at 883–84 (quoting *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994)). “To impose sanctions for a baseless filing, the trial court must find not only that the claim was without a factual or legal basis, but also that the attorney who signed the filing did not conduct a reasonable inquiry into the factual and legal basis of the claim.” *West*, 162 Wn. App. at 135.

The attorney's reasonableness in making inquiry into the factual and legal bases of the claims presented in a lawsuit is evaluated by an objective standard, meaning the court should ask whether a reasonable attorney in similar circumstances could have believed his or her actions were factually and legally justified. *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 142, 64 P.3d 691 (2003); *Harrington v. Pailthorp*, 67 Wn. App. 901, 911-12, 841 P.2d 1258 (1992). *See also, Merceri v. Jones*, 193 Wn. App. 1003 (2016) (unpublished) (CR 11 satisfied where court found that “[i]t is hard to imagine how attorneys can think it is acceptable to move to disqualify opposing counsel”). Courts test the appropriate level of pre-filing investigation by inquiring what was reasonable to believe at the time the pleading was filed. *Stiles v. Kearney*, 168 Wn. App. 250, 261-62, 277 P.3d 9 (2012).

“Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted.” *Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). The notice requirement exists to give fair warning to pleading violators and to deter violations as early as possible. *Id.* at 198. If fees are imposed as a sanction, the fee award must be limited to amounts reasonably expended in responding to sanctionable filings. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 436, 157 P.3d 431 (2007).

Ms. O’Brien first claims that the trial court improperly imposed sanctions on a finding of “improper purpose” alone. App. Br. at 37. That

argument rests on an inaccurate characterization of the challenged orders. In both of the orders on the motion for sanctions, the trial court found that the claims asserted against Mr. Koskinen and Mr. Lawson were baseless, as were the contract claims asserted against the Individual Defendants; and that the claims were asserted against the dropped defendants for an improper purpose. CP 656-57 (“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”); CP 2135-36. Ms. O’Brien’s argument that the “improper purpose” finding was unsupported by any facts, App. Br. at 38, is contrary to the record. In its initial order, the trial court identified the legal maneuvering that demonstrated an improper purpose, including the assertion of baseless claims and delay in withdrawing them. CP 655-57. As the federal Ninth Circuit court of appeals has noted, the “frivolous and improper purpose prongs of Rule 11 overlap, and ‘evidence bearing on frivolousness . . . will often be highly probative of purpose.’” *In re Grantham*, 922 F.2d 1438, 1443 (9th Cir. 1991) (quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990)).⁶

Ms. O’Brien’s effort to justify asserting claims against these individuals as a good-faith argument for the extension of existing law does not pass the “reasonable attorney” test. *See Roeber*, 116 Wn. App. at 142.

⁶ Washington courts look to federal authority interpreting Rule 11 for guidance in interpreting CR 11. *See Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 221-22, 829 P.2d 1099 (1992).

As Ms. O'Brien acknowledges, individual managers may be held liable "for their own unfair employment practices under the WLAD." App. Br. at 37 (citing *Brown v. Scott Worldwide Paper*, 143 Wn.2d 353, 360, 20 P.3d 921 (2001) ("will hold supervisors accountable for their discriminatory actions")). She then argues that the holding in *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729, 735 (2004), can logically be extended to hold Mr. Koskinen and Mr. Lawson liable for actions outside of the statute of limitations based on alleged unlawful actions *by others* occurring years later, after they left employment by the plaintiff's employer, such that could have taken no actions to contribute to the timely challenged actions. App. Br. at 39-42. In *Antonius*, the Washington Supreme Court followed federal precedent in holding that a plaintiff could assert a hostile work environment claim *against her employer* "based on acts that individually may not be actionable but together constitute part of a unified whole comprising a hostile work environment." *Antonius*, 153 Wn.2d at 268. An employer may be liable for the actions of its employees under a theory of *respondeat superior*. See *Brown*, 143 Wn.2d at 360, n.3. No similar theory would support imposing liability on a former supervisor based on the actions of other supervisors. Nor would the actions of other supervisors be a basis for extending the statute of limitations applicable to the former supervisor's actions. A reasonable attorney would be able to ascertain that the legal underpinnings of *Antonius* do not exist with respect to claims against individual supervisors based on their own actions.

Ms. O'Brien also argues that her contract claims against individual managers were not baseless, as they "might turn out . . . to be speaking agents or alter egos of the ABM corporations." App. Br. at 42. In addition, she argues that any harm is "de minimus," as they could be held liable for tortious interference with contract, and for a hostile work environment. *Id.* at 42-43. First, it is not a valid defense to a CR 11 violation that the party asserted valid claims along with invalid ones. *See Hudson v. Moore Bus. Forms, Inc.*, 836 F.2d 1156, 1160 (9th Cir. 1987) (analyzing merits of individual claim). *See also Mulato v. Wells Fargo Bank, N.A.*, 76 F. Supp. 3d 929, 961 (N.D. Cal. 2014) ("the mere existence of one non-frivolous claim" in a complaint does not immunize it from Rule 11 sanctions) (quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1364 (9th Cir. 1990)). Second, Ms. O'Brien offered no authority to support her claim that an individual manager could be liable under an employee handbook/quasi-contract claim like she asserted in this matter.⁷ After almost two years of litigation, her assertion that there might be valid "alter ego theory" does not meet CR 11 standards. *Biggs*, 124 Wn.2d at 197 (attorney's actions evaluated based on what was reasonable to be known at the time of the filing).

⁷ An employee handbook or manual may modify the terminable-at-will relationship if it creates an atmosphere of job security and fair treatment by promising specific treatment in specific situations, thereby inducing the employee to remain on the job and not seek other employment. *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 170, 914 P.2d 102 (1996) *modified*, 932 P.2d 1266 (Wash. Ct. App. 1997) (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 230, 685 P.2d 1081 (1984); *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 433, 815 P.2d 1362 (1991)).

Finally, the trial court appropriately limited the sanctions amount to that which was reasonably expended in responding to sanctionable filings (*Just Dirt, Inc.*, 138 Wn. App. at 418-419), after which it reduced the amount significantly to an amount it deemed appropriate in light of the sanctionable conduct. The court noted that the \$38,000 in fees incurred by defendants in responding to the frivolous claims was “well supported” if “made pursuant to a fee-shifting provision.” CP 2136. However, it reduced the award to a fraction of the fees and expenses incurred as a result of the frivolous claims and improper purpose, to \$6,500. *Id.* Given the clearly identified grounds for the sanctions award, this award is not an abuse of the court’s discretion.

B. The Trial Court’s Denial of Ms. O’Brien’s Request for a CR 56(f) Continuance Was Based on Tenable Grounds.

A trial court's denial of a CR 56(f) motion is reviewed for abuse of discretion. *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 629, 218 P.3d 621 (2009) (citing *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990)). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or reasons. *In re Det. of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

A trial court may deny a Rule 56(f) motion when: (1) the requesting party does not have a good reason for the delay in obtaining the evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3) the new evidence would not

raise a genuine issue of fact. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 742-43, 218 P.3d 196 (2009). *See also, e.g. Durand v. HIMC Corp*, 151 Wn. App. 818, 828, 214 P.3d 189 (2009) (employer did not have good reason for delay in obtaining discovery and thus was not entitled to continuance before hearing on employee's motion for summary judgment). To obtain a continuance, the party seeking the continuance must provide an affidavit stating what evidence the party seeks and how it will raise an issue of material fact to preclude summary judgment. *Durand*, 151 Wn. App. at 828. Although only one reason is required to deny a continuance, *Gross v. Sunding*, 139 Wn. App. 54, 68, 161 P.3d 380 (2007), good reasons supported denial here for all three reasons.

Ms. O'Brien had a full opportunity for over 18 months in *O'Brien I* to conduct discovery regarding her claims against the defendants. During that time she served three sets of written discovery and deposed three ABM Parking witnesses. CP 1418. The only reason Ms. O'Brien had previously not conducted the additional discovery for which she sought an extension is because of her own lack of diligence. CP 2073-74. It is simply inaccurate to state that Ms. O'Brien was unable to take the depositions she claimed she needed; rather, she cancelled the depositions of these witnesses, even though Judge Coughenour gave her additional time to take them. CP 655-57; 2022; 2027; 2135-36. From August (when the case was remanded) to November 2015 (when she requested a continuance), she served no discovery, noticed no depositions, and made no other effort to conduct any further discovery, even though the summary

judgment motions were filed in September 2015. CP 2023.

She also failed to show how the requested discovery would be material. In her request to the trial court for additional time to conduct discovery, Plaintiff said:

We need to take a 30(b)(6) deposition to learn about the “reorganization” which the defendants allege was the legitimate, non-discriminatory reason for their termination of Ms. O’Brien...

CP 1421-22. She also said she needed to depose Vivian Smith and Leonard Carder. CP 1422. *Plaintiff’s counsel* asserted, with no citation to any evidence, that Ms. O’Brien believed that that Ms. Smith knew or should have known of the “hostile work environment,” but failed to take appropriate action. *Id.* She also said she wanted to ask Ms. Smith about ABM’s code of conduct and personnel policies. CP 1421-22. With respect to Mr. Carder, she offered nothing more than her subjective belief that Mr. Carder made the decision to terminate her employment and orchestrated hostile actions by others. CP 1422.

This type of vague, generalized description is not sufficient for a Rule 56(f) continuance. For example, in *Briggs v. Nova Servs.*, 135 Wn. App. 955, 961-62, 147 P.3d 616 (2006), *aff’d*, 166 Wn.2d 794, 213 P.3d 910 (2009), plaintiffs’ counsel provided a similarly vague description:

I want to depose the board of directors. I want to know what the board of directors knew about the organization, knew about the mission of the organization, heard or didn't hear from the executive director about what

these employees were complaining about, whether they made any effort at all to find out if any of these things that these people said were true, if in fact they simply gave the executive director the authority to fire two managers without clear logic for doing so, whether in fact those were retaliations against any of these people after they did what they did.

Id. The court denied the Rule 56(f) request because the plaintiff did not “show what specific evidence the Workers would be able to locate or how the evidence would raise a material issue of fact.” *Id.* See also, *Thongchoom v. Graco Children's Prods., Inc.*, 117 Wn. App. 299, 308-09, 71 P.3d 214 (2003) (consumers not entitled to continuance of product liability action for further discovery regarding manufacturer’s knowledge where they did not identify specific evidence but merely asserted that the materials requested were in the scope of discovery).

Ms. O’Brien did not specify what evidence she was seeking from further discovery and how it would be material, but instead offered only vague generalities as to the scope of her desired discovery. For example, she says she wants to ask Mr. Carder if he was the person who summoned Melody Dillon to his office. App. Br. at 44. She makes no effort to explain how Mr. Carder’s involvement with Ms. Dillon’s employment in 2009—which no one has offered any competent evidence to establish, and which Mr. Carder has denied under oath—would support Ms. O’Brien’s claim that she was unlawfully discharged in 2013. CP 997-98. She offered no facts to establish what she believed Ms. Smith knew and when, to show that it would contribute to a timely, valid hostile work

environment claim.⁸ As in *Briggs* and *Thongchoom*, the trial court was within its discretion to deny her request for a Rule 56(f) continuance.

C. The Trial Court’s Summary Judgment Rulings Should Be Affirmed.

1. Standard of Review.

When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court. *American Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 672-73 (2012) (citation omitted). The court considers the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

The moving party can satisfy its initial burden under CR 56 by demonstrating the absence of evidence supporting the nonmoving party's case. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue for trial. *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 8-9, 820 P.2d 497 (1991). “In opposing summary judgment, a party may not

⁸ Ms. O’Brien’s lengthy declaration provided no support for Ms. Smith’s supposed knowledge. See CP 1842-75.

rely merely upon allegations or self-serving statements, but must set forth specific facts showing that genuine issues of material fact exist.” *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 157, 52 P.3d 30 (2002). To overcome a motion for summary judgment, the plaintiff “must do more than express an opinion or make conclusory statements.” *Francom v. Costco*, 98 Wn. App. 845, 852, 991 P.2d 1182 (2000) (quoting *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996)).

As the trial court noted, much of the declaration submitted by Ms. O’Brien in opposition to the motions for summary judgment was “conclusory,” “speculative,” and “lacking in foundation.” CP 2131. Ms. O’Brien’s appeal brief is similarly deficient. Her arguments are largely devoid of citations to the record. App. Br. at 46-58. At times she cites to many, many pages of deposition testimony. *E.g., id.* at 48 (citing to CP 183-230). Appellate courts are not required to search the record to locate the portions relevant to a litigant’s arguments. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). *See also, In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (courts are not obligated “to comb the record” where counsel has failed to support arguments with citations to the record); *Fishburn v. Pierce County Planning & Land Servs. Dep’t*, 161 Wn. App. 452, 468, 250 P.3d 146 (2011) (same). Although Ms. O’Brien has again failed to adequately support her legal arguments, as detailed below, the evidence in the record was insufficient to survive summary judgment.

2. Ms. O'Brien's Retaliation Claim Is Time-Barred and Unsubstantiated.

Ms. O'Brien alleged that she suffered retaliation after her manager, Hugh Koskinen, asked her to write up two valets in 2009 in response to Melody Dillon's complaint about an inappropriate text, and because of her involvement in responding to another employee's complaint about a gas leak. Ms. O'Brien's retaliation claim was properly dismissed as time-barred. Even if her claim were timely, Ms. O'Brien did not engage in protected conduct. Last, she offered no evidence to establish the required causation element.

(a) Ms. O'Brien's retaliation claims are time-barred.

The statute of limitations for claims under Washington's Law Against Discrimination ("WLAD") is three years. RCW 4.16.080(2); *Lewis v. Lockheed Shipbuilding & Constr. Co.*, 36 Wn. App. 607, 676 P.2d 545 (1984). The limitations period starts when a cause of action accrues. *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 141, 265 P.3d 971 (2011).

Ms. O'Brien filed her Second Amended Complaint against ABM Parking on June 3, 2015. CP 424-45. Thus, the statutory limitations period for her retaliation claim runs back to June 3, 2012. This limitations period is well after Ms. O'Brien's actions in writing up the valets in 2009, and well after any alleged retaliatory conduct by Dan Lawson and Mr. Koskinen, who both left ABM in 2010 and thus could not have engaged in any retaliatory conduct after 2010. CP 918, 800, 804. Any claim based on their alleged conduct is clearly time-barred. In addition to the Dillon

situation, Ms. O'Brien's other claims (that Mr. Koskinen objected to her actions with respect to Jason Reidt, *see* App. Br. at 47) are similarly time-barred, as any alleged retaliation must have occurred before Mr. Koskinen left employment in 2010.⁹

Ms. O'Brien offered no evidence to support tolling the three-year limitations period on her hostile work environment claim, under a theory that the alleged actions were part of a "unitary, indivisible hostile work environment claim." *Antonius*, 153 Wn.2d at 271 (plaintiff must establish relationship between alleged actions to constitute part of the same hostile work environment). Specifically, Ms. O'Brien provided no evidence to tie any alleged adverse actions within the limitations period to her 2009 involvement in responding to the Dillon complaint.

Ms. O'Brien cannot establish that any actions "based upon the same discriminatory animus" occurred after June 3, 2012. First, Mr. Carder had no knowledge of the Dillon investigation or Reidt situation, and thus lacked any retaliatory motive at any time. CP 1151-52. Nor were either Ms. Kwan or Mr. Howery, the two ABM Parking managers who were involved in the 2013 discharge decision, aware of her involvement in either situation. CP 697; 726. Second, the undisputed facts established that Mr. Carder had no involvement in the decision to

⁹ Ms. O'Brien erroneously suggests that the statute of limitations runs from the filing of her original complaint in *O'Brien I* in October 2013. App. Br. at 37. Ms. O'Brien's claims in *O'Brien I* were voluntarily dismissed without prejudice. CP 1439. "[W]here an original action is dismissed, a statute of limitations is deemed to continue to run as though the action had never been brought." *Logan v. North-West Insurance Co.*, 45 Wn. App. 95, 99, 724 P.2d 1059 (1986); *accord Steinberg v. Seattle-First Nat. Bank*, 66 Wn. App. 402, 406, 832 P.2d 124, 126 (1992).

eliminate Ms. O'Brien's position. CP 1151. There is no evidence to tie any alleged adverse actions within the limitations period to Ms. O'Brien's involvement in responding to either employment situation in 2009.

(b) Ms. O'Brien did not engage in protected "opposition" activity.

Ms. O'Brien's retaliation claim was also deficient because she did not engage in any legally protected conduct. She neither participated in any official proceedings nor engaged in protected "opposition" activity.

The WLAD protects employees engaged in statutorily protected activity from retaliation by their employer. *See* RCW 49.60.210. It provides:

It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

RCW 49.60.210(1). The statute provides protection in two circumstances: (1) when an employee opposes forbidden practices; and (2) when an employee files a charge, testifies, or assists in a proceeding. *Id.* The first, known as the "opposition clause," is at issue here, as Ms. O'Brien does not allege that she participated in any official WLAD proceedings. "The term 'oppose,' undefined in the statute, carries its ordinary meaning: 'to confront with hard or searching questions or objections' and 'to offer resistance to, contend against, or forcefully withstand.'" *Lodis v. Corbis*

Holdings, Inc., 172 Wn. App. 835, 851, 292 P.2d 779 (2013) (quoting Webster's Third New International Dictionary 1583 (2002)).

Ms. O'Brien did not engage in any protected "opposition" activity. According to Ms. O'Brien, she was directed by her supervisor to impose discipline on two employees who engaged in sexually inappropriate conduct, and she did. CP 432. She did not "oppose any practices forbidden by this chapter." *Cf. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 276, 129 S. Ct. 846, 172 L. Ed. 2d 650 (2009) ("When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's opposition to activity.'"). She did not communicate to her employer, ABM Parking, that she believed it had engaged in discrimination, or oppose any direction by her employer; *she was told* that two employees had behaved inappropriately and that she should, on behalf of her employer, impose corrective action. Her actions cannot be construed as resisting or confronting her employer.

Her involvement in investigating a situation involving Jason Reidt is not activity protected by the WLAD. To establish protected "opposition" activity, a plaintiff must establish opposition "to conduct that is at least arguably a violation of the law." *Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321, 332 (1998) (citation omitted); *see also Graves v. Dep't of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994) (affirming lower court's grant of summary judgment on the plaintiff's retaliation

claim because the complaints “were not of sexual discrimination”). Ms. O’Brien made a recommendation that “saved Jason Reidt from being unfairly terminated for the gas leak incident.” App. Br. at 23. That is not opposition to a violation of the WLAD.¹⁰

(c) Ms. O’Brien cannot establish a causal connection.

Finally, Ms. O’Brien failed to provide any evidence to establish a causal link between her actions in assisting Mr. Koskinen in responding to the Dillon complaint more than three years before in 2009 her termination in February 2013. The length of time between the two events negates a finding of a causal connection. *See, e.g. Francom*, 98 Wn. App. at 863 (no causal connection when alleged retaliatory act occurred fifteen months after protected activity). Second, as discussed above, Ms. O’Brien cannot establish a causal connection because the individuals involved in the discharge decision (Howery and Kwan) were unaware of her actions. *See, e.g., Petersen v. Utah Dep’t of Corr.*, 301 F.3d 1182, 1188 (10th Cir. 2002) (“An employer’s action against an employee cannot be *because* of that employee’s protected opposition unless the employer knows the employee has engaged in protected opposition.”)

¹⁰ Ms. O’Brien now also argues that she engaged in protected opposition activity when she advised Becky Livermore, a manger, not to question an employee “about confidential and personal medical issues.” App. Br. at 22. In her opposition to Defendants’ summary judgment motions, Ms. O’Brien identified only the Dillon and Reidt actions as protected opposition activity. CP 1405. “Under RAP 9.12, arguments not brought to the attention of the trial court at the time of summary judgment may not be considered by the appellate court.” *Houk v. Best Dev. & Const. Co. Inc.*, 179 Wn. App. 908, 915, 322 P.3d 29 (2014); *Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995).

3. Ms. O'Brien Has No Evidence to Support Her Age Discrimination Claim.

Ms. O'Brien's age discrimination claim was properly dismissed, as it is based on nothing more than speculation and a misconception about what constitutes unlawful age discrimination. She cannot even establish a prima facie case of age discrimination. Moreover, ABM Parking has offered a legitimate, nondiscriminatory reason for the layoff decision, and there is no evidence that this reason was untrue or motivated by age bias.

The WLAD prohibits an employer from discharging or otherwise discriminating against any individual on the basis of age if the individual is between the ages of 40 and 70. RCW § 49.60.180; *Scrivener v. Clark College*, 181 Wn.2d 439, 444-45, 334 P.3d 541 (2014). To prove her claim, a plaintiff must prove that age was a "substantial factor," that is, a "significant motivating factor," in the adverse employment action. *Scrivener*, 181 Wn.2d at 444.

Disparate-treatment claims of employment discrimination under the WLAD are analyzed under the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *E.g.*, *Scrivener*, 181 Wn.2d at 446. A plaintiff has the burden of making a prima facie case of discrimination by showing that (1) she belongs to a protected class; (2) she was qualified for the position; (3) she was subjected to an adverse employment action; and (4) similarly situated employees were treated more favorably. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002); *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 80, 98 P.3d 1222 (2004). A

“similarly situated employee” is one who performs “substantially the same work.” *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 459, 166 P.3d 807 (2007) (citing *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000) (quoting *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996))). The burden of production then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Villiarimo*, 281 F.3d at 1062; *Domingo*, 124 Wn. App. at 78. Finally, a plaintiff bears the full burden of persuading the fact finder that the employer intentionally discriminated against her. *Id.* A plaintiff can show pretext directly, by showing that discrimination more likely motivated the employer, or indirectly, by showing that the employer’s explanation is unworthy of credence. *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003).

Ms. O’Brien did not establish a prima facie case because she did not show that similarly situated employees were treated more favorably. There were no other employees performing “substantially the same work” as Ms. O’Brien. She was the only Operations Manager/Hiring Coordinator employed in the Seattle/Bellevue Branch office, or at *any* branch in the Northwest Region of ABM Parking. CP 696-97; 716. At other locations, the duties performed by Ms. O’Brien were performed directly by managers responsible for specific parking locations, in coordination with the San Francisco Human Resources employees. CP 696-97; 719-20. The trial court thus recognized that Ms. O’Brien failed to establish any “comparators” who were treated better. CP 2133.

Ms. O'Brien argues that this was erroneous, pointing out that the three employees originally considered for layoff, and two that were laid off, were all in the protected age group. App. Br. at 53; 31-32. The fact that three positions identified for layoff were occupied by employees over age forty raises no inference of discriminatory intent, absent evidence that similarly situated employees were treated more favorably. *See Domingo*, 124 Wn. App. at 79-80. Ms. O'Brien has identified no other *similarly situated employees* who were younger and retained.

The trial court also correctly concluded that ABM Parking “put forth an entirely plausible explanation for the elimination of plaintiff’s position,” and “[t]he plaintiff has not met her burden of showing there is admissible evidence which, if believed, would establish the employer’s explanation was a pretext for discrimination.” CP 695-96; 2132-33 (it was experiencing significant revenue losses, such that it decided to eliminate employees whose job duties could be absorbed easily by other employees). Again, the employer’s burden is only one of production, after which the burden of persuasion shifts back to the plaintiff. *Domingo*, 124 Wn. App. at 78. Ms. O'Brien offered nothing other than opinion to support her argument that the employer’s reason was pretext for discrimination (“a genuine issue of material fact exists as to whether a ‘reorganization’ involving only three employees, is pretext for discrimination”). App. Br. at 53.

Significantly, Ms. O'Brien admitted that her belief that age discrimination motivated the discharge decision is based on nothing more

than her own assumption. CP 775-76. Her speculation is insufficient to withstand a motion for summary judgment. *See, e.g., Domingo*, 124 Wn. App. at 85. Because Ms. O'Brien failed to state a prima facie age discrimination claim, and because she offered nothing other than speculation in response to ABM Parking's legitimate, nondiscriminatory reasons for its decisions, her claim was properly dismissed.

4. Although Ms. O'Brien Failed To Provide Notice That She Needed Accommodation for a Disability, ABM Parking Met Its Obligation To Provide A Reasonable Accommodation.

Ms. O'Brien asserts a disability discrimination claim based on her allegation that she was denied a reasonable accommodation for a disability. Specifically, she alleges that she requested a reasonable accommodation when assigned to work at the Spokane Fair due to "her physical limitations," and that ABM Parking failed to provide one. App. Br. at 54. The trial court appropriately dismissed this claim because (1) Ms. O'Brien offered no evidence to establish that she has a disability; (2) she failed to establish that she gave ABM Parking notice of the supposed disability and the accompanying substantial limitations; and (3) she offered no evidence that ABM Parking failed to adopt measures that were medically necessary to accommodate the disability.

To establish unlawful failure to accommodate a disability under the WLAD, a plaintiff must prove that (1) she had a sensory, mental, or physical abnormality that substantially limited her ability to perform the job; (2) she was qualified to perform the essential functions of the job; (3) she gave her employer notice of the disability and its accompanying

substantial limitations; and (4) upon receiving notice, the employer failed to affirmatively adopt measures that were both available and medically necessary to accommodate the disability. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004); *but cf Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 30, 244 P.3d 438 (2010) (suggesting that the 2007 amendment of RCW 49.60.040 has broadened the fourth element). If the plaintiff cannot establish a prima facie case, the defendant is entitled to judgment as a matter of law. *Dumont v. City of Seattle*, 148 Wn. App. 850, 862 (2009).

For purposes of qualifying for reasonable accommodation in employment, a disability must have a “substantially limiting effect upon the individual’s ability to perform his or her job.” RCW 49.60.040(7)(d)(1). The burden is on the employee to present a prima facie case of discrimination, including medical evidence of a handicap. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 642, 9 P.3d 787, 794 (2000) (citing *Simmerman v. U-Haul Co.*, 57 Wn. App. 682, 687, 789 P.2d 763 (1990)), *overruled in part on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). Despite discovery requests from Defendants and repeated follow-up requests, Ms. O’Brien produced no medical evidence to establish that she has a “sensory, mental, or physical impairment” that has a “substantially limiting effect” on her ability to perform her job at ABM Parking. CP 684-85. She offered nothing more than her own subjective assertions that she suffers from

various medical conditions.¹¹ Her claim was properly dismissed on this ground alone. *E.g., Calhoun v. Liberty Nw. Ins. Corp.*, 789 F. Supp. 1540, 1547 (W.D. Wash. 1992) (granting summary judgment under Washington law where plaintiff offered nothing more than her own subjective statements to establish the existence of a disability).¹²

Second, even if Ms. O'Brien had proved the existence of a disability in 2012, she failed to prove that she gave ABM Parking notice that she had a disability. When she was assigned to work at the Spokane Fair for a few days in 2012, Ms. O'Brien merely said, "I am not physically able to put in the long hours in the hot sun." CP 892-93. Courts have recognized that such statements are insufficient to put an employer on notice that an employee is requesting accommodation of a disability. *See, e.g., Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 671, 880 P.2d 988 (1994); *Garcia v. Cintas Corp. No. 3*, No. CV-12-3064-RMP, 2013 WL 1561116, at *8 (E.D. Wash. Apr. 12, 2013). Moreover, Ms. O'Brien attributed her physical inability to her age, not to a disability. CP 842-45.

Finally, Ms. O'Brien failed to establish that ABM Parking failed to reasonably accommodate her alleged disability. Once an employee provides notice of the need for accommodation, the employer has a duty to

¹¹ While Ms. O'Brien said in response to Interrogatory No. 20 that she suffers from "bone spurs and bone rubbing on bone on Plaintiff's right knee," she produced no medical evidence to support this assertion or that these conditions had a substantially limiting effect on Ms. O'Brien's ability to perform her job in 2012. CP 684-85; 884-90.

¹² The WLAD and the federal ADA have the same purpose; thus, Washington courts look to federal cases for guidance. *MacSuga v. Cnty. of Spokane*, 97 Wn. App. 435, 442, 983 P.2d 1167 (1999) (citing *Fahn v. Cowlitz Cnty.*, 93 Wn.2d 368, 376, 610 P.2d 857 (1980)).

engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. *See Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995). “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 School Dist. No. 1*, 160 Wn. App. 765, 779, 249 P.3d 1044 (2011) (citing *Goodman*, 127 Wn.2d at 409). After Ms. O’Brien said that she could not stand for long hours because of her age and “physical capability,” Paulette Ketza explained that ABM Parking was assigning more employees to ensure that shifts would be shorter. CP 842-45. Ms. O’Brien responded, “[A]ll my needs have been met!” *Id.* If she was tired at the fair, she never complained. CP 770-71. Having failed to notify ABM Parking that she needed additional accommodation, Ms. O’Brien cannot now prove that ABM Parking failed to reasonably accommodate her alleged disability. *Cf. Conneen v. MBNA America Bank N.A.*, 334 F.3d 318, 333 (3d Cir. 2003) (rejecting claim where employee never requested a continuation of a modified schedule, and that an employer “cannot be held liable for failing to read [the employee’s] tea leaves”).

5. Ms. O’Brien Failed to Establish an Unlawful Hostile Work Environment.

Ms. O’Brien claims that the trial court erred in dismissing her “hostile work environment” claim under the WLAD on the ground that the alleged mistreatment was neither severe nor pervasive enough. App. Br. at 5, 42-44. First, that was not the only basis for the court’s ruling; it also

found that many of the allegations were unsubstantiated. CP 2131-32. The trial court's ruling was also correct in that the supposed workplace slights she identified, which allegedly occurred over the course of many years, were neither severe nor pervasive enough to establish unlawful harassment. In addition, although she claimed to have suffered harassment because of her age (CP 443), she made no effort to show that every perceived slight over the course of her employment by ABM Parking was because of her age.

To establish a prima facie case of hostile work environment, a plaintiff has the burden of showing (1) the harassment was unwelcome, (2) the harassment was because of a protected characteristic, (3) the harassment affected the terms or conditions of employment, and (4) the harassment is imputed to the employer. *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 794, 120 P.3d 579 (2005). To meet the third hostile work environment element, the plaintiff must establish that the harassment was “sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.” *Glasgow v. Georgia–Pac. Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985). “Casual, isolated, or trivial manifestations of a discriminatory environment” are not sufficient to violate the WLAD. *Washington*, 105 Wn. App. at 10 (quoting *Glasgow*, 103 Wn.2d at 406).

Ms. O'Brien made—and makes—no effort to establish that any alleged hostility was because of a protected characteristic. App. Br. at 47-48. Again, she cites to swaths of the record, seemingly expecting the

Court to identify alleged wrongful actions, determine who did them, and see if there is any evidence to suggest that they were because of a protected characteristic. *See id.* (citing CP 183-230); App. Br. at 25-26 (citing CP 195, 1824-1920). The court is not required to hunt for evidence to support her claims. *In re Estate of Lint*, 135 Wn.2d at 532. In fact, what she describes are the same 2009 actions she attributes to retaliation for assisting with the Dillon complaint. *See* App Br. at 25-26, 47-48 (“After O’Brien disciplined the valets . . .”). In addition, the trial court correctly found that the conduct Ms. O’Brien described was either unsubstantiated,¹³ not harassment (such as being assigned to inspect a parking garage when you work at a parking company), and at best “casual, isolated, and trivial” (*e.g.*, being “glared at”), such that they do not establish unlawful harassment.

6. Ms. O’Brien Offers No Argument To Challenge Dismissal of Her Claims of Negligent and Intentional Infliction of Emotional Distress and Breach of Contract.

Although Ms. O’Brien ostensibly challenges the trial court’s dismissal of all her claims, *see* App. Br. at 2, she includes neither issues nor arguments to challenge the trial court’s dismissal of her claims of negligent and intentional infliction of emotional distress, *see id.* at 2, 44-57. While she includes as an issue the question of whether the trial court

¹³ As just one example, Respondent alleges that Mr. Koskinen recorded a private telephone communication of hers and “played it for the amusement of co-workers, telling them it was a conversation between O’Brien and her psychiatrist.” App. Br. at 26. She cites to many pages in the record (CP 195, CP 1824-1920), none of which contain evidence to support this allegation.

erroneously dismissed her claim of breach of contract or promissory estoppel, she makes no argument or citation to the record to support that issue. *Id.* The dismissal of these claims should, therefore, be affirmed. *See Kinderace LLC v. City of Sammamish*, No. 73409-1-I, 2016 WL 3660798, at *1 (Wash. Ct. App. July 5, 2016) (where no argument is presented in appellant's opening or reply brief, the court considers the assignment of error abandoned.)

7. The Trial Court Properly Dismissed Ms. O'Brien's Handbook Claim.

Ms. O'Brien offers no evidence to support her breach of contract/handbook claim. App. Br. at 57-58. The dismissal of this claim should be affirmed on this ground alone. *See Mills*, 67 Wn.2d at 721 (“We are not required to search the record for applicable portions thereof in support of the plaintiffs' arguments.”). Should the Court nevertheless choose to evaluate the claim, the trial court properly dismissed it for lack of evidence.

An employer's employment policies and procedures can alter the employment at-will relationship and form either a binding implied employment contract or create enforceable promises regarding terms of employment. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 104, 864 P.2d 937 (1994). “[A]n employee seeking to enforce promises that an employer made in an employee handbook must prove: (1) whether any statements therein amounted to promises of specific treatment in specific situations; (2) if so, whether the employee justifiably relied on any of these promises; and, finally, (3) whether any promises of specific

treatment were breached.” *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340-41, 27 P.3d 1172 (2001) (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984)). An employer may escape obligation if it states “in a conspicuous manner” in the written materials that “nothing contained therein is intended to be part of the employment relationship” (*i.e.*, the materials contain a conspicuous “disclaimer”), or if the employer specifically reserves a right to modify the policies, or writes them “in a manner that retains discretion to the employer.” *Thompson*, 102 Wn.2d at 230-31. *See also, Quedado v. Boeing Co.*, 168 Wn. App. 363, 370-71, 276 P.3d 365 (2012) (rejecting claim where statements in the code were “merely . . . general statements of company policy, and thus, not binding.”) (quoting *Thompson*, 102 Wn.2d at 231).

Even if Ms. O’Brien could establish that the Code of Business Conduct contained enforceable promises of specific treatment in specific situations, despite an express disclaimer (CP 901-11), she cannot establish that ABM Parking breached such promises. Ms. O’Brien suggests that she was terminated in retaliation for reporting “accounting irregularities,” as required by the Code. App. Br. at 35-36. Ms. O’Brien testified that she only reported her findings about Pacific Place to her supervisor, Matt Purvis. CP 750, 760, 772-73. However, it was Rod Howery, not Mr. Purvis, who made the decision to eliminate Ms. O’Brien’s position. CP 696. Mr. Howery was unaware of any concerns that Ms. O’Brien raised about “financial irregularities” (or any possible fraud, embezzlement, or wrong-doing) by anyone at the Pacific Place Garage. CP 697. Ms.

O'Brien cannot establish that she was discharged in violation of a promise not to retaliate against those who report Code of Business Conduct violations, when she has no evidence to support a claim that the decision-maker was aware of the alleged report.

8. The Trial Court Correctly Concluded That Ms. O'Brien Failed to Establish That ABMI Was Her Employer.

Ms. O'Brien argues that the trial court improperly determined that ABMI was not her employer. App. Br. at 53-54. She offers no legal authority to support her argument that ABMI was her employer. *Id.* She points to four factual assertions, with no citation to any evidence in the record. *Id.* The decision to dismiss any claims against ABMI based on alleged employer status should be dismissed on that ground alone. Should the Court nevertheless consider her argument that ABMI should be considered her employer, the trial court properly determined that the evidence was legally insufficient.

First, the undisputed evidence established that O'Brien was an employee of ABM Parking. CP 425. *See also* CP 987, 997. Ms. O'Brien has never been an employee of ABMI. CP 987. ABMI did not compensate her for her work for ABM Parking or pay any employment-related taxes on her behalf. CP 986. Her employment was managed by ABM Parking employees. CP 997.

Ms. O'Brien points to the fact that Vivian Smith, originally named as a defendant, was employee of ABMI, and that she "gave written approval for the termination of Plaintiff from ABM Parking." App. Br. at

53-54. She also says that ABM Parking used the ABM Handbook and ABM Code of Business Conduct. *Id.*

One of the services ABMI provides to its subsidiaries on a contractual basis is the opportunity to have layoff plans reviewed by a human resources professional. CP 1001. The subsidiary submits factual information to ABMI about the planned action, and ABMI informs the subsidiary if the planned action is “approved.” *See id.*; CP 952. In Ms. O’Brien’s case, Rod Howery, ABM Parking’s Regional Vice President, made the decision to layoff Ms. O’Brien in consultation with Madeline Kwan, ABM Parking’s former Regional Human Resources Director. CP 696; 997. Ms. Kwan then filled out the reduction-in-force paperwork and submitted it to Ms. Smith. CP 950-51. After receiving a verbal “approval” from Ms. Smith, Mr. Howery and Ms. Kwan communicated their layoff decision to Ms. O’Brien (and the other impacted employee). CP 697-98; 953-55.

Allegations that a parent and subsidiary share some “back office” functions are not sufficient to impose liability on the parent. *See, e.g., Rhodes v. Sutter Health*, 949 F. Supp. 2d 997, 1004 (E.D. Cal. 2013) (citing *Ruiz v. Sysco Corp.*, No. 09-CV-1824-H MDD, 2011 WL 3300098, at *4 (S.D. Cal. July 29, 2011) (evidence that an employer provided assistance with discrimination complaints and supported such departments as benefits, diversity, and labor relations for another employer is insufficient to find that it exercised day-to-day control over another employer’s employment decisions in general or exercised any control with

respect to plaintiff)); *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 846 (D.Del. 1978) (“Arrangements by a parent and subsidiary for economy of expense and convenience of administration may be made without establishing the relationship of principal and agent.”); *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 771, 657 P.2d 804 (1983) (that “all employees of the subsidiary were paid by the parent corporation” and “both companies had the same address, credit managers, lawyers, nonresident agents and auditors,” among other things, “were insufficient in themselves to enable a court to disregard the corporate entity and declare the two corporations to be identical . . .”) (citing *J.I. Case Credit Corp. v. Stark*, 64 Wn.2d 470, 475, 392 P.2d 215 (1964)). Similarly, the fact that the different entities share policies is likewise insufficient to establish a joint employer relationship. *Rhodes*, 949 F. Supp. 2d at 1004.

Last, Ms. O’Brien asserts without citation to the record that ABM Parking allowed her to retain seniority gained when she was employed by ABM Janitorial. She offers no argument or authority as to how that would establish that ABMI was her employer. The trial court’s dismissal of her claims against ABMI premised on employer status should be upheld.

9. The Trial Court Did Not Err in Dismissing All Claims Against Leonard Carder.

Ms. O’Brien argues, without citation to any evidence, that “a reasonable jury could conclude that Carder decided to fire O’Brien to ensure she would not be around or accessible to the press” App. Br. at 53. Her counsel has repeatedly asserted that “circumstantial evidence

strongly suggests that it was Leonard Carder [who summoned Melody Dillon to a meeting]” (App. Br. at 23-24), even though Ms. Dillon herself never identified Mr. Carder (CP 1618, 1696), Mr. Carder affirmatively denied any involvement (CP 997-98), and Ms. O’Brien has identified no evidence that supports her attempt to tie Mr. Carder to Ms. O’Brien’s involvement in responding to Ms. Dillon’s complaint of sexual harassment.

To hold a supervisor or manager personally liable under WLAD, the plaintiff must provide evidence showing that the supervisor or manager *personally engaged in affirmative acts of discrimination or retaliation*. *Brown*, 143 Wn.2d at 360, n.3 (emphasis in original). *See also, Thompson v. N. Am. Terrazzo, Inc.*, No. C13-1007RAJ, 2015 WL 926575, at *12 (W.D. Wash. Mar. 4, 2015) (granting summary judgment on claims under WLAD against three individual supervisors where plaintiff did not “offer evidence that Mr. Geiger, Mr. Singh, and Mr. Rubenstein affirmatively discriminated against Plaintiffs”).

Mr. Carder was not involved in the decision to eliminate Plaintiff’s position, which resulted in her discharge. CP 696; 997. By mid-2011, Mr. Carder was no longer managing the Northwest Region of ABM Parking. CP 997. Rod Howery, who took over that role in May 2011, chose Ms. O’Brien’s position for elimination after consulting with Madeline Kwan. CP 696. The facts indisputably show that the actual decision-makers were Mr. Howery and Ms. Kwan. CP 696; 727-32. Ms. O’Brien has no evidence to support her allegation that Mr. Carder was affirmatively

involved in the decision to terminate her position (or that he otherwise affirmatively engaged in any age discrimination).

Ms. O'Brien's retaliation claim against Mr. Carder was appropriately dismissed because Ms. O'Brien has no evidence that Mr. Carder knew about Melody Dillon's complaint or that Ms. O'Brien had handled her complaint. On the contrary, Mr. Carder declared under oath that he "was not personally aware of any complaints by Melody Dillon of sexually inappropriate or other unlawful conduct by other ABM Parking Services employees during her employment." CP 997-98. In an apparent effort to link Mr. Carder to her claim that she was subjected to retaliation for her handling of Ms. Dillon's complaint, Ms. O'Brien points to Ms. Dillon's testimony that she was called to a meeting at which she was "highly intimidated" by a "high level executive." CP 433. Plaintiff's counsel alleges in the Second Amended Complaint, "on information and belief, Leonard Carder is the person who summoned Ms. Dillon to his office and intimidated her." Following almost two years of discovery, there is no evidence to support that allegation. Ms. Dillon testified in her deposition that she went into "a fancy guy's office" in ABM Parking's office and felt intimidated. CP 1616. In response to questioning from Plaintiff's counsel, Ms. Dillon testified that she did not know whether Mr. Carder was the individual at issue. CP 1696. In fact, she testified that she "[didn't] remember who the guy was."¹⁴ CP 1618. In short, there is

¹⁴ In addition, Ms. Dillon could not even recall what the meeting was about. CP 1618-19. There is thus no evidence connecting the alleged meeting with Ms. Dillon's complaint about sexually inappropriate conduct, much less with Ms. O'Brien.

absolutely no evidence to support the allegation that Mr. Carder was in any way involved, or even knew that Ms. O'Brien had addressed Ms. Dillon's complaint.¹⁵ Thus, Ms. O'Brien has failed to establish the required causal connection for her retaliation claim against Mr. Carder. *Graves*, 76 Wn. App. at 712 (causal connection is met by establishing that the employee participated in an opposition activity, the employer knew of the opposition activity, and the employee was discharged); *see also, e.g., Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998) (affirming summary dismissal of retaliation claim, stating "[s]ince, by definition, an employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case."); *Jones v. Barnhart*, 349 F.3d 1260, 1269 (10th Cir. 2003) (affirming summary dismissal of retaliation claim where plaintiff "presents no evidence demonstrating that [the person who did not select her for promotion] was aware of her outspokenness [regarding racial discrimination]."); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 818 (8th Cir. 1998) (In order to establish the third element of his prima facie case of retaliation, plaintiff needed to present evidence that the defendant knew that he had engaged in statutorily protected activity).¹⁶

¹⁵ Mr. Carder does not even meet the physical description provided by Ms. Dillon (i.e., bald). CP 998; 1618.

¹⁶ The WLAD closely parallels Title VII of the United States Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Washington courts therefore look to interpretations of federal law when construing RCW 49.60. *Graves*, 76 Wn. App. at 712.

While Ms. O'Brien asserted various other claims against Mr. Carder, she offers no argument in support of them in her appeal brief. As any such claims parallel her claims against ABM Parking, they were also properly dismissed.

V. CONCLUSION

For the reasons stated herein, Respondents urge the Court to affirm the trial court's summary judgment and sanctions decisions.

DATED this 23rd day of September, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused the foregoing to be served, as indicated, upon the following:

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