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COURT OF APPEALS  
DIVISION II

10 OCT 22 PM 1:50

NO. 40446-0-II

STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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BERYL FERNANDES, a single person,

Appellant,

v.

JAY MANNING, Director, Department of Ecology, and the  
DEPARTMENT OF ECOLOGY and the STATE OF WASHINGTON,

Respondents.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This case is about a Regional Director at the Department of Ecology, Beryl Fernandes, who exhibited poor communication and interpersonal skills from the outset of her employment. After attempts to resolve issues regarding her performance problems and misconduct were unsuccessful, Ms. Fernandes chose to resign in lieu of termination. In her suit, Ms. Fernandes made race discrimination,<sup>1</sup> retaliation, wrongful discharge, hostile work environment, disparate treatment and disparate impact claims against Ecology<sup>2</sup> based upon her brief eighteen month tenure with the department. At the time of summary judgment, Ms. Fernandes did not offer admissible evidence in support of her causes of action, only her perceptions, opinions, and accusations.

Ms. Fernandes appeals the dismissal of her hostile work environment, retaliation, racial discrimination, and wrongful discharge claims and abandons her claims for age and sex discrimination, disparate treatment and disparate impact. On appeal, she cannot identify factual disputes or legal arguments that would require this court to deny summary

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<sup>1</sup> Fernandes does not identify herself with one race or ethnicity; rather, she identifies herself as “a woman of color” born in East Africa whose parents were born in Portuguese West India. CP at 646. Ecology classified Fernandes as Asian. CP at 571.

<sup>2</sup> Respondents Jay Manning, The Department of Ecology, and the State of Washington will be collectively referred to as “Ecology” or “the department” throughout this brief.

judgment. Ecology asks this court to affirm the trial court's dismissal of her claims.

## **II. COUNTERSTATEMENT OF ISSUES RELATING TO ERRORS ASSIGNED BY FERNANDES**

A. Did the trial court properly dismiss Fernandes' racial discrimination and retaliation claims when she could not establish a prima facie case under the Washington Law Against Discrimination (WLAD) and could not establish a reasonable inference that the legitimate and non-discriminatory reasons for Ecology's actions were pretextual?

B. Did the trial court properly dismiss Fernandes WLAD claims where she could not establish that he had ever done satisfactory work for Ecology?

C. Did the trial court properly dismiss Fernandes' hostile work environment claim when she could not prove the acts about which she complains occurred because of her race?

D. Did the trial court properly dismiss Fernandes' wrongful discharge in violation of public policy claim because it is duplicative of her claims under the WLAD?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. The Events**

#### **1. Ecology and the Regional Director Position**

Ecology's mission is to "protect, preserve and enhance Washington's environment, and promote the wise management of [Washington's] air, land and water" to benefit current and future generations.<sup>3</sup> The overarching goals of the department are to prevent

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<sup>3</sup> About Us: Working with you for a better Washington, <http://www.ecy.wa.gov/> (last visited August 9, 2010).

pollution, clean up pollution, and support sustainable communities and natural resources.<sup>4</sup> The department's priorities included saving the Puget Sound, facing climate change, reducing toxic waste, managing Washington's water, and supporting healthy wetlands.<sup>5</sup>

To help the department fulfill this mission, Ecology employed four Regional Directors in different geographic regions throughout the state. CP at 594. The Regional Director's responsibilities included: (1) directing agency operations within a given regional office; (2) representing the Director in interactions with various agencies and tribal groups, as well as elected officials, citizens and environmental groups; (3) managing the regional office with respect to office equipment, supplies, and support staff; (4) serving on the Senior and Executive Management Teams; and (5) leading the Regional Management Team ("RMT" or "the management team"). See Appendix A; CP at 163. The Regional Director position is an exempt management appointment that serves at the pleasure of the Director. CP at 30, 569, 843.

With respect to the RMT, Ms. Fernandes was responsible for coordinating the management team meetings every Monday morning. CP at 49. The overall purpose of the RMT was to "ensure the smooth-running implementation" of the environmental laws Ecology was responsible for

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

and implementing the Director's goals and objectives. CP at 27, 49. The RMT coordinated communication among the many agency programs, promoted cross program cooperation, coordinated service delivery, "shap[ed] the direction of the Southwest Regional Office," helped to implement the Agency's mandates in the region, resolved common regional office problems, and developed regional operating procedures. *See* Appendix A; CP at 49, 163.

The Regional Director position was intended to promote collaboration and cooperation because (a) the RMT consisted of eight Section Managers and five to six other individuals<sup>6</sup> and (b) the Regional Director had no direct supervisory authority over any of the members of the RMT. CP at 27, 49, 163, 181. Ms. Fernandes reported directly to the Director. CP at 49. To succeed as Regional Director, an individual was required to be a "highly skilled and collaborative" person because she had no direct authority over the Section Managers and programs in the RMT. CP at 49.

Additionally, the Regional Director's position required the ability to "communicate clearly and concisely," to "negotiate with others without arousing hostility," to "provide leadership that promotes a cooperative

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<sup>6</sup> Fernandes asserts as fact that this group contained "15-20 Caucasian middle managers" and was "all-white." App. Br. at 11, 12. The record shows the RMT had thirteen to fourteen members, two of whom were people of color. CP at 49, 594-595.

work environment,” and to possess “knowledge of collaborative negotiation, conflict resolution and other problem-solving processes and techniques.” *See* Appendix A; CP at 163. A Regional Director needed to “extract key issues from technically and emotionally complex situations in order to suggest and facilitate constructive paths forward.” *See* Appendix A; CP at 163. The Regional Director also “promote[d] effective working relationships with field office staff, supervisors, and other regional staff” and “coordinate[d] with [the other three] regional directors to ensure consistency, share information and identify opportunities for improvements to service delivery.” *See* Appendix A; CP at 164.

The functional duties of the Regional director position included managing twelve full time office staff, the region’s \$1.3 million biennial operating budget, and general facilities operations. *See* Appendix A; CP at 163. The Regional Director also implemented existing programs and developed new ones, reviewed actions proposed by staff (*e.g.*, enforcement orders, permits and variances) for cross program impact, directed agency response to controversial issues, and led actions requiring environmental impact statements involving multiple department and programs. *See* Appendix A; CP at 164.

Ms. Fernandes had at least two predecessors to this position: Neil Aaland and Sue Mauermann. CP at 212, 659. Aaland and Mauermann

both remained at Ecology after serving in the Regional Director position. CP at 211-213, 665-666.

**2. Fernandes Initially Presented Herself as a Team Player That Collaborated and Communicated Effectively**

In January 2003, Beryl Fernandes applied for Ecology's Regional Director position for the Southwest Regional Office. CP at 166. In her application materials, Fernandes presented herself as "a seasoned professional with a straightforward, trust engendering approach that builds bridges, wins collaboration and achieves results." CP at 166. Her philosophy included operating under the highest standards of integrity and fairness, in addition to demonstrating sensitivity, respect, humility and a willingness to learn and admit mistakes. CP at 168.

Ecology's director at the time, Tom Fitzsimmons, agreed with then Deputy Director Linda Hoffman that Fernandes seemed to be the best fit for the position. CP at 26-27. Fernandes was hired in March 2003. CP at 26-27. Hoffman was actively involved in the hiring process and was an integral part of the hiring decision. CP at 615. Two of the four Regional Director's were persons of color during the period Fernandes was employed by Ecology. CP at 594.

Soon after she was hired, Fitzsimmons provided Fernandes with a list of the Significant Results he expected from her in 2003. Appendix B;

CP at 178-179. His first expectation was for Fernandes to develop effective working relationships with colleagues on the management team and all key staff for the region. Appendix B; CP at 178-179. Fernandes was expected to “work cooperatively and effectively with the RMT, which consisted of Ecology managers who did not directly report to Fernandes.” CP at 27.<sup>7</sup> Fernandes was also expected to orient herself to all aspects of the agency and her position and begin to effectively direct agency

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<sup>7</sup> Ms. Fernandes asserts as fact that, upon her application, she “stepped into [a] culture of racial hostility.” App. Br. at 7. Her only citation to the record in support of this assertion is her own application materials. App. Br. at 7; CP 854-58. This--and other--unsupported assertions in appellant’s brief do not satisfy CR 56(e). App. Br. at 7.

Ecology moved in the trial court to strike Fernandes’ original opposition brief because it was not supported by admissible evidence. RP 12/4/ 2009 at 4-15. In response to Ecology’s motion, the trial court struck Ms. Fernandes’ declaration and all of its attachments. RP 12/4/2009 at 11-15; CP at 258-540.

The 1998 DRAFT report “The Effectiveness and Impact of Diversity Programs at the Department of Ecology” and the 2000 workforce cultural assessment were originally stricken by the trial court (as unauthenticated appendices) to the first Fernandes declaration. RP 12/4/2009 at 4-15; CP at 258-540.

The documents were re-submitted by counsel Thaddeus P. Martin as appendices to his December 17, 2009, declaration. CP at 639.

When the reports were submitted the second time, neither was authenticated by its author or by any other researcher familiar with the methodology the study employed. CP at 639; 859-917. The source of neither document was identified. CP at 639. One document exists only in DRAFT form. CP at 860-83. The data relied upon in the reports was compiled during the 1990’s, several years before Fernandes was employed by Ecology. *See* CP at 872-876, 900-904.

Even if the reports were authenticated and relevant, however, they do not support the conclusion that there was a “culture of racial hostility” in Ecology; rather, the reports provide a critical assessment of diversity within Ecology and provide (1) suggestions to improve Ecology’s handling of diversity related issues and (2) recommendations for recruiting and retaining people of color. CP at 877-883, 892-899.

The relevance of the reports to the issue before the trial court was not established by expert testimony. CP at 639; 859-917. The trial court considered all facts in Fernandes’ favor when it awarded summary judgment to Ecology, but was guided by the summary judgment standard (CR 56(e)) in considering evidence. CP at 971-83; *See, e.g.*, 973, fn. 3.

activities in her regional office. Appendix B; CP at 178. The Significant Results Fitzsimmons identified also required Fernandes to sponsor the agency's participation in the small communities' project, orient herself to the activities of Vancouver's Field Office, build effective partnerships with other state agencies and local governments, and assist in the implementation of watershed management in her region. Appendix B; CP at 178-179.

**3. From the Outset, Members of the Public, Co-Workers, and Managers Complained About Fernandes' Job Performance**

Within weeks of her hiring, Fernandes experienced friction with management colleagues and subordinate staff members. In general, these difficulties and concerns included consistent problems working and communicating with managers and staff in a constructive, collaborative, and respectful way. Some examples of such incidents, which will be discussed in greater detail below, included communicating with a management colleague regarding her refusal to authorize a subordinate's vacation pay, unilaterally changing staff duties without discussion or notice to other managers, planning an event that was not communicated to other managers, corresponding with a manager over the planning of a cross-region event, and dealing with external interest groups.

In April 2003, just a month after she was hired, Ms. Fernandes denied a request by Pam Berns, a subordinate staffer, to be paid for the time she telecommuted while on vacation visiting a friend out of state. CP at 209-216. The staff member sought input from Neil Aaland, a former Regional Director. CP at 212. Aaland had approved a similar request in the past. CP at 212.

In an e-mail to Aaland, Fernandes commented that instead of submitting documentation necessary to justify the paid time off, Berns “apparently went to Neil, who knows nothing about what’s been going on and has no authority to approve leave after the date he left the [Regional Director] position.” CP at 212. Fernandes told Aaland that it was “entirely inappropriate for any manager in the agency to insert themselves into a management issue like this without first talking with me to figure out what the whole issue might be.” CP at 213. She also said that it would “not be advisable for anyone else at this point to step in and tell Pam...that she does not have to be accountable to her own supervisor” or “that she can enlist the help and approval from anyone else in the department instead of dealing with her supervisor.” CP at 213.

Aaland replied:

I am disturbed by the tone of your e-mail. I don’t believe I am ‘inappropriately inserting myself’ in a situation. You asked [Pam] (sic) to check with me on this situation and

confirm ou[r] (sic) conversation, and I responded with information on the conversation I had with Pam...I was asked to confirm what had happened and did so.”

CP at 212. Fernandes then told Aaland that “it is now up to you, Neil (sic) to extricate yourself from this matter...” CP at 211. Aaland replied and explained that “I had no intention of trying to ‘manage your staff’ or ‘override your management decision.’ I was trying to provide information on what had gone on while I was [Regional Director].” CP at 211.

A second incident occurred in May 2003, two months after Ms. Fernandes was hired, when she made changes to office staff who regularly worked with the RMT. CP at 172. Fernandes made the staffing decision without consulting the RMT and then notified the RMT of her decision via e-mail. CP at 172. Kay Seiler, a member of the RMT, responded to Fernandes’ e-mail by stating that she wished “to discuss this more fully at RMT.” CP at 172. Seiler also noted that she had planned on asking about this change “because [of] (sic) the rumors that [had] been floating around” the office. CP at 172. Seiler went on to state: “I have concerns about the way this was done, without RMT input on the potential impacts to service to us and questions of what this means for service for my staff.” CP at 172. Seiler finished by asking to talk with Fernandes more in a few days. CP at 172. Less than two hours later, Fernandes replied:

Please be assured that the services currently provided by our office will continue as before. [Berns] will be on hand on Monday to outline how she's worked out the distribution of responsibilities. As you will find out, it will not have an impact on your staff or anyone else's. Please feel free to come by or call if you have further questions.

CP at 172.

Also in May 2003, Fernandes planned a potluck lunch for the entire Southwest Regional Office without first seeking the RMT's input. CP at 175. She again notified the RMT of the event via e-mail. CP at 175-176. This time, Seiler replied that "[t]he bigger question is how we work together as a team." Seiler said "[t]his was not a team effort" because it was planned "without thought to the question of what we should be doing to make [this event] work" for the entire regional office.<sup>8</sup> CP at 174. Seiler again said she would be bringing her concerns to the next RMT meeting. CP at 175. Nothing in the record indicates this was done.

In December 2003, Fernandes sent an e-mail to a management colleague, Raymond Hellwig, regarding an upcoming event with multiple tribes. CP at 192-93. Fernandes copied the message to three other people, including Hoffman. CP at 192-193. She said she had received a voicemail from Hellwig expressing his concern about Fernandes' "messaging around" in his region. CP at 192. Fernandes also "urge[d]"

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<sup>8</sup> Another e-mail exchange led Paula Ehlers to tell Fernandes "I think we have different definitions of collaborative decision-making." CP at 232.

[Hellwig] to talk to [his] staff at NWRO to also look at the big picture for Ecology and the State and not complain about [the event] as your message indicated.” CP at 193.

Hellwig wrote in reply: “You will note that my voice message does not refer to you as ‘messaging around’ in my region--that sounds a little derogatory or disparaging.” CP at 192. “I left you [a] (sic) voice message seeking clarification on the situation.” CP at 192. Hellwig noted that “I believe the tone of the message to you was good natured and clearly aimed at getting clarification about what was going on.” CP at 192. “I’m not sure I understand the tone and purpose of your [e-mail]...a simple response to my voice message back to me should have sufficed.” CP at 192.

Finally, in January 2004, an Ecology receptionist reported that Mr. and Mrs. Swanson, representatives from the organization Fish First, arrived at Ecology at 8:55a.m., claiming to have an appointment with Fernandes. CP at 199. The couple told receptionist Deanie Elwell that Fernandes said she would be sharing their information with her colleagues in Ecology. CP at 199. Upon learning Fernandes was not available, the couple left, returned at 10:25 a.m. and then “waited quite sometime (sic) for Fernandes.” CP at 199. At 12:05 p.m., the couple signed out of the building and told the receptionist they were “very unhappy with the way

[Fernandes] treated them.” CP at 200. They said Fernandes “completely switched her story” about what she said she would do for them and “treated them rudely” in their short meeting. CP at 200.

The couple reiterated that they “were very upset at Beryl” and were going to report the incident to local newspapers. CP at 200. After Elwell, the receptionist, told Fernandes that the Swansons were going to the press, Fernandes replied that she was “walking right into the middle of some bad experiences” Mr. Swanson had had and wanted to know how far this information had gone so she could “explain my side to whoever else [had] heard Mr. Swanson’s version of the meeting.” CP at 198.

In addition to these conflicts, the RMT and program managers provided Deputy Director Hoffman with unsolicited written feedback about Fernandes’ performance as Regional Director. CP at 27, 34-36. For instance, program manager Wendy Bolender’s concerns included being “dismissed and scolded” by Fernandes. CP at 34. Bolender said that Fernandes had a “lack of respect for regional managers,” was “defensive and confrontational,” inappropriately shared communication, was “unclear and ambiguous in her communication,” had “cancel[led] important meetings at a whim” and was “patronizing” and “undermined others.” CP at 34.

Additionally, Southwest Regional Office staff member, Perry Lund, said that Fernandes showed a “consistent lack of communication,” “[lacked] an [u]nderstanding of her [r]ole,” and showed a “[p]ersistent [d]isregard for [s]taff expertise and [e]xperience.” CP at 36. Lund reported Fernandes’ had “no sense of graciousness, [a] lack of respect, lack of courtesy” and an “inability to inspire confidence.” CP at 36.

Fernandes also sought the input of fellow RMT members for her performance evaluation. CP at 224-230. Greg Sorlie suggested a “major theme” for Fernandes was “improving her communication with RMT.” CP at 224. He also recommended Fernandes “let RMT know ahead of time and ask for their input” when planning events and “consult with key staff face-to-face (not e-mail).” CP at 224. She should also keep key commitments for meetings and appearances, “avoid being critical of RMT members, especially in e-mail,” and to “[t]rust staff.” CP at 224-225.

Dick Wallace also responded to Fernandes’ request and told her that “developing an effective relationship with the section managers and helping them work as a team” was critical. CP at 227. Wallace said she could focus on “[s]trong team work and relationships; frequent, clear and open communication; and leadership.” CP at 227. Another RMT colleague, Gordon White, thought it was important for Fernandes to focus on “building [her] relationship with [the RMT]” and supported Fernandes’

efforts to “improve the functioning of [the RMT].” CP at 229. Hoffman was copied on both e-mails. CP at 227, 229. Overall, the feedback Hoffman received “indicated that Fernandes had consistent problems with working and communicating with other managers and staff in a constructive, collaborative way.” CP at 27.<sup>9</sup>

#### **4. Hoffman Supported Fernandes’ Attempts to Address Reported Problems and Improve Her Own Effectiveness and Her Relationship With the RMT**

As Deputy Director, Hoffman took steps to help address the issues identified by members of the RMT. CP at 28-29. Hoffman’s goal was to foster collegiality between Fernandes and the RMT. CP at 28, 29. First,

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<sup>9</sup> Fernandes’ asserts as fact that *she* was receiving hostile treatment. App. Br. at 8-12. Her assertions are supported only by her own opinions and are not corroborated by other documentary evidence or by other witnesses. For example, Fernandes asserts as fact that subordinate staffer Pam Berns became “furious” with her. App. Br. at 8. Here, Fernandes cites her own deposition testimony where she stated “[Berns] was furious” with her. CP at 137. Fernandes can point to no evidence in the record corroborating this assertion of fact.

Similarly, Fernandes asserts that her experience with the RMT was “different from anything she had ever encountered” in her career, that she was told to “do her job and that she better do it [they way the RMT wanted] or else,” and that her predecessor “did not encounter these types of challenges from the RMT.” App. Br. at 9. Again, she cites her own testimony where she asserts these conclusions and does not provide corroborating objective evidence. CP at 659. Fernandes’ factual assertions that Ehlers “became openly hostile” and “belligerent, disrespectful, condescending, and argumentative” toward her, got “other members of the RMT involved in this behavior,” “continued the behavior at every single RMT meeting” and that Laurie Davis “lambasted” her are similarly unsupported by objective documentary or corroborating evidence. App. Br. at 10.

Fernandes also asserts as fact that Pam Berns “worked with the RMT to drive [Fernandes] out of Ecology.” App. Br. at 8-9. Fernandes does not provide a citation to the record in support of this assertion. *See* discussion of Pam Berns at pp. 9-11, above.

Fernandes’ assertion that the RMT “complained that [she] was too focused on diversity and that this was problematic” is supported by a citation to materials not included in the Clerk’s Papers. App. Br. at 9. This reference is now supported by testimony from Ms. Fernandes in the supplemented trial record. STR at 4 and 5.

in July 2003, at Fernandes' suggestion, there was a facilitated mini-retreat that included Fernandes, her staff, and the RMT. CP at 51-52. In September 2003, Fernandes herself noted that her relations with the RMT were "a serious problem that won't simply go away" and that she was treated with "hostility, resentment, and disrespect." CP at 222. Fernandes suggested an outside consultant to help. CP at 222. A second facilitated mini-retreat also occurred in September 2003.<sup>10</sup> CP at 52. Fernandes was hired in March 2003.

In October 2003, Hoffman succeeded Fitzsimmons as Director for Ecology and thus became Fernandes' immediate supervisor. CP at 27. Prior to the succession, Fitzsimmons and Hoffman discussed Fernandes' "initial problems with communicating and interacting with [her] own staff

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<sup>10</sup> The trial court consistently viewed facts of disputed issues in the light most favorable to Ms. Fernandes including the factual allegations regarding this second mini-retreat. CP 971-75. Fernandes claimed that this second session turned into a "multi-hour lambasting by 15-20 Caucasian middle managers from the RMT who did not even give [her] an opportunity to speak" and felt she was the victim of a "lynching or public stoning." App. Br. at 11, CP at 648-649, 652-653, 654. By contrast, the Boodell report found that "[n]one of the witnesses" attending the retreat "corroborated Ms. Fernandes' allegations of abusive and hostile behavior." Appendix C; CP at 53. Witnesses interviewed by Geoffrey Boodell said Fernandes was "[unable] to accept criticism." CP at 53. Interactions Fernandes describes as abusive and hostile were described to Boodell by other witnesses as "professional." CP at 53. The trial court accepted Ms. Fernandes view of the September 2003 mini-retreat for purposes of its decision. CP at 973, fn. 2.

Fernandes' assertions that Hoffman put her down in front of other employees, worked to undermine Fernandes' ability to work with the RMT, subjected Fernandes to a "grueling interrogation designed to provide Hoffman with the information necessary to begin an investigation, and "[putting] words in [Fernandes'] mouth as an excuse to conduct an investigation" are also unsupported by the record but should be viewed in Ms. Fernandes favor for purposes of this appeal. App. Br. at 12, 13, CP at 671-672, 684-685, 689.

and other managers, particularly members of the [RMT].” CP at 27. This was of concern to Hoffman because, “[a]s Regional Director, Fernandes was expected to work cooperatively and effectively with the RMT...” CP at 27. In her declaration, Hoffman noted that Fernandes “struggled with this critical aspect of her job” to the point of generating the complaints discussed previously. CP at 27. Hoffman’s concerns over Fernandes’ performance “began in late end of 2003 and built over the course of 2004.” CP at 823.

As the Interim Director, Hoffman had outlined her concerns to outgoing Director Fitzsimmons. CP at 27, 32. She described Fernandes’ communication and relationship difficulties, particularly in relation to Fernandes’ inability to improve collaboration and problem solving with the RMT and her lack of ability to manage cross program issues. CP at 32. Hoffman said these troubles were “definitely not [getting] better” and were a “significant problem.” CP at 32.

Subsequently, Fernandes’ November 2003 performance evaluation, conducted by both outgoing Director Fitzsimmons and Interim Director Hoffman, specifically emphasized that Fernandes’ relationship with the RMT was her biggest challenge and stressed that this problem, if not addressed, would impede her and the RMT’s effectiveness. CP at 29, 188. This directly conflicted with Fernandes’ Significant Results

Expected for 2003. CP at 178-179. The evaluation also expressed Ecology's support for hiring an outside coach to assist Fernandes and the RMT in improving their relationship. CP at 29, 188.

Hoffman and Fernandes thus worked together to identify an appropriate coach. CP at 29. Two months later, Hoffman told Fernandes of her "concern about your lack of progress bringing on a consultant over the course of the month." CP at 203. Hoffman also reemphasized the importance of addressing the "recent incidents with internal and external parties" demonstrating a "problem that is getting in the way of your and the team's effectiveness." CP at 203.

As the process continued, Hoffman noted that Fernandes was more interested in "[changing] the reporting relationship of RMT members to report directly to her, rather than trying to meaningfully improve her relationship and communication with them." CP at 28. Fernandes also "became less willing to accept responsibility for her difficulties in working with the RMT." CP at 28. Meanwhile, Hoffman sought Employee Services Director Joy St. Germain's advice on all possible options, including hiring an outside consultant and termination, for addressing and

remedying the serious difficulties in the working relationship between Fernandes and the RMT<sup>11</sup>. CP at 526<sup>12</sup>, 595, 602-613, 960-966.<sup>13</sup>

**5. Fernandes' Complaints of Hostile Treatment Led to an Independent Investigation That Revealed Her Own Negative Treatment of Ecology Employees**

In April 2004, while Hoffman and Fernandes were finalizing the selection of an outside coach, Fernandes told Hoffman that she had been “subjected to an abusive workplace, bullying, and hostile treatment” by Ecology staff, was “terrified,” and reported a “herd mentality” in the RMT and that made her “the victim.” CP 29, 238. By April 23, 2004, the hiring of an outside consultant was put on hold and, consistent with Ecology policy ensuring a safe/secure workplace, Hoffman and St. Germain determined an independent investigation was needed to decide what, if any, action was needed to address the hostile treatment reportedly directed towards Fernandes. CP 29-30, 43, 235-239, 250.

On May 7, 2004, Fernandes was notified of the decision and purpose of the investigation: to look into any potential violations of

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<sup>11</sup> Fernandes states as fact that Hoffman “sought advice from [St. Germain] regarding terminating [Fernandes] as early as January of 2004....” App. Br. at 4. Both Hoffman and St. Germain testified that Hoffman did not do so. CP at 604-605.

<sup>12</sup> Ecology objected to the admissibility of this letter on grounds that it was protected by attorney-client privilege. CP at 719, 963-965. The trial court considered the letter and ruled that no finder of fact could find it to be direct evidence of a decision to terminate Fernandes in January 2004 and that the inference of pretext supported by the letter was inadequate to defeat summary judgment given all that Ecology did between January and October 2004 (including the Boodell investigation). CP at 977.

<sup>13</sup> Hoffman did not ask St. Germain for advice on terminating Fernandes without raising legal issues. CP at 603.

Ecology policy requiring a secure workplace. CP 42-44, 238, 243. As

Hoffman noted in a correspondence with Fernandes:

Beryl, I will not tolerate bullying and abusive behavior in our workplace and I need to look into this. As the Director, I have been notified of actions which may be in violation of agency policy. Civil Service law and agency policy require me to conduct investigations of alleged employee misconduct in accordance with applicable legal and regulatory requirements in a prompt, thorough and impartial manner while recognizing and observing all employees['] (sic) rights.

CP at 243.

The ensuing investigation and report (“the Boodell report”) was conducted by an independent employment attorney who interviewed twenty employees and reviewed various documents<sup>14</sup>. CP at 46-48. Fernandes’ legal counsel accompanied her to the investigation’s opening interview.<sup>15</sup> CP at 48. The Boodell report determined there was no credible evidence that Fernandes’ perceptions of bullying, abusive behavior or a hostile work environment were grounded in fact. CP at 60-61.<sup>16</sup> Boodell also found no credible evidence suggesting a violation of Ecology policies or state and federal laws prohibiting discrimination based on a protected class. CP at 60-61.

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<sup>14</sup> Fernandes asserts as fact that the investigator only interviewed employees “who had been targeting and harassing [her].” App. Br. at 15. This assertion, similar to others, is not supported by the record.

<sup>15</sup> Fernandes obtained legal counsel on or before July 27, 2004. CP at 49, fn. 2.

<sup>16</sup> The Boodell report (CP at 46-61) is included as Appendix C.

Specifically, the Boodell report, after a lengthy analysis of Fernandes' description of events and interviews with employees, concluded:

There is no credible evidence to suggest a violation of Agency policies or a violation of state and federal laws prohibiting discrimination based on a protected classification or characteristic. While Fernandes perceives that she has been subjected to bullying and abusive behaviors, the evidence adduced during this investigation indicates that her perceptions are not well grounded.

With respect to Fernandes' allegations of bullying and abusive behaviors by members of the RMT, there is no credible evidence to support her perceptions and allegations. Other than Fernandes, all of the witnesses interviewed described the interactions complained of as being professional. I find these witnesses credible and conclude that Fernandes has significant difficulty communicating with the members of the RMT and does not react well to any form of criticism or feedback. Many of the witnesses commented about her inability to accept criticism, even when it is delivered in a cautious manner. I conclude that these observations about Fernandes better fit the reality of the breakdown in communications between Fernandes and the members of the RMT than do allegations of bullying and abusive behaviors. I do find, however, that due to the significant disconnect between Fernandes and the members of the RMT, a number of the members have avoided including her in matters.

Likewise, I find Fernandes' allegations against Hoffman to be entirely without merit. All of the credible evidence indicates that Hoffman's actions were legitimate and reasonable and none of the witnesses interviewed supported Fernandes' perception of events as they relate to Hoffman.

CP at 60 (Appendix C). The Boodell report also cited at length statements

received from RMT members during the course of the investigation:

- ‘She's not competent. She's in way over her head’
- ‘To a person, everyone thinks she's in over her head and is costing the Agency a lot of time and money.’
- ‘I'm managing because of Beryl as opposed to managing with Beryl.’
- ‘There is no ownership by Beryl of her inability to work with the RMT as a group.’
- ‘She's killing the morale of the staff.”
- ‘I cringe at the thought of Beryl getting involved - I avoid it when possible.’
- ‘She's rude and sarcastic.’
- ‘The feeling of all the Section Heads is that we are trying, but we don't see Beryl trying at all.”
- ‘The RMT’s relationship with Beryl is 'strained' at best.’
- ‘Beryl has never gotten out of the stage of getting up to speed.’
- ‘We are all 99% ignorant of what Beryl is doing.’
- ‘We have seen no growth - no changes from Beryl in the past year and a half.’
- ‘Morale is down the tubes because of Beryl.’
- ‘She adds no value.’
- ‘She is completely exclusionary.’
- ‘I don't know how to deal with her so I have gone into the 'avoidance mode.’”
- ‘She’s very autocratic and very demanding -she makes us all bristle.’
- ‘She has dismissed me and my staff so many times that I would work around her if I could.’
- ‘She causes us more work when she gets involved.’
- ‘She thought that as the Regional Director she could direct everybody - she's frustrated that it is not that way.’
- ‘There is such a disconnect that it's not fixable.’
- ‘She's the highest paid, yet functions at such a low level’
- ‘We are all very frustrated and skeptical that the right thing will be done.’
- ‘She has not shown any interest in my program nor has she demonstrated any knowledge in my program.’

- ‘We never know when she's out there in the field and worst yet, we never know what she is saying out there.’
- ‘Beryl shows no willingness or desire to partner with us as a team.’
- ‘She's not there for us.’
- ‘You have someone earning \$88,000 a year. If they don't know how to do their job, you fire them - you don't pay a coach to teach her how to do her job. Whether she's teachable or not, we shouldn't spend taxpayers' money to teach her how to do her job.’
- ‘I don't think Beryl's relationship with the rest of us is salvageable - I don't think she wants to change or recognizes that she needs to. People feel they have done everything to make it work.’
- ‘Our relationship with Beryl is like going to a marriage counselor. But at some point you have to recognize that the relationship is not going to survive despite everyone's best efforts.”

CP at 54-56 (Appendix C). Statements from subordinate staff members included:

- ‘She can be very condescending and rude. If she doesn't like what you are saying, she will cut you off’
- ‘She has hung up the telephone on me when I was speaking to her.’
- ‘She has scolded and yelled at me like a child.’
- ‘She acts like she is the queen bee.’
- ‘She has pointed fingers at me.’
- ‘Nothing is ever her fault.’
- ‘She is very defensive.’
- ‘She says inappropriate things that someone at her level should not be saying. I have heard her refer to Paula Ehlers, Laurie Davies, Rebecca Lawson and Wendy' Bolender as 'white bitches.’<sup>3</sup> I have also heard her refer to Linda (Hoffman) as a bitch.’
- ‘I can't continue working with her.’
- ‘You can't talk to her - she doesn't listen.’
- ‘Nobody likes her or trusts her.’
- ‘It can't get any worse than it is.’

- ‘She's very dismissive and she won't listen - she's a scary woman.’
- ‘Everyone has gone above and beyond to help her. If she doesn't go - I am out.’
- ‘The day of ruling by intimidation is long over. She's very dictatorial.’

CP at 55-56 (Appendix C).

Hoffman, after reviewing the report, notified Fernandes of her conclusion: there had not been a violation of agency policies by any member of the RMT or any violation of any laws prohibiting discrimination of a protected class. CP at 63.

#### **6. Fernandes’ Secretary Complained Fernandes Retaliated Against Her, Leading to an Investigation into Fernandes’ Alleged Misconduct**

In September 2004, Fernandes’ actions sparked an investigation into her own alleged misconduct. CP at 250. Fernandes’ secretary, Lorna Mendez-Correa, told Fernandes it made her “uncomfortable and uneasy” to discuss the ongoing Boodell investigation as all such information was supposed to remain confidential and not be discussed. CP at 248. Fernandes, noting the need to “express myself to my closest staff person,” requested a temporary transfer for Mendez-Correa. CP at 247.

Mendez-Correa subsequently complained that Fernandes was retaliating against her for her refusal to breach the confidentiality of the Boodell investigation. CP at 250. In response to Fernandes’ alleged

conduct and pursuant to Ecology policy, St. Germain notified Fernandes that Mendez-Correa's claim must be investigated. CP at 250. Hoffman directed Fernandes' secretary be temporarily re-assigned during the new investigation and asked that the two not to speak to each other. CP at 250.

**7. Fernandes Resigns in Lieu of Termination Eighteen Months After She Was Hired**

On October 4, 2004, Fernandes met with Hoffman and St. Germain. CP at 252. In that meeting, Hoffman gave Fernandes the option of termination or resignation based on Hoffman's conclusion that Fernandes' continuing communication and interpersonal problems and style and approach to management interactions were incompatible with the expectations for her position. CP at 30, 252-255. The decision was also based on Fernandes' failure to meet her position's performance expectations. CP at 30, 178-179. Fernandes chose to resign in lieu of termination and submitted her resignation letter on October 6, 2004. CP at 255, 257. Fernandes' last day in the office was October 11, 2004, and her resignation was effective October 29, 2004. CP at 252, 255, 257, 843.

**B. Procedural Posture**

Fernandes filed this suit in the Thurston County Superior Court on October 30, 2007. Ecology moved for summary judgment on

September 10, 2009 and Fernandes filed her Response on September 28, 2009. CP at 64, 541.

On December 4, 2009, Ecology moved to strike Fernandes' responding brief because the evidence relied upon in the motion would not be admissible at trial. RP 12/4/2009<sup>17</sup> at 5, 10. The trial judge agreed, but instead of striking Fernandes' brief, struck her declaration<sup>18</sup> (including the attached exhibits) because her filings were "rife with information that violates Civil Rule 56" and the interpreting case law. RP 12/4/200 at 11.

The trial judge noted that "a significant part of the information provided...is not relevant to the issues presented by this motion to dismiss" and was filled with "inadmissible hearsay statements." RP 12/4/2009 at 12. Fernandes was instructed to file an entirely new response and declaration "with some reference to the record" other than that contained in her declaration.<sup>19</sup> RP 12/4/2009 at 16. On December 18, 2009, Fernandes submitted a new response and declarations (one from

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<sup>17</sup> RP 12/4/2009 is the Verbatim Recording of Proceeding for trial court hearing and decision on Ecology's motion to strike. Ms. Fernandes' original declaration and attachments were stricken by the trial court. CP at 258-540. Ms. Fernandes has not appealed that decision and those documents are not properly before this court. See Motion to Strike Reference in Brief to Stricken Declaration, 8/11/2010.

<sup>18</sup> The trial judge stated: "I've carefully read the declaration filed by the plaintiff, and I find that there's good cause here to strike that declaration, and I'm going to do that." RP 12/4/2009 at 11.

<sup>19</sup> CP at 258-540 has been incorrectly designated and relied upon by Fernandes.

herself and one from her attorney), which appended many of the attachments from her stricken declaration.<sup>20</sup> CP at 621-942.

After considering all of Fernandes' factual assertions in the light most favorable to her, the trial judge dismissed Fernandes' claims with prejudice on March 5, 2010. CP at 984-985. Fernandes timely appealed the dismissal of her race discrimination, hostile work environment, retaliation, and wrongful discharge claims. App. Br. at 2, 21-32.

#### **IV. LAW AND ARGUMENT**

##### **A. Standard of Review for Summary Judgment**

This court reviews an order granting summary judgment de novo; this court engages in the same inquiry as the trial court, reviewing and considering disputed facts and reasonable inferences in a light favorable to the nonmoving party. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Summary judgment is appropriately affirmed if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). To defeat summary judgment, Fernandes has to set forth specific facts, by admissible evidence, showing there is a genuine

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<sup>20</sup> The trial court did not strike the second series of declarations but did discuss, in detail, the factual support it considered in awarding judgment to Ecology. CP at 973-75, particularly 973, fn. 3.

issue for trial with respect to each element of her claims. CR 56(e); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

Fernandes did not (and does not) show that genuine issues of material fact existed. She could not rely on conclusory allegations or generalized accusations, and that was the most she offered. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (conclusions insufficient); *Pub. Util. Dist. No. 1 v. WPPSS*, 104 Wn.2d 353, 360-61, 705 P.2d 1195 (1985) (a party cannot ward off summary judgment by rumor or conjecture); *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 84-85, 98 P.3d 1222, 1128-29 (2004) (a plaintiff does not establish discrimination simply because he or she cannot think of another reason for the events at issue). Ecology is entitled to judgment as a matter of law.

## **B. Overview**

There are ample grounds to affirm the trial court's summary dismissal of this case. Fernandes has not presented evidence establishing a prima facie case for her racial discrimination, retaliation, and hostile work environment claims. Additionally, Fernandes' wrongful discharge in violation of public policy is duplicative and should be dismissed. The evidence shows that Ecology had legitimate, nondiscriminatory reasons

for offering Fernandes the opportunity to resign in lieu of termination. Fernandes' discrimination, retaliation, and hostile work environment claims are allegedly based on race; however, evidence of racial animus is lacking in this case.

**C. Fernandes' Discrimination Claim Was Properly Dismissed**

**1. The Elements and *McDonnell Douglas* Standards**

Fernandes assigns error to the trial courts dismissal of her racial discrimination claim, which Fernandes brought under the WLAD<sup>21</sup>. In discrimination cases under the WLAD, when ruling on summary judgment motions, Washington courts apply the evidentiary burden-shifting protocol established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.3d 440 (2001).<sup>22</sup> Without direct evidence of discrimination, the employee must establish a prima facie case. *Id.* at 180-

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<sup>21</sup> See RCW 49.60.180. In her brief, Fernandes refers to this claim as "racial discharge under RCR 49.60.180." App. Br. At 28. The two claims are synonymous.

<sup>22</sup> Washington courts recognize federal employment law as "a source of guidance" while bearing in mind that they "are not binding and that we are free to adopt those theories and rationale which best further the purposes and mandates of our state statute." *Hill*, 144 Wn.2d at 180 (internal citation omitted). Specifically, because Title VII of the federal law closely parallels the WLAD, courts generally view federal law as persuasive in construing the WLAD. *Esteves v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 793, 120 P.3d 579 (2005) (internal citation omitted). However, the scope of Title VII is not as broad as RCW 49.60. *Martini v. Boeing Co.*, 137 Wn.2d 357, 372-73, 971 P.2d 45 (1999). Here, Fernandes brings all of her claims under state law (primarily the WLAD). Thus, any citation to federal case law is done in accordance with the above principles.

81. In the absence of a prima facie case the employer is entitled to judgment as a matter of law. *Id.* at 181.

To establish a prima facie case of racial discrimination under the WLAD, Fernandes must show that (1) she belonged to a protected class, (2) she was discharged or suffered adverse employment action, (3) she had been doing satisfactory work, and (4) she was replaced by someone not in the protected class. *Jones v. Kitsap County Sanitary Landfill, Inc.*, 60 Wn. App. 369, 371, 803 P.2d 841 (1991) (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 362, 753 P.2d 517 (1988)). Opinions or conclusory facts are not enough to support a prima facie case. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

If the plaintiff establishes a prima facie case the burden of production shifts to the employer to articulate a legitimate, non-discriminatory, reason. *Hill*, 144 Wn.2d at 181-82. Once the employer does so, the burden shifts back to the employee to show that the proffered reason “was in fact pretext.” *Id.* at 182, quoting *McDonnell Douglas*. “If the plaintiff proves incapable of showing pretext, the defendant becomes entitled to judgment as a matter of law.” *Id.* at 182.

Even if there is some evidence of pretext, other factors may still warrant judgment for the employer. *Hill*, 144 Wn.2d at 186, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148-49 (2000). Those

factors include the strength of plaintiff's prima facie case; the probative value of other proof that the employer's explanation is false; and any other admissible evidence supporting the employer. *Hill*, 144 Wn.2d at 182-87. When the "record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred," summary judgment is proper. *Hill*, 144 Wn.2d at 184-85; *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002) (quoting *Reeves*, 530 U.S. at 148).

Pretext is *not* shown by evidence that the employer's reason was incorrect or foolish. Rather, the plaintiff must show that the reason was unworthy of belief. *Griffith v. Schnitzer Steel Indus.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005) (citing *Hill*, 144 Wn.2d at 182); *Kuyper v. State*, 79 Wn. App. 732, 738, 904 P.2d 793 (1995). Speculation or a subjective belief in discrimination does not establish pretext. *Hill*, 144 Wn.2d at 190 ("[C]ourts must not be used as a forum for appealing *lawful* employment decisions simply because employees disagree with them."); *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn. App. 356, 372, 112 P.3d 522 (2005); *Manatt v. Bank of America, NA*, 339 F.3d 792, 801 (9th Cir. 2003). Nor are competing theories enough. A plaintiff survives summary

judgment only if the record contains a *reasonable* inference of discrimination. *Hill*, 144 Wn.2d at 186.

**a. Fernandes Did Not (and Cannot) Make a Prima Facie Case for Racial Discrimination**

Fernandes claims discrimination because, she says, she was a member of a protected class, was at the very least constructively discharged, was performing satisfactorily, and was replaced by a white male. App. Br. at 29. Fernandes cannot establish a prima facie case for her discrimination claim.

In particular, although she is a member of a protected class and was replaced by a person not in the protected class, Fernandes did not (and cannot) establish she was doing satisfactory work from even her earliest days as Regional Director. While Fernandes points out that her only performance evaluation (in November 2003) was positive, App. Br. at 29, the 2003 evaluation also comments on Fernandes' struggles with the RMT. This relationship was critical to her job as Regional Director and the difficulties were noted as being "a significant problem." Even viewed in the light most favorable to Fernandes, this is not strong evidence of satisfactory work, particularly given that the primary objective of her job was to *lead* the RMT. Improving her communication and relationship with the RMT was also such an important job function that it was included

as the first of eight “Significant Results Expected” in 2003 and addressed at length in her performance evaluation.

Feedback from her colleagues and multiple unfavorable incidents demonstrated Fernandes’ inability to perform satisfactorily. Among the many other examples in the record, the tone of many of Fernandes’ communications with management colleagues caused friction and discomfort. She also made decisions affecting the RMT without even notifying the other members or discussing the decision before it was made. The evidence also shows that Hoffman received many complaints and feedback about Fernandes’ management and what she needed to improve. The Boodell report independently established Fernandes’ poor communication and interpersonal skills.

Arguably, Fernandes also cannot show a prima facie case for racial discrimination because she did not suffer an adverse employment action: she voluntarily resigned in lieu of being terminated.<sup>23</sup> The trial court correctly assumed, without deciding, that Ms. Fernandes was constructively discharged for the purposes of summary judgment. CP at

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<sup>23</sup> An employee’s resignation is presumed voluntary and the employee bears the burden of rebutting this presumption. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 398, 928 P.2d 1108 (1996) (citations omitted). A resignation is not rendered involuntary because an employee tenders resignation to avoid termination for cause. *Molsness*, 84 Wn. App. at 399. And the employee’s subjective belief that she had no choice but to resign is irrelevant. *Molsness*, 84 Wn. App. at 399.

972. This court should make the same assumption since this contested issue has no effect on the award of judgment as a matter of law.

Ms. Fernandes cannot establish the third prong of the prima facie test for discrimination: she was not doing satisfactory work throughout the eighteen months she was Regional Director. This is sufficient ground for awarding judgment as a matter of law to Ecology.

**b. Ecology Had Legitimate, Nondiscriminatory Reasons for Asking Fernandes to Resign**

Even if Fernandes had sufficient evidence to support a prima facie case, and she did not, Ecology had legitimate, non-discriminatory reasons for giving her the option of resigning in lieu of termination. The evidence supporting these legitimate non-discriminatory reasons is the same that shows Fernandes' poor performance: the feedback and comments from colleagues, the conflicts and incidents around the office, her inability to work with the RMT, and, most importantly, the independent Boodell report. Fernandes' difficulties directly conflicted with the responsibilities and expectations of her position and hindered her effectiveness.

Ecology gave Fernandes ample support and time to address the communication and management issues identified in her first months of employment<sup>24</sup>; unfortunately, her performance did not improve.<sup>25</sup> No

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<sup>24</sup> Fernandes served at the pleasure of the Director. Her appointment could have been terminated at any time for a legitimate, non-discriminatory reason.

employer should have to ignore this type of poor performance. Such failures are made more unacceptable when they are the actions of an appointed senior manager like a Regional Director

**c. There Is No Evidence of Pretext**

Fernandes' persistent difficulties led Hoffman to conclude that Fernandes was not a good fit for the Regional Director position. The issue here is whether Fernandes carried her burden of persuasion by offering evidence that Hoffman's decision, based on Fernandes' persistent communication and interpersonal difficulties, was motivated by discrimination. Fernandes did not do so.

While not explicitly stating so in her argument<sup>26</sup>, Fernandes offers the January 29, 2004, memo from St. Germain to Hoffman as evidence of pretext. Fernandes argues the memo is direct evidence of Hoffman and Ecology deciding to terminate her prior to January 2004 and the Boodell investigation. No reasonable trier of fact could find direct evidence of pretext in this memo. CP at 977. Nor does this memo allow even a reasonable inference of pretext.<sup>27</sup> CP at 977. Hoffman was seeking advice from St. Germain on dealing with an appointed employee who was

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<sup>25</sup> Fernandes' alleged retaliation against Mendez-Correa, and the decision to investigate Fernandes' behavior toward her, further illustrates her continued poor performance.

<sup>26</sup> She makes this argument in her statement of facts. App. Br. at 5.

<sup>27</sup> See Appendix D for the complete text of St. Germain's memorandum (CP at 526-27).

failing to function with the group it was her job to lead and foster a collaborative relationship with. Appendix D. This memo reflects proper advice from Employee Services to Hoffman. Appendix D. The memo outlines the standard procedure and legal issues surrounding the termination of an employee. Such advice is standard procedure for *any* termination regardless of the surrounding circumstances. Appendix D. Further, the memo was provided as one option among many to deal with Fernandes' poor performance.<sup>28</sup> Other options considered and being implemented at the time included facilitated mini-retreats, Fernandes' soliciting feedback from colleagues to improve her practice, and Ecology hiring an outside coach to help Fernandes address her difficulties. Appendix D. No decision is reflected in the memo. Appendix D.

However, under the *McDonnell Douglas* burden-shifting standards, any reasonable inferences (even if made) and weak issues of fact are negated by the strength of the nondiscriminatory evidence and thus entitle Ecology to summary judgment. This is because (1) Fernandes was an at-will appointed employee who could be terminated at any time; (2) her leadership and collaboration with the RMT was a significant part of her

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<sup>28</sup> Fernandes contends the memo was "clearly designed to generate the pretext for firing her." App. Br. at 28. This argument is not supported by evidence, fact, or a reasonable inference from the record. CP at 977. Any speculation or subjective belief held by Fernandes is insufficient to defeat summary judgment. *See Kuypers*, 79 Wn. App. at 738-39; Appendix D; CR 56 (e).

job; (3) her performance evaluation and feedback received from colleagues indicated her need to improve her relationship with the RMT as an important goal; (3) Fernandes and Hoffman were working towards that goal; and (4) the Boodell report provides “abundant and uncontroverted independent evidence that no discrimination occurred.”<sup>29</sup>

**d. The Same Actor Doctrine Precludes the Claim**

Fernandes’ discrimination claim is also contradicted by the indisputable fact that Hoffman approved of Fernandes appointment as Regional Director. Hoffman’s decision presents a strong inference against the existence of discriminatory motive for later decisions in which she was involved, giving Fernandes the option to resign in lieu of termination for cause. *Griffith v. Schnitzer Steel Indus.*, 128 Wn. App. at 454, citing *Hill*, 144 Wn.2d at 189-90. Other than her opinion or understanding that Fitzsimmons had the final say,<sup>30</sup> Fernandes offered no direct evidence that rebuts this inference.

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<sup>29</sup> See *Milligan*, 110 Wn. App. at 637, quoting *Reeves*, 530 U.S. at 148; *Hill*, 144 Wn. 2d at 184-185.

<sup>30</sup> CP 657-658.

**D. Similarly, Fernandes' Retaliation Claim Was Properly Dismissed**

**1. The Elements and *McDonnell Douglas* Standards**

Fernandes also brought her retaliation claim under the WLAD.<sup>31</sup>

To establish a prima facie case of retaliation, Fernandes had to show (1) statutorily protected activity; (2) an adverse employment action; and (3) a causal link between the employee's protected activity and the adverse action. *Wash. v. Boeing Co.*, 105 Wn. App. 1, 14-15, 19 P.3d 1041 (2000). For causation, a plaintiff must show that the protected activity was a "substantial factor" in motivating the adverse action. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69-71, 821 P.2d 18 (1991). As with discrimination, upon a summary judgment motion, if a plaintiff establishes a prima facie case then the burden of production shifts to the employer to articulate a legitimate, non-discriminatory, reason. *Hill*, 144 Wn.2d at 181-82. The burden of proof then shifts back to the employee to show pretext. *Hill*, 144 Wn.2d at 182, quoting *McDonnell Douglas*. If the plaintiff cannot show pretext the defendant is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 182.

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<sup>31</sup> See RCW 49.60.210.

**a. Fernandes Did Not Make a Prima Facie Case for Retaliation**

Fernandes contends that her at-will appointment to regional director was ended in retaliation for her seeking redress for violations of the WLAD. She seems to allege that the protected activity was reporting “the harsh and hostile lynching” by the “all white RMT” at the September 2003 mediation to Hoffman. App. Br. at 27. She also seems to allege that the adverse actions were Hoffman’s initiation of an investigation to use as pretext for Fernandes’ termination and the eventual termination letter (even though she resigned) given to Fernandes by Hoffman. App. Br. at 27-28. None of these allegations support a prima facie case for retaliation.

First, Fernandes must show she engaged in a statutorily protected activity. *Milligan*, 110 Wn. App. at 638. The WLAD prohibits an employer from discharging or discriminating against any person because she has “opposed any practices forbidden by this chapter,” or because she “filed a charge, testified, or assisted in any proceeding under this chapter.” RCW 49.60.210(1)<sup>32</sup>. Such practices include discrimination based on race, color or national origin. RCW 49.60.180. However, the opposition must be to conduct that at least arguably violates an anti-discrimination law. *Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321, 332 (1998).

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<sup>32</sup> The statutes referenced in this brief are included in the Statutory Appendix.

Further, an employee does not enjoy complete protection from termination simply because she was opposing possible discrimination: an employee may still be discharged for cause. *Coville v. Cobarc Servs., Inc.*, 73 Wn. App. 433, 439, 869 P.2d 1103 (1994); *Kinney v. Bauch*, 23 Wn. App. 88, 96, 596 P.2d 1074 (1979).

Here, the RMT's conduct and subject of Fernandes' asserted opposition does not violate an anti-discrimination law because there is no evidence of racial animus in the record. Fernandes' termination was also for good cause given her documented poor performance with the RMT and the findings of the Boodell report.

Nor did Fernandes establish that an adverse action was taken. "An actionable adverse employment action must involve a change in employment conditions that is more than an inconvenience or a termination of job responsibilities,' such as reducing an employee's workload and pay." *Tyner v. State*, 137 Wn. App. 545, 564, 154 P.3d 920 (2007) (citing *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004)). The record shows that the Boodell investigation was not an adverse action because it was required by Ecology policy. Moreover, its stated purpose was to look into hostility *against Fernandes*, not find a reason to fire her. Significantly, although it did fail to confirm her

allegations against her RMT colleagues, the evidence does not show that the Boodell investigation changed Fernandes' employment conditions.

Even if Fernandes could establish the first two elements of her retaliation claim, she fails on the third: a causal link between her activity and the alleged adverse action (there was none). Under the WLAD, factors suggesting retaliation include temporal proximity or suspicious timing between the adverse action and protected activity, along with satisfactory work performance and evaluations. *Vasquez v. State, Dep't of Soc. and Health Services*, 94 Wn. App. 976, 985, 974 P.2d 348 (1999).

Here, the evidence does not support a causal link. Fernandes asserts a causal link because the Boodell investigation came "on the heels of" her complaints. App. Br. at 28. Such a loose temporal inference of causation, particularly when based on Fernandes' belief, is insufficient for Fernandes to meet her burden. Rather, the evidence reveals that any alleged adverse action had nothing to do with retaliation. Significantly, the investigation Fernandes relies on as the adverse action was in fact executed *for her benefit*: its purpose was to address alleged hostile conduct *against Fernandes* in accordance with policies insuring a safe and secure working environment for all employees.

Furthermore, Fernandes' 2003 employment evaluation reflected a need to improve relations with the RMT and these relations had not

improved. She also experienced friction with subordinate staff and external parties. The Boodell report confirmed all of this. In light of these factors, a causal link, or inferences thereof, is thus contradicted by the evidence.

**b. Ecology Had Legitimate, Nondiscriminatory Reasons for Asking Fernandes to Resign and There Is Insufficient Evidence of Pretext**

Even if Fernandes can establish a prima facie case of retaliation, she must overcome the evidence of a non-discriminatory explanation provided by Ecology and demonstrate some evidence of pretext. The same analysis applies here as was applied to Fernandes' discrimination claim. As discussed above, she has not done so (and cannot do so). Nor does the evidence support such a conclusion. Fernandes' retaliation claim was thus properly dismissed.

**E. Fernandes' Wrongful Discharge in Violation of Public Policy Claim Was Properly Dismissed Because It Is Duplicative<sup>33</sup>**

Where a plaintiff asserts a claim under RCW 49.60 and asserts a common law cause of action based on the same underlying facts, the common law cause of action should be dismissed as duplicative. *Griffith*

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<sup>33</sup> On *de novo* review of summary judgment, an appellate court may affirm the trial court on alternate grounds. *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004) ("an appellate court may affirm a trial court on any theory supported by the pleadings and the record even if the trial court did not consider that theory") (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)), *review denied*, 152 Wn.2d 1032, 103 P.3d 201 (2004). Here, the trial court did not consider whether the wrongful discharge in violation of public policy claim was barred as duplicative. Thus, this court may affirm summary judgment on such grounds.

*v. Boise Cascade, Inc.*, 111 Wn. App. 436, 444-45, 45 P.3d 589 (2002); *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000). In *Griffith*, the plaintiff sued her employer based on theories of both disability discrimination and wrongful discharge in violation of public policy. A plaintiff who fails to establish a retaliation and/or discrimination claim cannot sustain a claim of wrongful discharge for alleged violations of public policies based on that alleged retaliation and/or discrimination. *Griffith*, 111 Wn. App. at 444-45.

In *Francom*, the Court of Appeals upheld dismissal of common law claims for negligent infliction of emotional distress, negligent supervision, and negligent retention where they were based on the same underlying facts as the plaintiff employee's discrimination claim under RCW 49.60:

[W]hen a plaintiff alleges that non-discriminatory conduct caused separate emotional injuries, he or she may maintain a separate claim for negligent infliction of emotional distress. But here, the Francoms' separate claim for emotional distress arises directly from Mr. Hathaway's harassment, which they allege was discriminatory. The claim thus is duplicative. The superior court properly dismissed it.

...

[T]he Francoms rely on the same facts to support both their discrimination claim and their negligent supervision or retention claim. Just as with their claim for negligent infliction of emotional distress, the claim is duplicative, and the superior court properly dismissed it.

*Id.* at 865-66 (citations omitted).

Here, Fernandes' public policy claim is duplicative and should be dismissed. Fernandes makes a "racial discharge" claim under RCW 49.60.180. App. Br. at 28. Like the plaintiffs in *Francom*, whose duplicative common law claims were dismissed because they arose from the same underlying facts as their statutory WLAD claims, here, Fernandes' common law public policy claim should be dismissed because it is based on the same underlying facts as her statutory discrimination and retaliation claims under the WLAD.

By enacting RCW 49.60.180 and 49.60.210, the legislature has defined what remedies are available under Washington law when an individual is terminated by reason of race or retaliated against for opposing race discrimination. Washington courts have only recognized public policy claims based on statutory violations where the statute that was violated did not itself provide the plaintiff with a remedy. *See, e.g., Roberts v. Dudley*, 130 Wn.2d 58, 993 P.2d 901 (2000) (allowing plaintiff employee to bring a public policy claim based on gender discrimination against employer that had less than 8 employees, where neither RCW 49.60 nor other statutes provided her with a remedy). Given that the legislature has provided Fernandes with remedies in RCW 49.60, it is inappropriate for the court to allow her to bring a judicially-created public

policy claim. Fernandes has a remedy and will have her day in court without this duplicative and improper public policy claim.

**F. Fernandes' Hostile Work Environment Claim Was Properly Dismissed for Lack of a Prima Facie Case**

There are similarly convincing reasons for this court to affirm dismissal of Fernandes' hostile work environment claim. Although Fernandes subjectively believed she was the victim of harassment, she offered no evidence of harassment motivated by her race or a hostile work environment that was so pervasively abusive that it was actionable.

To establish a claim of hostile work environment based on any recognized protected status under federal or state law, Fernandes must prove: (1) she was subjected to unwelcome harassment; (2) the harassment was because of her race; (3) that the harassment affected the terms and conditions of her employment; and (4) the harassment is imputable to Ecology. *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 84, 98 P.3d 1222 (2004); *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.2d 729 (2004) (citing *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985)).

Most importantly, Fernandes' race must be the motivating factor for the harassment. *Campbell v. State*, 129 Wn. App. 10, 19, 118 P.3d 888 (2005). Even rude, obnoxious, boorish, and even threatening conduct in

the workplace is not actionable unless it is motivated by Fernandes' race. *See Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297-298, 57 P.3d 280 (2002). It is insufficient to merely show embarrassment, humiliation, or mental anguish arising from non-discriminatory harassment. *Id.* at 298.

Fernandes has not presented any evidence that harassment occurred because of her race. Fernandes' asserts "[t]he harassment of Beryl was due to her race." App. Br. at 24. Her offered evidence of "perform[ing] her job well," the "all-white RMT" and being "the only person of color in upper management" are completely unsupported by the evidence.<sup>34</sup> App. Br. at 24. In fact, these assertions are directly contradicted by the actual evidence: Fernandes' performance evaluation, criticism and feedback from colleagues and the Boodell report. Fernandes' conclusory assertions are insufficient to withstand summary judgment given such a glaring lack of support in the record. One thing is clear: there is no evidence beyond Fernandes' opinions that would support even an inference of racial animus on the part of Hoffman or any member of the RMT.

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<sup>34</sup> Additionally, Fernandes' description of the September 2003 mediation as a "lynching," while having a racial overtone, was unsupported by the independent investigation.

Fernandes also fails to establish that the harassment is imputable to Ecology. Conduct is imputable to an employer if “an owner, manager, partner, or corporate officer personally participate[d]” in creating the hostile work environment. *Glasgow*, 103 Wn.2d at 407. Liability may also be imposed under a negligence standard if the employer (1) authorized, knew, or should have known about a supervisor(s) or co-worker(s) harassment because it was open or obvious; *and* (2) failed to take reasonably prompt and adequate corrective action. *Id.*

Here, Fernandes is unable to show that her supervisors personally participated in creating the hostile work environment. The evidence, specifically the Boodell report, directly contradicts Fernandes’ assertion that Hoffman “yell[ed] and scream[ed]” at her, bullied her, or harassed her in any other way. App. Br. at 24. Furthermore, Fernandes’ allegation of harassment centers around the RMTs alleged conduct, of which Fernandes took no part. Fernandes’ conclusory assertions and accusations are insufficient to withstand summary judgment.

Fernandes is also unable to show that her employer authorized, knew, or should have known about the harassment and failed to take corrective action. First, Fernandes never complained to her supervisors that she was subjected to harassment because of her race. Thus, they were never apprised of conduct that required them to take steps to end alleged

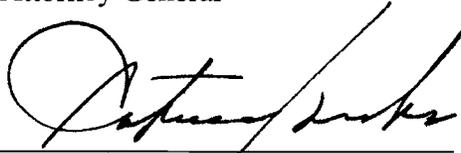
harassment pursuant to the WLAD. In fact, when Fernandes did report bullying and hostile behavior, Hoffman took direct action to end the conduct. Hoffman commissioned an independent investigation to look into the alleged behavior. She also supported and worked with Fernandes to first mediate the problems, and, when that did not appear to help, to bring in an outside coach/consultant to further assist Fernandes.

## V. CONCLUSION

Fernandes failed to present facts to establish either a prima facie case of discrimination/retaliation or to rebut as pretextual the legitimate non-discriminatory reasons for the actions taken by Ecology. Her conclusory opinions are devoid of factual support and, therefore, insufficient to withstand summary judgment. Ecology respectfully asks this court to affirm the trial court's order granting summary judgment.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of October, 2010.

ROB MCKENNA  
Attorney General



Catherine Hendricks, WSBA #16311  
Senior Counsel  
Attorney for Respondents Jay Manning,  
Department of Ecology, State of  
Washington

**CERTIFICATE OF SERVICE**

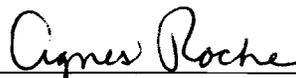
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding *Brief of Respondent* and *Certificate of Service* was filed by First Class Mail in the Washington State Court of Appeals, Division II, on the date below at the following address:

David Ponzoha, Clerk/Administrator  
Court of Appeals of Washington, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

And that a copy of the *Brief of Respondent* and *Certificate of Service* was served by First Class Mail on counsel for Plaintiff/Appellant Fernandes on the date below at the following address:

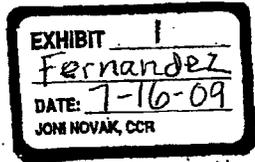
Thaddeus P. Martin  
Attorney at Law  
4928 109<sup>th</sup> Street SW  
Lakewood, WA 98499-3731

DATED this 21<sup>st</sup> day of October, 2010, at Seattle, Washington.

  
AGNES ROCHE

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# **APPENDIX A**



WASHINGTON MANAGEMENT SERVICE  
MANAGEMENT POSITION DESCRIPTION RECEIVED

DEC 14 2000

CURRENT DATE/  
LAST REVIEWED: OFFICE OF EMPLOYEE SERVICES

CLASS TITLE: Ecology Regional Director  
*(Information needed for the initial conversion only.)*  
WORKING TITLE: Southwest Regional Office Regional Director  
POSITION NO.: 0504 AGENCY/DIVISION: Ecology/Administration  
INCUMBENT'S NAME: Susan Mauermann

**POSITION OBJECTIVE:**  
Discuss in one or two sentences what the position is required to accomplish. Include an organization chart. (Chart should include all units managed by your supervisor with salary grade/band and position number.)

Directs agency operations within the Southwest Regional office through coordination of significant activities and service delivery priorities. Represents the Director with federal, Washington and Oregon State, local, tribal, and elected officials, citizens, environmental groups and the regulated community. Leads the Regional Management Team consisting of program supervisors within the region to promote cross-program cooperation, coordinate service delivery, share information on agency direction, resolve common regional office problems, and to develop regional operating procedures. Manages the regional office facility located in Lacey and the Vancouver field office with regard to office equipment, supplies, and office support staff. Serves as a member of the Department's Senior and Executive Management Teams.

**KNOWLEDGE AND SKILLS REQUIRED:**

Briefly explain the position's required knowledge and skills. (Asterisk the essential skills and abilities required.)

- \*1) Knowledge of environmental laws, regulations and policies carried out in the region: solid waste, hazardous waste, waste cleanup, water quality, water resources, shoreline management, watershed planning, spill prevention and response and air pollution control.
- \*2) Knowledge of higher-level management principles, budget and facilities management procedures.
- \*3) Knowledge of local, state, tribal and federal political processes and government operations and of locally significant economic, political and cultural issues within which implementation of existing and development of new programs must occur.
- \*4) Knowledge of collaborative negotiation, conflict resolution and other problem solving processes and techniques.
- \*5) Ability to communicate clearly and concisely, both verbally and in writing; extract key issues from technically and emotionally complex situations in order to suggest and facilitate constructive paths forward to resolve issues; negotiate with others without arousing hostility; provide leadership that promotes a cooperative work environment; act decisively

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- Resolves cross program operational problems with appropriate program managers and staff, and provides routine feedback to the Executive Management Team.
- Reviews actions proposed by regional and program staff, such as enforcement orders, permits, and variances for cross program impacts. Promotes effective working relationships with field office staff and supervisors, and other regional staff.
- Is delegated as an appointing authority in the agency which includes but is not limited to reduction in pay, suspension, demotion, dismissal and reduction in force.
- Directs agency response to issues that would be considered extremely controversial within or outside the agency
- Serves as the designated State Environmental Policy Act lead official on actions requiring an environmental impact statement involving multiple department programs.
- Identifies regional policy and procedure needs and takes the initiative to ensure their development.
- Coordinates with other regional directors to ensure consistency, share information and to identify opportunities for improvements to service delivery.

**FINANCIAL DIMENSIONS:**

**-BUDGET**

Briefly describe the type and annual amount of all monies that the position directly controls. Discuss other revenue sources managed by the position and what type of influence/impact it has over those sources.

**A. Operating budget controlled:**

**This position negotiates for and has direct control over a biennial operating budget of \$1.3 Million.**

**B. Other financial influences/impact:**

**Participates in agency wide budget management and development as a member of the Senior and Executive Management Teams. Coordinates cross program initiatives in the region to help all programs maximize the efficient use of agency resources.**

**-POSITIONS**

List total FTE's you manage and highest class/position managed.

**This position manages 12 FTEs, including 2 Washington Management Service appointees. Currently the highest class managed is Regional Business Administrator and Field Office Director (both WMS Band 1).**

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# **APPENDIX B**

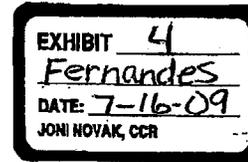
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Beryl Fernandes

OFFICE OF EMPLOYEE SERVICES

Significant Results Expected In 2003



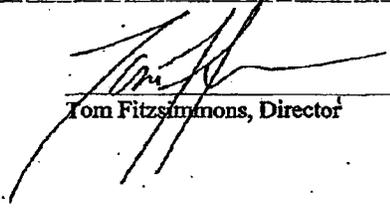
1. Orient yourself to all aspects of the agency and the position. This includes developing effective working relationships with your colleagues on the management team and all the key staff for the region. It also includes becoming familiar with the policies and practices of the agency and the region; assuming full responsibility for the supervision and budget responsibilities of the position; and beginning to assert leadership and add value to the workings of the region and the policy choices and strategies of the management team.
2. Begin to effectively direct agency activities in the regional office. This includes beginning to regional office policies, procedures and regulations; carrying out legislative and Governor direction through permitting, compliance monitoring, technical assistance, inspections, enforcement and education/outreach; identifying and coordinating cross program issues; resolving conflicts resulting from multiple requirements; taking initiative to facilitate cross program policy development efforts to ensure clarity and operational consistency; determining strategies for communication and implementation of new programs and requirements; and assisting in developing and implementing key internal agency priorities such as the transformation effort and the diversity program.
3. Provide effective project management for the Columbia River Channel Deepening Project. As the project transitions from Sue Mauermann, ensure good inter- and intra-agency coordination, clear processes, timely and effective decisions, and good communication. Bring relevant policy issues to SMT and appraise the Governor's Office where appropriate.
4. Provide effective project management for the Puget Sound Energy/Lake Tapps water rights application. As the project transitions from Sue Mauermann, ensure implementation of the cost recovery agreement for all phases of the project permit process, help to coordinate development of the preliminary permit, develop timelines for future permit decisions, and coordinate the determination of instream flows for the White River bypassed reach. Help to develop and implement the communication strategy that includes interactions with the Lake Tapps Task Force, Central Puget Sound water purveyors, the Puyallup and Muckleshoot Tribes, PSE, federal and state agencies, the environmental community and local elected officials.
5. Sponsor the agency participation in the small communities' project. Identify and secure funding to support Ecology's share of the Initiative over the next biennium and together with the Steering Committee, promote methods to assist small communities in achieving regulatory compliance and environmental protection.
6. Orient yourself to the activities of the Vancouver Field Office including organizing appropriate working and supervisory relationship with the Director and develop performance results for Vancouver Field Office. Assist as needed in the recruitment and appointment to any vacant positions.

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7. Build effective partnerships with other state agencies and local governments through organizing and holding meetings with regional managers of other agencies and local elected officials where issues and ideas can be shared to improve coordination and problem solving.
8. Assist to Implement Watershed Management with in the region. Working with the regional water management team and key staff help to coordinate resource allocation and policy development for the watershed activities in the region.

---



Tom Fitzsimmons, Director

4-13-03  
Date

# **APPENDIX C**

RECEIVED

SEP 24 2004

DEPARTMENT OF ECOLOGY  
OFFICE OF DIRECTOR

**SEBRIS BUSTO JAMES**  
a professional corporation

Geoffrey M. Boodell  
gboodell@sebrisbusto.com

(425) 450-3387

September 22, 2004

**PRIVATE AND CONFIDENTIAL**

Linda Hoffman  
Director  
Washington State Department of Ecology  
P.O. Box 47600  
Olympia, WA 98504-7600

**Re: Independent Workplace Investigation**

Dear Ms. Hoffman:

I am writing to report my findings with respect to the independent workplace investigation I recently conducted at the request of the Washington State Department of Ecology (the "Agency"). This investigation was initiated in response to concerns of bullying and abusive behavior by Agency employees as raised by Beryl Fernandes, the Agency's South West Regional Office's ("SWRO") Regional Director. In response to her allegations, your Agency determined that it was imperative to conduct an independent investigation. As my investigation unfolded, I learned that Ms. Fernandes' coworkers and subordinates also had concerns about Ms. Fernandes' management style and communications. I have also addressed and identified their concerns as part of this investigation.

I conducted interviews and reviewed relevant documentation between June 23, 2004 and September 17, 2004<sup>1</sup>. Following is a summary of my investigative procedure and factual findings.

**I. Investigative Procedure**

This investigation included:

**A. Personal Interviews:** I met personally with the following individuals: Beryl Fernandes, Linda Hoffman, Joy St. Germain, Tom Fitzsimmons, Doug Brown, Kay Seiler, Iloba

<sup>1</sup> This investigation was prolonged due to difficulties in coordinating the schedules of witnesses, Ms. Fernandes and her legal counsel, as well as myself.

SEBRIS BUSTO JAMES  
14205 S.E. 36<sup>th</sup> Street • Suite 325 • Bellevue, WA 98006  
Telephone: (425) 454-4233 • Fax: (425) 453-9005  
www.sebrisbusto.com

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September 22, 2004

Page 2

Odum, Kelly Susewind, Sandy Howard, Wendy Bolender, Lorna Mendez-Correa, Tom Loranger, Eric Heinitz, Rodger Sesna, Rebecca Lawson, Pam Berns, and Paula Ehlers.

B. Telephone Interviews: I conducted telephone interviews of the following individuals: Beryl Fernandes, Polly Zehm, Laurie Davies and David Whitfield.

C. Review of the Following Documentation: The documentation I reviewed included the following:

- Executive Policy & Procedure; Policy 1-70 – Establishing Guidelines for Internal Personnel Investigations
- Executive Policy & Procedure; Procedure 01-29-01 – Responding to Violence in the Workplace
- Executive Policy & Procedure; Policy 1-29 – Providing a Secure Workplace
- Ecology Security Incident Report
- Department of Ecology memo dated May 7, 2004 from Linda Hoffman to Beryl Fernandes w/attached emails
- Email from Beryl Fernandes to Linda Hoffman dated April 21, 2003 with the Workplace Bullying and Trauma Institute (WBTI) 2003 Report on Abusive Workplaces
- 13-page fax dated/received 8/12/04 from Michael Hanbey to Geoff Boodell with multiple emails attached – re: consultants and scope review for same
- Letter dated July 27, 2004 from Michael Hanbey to Geoff Boodell re: Additional information from Beryl Fernandes
- 4 page fax dated/received 7/27/04 from Michael Hanbey to Geoff Boodell with Letter dated July 27, 2004 from Michael Hanbey to Geoff Boodell re: Additional information from Beryl Fernandes
- Letter dated July 23, 2004 from Michael Hanbey to Geoff Boodell re: Additional information from Beryl Fernandes
- 5-page fax dated/received 6/17/04 from Joy St. Germain to Geoff Boodell w/attached emails
- Organizational Chart depicting the Southwest Regional Office dated 3/4/04
- 6-7 Months Performance Evaluation of Significant Results Expected in 2003 for Beryl Fernandes – signed by Tom Fitzsimmons and Linda Hoffman on 11/17/03
- SWRO RMT Meeting minutes dated July 28, 2003 8 a.m. to 11 a.m.
- RMT Charter Meeting #2 – Minutes September 22, 2003
- Significant Results Expected in 2003 for Beryl Fernandes signed by Tom Fitzsimmons on 4/13/03
- Copy of U.S. Department of Justice “Notice of Right to Sue Within 90 Days” re: Davis v. Washington State Department of Ecology; EEOC No. 380-2003-02038

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September 22, 2004

Page 3

- Email dated April 27, 2004 from Beryl Fernandes to Joy St. Germain re: hiring an attorney
- Email dated April 26, 2004 from Joy St. Germain to Beryl Fernandes re: having an investigation based on Fernandes' statements
- Email dated April 26, 2004 from Joy St. Germain to Beryl Fernandes re: RMT meeting and "Washington Works" materials left with Lorna
- Email dated April 6, 2004 from Beryl Fernandes to Linda Hoffman re: Consultant Scope of Work
- Email dated February 27, 2004 from Beryl Fernandes to Linda Hoffman re: Reminder Fw: Consultant Final Draft w/attached Scope of Work dated 2/26/04
- Washington Management Service Management Position Description for Ecology Regional Director/SW Regional Office Regional Director
- Amendment No. 1 to Ecology Contract No. C0400279 between the State of Washington Department of Ecology and Sebris Busto P.S.
- Email dated May 18, 2004 from Beryl Fernandes to Eric Heinitz w/cc to Pam Berns re: Complaint Tracker
- Email dated November 20, 2003 from Beryl Fernandes to Iloba Odum re: "Perf Eval"
- Items of Concern w/SWRO Position – received from Lorna Mendez-Correa 7/1/04
- Washington State Department of Ecology Organizational Chart for the SW Management Team
- Packet dated August 10, 2004 from Beryl Fernandes
  - News article, The Olympian, February 26, 2003
  - News article, The Olympian, February 21, 2003
  - Memo from Fitzsimmons to Fred Kiga, Governor's Chief of Staff, February 28, 2003
  - "A Review of Affirmative Action and Diversity in the Department of Ecology," prepared by State of Washington Dept. of Personnel, Jan. 2003
  - "Workforce Cultural Assessment" Submitted to Ecology Senior Management Team and Executive Management Team, June 7, 2000 by Molly Gibbs & Associates
  - Email message from Beryl to Doug Brown, September 23, 2003
  - Email message from Beryl to Tom F., September 24, 2003
  - "Cross-Cultural Communication Techniques" prepared by Sheryl Hutchison, Ecology Director of Communications, Oct. 2003
- Draft dated May 26, 1998 "The Effectiveness and Impact of Diversity Programs at the Department of Ecology – submitted by Dan Josue

**II. Summary of Concerns Raised**

During my interviews of Ms. Fernandes, she and her legal counsel "walked me through" a detailed chronology of her employment and interaction with the Agency, most particularly with

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members of the Regional Management Team ("RMT") and Ms. Hoffman, the Agency's Director, and her belief that she has been subjected to an abusive, bullying, and hostile work environment. Ms. Fernandes also shared with me her concerns that she and others may have been subjected to discriminatory behavior based on race. Specifically, Ms. Fernandes identified the following areas of concern that she believes violate Agency policies:<sup>2</sup> Ms. Fernandes believes:

1. Members of the RMT have subjected her to a hostile, bullying and abusive work environment;
2. Ms. Hoffman has exhibited an "abuse of power, abusive behavior, differential treatment toward Ms. Fernandes" and has engaged in "collusion with RMT members" and;
3. Ms. Berns, an RMT member, has inappropriately "taken paid leaves of absence."

**A. Ms. Fernandes' Allegations Regarding Members of the RMT**

The RMT is comprised of eight Section Managers as well as five to six other individuals within the South West Region. The overall purpose of the RMT is to ensure the smooth-running implementation of the environmental laws for which the Agency is responsible. The RMT helps coordinates communication between the programs, shapes the direction of the Southwest Regional Office, and helps implement the mandates of the Agency in the South West Region. As the Regional Director, Ms. Fernandes is responsible for coordinating the RMT meetings, which occur every Monday morning. However, under the Agency's matrix system of management, the Section Managers who comprise the majority of the RMT do not report to Ms. Fernandes. Rather, they report to their Program Managers who ultimately report to the Director via the Deputy Director by way of a separate chain-of-command that does not involve Ms. Fernandes directly. Ms. Fernandes, however, reports directly to the Director of the Agency. Because of this, all of the witnesses interviewed indicated that it takes a highly skilled and collaborative person to succeed as a Regional Director because the position requires the individual to facilitate and coordinate collaboration amongst the various programs without having any direct authority over the programs.

Ms. Fernandes informed me that she began experiencing difficulties with the members of the RMT shortly after she began her employment with the Agency in March of 2003. She indicated that she felt "attacked" by the RMT from the "get-go." Ms. Fernandes relayed to me that her first recollection of being "attacked" by members of the RMT was when she replaced her predecessor's

<sup>2</sup> These allegations are set forth in a letter from Ms. Fernandes' legal counsel dated July 27, 2004, a copy of which is attached hereto. The substance of these allegations are addressed in the body of this investigative report.

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administrative assistant, Abbe White. Ms. Fernandes stated that all of the members of the RMT "got on her case" for making the personnel change without consulting the members of the RMT and for not advising them of the specific reasons for her decision to replace Ms. White. Although Ms. Fernandes could not recall the specific words used, she relayed to me her feelings that the RMT members were "upset" with her about this issue and specifically recalls Ms. Davies "ripping her to shreds." Ms. Fernandes further described these events as "incredible" and stated that she "had never been through anything like this before." Although she could not recall specifically what was said at that time, Ms. Fernandes described to me her perception that one RMT member would criticize her and "others would jump in." When asked why the members of the RMT would be so upset over the personnel change, Ms. Fernandes described the RMT as a "tight-knit sisterhood."

Following the incident with Ms. Davies at the RMT meeting, Ms. Fernandes stated that she "went running up to the third floor" to see the Director, Mr. Fitzsimmons. Mr. Fitzsimmons was not available at that time so she "sat down" with Ms. Hoffman, the Deputy Director, and "told her everything" that had transpired in the RMT meeting. When questioned, Ms. Fernandes indicated that she did not consider her discussion with Ms. Hoffman to be a complaint of inappropriate behavior and that she only considered her discussion with Ms. Hoffman to be of a "personal" nature. During my interviews, however, Ms. Fernandes indicated that she believed that her discussion with Ms. Hoffman had put the Agency on notice of her complaints and that the Agency should have taken a proactive approach at that time to resolve her concerns. However, she did state that she did not raise any specific complaints of abusive or bullying behavior until April 19, 2004, which ultimately gave rise to this investigation.

Ms. Fernandes also alleges that her working relationship with the RMT has undermined her ability to do her job. She believes that the RMT members have intentionally kept her "out of the loop" and have failed to include her in key decisions or have failed to inform her of critical issues of importance. She also believes that members of the RMT have excluded her from important meetings by either not informing her of them or scheduling them at a time that she was not available to participate. When asked for specifics, Ms. Fernandes relayed several instances, most particularly relating to Ms. Ehlers, in which she believes that she was intentionally excluded. In one instance, she believes that she was excluded from participating in the hiring panel for a position within Ms. Ehlers' section, which Ms. Fernandes identified as a key position. Ms. Fernandes complained that Ms. Ehlers had sent her an email advising her that the interview for the position had been set for a specific date in which Ms. Fernandes could not be present. However, Ms. Fernandes did not request that the date for the interview be changed to accommodate her schedule. In another instance, she complained that she had not been invited to a key meeting in which the Governor was going to be present relating to the Nisqually Watershed Plan. Ms. Fernandes stated that Ms. Ehlers failed to invite her to the meeting and that she only learned of the meeting from a member of her staff. She

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also complained that she had been excluded from critical meetings relating to the Columbia River Deepening Project, which have undermined her ability to succeed.

Ms. Fernandes also complained of an interaction with Ms. Ehlers in which Ms. Fernandes requested a written update of Ms. Ehlers' projects. Ms. Fernandes stated that Ms. Ehlers responded by advising her that she would be willing to provide her with an oral briefing. Ms. Fernandes complained that when she specifically requested the update in writing and in "bullet points," Ms. Ehlers responded by saying "No." Ms. Fernandes then complained to Mr. Fitzsimmons regarding her interaction with Ms. Ehlers. Mr. Fitzsimmons directed her to address the issue with Gordon White, Ms. Ehlers' manager. When she approached Mr. White about the issue, Ms. Fernandes complained that Mr. White "absolutely refused" to put an update in writing and advised her that, "If people have questions, send them to me." Ms. Fernandes further complained that she had advised Mr. White that Ms. Ehlers had previously "stormed" out of her office on three separate occasions. Ms. Fernandes alleges that Mr. White responded by inquiring, "What did you do to provoke her?" Ms. Fernandes relayed to me that she considered Mr. White's response as an "attack" on her. Since that time, Ms. Fernandes has not complained any further to Mr. White about Ms. Ehlers.

Ms. Fernandes further advised me that she complained to Mr. Fitzsimmons about Mr. White's response. At that time, Mr. Fitzsimmons advised her to speak with Mr. White's supervisor, Ms. Hoffman, who Ms. Fernandes alleges simply "listened, but didn't do anything." Ms. Fernandes also shared with me her belief that Ms. Ehlers "has a tremendous amount of power" in the RMT and that she and others within the RMT have "power or perceived power" because of their relationship with Mr. Fitzsimmons and Ms. Hoffman. When asked what she meant by that, Ms. Fernandes indicated that Ms. Ehlers had "power" because "she was one of the people at Thurston County that shifted over" to the Agency with Mr. Fitzsimmons and Ms. Hoffman.

Because of Ms. Fernandes' perceived problems with the RMT, she spoke to Mr. Fitzsimmons on several occasions regarding these issues and suggested bringing in an outside consultant to address the group's communication issues. Ms. Fernandes indicated that Mr. Fitzsimmons was "very supportive" and approved her suggestion. However, Ms. Fernandes stated that, "As soon as the RMT heard of it, they killed the idea," and instead, suggested an in-house facilitator, Ms. Zehm. At that time, Ms. Zehm was also a Regional Director and Ms. Fernandes' counterpart. Ms. Fernandes relayed to me that she spoke with Mr. Fitzsimmons about using Ms. Zehm as a facilitator and he inquired, "How do you feel about it?" She responded back by stating, "If they (the RMT members) get engaged, I am OK with it."

On July 28, 2003, the RMT had a three-hour mini-retreat with Ms. Zehm acting as a facilitator to fashion a charter and a mission for the RMT as well as to address communication

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issues. Ms. Fernandes indicated to me that the RMT was not able to accomplish everything during this initial meeting and scheduled another mini-retreat for September 22, 2003.

Ms. Fernandes describes the September 22, 2003 meeting as a "horrible experience" that "deteriorated rapidly." She described the meeting as a "professional lynching" that consisted of a three-hour "lambasting." She stated to me her belief that the "lambasting" was relentless and that she had never experienced anything so "destructive." When questioned what was said to her to make her feel this way, Ms. Fernandes stated that it "was not what was said, but rather the way in which it was said. It was mean and derogatory." When asked for specifics, Ms. Fernandes stated that it was relentless because one member after another spoke negatively of her and that, "It was all petty stuff, but it was the way it was said."

Ms. Fernandes described the "lambasting" as beginning when Ms. Zehm asked the group to describe a "good project that you worked on with Beryl." Ms. Fernandes stated that the group responded with "silence." She then indicated that Ms. Lawson began talking about an experience relating to the Clark Public Utilities Vancouver Project in a "negative" tone. Ms. Fernandes next complained that Ms. Bolender followed Ms. Lawson's comments and "went on and on" about Ms. Fernandes scheduling meetings without advising Ms. Bolender. This upset Ms. Fernandes because she believed that it gave the group the impression that she was excluding them from meetings. She also complained that Mr. Heinitz followed up Ms. Bolender's comments and asked her, "Why do you have shades on your office window? Why are you hiding?"

Ms. Fernandes described that she was "naive" to allow the meeting to happen without an outside consultant because she realized that she was "outnumbered right away." She further complains that Ms. Zehm failed to take any action to stop the abusive behavior. Ms. Fernandes also relayed to me that she was so upset over the comments made to her during this meeting that she approached an African American employee that was not involved in the meeting during a break and complained, "All of these white people are lambasting me." He allegedly responded by saying, "I know what you are talking about."

Ms. Fernandes further described the RMT as being rampant with "insidious and destructive gossip" and that RMT members do not operate in a "straightforward" manner and "go behind her back" on issues. Ms. Fernandes further describes the RMT members as continually "rolling their eyes, passing notes, contradicting and criticizing me" in the RMT meetings. She states that this behavior continues to this day.

During our interviews, Ms. Fernandes also identified the September 22, 2003 meeting date as especially significant because Mr. Fitzsimmons announced within a couple of days of the RMT mini-retreat that he was stepping down as Director to become the Governor's Chief of Staff. This

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was devastating to Ms. Fernandes because he had always been very supportive of her and served as an "anchor" for her.

Following the September 22, 2003 meeting, Ms. Fernandes indicated that she spoke with Mr. Fitzsimmons about bringing in an outside organizational consultant to address the RMT issues. Ms. Fernandes states that while he agreed with the concept in general, they did not, however, come to an agreement regarding the specific scope of the consultant's services.

Over the next few months, Ms. Fernandes and Ms. Hoffman worked on engaging an outside management consultant to assist Ms. Fernandes in improving internal communications. Ms. Fernandes' specific complaints regarding this process are set forth in detail below in Section D of this report.

**B. RMT Members Responses to Ms. Fernandes' Allegations**

All of the members of the RMT universally dispute Ms. Fernandes' allegations. In a twist on the adage, "he said/she said," the majority of the witnesses interviewed described it as, "Beryl's perceptions versus everyone else's perception." All of the witness interviewed described all of the interactions within the RMT as professional. None of the witnesses corroborated any of Ms. Fernandes' allegations of abusive and hostile behavior. In fact, all of the witnesses interviewed perceived her allegations as her inability to accept criticism. The majority of the witnesses describe the RMT as a senior, experienced and successful management team that took significant efforts to help Ms. Fernandes succeed when she first joined the Agency. Numerous RMT members shared with me their sincere desire that she succeed. However, the RMT members also universally shared with me their concern that there has been a serious deterioration in the trust and communication between Ms. Fernandes and the RMT. All of the witnesses shared with me their belief that the RMT successfully communicates and collaborates among members. However, they all point to the same source for the breakdown in trust and communication – Ms. Fernandes.

Many of the witnesses complained that Ms. Fernandes fails to communicate with them when she goes out into the field and fails to provide any feedback about what she did while out in the field. The majority of the RMT members also shared with me their resentment over Ms. Fernandes frequently rescheduling and canceling meetings. Many of them advised me that her frequent canceling or rescheduling of meetings was a "standing joke" amongst the RMT members. The majority of the RMT members also describe her as "autocratic and demanding." Many of the RMT members shared with me their belief that she is uncomfortable with the matrix system of management and acts "like we all should report to her."

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The RMT members also universally shared with me their concerns over Ms. Fernandes' communication style. During the September 22, 2003 mini-retreat, many of the members raised their concerns over Ms. Fernandes' lack of communication and her preferred method of communication, which is email. During the mini-retreat, the members shared that they would prefer to have either one-on-one communication or telephone communication to discuss issues and voiced concern over the use of email as a way to communicate. Ms. Fernandes prefers to communicate via email, which several of the witnesses advised they had concerns with due to the public disclosure laws and the inability to interpret tone or ask follow up questions. As one member said, "She sends these emails and you have no idea what she wants. Is she just advising us or is she asking us to do something? It is very frustrating."

Although all of the witnesses described the September 22, 2003 mini-retreat as professional and direct, they believe that Ms. Fernandes took their concerns as a personal attack and attempted to deflect blame on to others. Many of the witnesses shared with me their belief that Ms. Fernandes fails to accept any criticism and fails to take any "ownership" for her failures in communication. However, none of the witnesses described any of the interactions as being unprofessional or abusive in any fashion.

The majority of the members also shared with me their frustration and concern that the relationship between Ms. Fernandes and the RMT has seriously deteriorated to the point where many believe that it is unfixable. The following is a compilation of various statements made during this investigation:

- "She's not competent. She's in way over her head."
- "To a person, everyone thinks she's in over her head and is costing the Agency a lot of time and money."
- "I am managing because of Beryl as opposed to managing with Beryl."
- "There is no ownership by Beryl of her inability to work with the RMT as a group."
- "She's killing the morale of the staff."
- "I cringe at the thought of Beryl getting involved - I avoid it when possible."
- "She's rude and sarcastic."
- "The feeling of all the Section Heads is that we are trying, but we don't see Beryl trying at all."
- "The RMT's relationship with Beryl is 'strained' at best."
- "Beryl has never gotten out of the stage of getting up to speed."
- "We are all 99% ignorant of what Beryl is doing."
- "We have seen no growth - no changes from Beryl in the past year and a half."
- "Morale is down the tubes because of Beryl."

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- "She adds no value."
- "She is completely exclusionary."
- "I don't know how to deal with her so I have gone into the 'avoidance mode.'"
- "She's very autocratic and very demanding – she makes us all bristle."
- "She has dismissed me and my staff so many times that I would work around her if I could."
- "She causes us more work when she gets involved."
- "She thought that as the Regional Director she could direct everybody – she's frustrated that it is not that way."
- "There is such a disconnect that it's not fixable."
- "She's the highest paid, yet functions at such a low level."
- "We are all very frustrated and skeptical that the right thing will be done."
- "She has not shown any interest in my program nor has she demonstrated any knowledge in my program."
- "We never know when she's out there in the field and worst yet, we never know what she is saying out there."
- "Beryl shows no willingness or desire to partner with us as a team."
- "She's not there for us."
- "You have someone earning \$88,000. a year. If they don't know how to do their job, you fire them – you don't pay a coach to teach her how to do her job. Whether she's teachable or not, we shouldn't spend taxpayers' money to teach her how to do her job."
- "I don't think Beryl's relationship with the rest of us is salvageable – I don't think she wants to change or recognizes that she needs to. People feel they have done everything to make it work."
- "Our relationship with Beryl is like going to a marriage counselor. But at some point you have to recognize that the relationship is not going to survive despite everyone's best efforts."

**C. Concerns of Subordinate Staff About Ms. Fernandes**

Similar to the concerns voiced by the members of the RMT, Ms. Fernandes' direct reports that were interviewed also shared significant complaints about Ms. Fernandes. Although their specific individual complaints were outside the scope of this investigation, they are significant because they are consistent with the concerns of the members of the RMT. The following is a compilation of statements made by staff during this investigation:

- "She can be very condescending and rude. If she doesn't like what you are saying, she will cut you off."
- "She has hung up the telephone on me when I was speaking with her."

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- "She has scolded and yelled at me like a child."
- "She acts like she is the queen bee."
- "She has pointed fingers at me."
- "Nothing is ever her fault."
- "She is very defensive."
- "She says inappropriate things that someone at her level should not be saying. I have heard her refer to Paula Ehlers, Laurie Davies, Rebecca Lawson and Wendy Bolender as 'white bitches.'<sup>3</sup> I have also heard her refer to Linda (Hoffman) as a bitch."
- "I can't continue working with her."
- "You can't talk to her – she doesn't listen."
- "Nobody likes her or trusts her."
- "It can't get any worse than it is."
- "She's very dismissive and she won't listen – she's a scary woman."
- "Everyone has gone above and beyond to help her. If she doesn't go – I am out."
- "The day of ruling by intimidation is long over. She's very dictatorial."

**D. Ms. Fernandes' Allegations Regarding Ms. Hoffman**

Ms. Fernandes alleges that since Ms. Hoffman has "come on board" as the Agency's Director, she feels that Ms. Hoffman has been "coming out swinging" at her. During her six-month evaluation in October 2003 with Ms. Hoffman and Mr. Fitzsimmons, Ms. Fernandes alleges that Mr. Fitzsimmons and Ms. Hoffman inappropriately "pointed their fingers" at her for the breakdown in communications with the RMT. During this evaluation, Ms. Hoffman agreed to engage an outside management consultant to assist Ms. Fernandes in improving internal working relationships. A review of her evaluation dated November 17, 2003 and signed by Mr. Fitzsimmons and Ms. Hoffman indicates in part that they advised Ms. Fernandes of the following:

We are pleased to hear of your intent to engage an outside management facilitator/coach. It is important to get outside assistance to work with you on this problem. You have stated that long-standing relationships and other issues have made it easily the most contentious group that you have encountered. Typically when relationships deteriorate, all of the parties own parts of the problem. We would encourage you to keep an open mind about possible changes that you can make that could lead to improvement.

<sup>3</sup> When questioned, Ms. Fernandes does not recall referring to anyone as "white bitches."

Ms. Fernandes advised me that she believed that the issue was much broader than identified by Mr. Fitzsimmons and Ms. Hoffman. Although both Mr. Fitzsimmons and Ms. Hoffman agreed to engage an outside management consultant to assist Ms. Fernandes in improving internal working relationships, the specific nature and scope of the consultant's work was not accomplished during Mr. Fitzsimmons tenure.

Over the next few months, Ms. Fernandes and Ms. Hoffman discussed the specific scope of the proposed work that an outside consultant would perform. Ms. Fernandes and Ms. Hoffman identified David Whitfield and Natalie Mattson, organizational development consultants from Integrity Leadership, as possible consultants. However, Ms. Fernandes describes the process of selecting an outside consultant and defining the scope of the services as "abusive."

On April 19, 2004 at approximately 8:10 a.m., Ms. Fernandes alleges that she received an urgent call from Ms. Hoffman's assistant. She states that Ms. Hoffman's assistant informed her that, "Linda wants to see you right away." Ms. Fernandes indicated that Ms. Hoffman came to her office, shut the door and demanded, "What is this about the consultant's work scope." She describes Ms. Hoffman as sitting next to her and being "very angry and yelling." She further describes Ms. Hoffman as being "furious" and that she "got right in my face" and that Ms. Hoffman's face was "scrunched up in anger." She further describes Ms. Hoffman as being "right in my face and very menacing - her hands were like claws and she was acting like a wild animal out of control - just yelling and screaming." Ms. Fernandes stated that it was so loud that her assistant, Ms. Mendez-Correa, could hear Ms. Hoffman yelling behind the closed door.<sup>4</sup> She further describes Ms. Hoffman as "running to her computer" and demanding to see an email that Ms. Fernandes had sent about the scope of the consultant's services. Ms. Fernandes also describes herself as being extremely "frazzled" at the time and that she excused herself to go to the restroom to regain her composure, but that Ms. Hoffman blocked her way for a period of time. Ultimately, Ms. Fernandes stated she sent Ms. Hoffman the requested email when she returned from the restroom. Ms. Fernandes further alleges that Ms. Hoffman's behavior constituted an "abuse of power" and was "abusive."

Ms. Fernandes also complained that the meeting was inappropriate and abusive because it interfered with her preparation for an RMT meeting that was scheduled for 9:00 a.m. Following the RMT meeting on April 19, 2004, Ms. Fernandes and Ms. Hoffman engaged in a telephone conference with Mr. Whitfield and Ms. Mattson. The purpose of the telephone conference was to discuss the different views that Ms. Hoffman and Ms. Fernandes had on the proposed scope of service, to get on the same page with respect to the proper scope and to finalize the contract with the

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<sup>4</sup> When questioned, Ms. Mendez-Correa indicated that she had never observed Ms. Hoffman acting unprofessionally and did not corroborate Ms. Fernandes' allegations.

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consultants. However, during this telephone conference, Ms. Fernandes stated for the first time that she had been subjected to bullying, abusive and hostile treatment by Agency staff. Once Ms. Fernandes raised these allegations, Ms. Hoffman asked Mr. Whitfield what the Agency should do. Mr. Whitfield responded by advising the Agency to "dig until you get to the bottom of it." Because of the nature of the allegations, the Agency decided to put the implementation of the outside consultants on hold until it determined the appropriate action that should be taken to address Ms. Fernandes' allegations.<sup>5</sup>

On April 21, 2004, Ms. Hoffman and Joy St. Germain, the Agency's Employee Services Director, met with Ms. Fernandes to discuss her allegations of bullying and abusive behavior. Ms. Fernandes describes this meeting as "horribly intense" and that she felt "ambushed" because she was unprepared to discuss specific policy violations by Agency employees. She further describes the meeting as an "interrogation" and "abusive." However, Ms. Hoffman and Ms. St. Germain state that the meeting was to discuss her allegations and possible policy violations. During this meeting, Ms. Fernandes complained that unnamed Agency employees had subjected her to bullying and abusive behavior. That afternoon, Ms. Fernandes sent Ms. Hoffman an email that attached research by the Workplace Bullying and Trauma Institute, which included a report on abusive workplaces.

Following the April 21, 2004 meeting, Ms. Fernandes traveled to Vancouver, Washington for business. Ms. Fernandes describes this period of time as the "week from hell" as she became very ill due to the stress related to her allegations and treatment by Ms. Hoffman.

On April 23, 2004, Ms. Hoffman telephoned Ms. Fernandes and advised her that the Agency was putting the organizational development consultants on hold while the Agency pursued an investigation into her allegations in accordance with the applicable Civil Service regulations and Agency policies. Following this discussion, Ms. Fernandes alleges that she was "constantly bombarded" by Ms. Hoffman and Ms. St. Germain to meet with me to discuss her allegations. Ms. Fernandes further alleges that their efforts to direct her to meet with me were "highly inappropriate" and "an abuse of power."

Ms. Fernandes also alleges that Ms. Hoffman's failure to approve any of her reimbursement expenditure vouchers since November of 2003 is an "abuse of power." Ms. Fernandes has sought reimbursement for travel when she has been required to use her personally owned vehicle for business. However, it appears that Ms. Fernandes' requests for reimbursement are not in accordance with governmental policies relating to travel reimbursement. Mr. Fitzsimmons

<sup>5</sup> Ms. Fernandes also alleged that others had been subjected to similarly abusive behaviors. When questioned, Ms. Fernandes did not have any first hand knowledge regarding these alleged other incidents. As such, those allegations were not included as part of this investigation.

describes this dispute as being one in which Ms. Fernandes' "sense of what is fair and equitable is very different than state policies."

Ms. Fernandes also alleges that Ms. Hoffman has engaged in an "abuse of power" by denying her compensatory time off. As a senior manager, Ms. Fernandes states that she is required to work in excess of 40 hours per week. She indicated that she had an agreement with Mr. Fitzsimmons that she would be allowed six (6) days per year in addition to her sick and vacation leave as compensatory time off. Ms. Fernandes alleges that she spoke with Ms. Hoffman in December of 2003 about this issue and that Ms. Hoffman would "get back to her." However, Ms. Fernandes advised me that she has not followed up with Ms. Hoffman and has not had any further discussions with her about this issue.

Ms. Fernandes also alleges that Ms. Hoffman has treated Ms. Fernandes differently than other managers by challenging her reimbursement vouchers and by "unfairly criticizing" her in meetings. She alleges that Ms. Hoffman has acted in a "condescending and arrogant" manner towards her in meetings, which she describes as "humiliating." When asked for specifics, Ms. Fernandes could not relay any specific words used, but indicated that, "It was the tone as opposed to the message." Because of this, Ms. Fernandes alleges that she has since stopped going to senior management meetings as much as possible.

**E. Ms. Fernandes' Allegations Regarding Ms. Berns**

Ms. Fernandes alleges that shortly after she began her employment with the Agency, Ms. Berns approached her and asked her to sign a leave slip. At that time, Ms. Fernandes inquired whether Ms. Berns was taking vacation leave. Ms. Fernandes stated that Ms. Berns advised her that she was going to be telecommuting from Colorado. Apparently, Ms. Berns had previously had the approval of two supervisors to do so in the past when she had been ill. However, Ms. Fernandes saw no reason to continue to allow this practice and states that Ms. Berns became "angry" at her for not wanting to approve this practice. Ms. Fernandes spoke with Mr. Fitzsimmons about this issue and advised Ms. Berns that she would have to get someone higher up in the Agency to approve it. Ms. Fernandes further describes this as a "big and contentious" issue and ultimately, Ms. Berns' request was denied. Ms. Fernandes complains that "not one person said what I did was good." In fact, she alleges that it was "thrown back in her face" by Ms. Hoffman when Ms. Fernandes sought approval for an employee with cancer to telecommute.

**F. Ms. Fernandes' Allegations Regarding Race Discrimination**

During my interviews, Ms. Fernandes did not specifically raise any allegations of race discrimination nor did she identify any actions or behaviors that were targeted towards her that she

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believes was discriminatory based on a protected classification or characteristic. However, she did indicate that she thought it was "jarring and significant" that the eight Section Managers in the RMT are Caucasian. She stated that, "While I won't make any conclusions as to why I have been treated like I have and nothing overt has occurred to me, it is significant that all of the management team is white - there are very few people of color with authority in the Agency."

Although she could not point to anything to suggest that she has been treated discriminatorily based on her race or any other protected classification or characteristic, she did provide me with various reports and news articles regarding diversity within the Agency. She also advised me that other employees had filed tort claims and charges of discrimination with the Equal Employment Opportunity Commission that involve members of the RMT. However, a review of these claims and charges indicates that they allege claims that are dissimilar to those raised by Ms. Fernandes.

### III. Findings and Conclusions

There is no credible evidence to suggest a violation of Agency policies or a violation of state and federal laws prohibiting discrimination based on a protected classification or characteristic. While Ms. Fernandes perceives that she has been subjected to bullying and abusive behaviors, the evidence adduced during this investigation indicates that her perceptions are not well grounded.

With respect to Ms. Fernandes' allegations of bullying and abusive behaviors by members of the RMT, there is no credible evidence to support her perceptions and allegations. Other than Ms. Fernandes, all of the witnesses interviewed described the interactions complained of as being professional. I find these witnesses credible and conclude that Ms. Fernandes has significant difficulty communicating with the members of the RMT and does not react well to any form of criticism or feedback. Many of the witnesses commented about her inability to accept criticism, even when it is delivered in a cautious manner. I conclude that these observations about Ms. Fernandes better fit the reality of the breakdown in communications between Ms. Fernandes and the members of the RMT than do allegations of bullying and abusive behaviors. I do find, however, that due to the significant disconnect between Ms. Fernandes and the members of the RMT, a number of the members have avoided including her in matters.

Likewise, I find Ms. Fernandes' allegations against Ms. Hoffman to be entirely without merit. All of the credible evidence indicates that Ms. Hoffman's actions were legitimate and reasonable and none of the witnesses interviewed supported Ms. Fernandes' perception of events as they relate to Ms. Hoffman.

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Private and Confidential

September 22, 2004

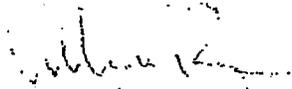
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Finally, I conclude Ms Fernandes' allegations regarding Ms. Bern also do not support a violation of Agency policy.

Please do not hesitate to call me if you have any questions about this report, or need additional information. It has been a privilege to work with the Department of Ecology, and I appreciate the participation of everyone who was involved in this process.

Sincerely,

SEBRIS BUSTO JAMES



Geoffrey M. Boodell

GMB/bd  
Enclosure

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# **APPENDIX D**

January 29, 2004

Hi Linda,

Here's the summary of the key points from Stewart Johnston's conversation with me.

- Exempt, "at-will" positions serve at the pleasure of the agency Director and therefore, you do not need to go through the Loedermill process nor provide specific reasons for your decision;
- Recommended is providing less specific information, for if you give a lot of reasons for your decisions, you run the risk that the reasons could be seen as pretext for some other purpose;
- Broad reasons and vague terms could be provided such as, "we have different management philosophies," or "we need a change in direction," or "a different skill set is needed," "it is not a good fit with me or the team(s)." At this point in the process, no detailed reasons need to be provided at all.
- If challenged later, (e.g., lawsuit), you may need to give reasons and the basis and foundation for your decision, with concrete examples. If sued, we would need to demonstrate that the person was terminated for legitimate, non-discriminatory reasons. Doing a "dry-run" of these reasons could be done now and reviewed by Stewart. What measurable criteria can be shown that was used to assess her performance? Show the evidence of poor interactions. You can call out specific performance deficiencies, and show that clear expectations and assistance was provided by you and many others who want her to succeed.
- The letter given should be short and simple: "Thank you for your year of service. Your last day is \_\_\_\_\_. Wishing you the best in your future endeavors." Do not put any criticisms or reasons in the letter at all.
- Example: at DSHS years ago when former Director Jean Saliz terminated an exempt Director of one of her programs/divisions, someone complained to the newspaper. When someone asked her why she did this, she took the bait and started explaining why in a critical way in a public forum, not one-on-one. The person sued for defamation of character and they won (they were reinstated with some back pay).
- Stewart can talk with you directly if this would be helpful (664-4186).

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Conversation with Jan Bacon and Pam Durham, some considerations:

- There are some liabilities/risk with our direct knowledge of a hostile work environment for employees, and alleged discriminatory remarks being made. We



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can look at our obligation under our policies on a safe work environment to pursue some action.

- There are also examples of misuse of state resources.
- Advice from Jan/Pam: get back to the two employees and acknowledge that you heard what they said and that you want to let them know that you plan to take some action to resolve these issues. That this is confidential, please do not share our conversations. You will not be retaliated against. Encourage them to file a hostile work environment incident report. Purpose: gives employees some hope.

# **STATUTORY APPENDIX**

**RCW 49.60.210**

**Unfair practices -- Discrimination against person opposing unfair practice -- Retaliation against whistleblower.**

(1) 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.

(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.

[1992 c 118 § 4; 1985 c 185 § 18; 1957 c 37 § 12. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

## **RCW 49.60.180**

### **Unfair practices of employers.**

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification:

PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

[2007 c 187 § 9; 2006 c 4 § 10; 1997 c 271 § 10; 1993 c 510 § 12; 1985 c 185 § 16; 1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

### **NOTES:**

**Severability -- 1993 c 510:** See note following RCW [49.60.010](#).

**Effective date -- 1971 ex.s. c 81:** See note following RCW [49.60.120](#).

Element of age not to affect apprenticeship agreements: RCW [49.04.910](#).

Employment rights of persons serving in uniformed services: RCW [73.16.032](#).

Labor -- Prohibited practices: Chapter [49.44](#) RCW.

Unfair practices in employment because of age of employee or applicant: RCW [49.44.090](#).