

FILED  
COURT OF APPEALS  
DIVISION II

Court of Appeals No. 40647-1-II

11 FEB 28 AM 11:01

---

IN THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON  
BY   
DEPUTY

**Leanna Shipp,**  
Appellant,

v.

**Mason General Hospital Foundation (MGHF), et al,**  
Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Carol Murphy

---

REPLY BRIEF OF APPELLANT

---

Christopher W. Bawn, WSBA #13417  
1700 Cooper Pt. Rd. SW, #A-3  
Olympia, WA 98502  
voice: (360) 357-8907  
fax: (360) 539-1805  
[cwbawn@justwashington.com](mailto:cwbawn@justwashington.com)

**TABLE OF CONTENTS**

	Page
1. <u>TITLE</u>	i
2. <u>TABLE OF CONTENTS &amp; TABLE OF AUTHORITIES</u>	ii
3. <u>ARGUMENT</u> . . . . .	1
A. <u>MGHF's Improper Request for Affirmative Relief</u>	
B. <u>MGHF's Hearsay Argument Is Invalid</u>	
C. <u>MGHF's Erroneous View of the Outrage Facts and Law</u>	
D. <u>MGHF's Retaliation Argument Is Contrary to the         Summary Judgment Standard</u>	
4. <u>CONCLUSION &amp; PROOF OF SERVICE</u> . . . . .	25
5. <u>APPENDIX</u> . . . . .	n/a

## TABLE OF AUTHORITIES

### **Court Rules, Statutes, Jury Instructions**

Evidence Rule (ER) 801(d)(2)	4
Evidence Rule (ER) 803(a)(3)	4
Washington Rules of Appellate Procedure (RAP) 2.4(a)	1
Federal Rules of Appellate Procedure (FRAP) 32.1	5
RCW 51.48.025	18
6A Washington Pattern Jury Instructions – Civil (WPIC) 330.05 (2010)	18

### **Cases**

<u>Ann. Legion Post 32 v. City of Walla Walla</u> , 110 Wn.2d 1, 802 P.2d 784 (1991)	4
<u>Anica v. Wal-Mart Stores</u> , 120 Wn.App. 481, 84 P.3d 1231 (2004)	19
<u>Collins v. Gee West Seattle, LLC</u> , ___ F.3d ___, 211 WL 182447, 2011 U.S. App. LEXIS 1169 (9th Cir., released for publication 1/21/2011)	1
<u>Contreras v. Zellerbach</u> , 88 Wn.2d 735, 565 P.2d 1173 (1977)	7
<u>Corey v. Pierce County</u> , 154 Wn.App. 752, 225 P.3d 367 (2010)	8,13
<u>Daley v. Wellpoint Health Networks, Inc.</u> , 146 F.Supp.2d 92 (D. Mass. 2001)	5
<u>Dease v. Beaulieu Group, Inc.</u> , No. 08-cv-328 (Middle D.C., Alabama, 2009)	11

<u>Hernandez v. City of Vancouver</u> , 277 Fed. Appx. 666 (9th Cir. 2008)	5
<u>Hollenback v. Shriners Hospitals for Children</u> , 149 Wn. App. 810, 206 P.3d 337 (2009)	15-17
<u>Horn v. New York Times</u> , 100 N.Y.2d 85, 790 N.E.2d 753, 760 N.Y.S.2d 378 (2003)	12
<u>Kahn v. Salerno</u> , 90 Wn. App. 110, 951 P.2d321 (1998)	18
<u>Magiera v. City of Dallas</u> , 389 Fed. Appx. 433; 2010 U.S. App. LEXIS 16802 (5th Cir. 2010)	5
<u>Marvik v. Winkelman</u> , 126 Wn. App. 655, 109 P.3d 47 (2005)	1,4
<u>Murphy v. American Home Products Corp.</u> , 58 N.Y.2d 293, 448 N.E.2d 86 (1983)	12
<u>Nord v. Phipps</u> , 18 Wn.App. 262, 566 P.2d 1294 (1977)	2
<u>Ongom v. Dep't of Health</u> , 159 Wn.2d 132, 148 P.3d 1029 (2006), <u>cert. denied</u> , 550 U.S. 905 (2007)	13
<u>Robel v. Roundup Corporation</u> , 148 Wn.2d 35, 59 P.3d 611 (2002)	13,22
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001)	22
<u>Sunland Investments v. Graham</u> , 54 Wn.App. 361, 773 P.2d 873 (1989)	1
<u>Thompson v. St. Regis Paper Co.</u> , 102 Wn.2d 219 (1984)	13
<u>Wagner v. Beech Aircraft Corp.</u> , 37 Wn.App. 203, 680 P.2d 425 (1984)	1
<u>Wilmot v. Kaiser Aluminum &amp; Chem. Corp.</u> , 118 Wn.2d 46, 821 P.2d 18 (1991)	18.20
<u>Wilson v. Steinbach</u> , 98 Wn.2d 434, 656 P.2d 1030 (1982)	15

## Law Reviews

Bauman, Appeal and Error – Law of the Case – Discretionary Rule, 2 Gonz. L. Rev. 105 (1967) 22

Utter, Justice Robert (ret.), Goldmark Award Epitomizes the Meaning of Service, King County Bar Bulletin (February, 2011) 7

#### **IV. ARGUMENT**

##### **A. MGHF's Improper Request for Affirmative Relief**

MGHF did not cross-appeal. Its invalid request for affirmative relief should be denied. MGHF's "Introduction" and part "b(ii)" seem to complain that the trial court abused its discretion by denying a "Motion to Strike." MGHF seeks unusual relief:

"This Court should remand this matter to the trial court with directions that the trial court exercise its discretion and impose appropriate penalties, including – if the trial court determines it is warranted– exclusion and striking of the plaintiff's undisclosed witnesses–before this Court examines retaliation claims based in part on the testimony of plaintiff's undisclosed witnesses." Brief of Respondent, at 16.

Appellate courts don't grant affirmative relief from trial court rulings a respondent fails to cross-appeal. Marvik v. Winkelman, 126 Wn. App. 655, 661 n.3, 109 P.3d 47 (2005) (respondent must cross-appeal to challenge failure to strike declarations); RAP 2.4(a); Collins v. Gee West Seattle, LLC, \_\_\_ F.3d \_\_\_, n. 8, 211 WL 182447, published (9<sup>th</sup> Cir. 2011)(employer failed to cross-appeal denial of a motion to strike testimony "and has therefore waived any objection to that testimony."). See also, Sunland Investments v. Graham, 54 Wn.App. 361, 364, 773 P.2d 873 (1989) (rejecting respondent's untimely challenge to a trial court ruling); Wagner v. Beech Aircraft, 37 Wn.App. 203, 212-213, 680 P.2d 425 (1984) (rejecting untimely challenge to trial court decision to grant

Appellant relief from some of the damages sought by Respondent); Nord v. Phipps, 18 Wn.App. 262, at n.3, 566 P.2d 1294 (1977) (reversing summary judgment based on “affidavits and documents before the trial court,” rejecting non-cross-appealed claims).

Here, the trial court rejected MGHF’s claim that it was “materially prejudiced.” The crux of MGHF’s claim was that the failure to file a trial witness list “meant that none of those witnesses could be deposed prior to the Hospital Foundation’s motion for summary judgment.” Brief of Respondent, at 14. MGHF does not explain why it chose not to depose any witnesses since 2007, despite the fact that the witnesses’ information was “received in discovery.” See Respondent’s Brief, note 27.<sup>1</sup> The declarants here are two employees of MGHF and the spouse of one of those employees. They are referenced in the Complaint that was served in 2007 on MGHF’s President (Sara Watkins) and its Managing Agent (Leigh Bacharach) as follows: “[MGHF made] a series of false accusations concerning the Plaintiff which the defendants reported to the Plaintiffs former co-workers and to others.” CP. 201. They were disclosed during Leanna Shipp’s lengthy deposition, taken by MGHF (CP. 147).

---

<sup>1</sup> MGHF’s non-appeal results in an absence of multiple discovery motions and orders in the trial court, admittedly making reference to the record sub-optimal.

After Leanna Shipp disclosed her witnesses to MGHF, its legal team contacted at least one of them, with an assurance that Leanna Shipp “had said that [Respondent] could talk with me about the case.” See Declaration of Gail Johnston, CP. 64. MGHF expressly assured the trial judge that “discovery is complete” and agreed to an order to that effect which MGHF also did not cross-appeal (CP. 123). In fact, MGHF cited a “relationship” between one of Leanna Shipp’s declarants and the trial judge as a basis for MGHF not appearing in court for a summary judgment hearing, filing an affidavit of prejudice, a motion to transfer, and asking the trial judge to recuse herself, which was granted. CP. 32-33.

The trial court had the complete record below, and obviously saw through MGHF’s “we-would-have-deposed-all-the-undisclosed-witnesses” argument, particularly since the same witness MGHF interviewed off of Leanna Shipp’s witness list had previously testified against MGHF, convincingly, in a prior contested administrative proceeding between the parties. CP. 63, CP. 80, CP. 86-87. The record also shows that MGHF entered the motion for summary judgment with “unclean discovery hands” (CP. 44-45) yet chose to oppose a continuance to permit the sort of

discovery that it now asks the Court of Appeals to “direct” prior to deciding this appeal. MGHF’s affirmative relief request should be denied.

**B. MGHF’s Hearsay Argument** In a footnote MGHF says “plaintiff’s declarations incorporate extensive hearsay remarks.” Brief of Respondent, n.5. This should not be considered, as Respondent did not cross-appeal, Marvik v. Winkelman, at 661 n.3. Also, MGHF’s assertion lacks argument or citation to legal authority. See Am. Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 7, 802 P.2d 784 (1991)(side issues will not be considered without legal authority and reasoned argument). In any event, Shipp’s declarations were appropriately before the trial court under ER 801(d)(2) and ER 803(a)(3), Leanna Shipp properly testified concerning the threats she received from MGHF’s management.

As Respondent concedes in its brief, the only evidence it presented the trial court is what MGHF claims it “believed” was the motivation it had for firing Leanna Shipp. Thus MGHF placed at issue the employer’s state of mind and emotion (such as intent, plan, motive, design ...), when threatening Leanna Shipp on January 16, and when telling multiple witnesses inconsistent motives for terminating Leanna Shipp. The court did not abuse its discretion in admitting the declarations under ER

803(a)(3), as they demonstrated the inconsistent state of mind and motive for depriving Leanna Shipp of her job. The conflicting statements also constitute admissible statements against interest under ER 801(d)(2). Under that rule, a statement is not hearsay if it is offered against a party and is “a statement by a person authorized by the party to make a statement concerning the subject,” or “a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party”. ER 801(d)(2)(iii),(iv). The trial court properly allowed the statements MGHF made to Shipp, Gail Johnston and Dawn Pennell that contradict the excuses offered by MGHF. See, e.g., Magiera v. City of Dallas, 389 Fed. Appx. 433; 2010 U.S. App. LEXIS 16802 (5<sup>th</sup> Cir. 2010)(sergeant’s hearsay concerning lieutenant’s reasons for terminating Magiera’s training admissible against party opponent); Hernandez v. City of Vancouver, 277 Fed. Appx. 666, Fn.2 (9th Cir. 2008)<sup>2</sup> (in race discrimination case, affidavit with two out-of-court statements was not hearsay because the first was not offered to prove the truth of the matter asserted and the second was an admission of a party-opponent).

It would be unfair in a race, sex or workers compensation discrimination case, to discard the hearsay statements of the speaking

---

<sup>2</sup> FRAP 32.1 permits citing unpublished appellate cases issued after 1/1/2007.

agents, when they contradict the excuses offered by the same speaking agent. Daley v. Wellpoint Health Networks, Inc., et al., 146 F.Supp.2d 92 (D. Mass. 2001) (inconsistent hearsay comments about worker admissible to contradict allegedly non-discriminatory pretextual excuse).

C. **MGHF's Erroneous View of the Law and Facts of Outrage**<sup>3</sup>

MGHF downplays the facts in order to oppose the outrage claim. For example, MGHF says no outrage is caused by loss of medical benefits. That is not true. As Shipp explained, she was “financially, emotionally and medically devastated” and left with “severe carpal tunnel, no job, no medical benefits, multiple false excuses for firing me, and orders never to return to Treasures. I could no longer pay for my home, and I went into a deep depression.” CP. 80. Accepting Shipp’s version of events, MGHF abruptly created a falsified, dramatic and abusive method of terminating Leanna Shipp’s employment, at the point MGHF discovered that she (and her doctor) said she was suffering a “severe” disabling condition and was in need of medical attention. By firing Shipp because she was seeking

---

<sup>3</sup> MGHF complains (in a footnote) that the Brief of Appellant has a “laundry list” of evidence with no cites to the record. The record is cited already for every item in the concluding paragraph, citations to the record in the Brief of Appellant. MGHF highlights the allegedly uncited statement that MGHF terminated Shipp’s medical benefits, which was already quoted verbatim (CP. 80-81) on page 15 of the Brief of Appellant. MGHF also claims the conflicting, false statements MGHF made after Leanna Shipp’s termination were not cited. The witnesses’ statements are cited verbatim on pages 9 through 12 of the Brief of Appellant.

medical attention, and using false misconduct charges to do it, the rest of the outrageous conduct (described below) is magnified.

MGHF cites a New York court (see cases cited, *infra*), which still holds onto the outdated rule that employers retain an unfettered right to terminate, humiliate and even “abuse” at-will employees, Washington courts focus on the reasonable person in society, and consider the sorts of “abuse” and vulnerability that a present day finder of fact is allowed to consider as it relates to an outrage claim. See Contreras v. Zellerbach, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977)(noting “changing sensitivity in our society” to such conduct as racism, and that the relationship of the parties is also probative, where supervisory personnel were aware of but failed to stop racist and other comments in the workplace). Accord, Justice Robert Utter (ret.), Goldmark Award Epitomizes the Meaning of Service, King County Bar Bulletin (February, 2011)(citing the evolutionary process of the tort of outrage as explained in Contreras, to protect the parts of our society that would otherwise be “denied the opportunity to have the benefit of the laws that theoretically protect all.”). Clearly, evidence of a serious physical disability and the immediate need for medical care, merits consideration by a trier of fact in this outrage case. The contradictory

false statements by the employer about the store manager being a liar and gossip, and not being able to do her job (Declaration of Gail Johnston, *infra*), and causing money losses (Declaration of Dawn Pannell, *infra*) also evidence an outrageous scenario where any chance Leanna Shipp could use her reputation and competence to practice store directing was trashed.

The Respondent MGHF condemns itself when it concedes that Corey v. Pierce County, 154 Wn.App. 752, 225 P.3d 367 (2010) is a valid outrage case to go to a jury because of the facts. Understandably, that victim was a public lawyer, her boss was the county prosecutor, who lost confidence in the victim's loyalty, and granted her only a few minutes to accept the choice of an orderly departure from her job (weeks later) by resignation in lieu of discharge; then triggered the outrage claim by making a misleadingly false public comment that the victim was part of an ongoing criminal investigation (which actually involved an effort to locate some petty cash Ms. Corey had collected from co-workers to get a gift for a sick co-worker, which she accomplished).

Looking at Respondent MGHF through the lens of outrage that the court in Contreras and Corey allow in today's society, it is patently wrong

for MGHF to argue that Shipp's evidence was not sufficient to survive summary judgment. In this case Shipp, a former Godfather's pizza worker (CP. 73) and her mostly-volunteer staff of thrift store workers, collected \$325,000 in thrift store revenue for MGHF. 57, 60, 63, 70. The work was not easy for Shipp, who took a court ordered community service worker with her to customers' homes to pick up merchandise for the thrift store. CP. 71. It also involved "constant and repetitive lifting, sorting, arranging, repairing, cleaning, and other hands-on work in the stores. CP. 70. The store did not have the proper equipment, so large furniture, like couches, had to be lifted on the workers' shoulders. CP. 156. Leanna Shipp also did sorting, pricing, cashier work, and maintained the floor and window displays, among other tasks. CP. 85. She was well known to the public as a result of her position with the Kiwanis club and volunteer work in the community. CP. 94. MGHF was managed by a large Board of Directors, and had Officers and staff members, and committees to manage operations, including distribution of the revenues and endowments. CP. 57-58. Leanna Shipp's new boss in January <sup>2004</sup>~~2001~~, Elizabeth Johnston, was a MGHF Board member, with multiple advanced college degrees, and an American Business Woman of the Year in 2001. CP. 141. Ms. Shipp was

diagnosed with a carpal tunnel condition in her hands, evidenced by numbing, swelling, her dropping things, and losing the feeling in her hands, which she understood meant her hands were “messed up” and she would “never, ever have the full feelings in my hands like I did before.” CP. 155. Ms. Shipp had earned a good reputation for maintaining confidentiality and opposing gossip (CP. 67, 94).

Leanna Shipp underwent a Nerve Conduction Study in December 2003, and she met with Elizabeth Johnston on January 16, 2004 to discuss the results. CP. 73. Ms. Johnston told Leanna, among other things, that “they did not want me to file an L&I claim, and asked if I realized that by filing a claim, I was making my fellow employees pay for my surgery and that would hurt [the thrift store] Treasures.” CP. 73. Shipp said she felt she was being “threatened” (CP. 77) against filing a workers’ compensation claim. On January 19, 2004, Leanna Shipp and her doctor completed a workers’ compensation claim, which Shipp reported to Johnston, due to the Nerve Conduction Study showing moderate to severe carpal tunnel syndrome in both of Leanna Shipp’s hands. CP. 74. On January 21, 2004, Ms. Shipp was “immediately” terminated from employment after “giving” Elizabeth Johnston her medical paperwork and

employee evaluations. CP. 75. Ms. Shipp was wrongfully accused of gossiping, lying to cover up the gossip, and accusing another person of the gossip. Management followed Leanna Shipp to the store, paraded her through the store in front of other employees, escorted her out the back door, whereupon her employer slammed the door and told Leanna Ship that she was never to come back to the store. CP. 75. To make matters worse, MGHF then publicly disclosed (falsely) that Shipp was fired because the store she previously managed wasn't making money (CP. 34), she was responsible for decreasing sales even after she was fired (CP. 63), and Shipp was fired because she was unable to perform a list of jobs she was given. CP. 62.

MGHF misquotes a passage from an unpublished 2009 opinion from Alabama, Dease v. Beaulieu Group, Inc., that says: "Dease seems to base her outrage claim solely on her assertion that an escort was neither necessary nor appropriate to remove her from the building. She does not allege any additional facts suggesting that the manner in which she was escorted out of the building was harsh or abusive. But the mere act of escorting a terminated employee out of the building, without more, is not "atrocious" or otherwise intolerable conduct--rather, it is arguably a

routine occurrence. That Dease felt humiliated is not enough to render the conduct outrageous.” To make matters worse, MGHF relies upon an old escort-from-building decision out of the New York Court of Appeals. Murphy v. American Home Products, Corp., 58 N.Y.2d 293, 303, 448 N.E.2d 86 (1983). There, the plaintiff sued for “abusive discharge” based upon his escort from the building. The appellate court did not even bother to recite the facts, because it ruled as a matter of law that “there is now no cause of action in tort in New York for abusive or wrongful discharge of an at-will employee, plaintiff should not be allowed to evade that conclusion or to subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress.”

MGHF seeks to reverse decades of Washington jurisprudence to adopt the law in one of the few remaining jurisdictions in America that rejects a cause of action for “abusive discharge” and workers compensation retaliation. See Horn v. New York Times, 100 N.Y.2d 85, 90, 790 N.E.2d 753, 760 N.Y.S.2d 378 (2003)(citing Murphy as the basis for rejecting a “workers compensation retaliation” cause of action because “We have consistently declined to create a common-law tort of wrongful

or abusive discharge.”). The Murphy/Horn theory of “at-will employment contract law” is completely unsound precedent to rely upon in Washington. See Thompson v. St. Regis Paper Co., 102 Wn.2d 219 (1984)(recognizing common law tort of wrongful discharge); Robel v. Roundup Corporation, 148 Wn.2d 35, 59 P.3d 611 (2002) (recognizing tort of abusive discharge). As explained in Robel, the “threshold question” of law is whether reasonable minds could differ, and the relationship between the parties (including the added impetus of the Plaintiff’s vulnerable health status) is a significant factor in determining whether liability should be imposed.

As noted previously, MGHF attempts to distinguish one of the cases cited in the Brief of Appellant, Corey v. Pierce County, 154 Wn. App. 752, 225 P.3d 367 (2010)(outrage claim permitted by lawyer, because employer said she was “subject to a ‘pending criminal investigation into whether money was mishandled in [prosecutor’s] office’ ). MGHF says this court should treat the amount of outrageous “stigma” differently, depending upon the occupation of the victim and whether or not the accusations of the employer involve wrongdoing of a criminal nature. This is exactly the sort of slippery-slope reasoning that the

Supreme Court rejected in Ongom v. Dep't of Health, 159 Wn.2d 132, 148 P.3d 1029 (2006), cert. denied, 550 U.S. 905 (2007)(rejecting different burdens of proof in disciplinary proceedings for doctors than for adult family home managers). As the Supreme Court explained in Ongom, “loss of reputation to one marginally qualified for a modest occupation is potentially more damaging than the loss of reputation for a highly qualified medical specialist.”

This is not a “mere” escort-from-the-workplace case, and Washington courts should not adopt the reasoning that false suggestions of criminality against lawyers create outrageous “stigma,” but a crippled thrift store manager suffers no such stigma when her employer threatens her to not file a workers’ compensation claim, terminates her, parades her in front of her subordinates to the back door, slams the door, tells her never to come back, then misrepresents that she 1) gossiped, 2) lied about it, 3) failed to do her job, and 4) caused the store she managed to lose money *before and after* she was terminated.

In sum, the Respondent MGHF may not be outraged, but the Appellant Leanna Shipp provided sufficient evidence to support the outrage claim beyond summary judgment.

MGHF Retaliation Argument Is Contrary to the Summary Judgment Standard

MGHF does not even acknowledge the summary judgment standard when it argues, without citing a single legal precedent: “the proper inquiry instead is whether her supervisor believed she had [gossiped, lied about not gossiping, and wrongly blamed another employee for her actions] and whether that belief was the reason for terminating plaintiff’s employment.” Brief of Respondent, at page 11. To establish that “belief” MGHF repeatedly cites the declaration of Elizabeth Johnston, and asks this court to remand this case for a “penalty” hearing, before considering any of the declarations and exhibits in the record from the non-moving party. That is an improper manner for an appellate court to review an order granting summary judgment. Instead, all the evidence in the record, and the inferences therefrom, must be considered in the light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Circumstantial contradictory evidence is admissible, because an employer will rarely reveal the retaliatory mental state behind its actions. See Hollenback v. Shriners Hospitals for Children, 149 Wn.App. 810, 206 P.3d 337 (2009). MGHF’s theory, which allows summary judgment on the basis of the employer’s “belief” has been

repeatedly rejected in Washington. See Hollenback, supra (“Pretext may be shown with evidence that (1) the reasons given have no basis in fact; (2) even if the reasons are based in fact, the employer was not motivated by these reasons; or (3) the reasons are insufficient to motivate an adverse employment decision.”).

In Hollenback, the employer claimed a discharge was not retaliatory because the employer believed the employee violated explicit directions and engaged in retaliatory conduct herself by bad-mouthing (i.e. “gossip”) her colleagues; because two witnesses for the employer believed the employee called people “tattletales”. The appellate court reversed summary judgment, because the employee had filed a declaration, from someone present during the meeting, who said the employee had not made the gossipy “tattletale” comment as the employer articulated. The appellate court in Hollenback also noted that a question of fact was created from unemployment documents, which showed that the employer later professed a different story than the “tattletale” issue, stating the employee was “unable to do the job through no fault of her own.”

In the present case, the declarations of Gail Johnston (CP. 61-62) and Leanna Shipp (CP. 75), who were present at the time of the alleged

“gossip” on January 20, 2004, establish that Leanna Shipp did not gossip on that day, and Leanna Shipp testified that on January 16, 2004, the President of MGHF (Sara Watkins) identified her knowledge of another employee, Yvonne Stedman (the assistant manager, CP 84) who gossiped “almost daily” to MGHF’s President. CP. 74. (In her declaration, Gail Johnston described Yvonne Stedman as a “known gossip” CP. 62). MGHF President Watkins said the MGHF Board was in the process of forming a 3-person team to work on stopping gossip (CP. 74, 83-84). Elizabeth Johnston responded to assistant manager Yvonne Stedman’s gossip problem by indicating that Shipp should make sure that “Yvonne’s (my assistant) evaluation had something in it about her gossiping.” CP. 84. Here, Leanna Shipp has established “pretext” under all three of the Hollenback prongs, creating a genuine issue of material fact against MGHF’s excuse for terminating Shipp for gossip (upon the mere “belief” of Elizabeth Johnston who was *not even present* for the alleged gossip).

MGHF also claims the trial court correctly decided this case because “[t]here is no evidence that the Hospital Foundation had any knowledge of the filing of this claim until many weeks after the termination.” Brief of Respondent, at page 12. Obviously, “knowledge”

of the industrial insurance claim is an elemental material fact in a retaliation case. See Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991) and RCW 51.48.025(3) (requiring evidence that the employee filed a claim, *communicated an intent to file a claim*, or exercised any other right under Title 51); 6A WPIC 330.05 (2010)(citing Wilmot); Kahn v. Salerno, 90 Wn. App. 110, 129, 951 P.2d321 (1998)(rebuttable presumption that "precludes us from dismissing the case" is created by proof of employer's knowledge of the protected activity)(citing Wilmot).

The record on appeal clearly shows that the trial court erred in deciding that material disputed issue of fact ("knowledge") against Leanna Shipp at the summary judgment phase, upon the employer's mere allegation that it did not have knowledge. The exhibit at CP. 154 alone creates a reasonable inference that MGHF received the claim paperwork (Shipp's doctor notes indicate a copy was sent to MGHF's P.O. Box on 1/20/2004) on the ~~same~~ <sup>next</sup> day MGHF terminated Leanna Shipp (1/21/2004).) In addition, the trial court had the testimony and notes (filed by both parties) that confirm that Leanna Shipp discussed the claim on January 16, 2004 with the President of MGHF (Sara Watkins), the "managing agent"

of MGHF (Leigh Bacharach), and with MGHF's speaking agent, Elizabeth Johnston, at which point Johnston threatened Leanna Shipp. CP. 73, 83-84. Three days later, Leanna Shipp verbally notified her supervisor that she and her doctor had filed a "L&I claim" (CP. 74), and she was fired just after she personally handed a copy of the claim documents to her supervisor on January 21, 2004. CP. 75.

The only Washington case MGHF references, Anica v. Wal-Mart Stores, 120 Wn.App. 481, 84 P.3d 1231 (2004), is factually and legally different from the present case. In that case, the plaintiff injured herself two different times, there was overwhelming evidence that Wal-Mart accommodated her medical and her workplace needs for well over a year, nothing adverse was ever said or done relating to her claim during the three months she worked after she filed her workers' compensation claim. The plaintiff offered no evidence that Wal-Mart discouraged the plaintiff from filing a claim or even disputed its validity. The plaintiff also admitted that she was not legally able to work for Wal-Mart, due to a long-term problem she had a lawyer trying to resolve with the federal Social Security Administration. Even after her claim, she asked for, and received a special employment extension from Wal-Mart. There was no

circumstantial or direct evidence that Wal-Mart ever offered any other reason than the Social Security problem as the basis for the Plaintiff's discharge, made necessary because Wal-Mart would otherwise be out of compliance with federal employment qualification regulations.

Here, without repeating all the references to the record and cases cited in the opening brief of the Appellant, there is substantial credible evidence that MGHF immediately came up with a method of avoiding Leanna Shipp's workers' compensation claim by blaming the entire claim on a prior employer, threatened Leanna Shipp not to file it, and fired her from her job because she was trying to pursue it. Multiple witnesses testified that no gossip occurred, it was not a firing offense for a "known gossip" (assistant manager Yvonne Stedman), and MGHF's speaking agents abandoned the gossip excuse for terminating Leanna Shipp, repeatedly, when witnesses asked: "Why was Leanna Shipp terminated?"

In any case of retaliation under the public policy tort, the employer may claim any reason for discharge. But that claim is insufficient, as a matter of law, if the non-moving party provides evidence showing that an illegal reason was a substantial factor in the decision to terminate her

employment. Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 71, 821 P.2d 18 (1991).

MGHF claims two more alleged facts merit dismissal of Leanna Shipp's retaliation claim: First, to bolster the lack of a genuine issue of a material fact, MGHF argues, "evidently" that Leanna Shipp believed MGHF was self-insured by the hospital, so she misfiled her workers' compensation claim "with the hospital, which is a separate legal entity and not a party to this litigation." Brief of Respondent, at 12, and footnote 26 (claiming that Leanna Ship "filed improper paperwork [to commence her L&I claim] on January 19, 2004.").

MGHF has already been through one appeal where MGHF lost on its alleged "separate legal entity" loophole, which confounded the trial court into granting an erroneous summary dismissal. See Unpublished Decision and Mandate, CP. 183-194. If the trial court decided this case again based upon the "hospital" vs. MGHF loophole, the trial court clearly erred. The "L&I" claim forms, and all other conversations and notices regarding the workers' compensation claim were directed to MGHF, its President Sara Watkins, its managing agent Leigh Bacharach, and its Board Member/new-supervisor Elizabeth Johnston. CP. 153-154, CP. 73-

74. Under the law of the case doctrine, MGHF should be barred on appeal from again resurrecting the “hospital loophole” – which suggests that actions Leanna Shipp undertook with officers and agents of MGHF do not trigger any liability for MGHF. See Bauman, Appeal and Error – Law of the Case – Discretionary Rule, 2 Gonz. L. Rev. 105, at n.1 (1967); State v. Clark, 143 Wn.2d 731, 745, 24 P.3d 1006 (2001) (law of the case). See also Robel v. Roundup Corporation, 148 Wn.2d 35, n. 5, 59 P.3d 611 (2002) (upholding an employer’s actual and constructive knowledge, and liability, when employer’s “managers” were involved).

Lastly, MGHF claims that this court should affirm the trial court because, to do otherwise, would bolster “the absurd conclusion that any time an employee’s employment is threatened, the employee must only threaten to file an L&I claim to avoid dismissal [of employment].” Brief of Respondent, at 13. The MGHF argument goes as follows: Leanna Shipp “knew in advance her job was in jeopardy” (four months earlier, in September 2003)<sup>4</sup> which MGHF alleges is the reason why Shipp made a

---

<sup>4</sup> In 2003, Board Member Elizabeth Johnston agreed to do new job descriptions for the thrift store employees. CP. 72. Leanna Shipp called her supervisor, Sara Watkins, to report that the employees were unhappy because the job descriptions were not being done as planned, which meant the paid employees’ raises would not be forthcoming as promised. CP. 72. Elizabeth Johnston met with Leanna Ship on September 11, 2003. CP. 82. At the meeting, Elizabeth Johnston gave Leanna Shipp a new job description, an evaluation based on the new description, and a “write-up” alleging that Shipp had placed her name on the title to a car that

retaliatory “threat to file an L&I claim” (four months later), just prior to her termination for unrelated conduct, to set up “her assertion three years later” that she was a victim of retaliation. Brief of Respondent, 12-13 (citing CP. 82).

MGHF’s argument defies logic. Why would Leanna Shipp wait four months to initiate discussion of her L&I claim, if she were trying to avoid an imminent threat of termination four months earlier? It is also not consistent with the timeline. Leanna Shipp discussed and started her L&I claim on January 16 and 19, 200~~4~~<sup>3</sup>. That is two days before she was accused (and fired) on January 20, 200~~4~~<sup>3</sup>. Those facts support Shipp’s retaliation claim. MGHF was the party reacting to an imminent issue.

At a minimum, Leanna Shipp has established genuine disputes as to material facts concerning workers’ compensation retaliation, using the Declarations of Leanna Shipp (CP. 69-96), Dawn Pennell (CP.68), Gail Johnston (CP. 60-64), and Ron Pannell (CP. 65-67). MGHF’s new boss,

---

was donated to the thrift store, and she had supposedly kept the keys. CP. 72-73. Instead of filing a Title 51 claim in accordance with MGHF’s theory, Shipp took her supervisor right to the thrift store, and showed her that none of write-up statements were accurate, so MGHF “voided [the] write-up.” CP. 73, 83. On September 20, 2003, Leanna Shipp also provided her supervisor with “comments concerning my evaluation,” as requested (CP. 83), because “many things written on the evaluation were not accurate” (CP. 72). On September 25, 2003, Elizabeth Johnston said that “based on Leanna Shipp’s comments,” she thought MGHF was going to terminate Leanna Shipp’s employment. CP. 83.

a self-proclaimed HR *and* medical expert, testified she had a “right (and I believe an obligation) to oppose any such claim that is not well grounded in the facts.” CP. 140. The boss started exercising that “right” from the outset by retaliatory discrimination against Leanna Shipp in several ways, including a retaliatory termination from employment. On Friday, January 16, 2004, Shipp communicated the intent to file a workers’ compensation claim against MGHF based upon a nerve conduction study. The boss threatened Shipp by telling her MGHF did not want her to do that, that she could help MGHF avoid responsibility entirely by blaming the injury totally on a former employer, and that she would be taking money away from her co-workers and harming MGHF’s business by filing the claim against MGHF. On January 19<sup>th</sup>, the boss found out from Shipp that the claim was going forward, and on January 21<sup>st</sup> the boss retaliated by manufacturing a false excuse to terminate Leanna Shipp’s employment, then MGHF continued to retaliate after the termination by repeatedly launching additional false and conflicting excuses for Shipp’s termination.

When looking at the temporal component, the “job in jeopardy” theory advanced by MGHF is also unconvincing. MGHF relies upon the “job in jeopardy” incidents the Respondent cites in September 2003,

which MGHF argues triggered Shipp to pull out a last minute workers' compensation claim four months later on January 16, 2004. A four month gap defeats the probative value of MGHF's alleged temporal connection. See Anica v. Wal-Mart Stores, 120 Wn.App. 481, 84 P.3d 1231 (2004)(rejecting attempt to establish cause and effect in a workers' compensation retaliation case when the gap is over three months). A rational factfinder would certainly consider the 2-day gap between claim and termination more convincing than the huge gap in cause and effect that the Respondent relies upon in its brief.

### CONCLUSION

MGHF's brief contains flawed legal analysis, requests improper affirmative relief, and offers an incorrect assessment of the laws and facts concerning the analysis of Leanna Shipp's claims for Outrage and Retaliation at summary judgment. This court should reject the Respondent's argument and reverse the trial court's decision.

Respectfully submitted February 25, 2010

A handwritten signature in black ink, appearing to read "Chris Bawn" with a stylized flourish at the end.

Christopher W. Bawn, #13417  
Attorney for Appellant

