

No. 43708-2-II

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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SUSAN K. BROWN,

Appellant,

vs.

CITY OF TACOMA, et. al.,

Respondents.

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APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 11-2-05394-1

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REPLY BRIEF OF APPELLANT

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WSB #17283

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## **I. STATEMENT OF THE CASE**

Ms. Brown adopts the facts set forth in her opening brief. However, as it relates to what has been characterized by the respondent as “double hearsay,” it is important to point out that the statements were made by Mr. Briehl and Mr. Anderson – both employees and agents of the respondent, City of Tacoma. CP 6-7;302-306. Mr. Briehl was director of the department that Ms. Brown worked for within City of Tacoma and Mr. Anderson worked as the City Manager for the City of Tacoma. Id. As such, given that the lawsuit in this case was against the City of Tacoma, both statements were made by agents of the City, working in their professional capacity. Therefore, as it relates to Ms. Brown’s underlying lawsuit against the City, the statements were not hearsay, rather they were admissions by a party opponent.

## **II. ARGUMENT**

As this Court is aware, Ms. Brown’s case was dismissed at the trial court level by way of summary judgment. While the summary judgment standard has been previously set forth in petitioner’s opening brief, it is important to emphasize that, as it relates to employment cases, summary judgment should rarely be granted, Sangster v. Alberton’s, Inc., 99 Wn.App. 156, 160, 991 P.2d 674 (2000), and only minimal evidence should be required to overcome such a motion. See Schmidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410-1411 (9<sup>th</sup> Cir. 1996).<sup>1</sup>

“Summary judgment in favor of the employer in a discrimination case is often

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<sup>1</sup> Washington courts have held that federal law is instructive with regard to our state discrimination laws. Dedman v. Pers. Appeals Bd., 98 Wn.App. 471, 478, 989 P.2d 1214 (1999).

inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury.” Davis v. West One Automotive Group, 140 Wn.App. 449, 456, 166 P.3d 807, 811 (2007)(citing Kuyper v. Dep’t of Wildlife, 79 Wn.App. 732, 739, 904 P.2d 793 (1995), *review denied*, 129 Wn.2d 1011 (1996)).

Here, where Ms. Brown presented evidence of a conversation between two City of Tacoma officials where it was stated by the City Manager that “One of you is going to get fired over this,” (CP 302), Ms. Brown presented sufficient facts to overcome summary judgment and this Court should reverse the trial court’s dismissal of her case.

*A. The statement in question was not hearsay.*

The City has argued that Ms. Brown’s case relies on “double hearsay.” Brief of Respondent at 10. However, first, because the statement was not hearsay, but rather an admission by a party opponent and the statement of a speaking agent, the trial court should be reversed. Second, because genuine issues of material fact can be created by hearsay statements – and therefore withstand a motion for summary judgment – depending on the circumstances, the trial court should, respectfully, be reversed. See Turngren v. King County, 104 Wn.2d 293, 705 P.2d 258 (1985); see also Meadows v. Grant’s Auto Brokers, Inc. 71 Wn.2d, 880-82, 431 P.2d 216 (1967).

ER 801(d)(2) provides that an admission by a party-opponent is not hearsay. ER 801(d)(2). Specifically, the rule states:

A statement is not hearsay if –

...

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party . . .

See ER 801(d)(2); Lockwood v. A C & S, 109 Wn.2d 235, 261, 744 P.2d 605 (1987).

Admissions, clearly, are not hearsay. For a speaking agent's statement to meet these requirements, "the declarant must be authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party." Id. at 262; Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wn.2d 153, 163, 422 P.2d 496 (1967); Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980). If the declarant is authorized to make the statement, regardless of whether the statement was opinion or fact, the statement should not be excluded as hearsay. Lockwood, 109 Wn.2d at 262-63.

ER 805 addresses hearsay within hearsay, and states as follows:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Here, Susan Brown testified that John Briehl, Executive Director of the City of Tacoma Human Rights and Human Services Department was told by Mr. Anderson, the Tacoma City Manager, that somebody would be fired over Ms. Brown's and Mr. Gavaldon's complaint about Ms. Strong Moss. As "Executive

Director” of the City of Tacoma’s Human Rights and Human Services Department, it surely cannot be argued that Mr. Briehl did not possess the authority to speak on behalf of the City of Tacoma. Additionally, Mr. Anderson’s statement about somebody losing their job as a result of the complaint is a crucial party admission as the City of Tacoma is the respondent and Mr. Anderson was the City Manager who made the statement.

Because this statement, even if communicated to Ms. Brown through a third person (Mr. Briehl), is clearly an admission by a party-opponent, it is, by definition, not hearsay under ER 801(d)(2). As such, it is grounds to support the inference that Ms. Brown’s firing was in retaliation for her complaint. Because summary judgment should not occur when material facts or inferences from material facts exist – especially in employment cases – this court should, respectfully, reverse the decision of the trial court.

*B. The statement made by Mr. Anderson – taken in the light most favorable to Ms. Brown – is more than enough to show that her firing for improper computer usage constituted the pretext for her wrongful termination.*

Respondent, in its briefing, has gone to great lengths to justify the differential treatment received by Ms. Brown in an attempt to show this Court that her termination was justified. However, respectfully, the issue here is not whether the termination was justified, but rather whether Ms. Brown has presented sufficient material facts such that summary judgment was improper.

As such, this Court need look no further than petitioner’s opening brief where the material facts of Ms. Brown’s case – specifically addressing her complaint about Ms. Strong Moss, the subsequent mediation, the statement from

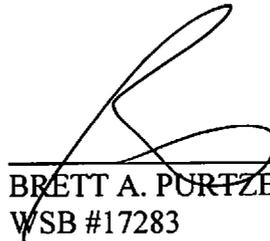
Mr. Anderson to Mr. Briehl and the City's investigation into computer usage and differential discipline towards Mr. Briehl and Ms. Brown – are set forth. Where it was pre-determined that an employee would be fired because of the complaint about Ms. Strong Moss, and a termination did occur – the inference is that the stated reason for the termination was the pretext. In other words, regardless of the City's attempt to prove the merits of Ms. Brown's termination, as it relates to whether it was error to dismiss her case by way of summary judgment, because she has shown material facts suggesting "somebody was going to get fired" for the complaint, she has shown the possibility of a pretextual motive and thus, this Court should, respectfully, reverse the trial court.

### III. CONCLUSION

Based upon the aforementioned, Ms. Brown respectfully urges this Court to reverse the trial court's order granting summary judgment in favor of the City of Tacoma and Jacqueline Strong Moss.

RESPECTFULLY submitted this 21 day of March, 2013.

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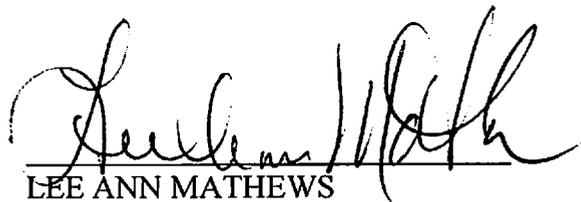
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 21<sup>st</sup> day of March, 2013.

  
LEE ANN MATHEWS

# HESTER LAW OFFICES

**March 21, 2013 - 11:01 AM**

## Transmittal Letter

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