

NO. 44295-7-II

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

MARTHA LEAH WOODS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, and
TERRI VAN AUSDLE and "JOHN DOE" VAN AUSDLE and their
marital community,

Respondents.

STATE OF WASHINGTON
BY _____
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COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In 2005, the Department of Corrections (Department) entered into a settlement agreement with Ms. Martha Woods concerning her allegations she was being discriminated against by her supervisor. As part of the agreement, Ms. Woods was transferred to a new unit. During the course of her training in the unit, Ms. Woods would claim “discrimination” when her front line supervisor, Ms. Terri Van Ausdle, attempted to address error rates or other work related issues. Prior to completing her 12 month trial period, Ms. Woods left the unit in August 2006 on a Labor and Industries claim for a previous back injury. In an attempt to get a new supervisor, Ms. Woods sought to revert to a secretary supervisor position in the spring of 2007.

The reversion process under the Collective Bargaining Agreement (CBA) allows an employee to transfer to a vacant funded position at or below their pay grade. Ms. Woods had been out of the office for almost a year due to a back injury. Ms. Woods failed to provide the Department with any medical information indicating she was capable of performing the essential functions of the secretary supervisor position with or without an accommodation.

Simultaneously, Ms. Woods was certifying to the Department of Labor and Industries she was incapable of working at any job. Unable to

determine if Ms. Woods was capable of performing the job with or without accommodation, Mr. Armando Mendoza, the regional director, offered the option to be placed on the internal lay-off register per the terms of the CBA. Ms. Woods did not place her name on the lay-off register and ultimately filed this lawsuit.

The trial court properly granted summary judgment for five reasons. Accordingly, this Court can affirm summary judgment for each of these reasons.

First, the trial court properly granted summary judgment because the Department did not breach any terms of its settlement contract with Ms. Woods. The plain language of the contract does not require a formal training plan be developed and the contract does not contain a “time of the essence” clause requiring Ms. Woods’ training needs be determined by a date certain. Ms. Woods was provided extensive training during the time she worked in the Records Unit and the trial court correctly concluded there was no breach of the terms of the contract.

Second, the trial court properly granted summary judgment because Ms. Woods was not subject to a hostile work environment. Ms. Woods was not subject to a steady barrage of disparaging remarks or jokes based on any real or perceived disability during the time she worked in the Records Unit. Appellant has provided no evidence that once she left

the Records Unit any alleged hostile behavior was imputable to the Department either. Ms. Van Ausdle was a low level front line supervisor and there is no evidence in the record showing Ms. Woods ever claimed or reported to the Department that she was touched by Ms. Van Ausdle during the time Ms. Woods worked in the Unit or afterwards. Most importantly, there is no admissible evidence in the record showing any of the alleged behavior the Appellant complained of was based on any discriminatory animus so the trial court properly granted summary judgment on Appellant's hostile work environment claim.

Third, the trial court properly granted summary judgment because Ms. Woods was not subject to disparate treatment or retaliation. Ms. Woods bases these liability claims on the results of the reversion process which ended in Mr. Mendoza offering to place her on the internal lay-off register per the terms of the CBA. Mr. Mendoza made this offer because he was unable to determine if Ms. Woods was capable of performing the secretary supervisor position she was seeking to revert to with or without an accommodation. Ms. Woods failed to provide the Department with any medical documentation stating she could perform the essential functions of the position with or without an accommodation. Ms. Woods' claims were appropriately dismissed because (1) she failed to show she was treated differently than a non-protected comparator during the process and

(2) she failed to show Mr. Mendoza's decision was pretextual or illegitimate. Mr. Mendoza lacked any information to offer her a reversion option so he offered Ms. Woods the only other option dictated by the CBA, which is to be placed on the internal lay off register.

Fourth, the trial court properly granted summary judgment because the Appellant's negligent hiring and supervision claims are duplicative of her overall discrimination claims. Since Ms. Van Ausdle was acting within the scope of her employment any liability would be based on the agent principle relationship. Therefore, vicarious liability theories of negligent hiring and supervision are inapposite.

Finally, the trial court properly granted summary judgment on Ms. Woods' failure to accommodate claim because she failed to present any evidence she could have performed any job with or without an accommodation. The trial court properly concluded the claim failed because Ms. Woods was not only claiming she was incapable of working at any job to secure Labor and Industries benefits, there is no evidence in the record showing she was capable of performing the job she wanted, the secretary supervisor position, with or without an accommodation.

The Department as a matter of law was not required to provide Ms. Woods a new supervisor, which was part of her request for light duty, and

there is no evidence in the record that a light duty position was available for her. As such, summary judgment was appropriate.

Based on these reasons the trial court properly granted summary judgment and the ruling should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the trial court properly granted summary judgment on Appellant's breach of contract claim when the terms of the contract did not require a formal training plan be developed, there is no "time of the essence" clause requiring her training needs be determined by a date certain and Ms. Woods was provided extensive training throughout the time she worked in the Records Unit?

2. Whether the trial court properly granted summary judgment on Appellant's reasonable accommodation claim when she failed to provide the Department with any information showing she could perform the essential duties of the secretary supervisor position with or without a reasonable accommodation?

3. Whether the trial court properly granted summary judgment on Appellant's disparate treatment and retaliation claims when there is no evidence in the record Woods was treated differently than a non-protected comparator during the reversion process and Ms. Woods was claiming to

the Department of Labor and Industries (L&I) to secure benefits that she was incapable of working at any job?

4. Whether the trial court properly granted summary judgment on Appellant's disparate treatment and retaliation claims when Mr. Mendoza's decision to offer to place Ms. Woods on the internal layoff register was based on a legitimate business purpose?

5. Whether the trial court properly granted summary judgment on Appellant's hostile work environment claim when there is no evidence the alleged behavior was based on any discriminatory animus?

6. Whether the trial court properly struck Dr. Namie's declaration from the record when his opinions that Ms. Woods had been subjected to a hostile and discriminatory work environment had never been disclosed during discovery despite the case being in litigation for over three years?

III. COUNTER STATEMENT OF THE FACTS

As part of a settlement agreement to resolve Ms. Woods' allegations of discrimination while she worked as a secretary supervisor at Progress House, the Department agreed to transfer Ms. Woods to the Records Unit located in Lakewood, Washington. CP at 25-27. Ms. Woods began working in the Records Unit on September 12, 2005.

A. The Work Of The Records Unit

The Records Unit is responsible for time sensitive, detail oriented legal work. CP at 145-46. The primary responsibility of the Department's Records Unit is to enter offender Judgments and Sentences (J&S) into OBTS. CP at 145-46. OBTS is a computer system used by community corrections officers to track conditions placed by the courts and community corrections officer among other things. CP at 145-46.

The information placed into the computer needs to be accurate so the community corrections officers can properly track court imposed conditions. CP at 145-46. The Records Unit also take fingerprints of offenders on field supervision, handles the processing of public disclosure requests and monitors escapes, apprehensions, and warrants. CP at 145-46. In addition, the Unit is responsible for making sure supervision end dates are correct and notifying law enforcement and victims when an offender is being released. From time to time, the unit staff is also called upon to testify in court about records maintained by the Unit. CP at 145-46.

B. Ms. Woods Begins Working At The Unit And Is Provided Extensive Training

During the first couple of months, Ms. Woods primarily was responsible for records copying and filing. CP at 146 ll. 16-18.

Additionally, she studied the Records Guide which outlines office procedures concerning the input of records into the system. CP at 146 ll. 16-18.

At the end of November 2005, Ms. Van Ausdle became Ms. Woods' supervisor. The supervisor position was a represented position under the collective bargaining agreement. As Ms. Woods' supervisor, Ms. Van Ausdle was required to evaluate Ms. Woods' work. CP at 15 ll. 21-24. Ms. Van Ausdle did not have the authority to hire, fire or make disciplinary decisions about Ms. Woods' pay. CP at 15 ll. 21-24.

Ms. Van Ausdle drafted a formal training plan, reviewed the plan with Ms. Woods, and on December 5, 2005, Ms. Woods started receiving training per the plan. CP at 146 ll. 22-23. Trainings were conducted by different members of the Unit. CP at 147 ll. 2-3.

At the end of January 2006, Ms. Van Ausdle began formulating Ms. Woods' four month trial service evaluation. CP at 147 ll. 13-20. The discussion of the evaluation occurred in a number of different meetings. CP at 147 ll. 13-20. The draft evaluation noted Ms. Woods had undergone training in a number of areas and was doing well in handling special batch reports. CP at 145. It also noted some areas where Woods needed to improve, such as not being overly talkative and properly handling criticism. CP at 148 ll. 11-15.

During the meetings, Ms. Woods questioned if her co-workers were attempting to sabotage her. CP at 147 ll. 17-18. Ms. Van Ausdle was concerned by this and advised Ms. Woods that she needed to move past whatever occurred in her last job. Ultimately, Ms. Van Ausdle referred Ms. Woods to the Employee Assistance Program as an attempt to assist her in moving past whatever occurred in her former job, not because Ms. Van Ausdle perceived Ms. Woods as suffering from a mental disability. CP at 147 ll. 22-24.

In early February 2006, Ms. Woods submitted approximately 250 typed pages of questions relating to her review of the Records Guides. CP at 148, ll. 7-10. The Unit provided written responses to Ms. Woods. CP at 148 ll. 9-10.

During the spring of 2006, Ms. Woods continued to undergo training in the Unit. Trainers observed Ms. Woods would spend time retyping training materials and making cheat sheets which were inaccurate and led her to make mistakes. CP at 148 ll. 23-26. Ms. Van Ausdle documented the errors. CP at 159-68, 174-75. As an example, in a review of Ms. Woods' work for the first week of May 2006, Ms. Woods only completed entry of six judgment and sentences. She had a 70 percent error rate. CP at 149 ll. 11-19. This is well below office expectations both in volume of work and error rate.

Ms. Woods continued to have work performance problems. Her error rates were considerable even for someone who was new to the job. CP at 150 ll. 16-22. Even though she had undergone training, she still had trouble handling the essential functions of the job. CP at 150 ll. 16-22. Ms. Van Ausdle continued to document those errors and address them with Ms. Woods. CP at 150 ll.16-22. Errors made in the Records Unit can have serious consequences. For example, an offender's civil rights could be violated if their release date is not properly recorded.

In June 2006, Ms. Van Ausdle wrote a memo of concern to Ms. Woods outlining her work problems and identified areas she needed to improve in. Ms. Woods filed a grievance in June 2006 alleging discrimination. CP at 16 ll.1-4. An investigation of this claim was performed by the Department. The investigation noted workplace disagreements between Ms. Woods and her supervisor. CP at 16 ll. 5-8. The report did not note any claim alleging Ms. Van Ausdle touched Ms. Woods either in the breast area. CP at 29-41. Likewise, the investigation did not find any evidence of discrimination. CP at 29-41.

C. Ms. Woods Seeks To Revert In 2007

In early August 2006, Ms. Woods went on leave for an L&I claim for a previous back injury. She had not completed her 12 month trial service in the Unit. In the spring of 2007, Ms. Woods was still out on L&I and her

doctor was advising L&I she should not return to work in the Records Unit claiming it was too stressful for Ms. Woods to be supervised by Ms. Van Ausdle. CP at 96.

At that time, Ms. Woods began inquiring about reversion options. Under the Collective Bargaining Agreement a person on trial service may voluntarily seek reversion at any time to a funded permanent position in the same agency that is vacant or filled by a non-permanent employee and is at or below the employee's previously held job classification. CP at 17 ll. 12-16.

The employer will determine the position the employee may revert to and the employee must have the skills and abilities required for the position. CP at 17, ll. 17-20. If possible, the reversion option will be within a reasonable commuting distance for the employee. CP at 17 ll. 17-20. If there are no reversion options, the employee may request that his or her name be placed on the agency's internal layoff list for positions in job classifications where he or she had previously attained permanent status. CP at 17 ll. 21-23. Ms. Woods was informed by her union representative, Steve Chenoweth, that a secretary supervisor position was vacated and that it was a possible reversion option. CP at 61.

On June 9, 2007, Ms. Woods formally requested reversion to her former position as a secretary supervisor in an email. CP at 61. On June

13, 2007, the Department informed Ms. Woods it was considering her e-mail as a formal request to revert. CP at 61. Ms. Woods was aware the reversion process included the potential of being placed on the internal layoff register if a reversion option was not available. CP at 760-61. Ms. Woods did not withdraw her request to revert.

The Department forwarded a copy of the position description to Ms. Woods so that her doctor could review the job description to determine if she was physically capable of handling the essential functions of the position. CP at 66. Ms. Woods also applied for the position online using the Department's e-recruiting system. The announcement states the position was for a secretarial supervisor support at the Department's Peninsula Work Release and Olympia Work Release. CP at 485-512.

The Secretary Supervisor announcement outlined the requirements/essential functions of the job. On pages 01510054 and 01510055, under "Duties" the announcement states "This position will provide complex secretarial support for the Peninsula Work Release" . . . "and Olympia Work Release. The position may be based at either facility depending on workload and needs of the facility and may require extensive driving between work locations. This position provides complex secretarial support for Peninsula Work Release and may require extensive traveling as determined by the supervisor." CP at 457-85.

Martha Woods submitted an application for this recruitment on June 11, 2007. Her applicant's profile notes she was willing to travel. CP at 457-512. On June 28, 2007, Ms. Woods was advised the position would be based out of the Olympia Work Release office. CP at 19 ll. 5-6.

On July 9, 2007, Ms. Woods informed Bonnie Francisco, the SW Region Human Resources Manager, that her doctor's appointment was scheduled for July 13, 2007, and that she would follow up with Ms. Francisco regarding the doctor's determination if she was capable of performing the essential functions of the job. CP at 19 ll. 10-13. Ms. Woods met with Dr. Finkleman on July 12 and July 26, 2006. CP at 98-104. He does not recall reviewing the job description and his records do not indicate he provided her a release indicating she could perform the essential functions of the job with or without an accommodation. CP at 98-104.

By the end of July, the Department still had not received any information from Ms. Woods or her medical provider that she was capable of performing the essential functions of the position, with or without accommodation. CP at 19 ll. 13-17. Armando Mendoza, the Regional Field Administrator, then wrote to Ms. Woods that he lacked sufficient

information to provide her a reversion option.¹ CP at 79-80. He then advised her per the Collective Bargaining Agreement she could request her name be placed on the agency's internal layoff list for positions in her classification. CP at 79-80.

Ms. Woods never supplied the Department with a release from her doctor indicating she was capable of performing the job with or without an accommodation during the time the Department was attempting to fill the position. Additionally, Ms. Woods continued to declare to the Department of L&I she was incapable of working at any job and received time loss benefits. CP at 765-767, 774-776. Ms. Woods failed to request her name be placed on the internal layoff register so that she could be considered for other positions and instead she filed suit.

IV. PROCEDURAL HISTORY

Appellant filed her lawsuit on September 30, 2009. CP at 3-7. Appellant initially responded to Respondents' discovery requests March 8, 2010. CP at 779-790. On June 1, 2012, Respondents filed a summary judgment motion. CP at 204-32. After a number of continuances, Appellant filed a reply on October 2, 2012. CP at 267-88. The Respondents filed a reply on October 8, 2012. CP at 435-56. Appellant filed an amended response on November 2, 2012. CP at 513-42. Dr.

¹ The position was ultimately filled on or about October 1, 2007.

Namie's opinions were disclosed for the first time in a declaration submitted with the amended brief. Respondents filed a supplemental reply which contained a motion to strike Dr. Namie's report for not being disclosed in a timely manner and for containing inadmissible conclusory factual and legal opinions. CP at 791-810. The summary judgment hearing was conducted on November 9, 2012, dismissing all of Appellant's claims and striking Dr. Namie's report. CP at 828-30.

V. LAW AND ARGUMENT

A. **The Trial Court Correctly Granted Summary Judgment Because There Was No Breach Of The Settlement Contract**

Appellant asserts the trial court erred in granting summary judgment by arguing the Department failed to collaborate with her in establishing her training needs by September 30, 2005. This assertion is without merit.

A review of a trial court's ruling granting summary judgment is de novo. *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 993 P.2d 259 (2000). A trial court properly grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

1. **The Trial Court Properly Granted Summary Judgment Because The Contract Did Not Require The Department To Develop A Formal Training Plan**

Courts interpret settlement agreements in the same way it interprets other contracts. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164

Wn.2d 411, 424 n.9, 191 P.3d 866 (2008). In doing so, the court must attempt to determine the intent of the parties by focusing on the objective manifestations as expressed in the agreement. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The subjective intent of the parties is generally irrelevant if the court can impute an intention corresponding to the reasonable meaning of the actual words used. *Id.* at 503-04.

The settlement agreement stated, in pertinent part:

The training needs for Martha Woods shall be established between the supervisor of position 1225 and Martha Woods no later than September 30, 2005. The Department of Corrections recognizes that Martha Woods will need job-specific training. The Department of Corrections agrees that in the absence of any other problem, lack of training or experience alone, will not be sufficient reason for reversion within the first six months of trial service. Any dispute regarding the necessity for training shall be finally determined by the second line supervisor. Martha Woods waives any further right of appeal or right to grieve the decision.

In this case, Appellant initially argued to the trial court the Department breached the contract because a “formal training plan” was not developed by September 30, 2005. CP at 253. This claim lacks merit because the plain language of the contract does not create a duty to develop a formal training plan. CP at 25-27. The trial court correctly concluded there was no breach because Appellant failed to show the

parties intended to create such a duty which is an essential element of her claim. *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

2. The Trial Court Properly Granted Summary Judgment Because The Settlement Did Not Contain A “Time Is Of The Essence” Clause

Faced with the fact the plain terms of the contract did not create a duty to develop a formal training plan, Appellant abandoned the previous argument and claimed in an amended response that the Department breached the contract by failing to establish her training needs by September 30, 2005. CP at 541. The trial court properly determined this theory lacked merit as well because (1) the contract does not contain a “time is of the essence” clause and (2) Ms. Woods was provided extensive training during the time she worked in the unit. CP at 25-27, 170-172.

It is generally accepted that a party need not perform on the precise day stated in the contract unless time is of the essence. *Calamari & Perillo, Contracts* § 11-18 at 432 (5th ed. 2003). If time is not of the essence, a reasonable delay does not constitute a material breach. *Id.*

Here, the trial court properly granted summary judgment because Ms. Woods was provided extensive training and the contract did not contain a “time is of the essence” clause. As part of her training the Appellant initially reviewed the records guides in order to learn the rules concerning her new job. In December 2005, she then began more

formalized training with multiple members of her Unit. CP at 147, 170-172.

Contrary to Appellant's assertions before the trial court, the contract did not create a duty to "establish" her training needs precisely on September 30, 2005. Frankly why would it? Ms. Woods was in a 12 month trial service period and it is not unreasonable that a supervisor would have to establish, modify or reassess an employee's training need through out that time. CP at 25.

3. The Trial Court Properly Granted Summary Judgment Because It Was the Department's Decision Whether Training Was Needed Per the Terms of the Contract.

Appellant's claim also lacks merit because the final decision of whether Ms. Woods needed additional training was to be decided by the Department per the terms of the contract. There is no evidence in the record Ms. Woods objected to her experience in the unit including the training she had received during the first couple months of her new job.² But if she had felt she needed more training, the contract provided her an express remedy to address the training issue. Specifically the contract states:

Any dispute regarding the necessity of training shall be finally determined by the second line supervisor. Martha

² In fact, Ms. Woods nominated the records unit for a Team Excellence Award. CP at 147.

Woods waives any right of appeal or right to grieve the decision.

While there is no evidence in the record Ms. Woods objected to the training being provided to her during the fall of 2005, per the contract she waived any right to sue over the training provided because ultimately the necessity of training shall be finally determined by her second line supervisor per the terms of the contract.

The plain language of the contract does not create a duty for the Department to collaborate or seek input from Ms. Woods in determining what training she needed. But again, even if the express terms of the contract required input from Ms. Woods, which it does not, the contract clearly states any dispute over the need for training was to be resolved by a second line supervisor. CP at 26.

More importantly, Ms. Woods was provided extensive training. In addition to her reading the manuals and having one-on-one trainings with members of the unit, the entire unit addressed the 250 pages of questions Ms. Woods generated concerning the records guide. CP at 148, 170-172.

Implicit in Appellant's argument is the assertion the express language of the contract provided a guarantee Appellant would be able to successfully perform the job. The plain language of the contract contained

no such guarantee and, as such, the trial court properly granted summary judgment.³

B. The Trial Court Properly Dismissed Appellant’s Reasonable Accommodation Claim Because She Failed To Provide The Department Any Information From Which It Could Determine Whether Ms. Woods Could Perform The Essential Functions Of The Secretary Supervisor Position

Appellant asserts the trial court erred in granting summary judgment because the Department failed to accommodate her request for light duty in the spring of 2007 while she was on L&I. This claim is without merit.

The Washington Law Against Discrimination (WLAD) requires employers like the Department of Corrections to make reasonable accommodations for disabled employees. *Cripe v. City of San Jose*, 261 F.3d 877, 881 (9th Cir. 2001); *Dean v. Mun. of Metro. Seattle-Metro*, 104 Wn.2d 627, 632, 708 P.2d 393 (1985). The requirement to accommodate, however, is not without limit.

The WLAD’s prohibition against disability discrimination does not apply if the disability prevents the employee from performing the essential functions of his or her position. *See* WAC 162-22-045; *Dedman v. Pers. Appeals Bd.*, 98 Wn. App. 471, 486, 989 P.2d 1214 (1999). Further, an employer is not required “to offer the employee the precise

³ Ms. Woods never failed her 12 month trial period. She left the unit based on an unrelated Labor and Industries claim. CP at 15.

accommodation he or she requests,” or to create a job where none exists. *Dedman*, 98 Wn. App. at 485 (quoting *Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993)). The employer need not necessarily grant the employee’s exact request. It need only reasonably accommodate the disability. *Snyder v. Med. Serv. Corp. of Eastern Wash.*, 98 Wn. App. 315, 326, 988 P.2d 1023, 1030 (1999).

Reasonable accommodation also envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee’s capabilities and available positions. *Maxwell v. State Dep’t of Corr.*, 91 Wn. App. 171, 180, 956 P.2d 1110 (1998). At the same time, the employee has a duty to cooperate with the employer’s efforts at reasonable accommodation by explaining their disability and its limitations. *Id.* at 180. Ms. Woods failed to satisfy that duty.

1. The Trial Court Properly Granted Summary Judgment Because Appellant Failed To Provide The Department With Any Information So It Could Determine She Was Capable Of Performing The Secretary Supervisor Position With Or Without An Accommodation

Before the trial court, Appellant argued the Department failed to provide her a reasonable accommodation so she could revert to a secretary supervisor position and would not have to return to work in the records

unit with Ms. Van Ausdle. CP at 532. The trial court properly granted summary judgment.

There is no evidence in the record she requested a specific accommodation that was both reasonable and available. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 643, 9 P.3d 787, 795 (2000); *MacSuga v. Cnty. of Spokane*, 97 Wn. App. 435, 983 P.2d 1167 (1999). This must happen at the summary judgment stage. *Dean*, 104 Wn.2d at 637. As a matter of law, the Department was not required to provide her a new supervisor. *Pulcino*, 141 Wn.2d at 644; *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 241, 35 P.3d 1158 (2001).

More to the point, the trial court properly dismissed Appellant's accommodation claim because she failed to provide the Department any information to determine if she could perform the essential functions of the secretary supervisor position with or without an accommodation.

The fact the Appellant may have wanted a particular job is not relevant to whether the Department failed to supply her with a reasonable accommodation. Employers are not required to eliminate essential functions of a job or provide the employee with the exact accommodation they have requested. An employer meets its obligation by offering an accommodation that is reasonable, even if the offered accommodation is not what the employee desires. *Griffith v. Boise Cascade, Inc.*, 111 Wn.

App. 436, 45 P.3d 589 (2002) (employee not entitled to position she felt best met her career goals). It is fundamental to the accommodation process that the employee supplies sufficient information so that an employer can evaluate whether an accommodation may be needed. *Id.* at 444; *Wurzbach v. City of Tacoma*, 104 Wn. App. 894, 899, 17 P.3d 707 (2001).

It is possible Ms. Woods may attempt to argue in her reply Dr. Finkelman released her to the position. The Department objected to the admissibility of this statement at the trial court because it is hearsay. CP at 746. Additionally, it is not supported by the record.

Ms. Woods consistently certified to the Department of L&I during the entire summer and fall of 2007 she was incapable of working at any job. Based on her certifications, the Department of L&I issued appealable orders granting her time loss based on those certifications. CP at 767, 773-777.

Her claim she was incapable of working at any job to receive benefits precludes her reasonable accommodation claim under the doctrine of judicial estoppel. The doctrine of judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action. *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982). The doctrine of judicial estoppel goes to the integrity of the judicial adjudicative process. The trial court therefor properly granted

summary judgment because of Ms. Woods' certification she was incapable of working at any job in order to received time los benefits.⁴

Even if the doctrine of judicial estoppel does not outright preclude Ms. Woods from now claiming the Department failed to accommodate her, a close review of the record shows Appellant failed to provide the Department with any information from which it could determine Ms. Woods was capable of performing the secretary supervisor job, with or without an accommodation in June, July, August, and September 2007, when the Department was attempting to fill the position.

Lacking any documentation that Appellant or her doctor provided the Department any information from which it could determine if Ms. Woods could perform the job with or without an accommodation, the trial court properly concluded summary judgment was appropriate.

⁴ Appellant's assertion judicial estoppel does not preclude liability because it was not raised in the Respondents' opening brief on summary judgment is without merit. Appellant waived any objection by not raising an objection at the time the motion was heard. Further, Appellant should not be allowed to assert she was capable of performing a job when by her own admission she was not.

2. Granting Of Summary Judgment Was Appropriate Because There is No Evidence Ms. Woods Requested An Reasonable Accommodation That Was Available.

Appellant now asserts the Department failed to accommodate her because the Department did not provide her with a light duty position. This claims also lack merit.

In the spring of 2007, Ms. Woods was requesting she be provided with a new supervisor and that she be provided light duty. CP at 94, 96. A specific accommodation request must be both reasonable and available. *Pulcino* at 141 Wn.2d 629.

As a matter of law, the Department was not required to provide Ms. Woods with a new supervisor as part of an accommodation request. Further, there is no evidence in the record that a funded vacated position was available for Ms. Woods so the trial court properly granted summary judgment.

C. The Trial Court Properly Dismissed Appellant's Hostile Work Environment Claim

Appellant asserts the trial court erred in dismissing her hostile work environment claim. She focuses her claim primarily on the manner in which Ms. Van Ausdle, her front-line supervisor, addressed Ms. Woods' significant error rate and lack of productivity. In addition, Ms. Woods complains about incidents where Ms. Van Ausdle placed a hand on

Ms. Woods' shoulder in the spring of 2006 and an alleged one time incident in 2007 where Ms. Woods claims Ms. Van Ausdle walked up behind her. Ms. Woods' claim is without merit because there is no admissible evidence the actions complained of were extreme, imputable to the employer and based on any protected status.

Washington's Law Against Discrimination, RCW 49.60.180, prohibits discrimination based on a person's age, sex, marital status, sexual orientation, race, creed, color, national origin, or disability. To establish a prima facie case for a hostile work environment based on a perceived disability, a plaintiff must prove each of the following elements: (1) the harassment was unwelcome, (2) the harassment was because of an alleged disability, (3) the harassment affected the terms or conditions of employment, and (4) the harassment is imputed to the employer. RCW 49.60.180(3); *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985); *Fisher v. Tacoma Sch. Dist. No. 10*, 53 Wn. App. 591, 595-96, 769 P.2d 318 (1989).

- 1. The Trial Court Properly Granted Summary Judgment Because Appellant Failed To Submit Any Admissible Evidence Any Of The Alleged Behavior Was Due To Any Disability**

The trial court properly dismissed Appellant's harassment claim because the Appellant failed to show any actions of the Department or Ms. Van Ausdle were based on any perceived disability.

There is no evidence Ms. Woods was subjected to a steady barrage of jokes or negative comments based on any perceived or real disability during the time she worked in the Records Unit under Ms. Van Ausdle or afterwards. Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law." *Glasgow*, 103 Wn.2d at 407. For example, in *Bolden v. PRC Inc.*, 43 F.3d 545, 549-52 (10th Cir. 1994), the court dismissed a hostile work environment claim involving use of terms "nigger" and "honky" and a racist cartoon. Instead, there must be a steady barrage of opprobrious comments based on a person's alleged disability. In this case the trial court properly granted summary judgment because Ms. Woods provided no evidence she was ever subjected to a single joke or derogatory comment based on a perceived disability while working in the Records Unit, let alone a steady barrage of opprobrious comments based on any real or perceived disability.⁵

⁵ Appellant's reliance on hearsay statements or statements made in settlement discussions by her counsel should be rejected because they are inadmissible and were objected to by the Respondents. CP at 739. CP at 581-82, and 659 are inadmissible because they are hearsay and lack proper foundation. CP at 660-665 are also

Appellant's complaints over her disagreement with Ms. Van Ausdle's style of supervising or how Ms. Van Ausdle presented things to Ms. Woods lacks merit as well. Having to attend meetings with a supervisor or being told to consult training manuals before asking questions of a trainer is not evidence of a discriminatory environment either. Even if such circumstances could be objectively viewed as unpleasant, which they can't, Washington courts do not recognize a cause of action simply for workplace conflict and unpleasantness. *Bishop v. State*, 77 Wn. App. 228, 889 P.2d 959 (1995). (There is no cause of action against an employer for emotional distress arising out of what amounts to workplace and personality disputes between employees.)

While Ms. Woods may not have liked her supervisor addressing her failing work performance, the trial court correctly granted summary judgment because an employee does not establish discriminatory harassment simply because they allege they suffered embarrassment, humiliation or mental anguish. *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297-98, 57 P.3d 280 (2002). The laws against discrimination, including harassment, are not a code of "general civility." *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 786-89, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

inadmissible because they are settlement discussions authored by Appellant's counsel. Settlement discussions are not admissible. ER 408.

As noted by the U.S. Supreme Court in *Faragher*, 524 U.S. 775:

These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' . . . Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.' . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.

Id., 524 U.S. at 788 (internal citations omitted).

Appellant's reliance on a one time complaint that Ms. Van Ausdle pulled up a co-worker's low cut blouse to cover the worker's cleavage and complaints about Ms. Van Ausdle's management style approximately two years after Ms. Woods left the unit are misplaced as well.⁶ They lack merit because they do not show Ms. Van Ausdle's actions towards Ms. Woods were discriminatory.

To establish a claim of hostile work environment, the plaintiff must show not only the behavior was extreme and pervasive, they must show the behavior was because of discriminatory animus. A manager's rude, boorish and thoroughly obnoxious behavior, including tantrums is insufficient to establish a claim of harassment when a plaintiff fails to establish that they would not have been subjected to the harassment based on their perceived disability or other protected status. In *Adams*, the

⁶ Respondents generally objected to any evidence submitted by Ms. Woods concerning Ms. Van Ausdle's demotion which occurred in 2010. CP at 454.

manager vented his workplace rage to men and women. *Adams*, 114 Wn. App. at 297-98. Also, although the plaintiff showed that she, a woman, was the only one treated physically rough, she did not establish that the conduct was based on the boss's animus toward her as a woman. *Id.* at 298.

The complaints by other employee's don't establish Ms. Van Ausdle's alleged behavior toward Ms. Woods was due to any alleged disability. They do just the opposite. The evidence shows Ms. Van Ausdle's alleged behavior was not directed solely at Ms. Woods. In the investigation in 2009, another employee claimed Ms. Van Ausdle yelled at her, made unreasonable job demands and yelled at other employees, including a male in the office. CP at 669-709. This is fatal to Ms. Woods claim because it shows Ms. Van Ausdle's alleged behavior was not directed toward Ms. Woods based on any discriminatory animus.

Ms. Woods' reliance on her allegation Ms. Van Ausdle touched her on the shoulder in a meeting(s) and the claim Ms. Van Ausdle walked up behind her and Ms. Van Ausdle's belly touched Ms. Woods' leg also lacks merit. This argument lacks merit for three reasons.

First, the claim lacks merit because even in circumstances where the alleged harassing conduct is based on a disability, which is not the circumstance here, the alleged conduct must be *extreme* in order to alter the terms and conditions of employment. *Faragher*, 524 U.S. 775. A

plaintiff must also show the working environment was abusive from both an objective and subjective standpoint; not only did they perceive the atmosphere as abusive, but a reasonable person would also perceive it as such. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 885, 912 P.2d 1052 (1996). Touching a person on the shoulder and accidentally bumping into another person is not evidence of extreme conduct.

Second, these two alleged incidents are not imputable to the Department. There is no evidence in the record Ms. Woods contemporaneously complained about either of these two incidents. Ms. Van Ausdle was a front line supervisor and did not act as the “alter ego of Department.” The incidents therefor are not imputable to the Department. *See generally Glasgow*, 103 Wn.2d 401 at 407; *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 855-56, 991 P.2d 1182 (2000).

Third, this argument lacks merit because even if Ms. Woods had complained about these isolated incidents and these incidents could objectively be perceived as harassing, her allegations are far less egregious than a number of cases where the appellate courts have upheld the granting of summary judgment in favor of employers even when there was evidence of discriminatory statements coupled with physical contact.

For example, in *Washington v. Boeing*, 105 Wn. App. 1, 19 P.3d 1041 (2000), the court held that the workplace conduct was highly

offensive, but was not sufficiently pervasive to alter the conditions of employment. There, the employer referred to the plaintiff as “brillo head,” transferred her after a coworker remarked that she couldn't perform her job as well as a man and again after another coworker grabbed her buttocks, failed to provide her with training, and called her “dear” and “sweat pea.” *Boeing Co.*, 105 Wn. App. at 6, 10-3. The described events were not sufficiently pervasive and workplace-altering to be actionable harassment. *Id.* at 9-13.

Another example is *MacDonald v. Korum Ford*, 80 Wn. App. 877, 886-87, 912 P.2d 1052 (1996). In this case, the court granted summary judgment in favor of employer where one manager kissed plaintiff, another manager made two offensive comments to plaintiff including a comment about her breasts and brushed up against plaintiff, placing his hands on her back.

The incidents described by Ms. Woods are far less compelling. So in sum, the trial court properly granted summary judgment because the laws against discrimination, including harassment, are not a code of “general civility. *Adams*’ claims failed just as Ms. Woods’ claims fail because there is no evidence Ms. Van Ausdle’s behavior was based on the fact Ms. Woods had a real or perceived disability. *Adams*, 114 Wn. App. at 291.

D. The Trial Court Properly Dismissed Appellant's Claims For Retaliation Or Disparate Treatment Because To The Extent Her Claims Were Not Barred By The Statute Of Limitations She Failed To Establish The Prima Facie Elements Of A Claim, And There Were Legitimate Non-Discriminatory, Non-Retaliatory Reasons For The Actions She Complains Of

1. The Trial Court Properly Granted Summary Judgment Because Appellant's Claims Premised On Any Conduct Occurring Prior To July 30, 2006 Are Barred By The Statute Of Limitations

Discrimination and retaliation claims under the Washington Law Against Discrimination (WLAD) are governed by the general three-year statute of limitations for personal injury actions. *Antonius v. King Cnty.*, 153 Wn.2d 256, 103 P.3d 729 (2004); RCW 4.16.080(2). The applicable statute of limitations is an issue of law and is a proper subject for summary judgment. *Harris v. Alumax Mill Prods., Inc.*, 897 F.2d 400, 403 (9th Cir. 1990).

In the present case, Appellant served her complaint on September 30, 2009. She left the Records Unit due to an unrelated L&I claim in late July or early August 2006. Therefore, any claims based on acts occurring prior to July 30, 2006, are barred by the statute of limitations. Appellant's assertion of a continuing violation theory in her harassment claim does not apply here and does not toll the statute of limitations.

Even if these claims were not barred the statute of limitations, the trial court properly granted summary judgments because Appellant failed to establish a prima facie case concerning discrete incidents before and after she left the Records Unit in the summer of 2006.

2. Analytical Framework For Discrimination And Retaliation Claims

Our Supreme Court clarified and modified the correct standard of review for dispositive motions in employment cases in *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 23 P.3d 440 (2001). Under *Hill*, Washington courts continue to follow the basic evidentiary burden-shifting protocol established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Hill*, 144 Wn.2d at 180-81. In the typical case, where there is no direct evidence of discrimination or retaliation, the employee must satisfy the first intermediate burden by producing the facts necessary to support a prima facie case. *Id.* Unless a prima facie case is set forth, the employer is entitled to prompt judgment as a matter of law. *Id.*

Disparate treatment requires an individual to be singled out and treated less favorably on account of race, disability, color, religion, sex or national origin, than other similarly situated employees. *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985); *Jauregui v.*

City of Glendale, 852 F.2d 1128, 1134 (9th Cir. 1988). To establish a prima facie case of disparate treatment, plaintiff must show that (1) he or she is a member of a protected class; (2) he or she was treated less favorably in the terms and conditions of his employment; (3) he or she was treated less favorably than a similarly situated non-protected employee; and that (4) he or she and the non-protected comparator were doing substantially the same work. *Boeing Co.*, 105 Wn. App. 1. If there is no evidence that the plaintiff was treated less favorably than a similarly situated, non-protected employee, then there is no way for a jury to compare her situation to that of a similarly situated non-protected person, and the claim is properly dismissed. *Haubry v. Snow*, 106 Wn. App. 666, 677, 31 P.3d 1186 (2001).

To make out a prima facie case of retaliation, the plaintiff must show that (1) she engaged in statutorily protected activity, (2) adverse employment action was taken against her, and (3) there is a causal link between the activity and adverse action. *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002), citing *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862, 991 P.2d 1182, review denied, 141 Wn.2d 1017 (2000).

Only if the plaintiff can establish a prima facie case does the burden of production shift to the employer to articulate a legitimate, non-

discriminatory or non-retaliatory reason for the adverse employment decision. *Hill*, 144 Wn.2d at 181-82. Once such a reason is identified, the burden of production shifts back to the employee to show that the proffered reason is pretext. *Id.* “If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law.” *Id.* at 182.

Finally, even where an employee produces some evidence of pretext, other factors may still warrant judgment as a matter of law. *Hill*, 144 Wn.2d at 182-87. If an employee presents some evidence of pretext, the court must still consider whether additional factors undermine the employee’s competing inference of discrimination, justifying dismissal as a matter of law. *Id.* at 186. Those factors include:

- The strength of the employee’s prima facie case;
- The probative value of the proof that the employer’s explanation is false; and
- Any other evidence that supports the employer’s case and that properly may be considered on a motion for judgment as a matter of law.

Washington courts will dismiss the case where an employee’s evidence of pretext is weak:

When the record conclusively revealed some other, non-discriminatory 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 evidence that no discrimination had occurred, summary judgment is proper.

Milligan, 110 Wn. App. at 637, quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (internal quotations omitted); *Hill*, 144 Wn.2d at 184-85.

3. The Court Properly Granted Summary Judgment Because Appellant Was Not Subject To An Adverse Employment Action During The Time She Worked In The Records Unit

Even if Appellant could overcome the fact her claims of retaliation and disparate treatment based on circumstances before she left the Records Unit in August 2006 are barred by the statute of limitations, which she cannot, the trial court properly granted summary judgment because she was not subject to an adverse employment action.

One of the fundamental elements of establishing a prima facie case of retaliation or discrimination is establishing that the complaining party has been either discharged or subjected to an adverse employment action because, absent one of these two, the plaintiff does not have a claim. Washington courts have defined “adverse employment action.” According to our Supreme Court, discrimination requires “an actual adverse employment action, such as demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.” *Robel v. Roundup Corp.*, 103 Wn. App. 75, 10 P.3d 1104 (2000), *aff’d in part, rev’d in part by*, 148 Wn.2d 35, 74 n.24, 59 P.3d 611 (2002).

The Court of Appeals has recognized federal law as providing guidance, noting that an actionable adverse employment action must involve a change in employment conditions that is more than an “inconvenience or alteration of job responsibilities.” *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004), citing *DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995). The court noted the reduction of an employee’s workload and pay as an example of an actionable change in employment conditions. *Id.* In contrast, yelling at an employee or even threatening to fire an employee are not adverse employment actions. *Id.* Investigatory and disciplinary actions, although inconvenient, do not constitute adverse employment actions. *Id.* In *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1125 (2004), the court recognized that “an adverse employment action includes termination, demotion, reassignment with significantly different responsibilities, or significant reduction in pay or benefits.”

Being “isolated” or “yelled at” does not constitute adverse employment actions under existing Washington case law. *Kirby*, 124 Wn. App. at 465 (“An actionable adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities, such as reducing an employee’s workload and pay. Yelling at an employee or threatening to fire an employee is not

an adverse employment action” (internal quotation marks and citations omitted)); *Campbell v. State*, 129 Wn. App. 10, 22, 118 P.3d 888 (2005) (relying upon *Kirby*’s definition of “adverse employment action” in retaliation context).⁷

Here, the trial court properly granted summary judgment on Appellant’s claims of disparate treatment and retaliation for incidents which occurred prior to her leaving the Records Unit in July 2006 because she was not subject to an adverse employment action during that time. Ms. Woods was not a similarly situated employee compared with other members of the unit. She was in training and on a 12 month trial service. CP at 16. *McMillan v. Bair*, 304 Fed. Appx. 876, 877 (D.C. Cir. 2008) (“[P]robatinary trainees are not similarly situated to permanent employees for purposes of Title VII when an employer decides to retain or dismiss the probationary employee.”); *Elgabi v. Toledo Area Reg’l Transit Auth.*, 228 Fed. Appx. 537, 542 (6th Cir. 2007) (holding, as a matter of law, probationary employee not similarly situated to permanent employees); *Anderson v. Sedgwick Cnty.*, 150 Fed. Appx. 754 (10th Cir. 2005) (holding as a matter of law, probationary employee not similarly situated to permanent employees); *Steinhauer v. DeGolier*, 359 F.3d 481, 484-85 (7th Cir. 2004) (affirming dismissal of discrimination claim

⁷ To the extent Appellant complains of discrete incidents of misconduct prior to July 30, 2006, they are barred by the statute of limitations.

because, “Purifoy and Steinhauer were not similarly situated because Steinhauer was still on probation while Purifoy was not”).

Ms. Woods’ complaints about her front line supervisor requiring her to attend meetings to address her work performance and complaining about having multiple trainers is not evidence of an adverse employment action. Set forth above in the Statement of Facts, Ms. Woods did not meet performance expectations of Ms. Van Ausdle. Her supervisor and members of the unit met with her repeatedly, providing advice to remedy her work problems, and Ms. Van Ausdle documented her concerns. While Ms. Woods may have disliked Ms. Van Ausdle’s style, there is no evidence in the record identifying any similarly situated non-protected comparator who had performance issues similar to hers and was treated more favorably than she was.

More importantly, providing a trainee training or a supervisor addressing training issues with a trainee during their training period does not constitute an adverse employment action. Ms. Woods’ salary was never reduced and there is no evidence she was ever denied a promotion while working in the Records Unit. As such, the trial court properly concluded the Appellant could not sustain a disparate treatment or retaliation claims concerning anything which occurred prior to August 2006 because she was not subject to an adverse employment action.

4. The Trial Court Properly Granted Summary Judgment Because Appellant Failed To Establish A Prima Facie Case Of Disparate Treatment Based On Discrete Incidents Which Occurred After She Left The Records Unit

Appellant's disparate treatment claim based on the reversion process lacks merit also. The trial court properly dismissed Appellant's claims because she could not establish a prima facie case of discrimination or retaliation concerning the reversion process either.

Appellant's disparate treatment claim based on the reversion process fails because Appellant failed to provide any evidence she was treated differently than a non protected comparator when the Department was unable to determine if there was a reversion option available. The terms of the reversion process are dictated by the CBA. CP at 140-141. Appellant's union representative informed her about the opportunity and she voluntarily submitted her official request to revert. CP at 59. When the Department was unable to determine if there was a viable reversion option for her, the Department offered her the option to have her name placed on the internal lay off register which is dictated by the terms of the CBA. The trial court therefore properly concluded that Ms. Woods' disparate treatment claim lack merit because Ms. Woods could not establish a prima facie case. She failed to provide any evidence she was treated any differently than any other non-protected employee seeking

reversion where a viable reversion option can not be identified by the Department.

Likewise, Appellant's disparate treatment claim and retaliation claim fail because she failed to offer any admissible evidence Mr. Mendoza's decision to offer her the opportunity to be placed on the internal lay off register was pretextual or illegitimate. The admissible evidence shows Ms. Woods did not provide the Department with any information from which the Department could determine she could perform the secretary supervisor position with or without an accommodation. Woods continued to certify in the summer and fall of 2007 she was incapable of working at any job and the deposition testimony of Dr. Finkelman offered by Appellant does not state he released her to perform the position with or without an accommodation. CP at 655. The position needed to be filled and Mr. Mendoza simply followed the terms of the CBA. CP at 74. As a result, the trial court properly determined there was no evidence his actions were illegitimate and granted summary judgment.

E. Appellant's Negligent Hiring, Retention And Supervision Claims Were Properly Dismissed

The trial court properly dismissed Appellant's negligent hiring, retention and supervision claims because they are duplicative of appellant's overall discrimination claims.

When plaintiffs rely on the same facts to support both discrimination and negligent hiring or supervision claims, the negligent supervision claims are duplicative and are properly dismissed by the trial court. *See Gilliam v. Dep't of Soc. & Health Servs.*, 89 Wn. App. 569, 585, 950 P.2d 20, 28, *review denied*, 135 Wn.2d 1015, 960 P.2d 937 (1998). In *Gilliam*, the Court addressed the issue of whether a claim for negligent supervision was redundant given a stipulation that a state employee whose conduct was in question was acting within the scope of their employment. In *Gilliam*, plaintiff brought a claim of negligent investigation against the Child Protective Services Social Worker (Marrow) and a claim for negligent supervision against DSHS on the theory that the State negligently supervised the CPS worker.

The State acknowledged that its employee was acting within the scope of employment and that the State would be liable for her conduct. Thus, the Court held,

Under these circumstances a cause of action for negligent supervision is redundant. If Gilliam proves Morrow's

liability, the State will also be liable. If Gilliam fails to prove Morrow's liability, the State cannot be liable even if its supervision was negligent. We find no error in the trial court's dismissing the cause of action given the record before it.

Id. at 585.

In this case, Ms. Van Ausdle was acting within the scope of her employment during the relevant time periods at issue. Accordingly, under *Gilliam*, vicarious liability claims of negligent supervision and hiring are improper and misdirected. The trial court properly dismissed these claims.

F. Appellant's Argument That The Trial Court Should Not Have Stricken Dr. Namie's Report Is Moot And Without Merit

Appellant asserts the trial court erred in striking Dr. Namie's report. The claim is moot, without merit and does not provide a basis for reversing the ruling on summary judgment for several reasons.

1. Appellant's Argument Is Moot

Appellant claims the trial court erred in striking Dr. Namie's declaration without conducting a *Frye* hearing are moot. The argument is moot because Appellant did not provide argument or authority in her appeal brief claiming the court committed error when it struck Dr. Namie's opinions because they were not timely disclosed during discovery. App. Br. at 17-19.

It is well settled that a party's failure to provide argument and citation of authority in support of an assignment of error, as required under

RAP 10.3, precludes appellate consideration of an alleged error. Appellant has provided no argument or authority claiming the court improperly struck Dr. Namie's report because it was not disclosed in a timely fashion. Dr. Namie's report was only disclosed to the Respondents seven days before the motion was to be heard despite the motion pending for months and discovery requests having been served on the Appellant two plus years prior. CP at 791-810.

The failure to make argument and provide citation to authority in support of the argument is a waiver of any argument on the issue and renders Appellant's remaining arguments concerning Dr. Namie's report moot.

2. The Trial Court Properly Struck Dr. Namie's Report Because It Was Not Timely Disclosed During Discovery

Even if Appellant had not waived this issue, the trial court properly struck Dr. Namie's report because it was never timely disclosed in the course of discovery so that the Respondents had an opportunity to depose Dr. Namie and/or rebut his opinions.

A trial court's ruling on a motion to strike evidence not timely disclosed in the course of discovery is reviewed for an abuse of discretion. *King Cnty. Fire Prot. Dist. No. 16 v. Hous. Auth. of King Cnty.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Washington State and local court

rules require a party to disclose discovery in a timely manner. A trial court has broad discretion as to the sanction to impose for the violation of discovery rules. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355, 858 P.2d 1054 (1993).

If a party violates CR 26, the imposition of sanctions is mandatory. CR 26(g). The court in its discretion may sanction a party by striking evidence which was not previously disclosed during the course of discovery. Discovery sanctions based on the failure to comply with CR 26 do not require a showing that the party violated an order compelling discovery. CR 26(g); *Fisons*, 122 Wn.2d at 343. “A motion to compel compliance with the rules is not a prerequisite to a sanctions motion.” *Fisons*, 122 Wn.2d at 345.

Subjective intent of a party is not relevant either. An inadvertent error in failing to disclose an expert has been deemed willful as a “‘willful’ violation means a violation without a reasonable excuse.” *Id.* (citing *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985)).

In this case, the trial court properly struck Dr. Namie’s opinions because they were not timely disclosed during the course of discovery. None of the cases cited by Appellant require the court to conduct a *Frye*

hearing prior to striking previously undisclosed discovery. The report was first disclosed to the defense on November 2, 2012, when the Appellant filed her supplemental response. CP at 719. The Appellant never disclosed Dr. Namie's opinions in request to interrogatories despite the fact interrogatories requesting they disclose expert's opinions were first served on the Appellant years prior to the summary judgment. CP at 778-789. This severely prejudiced the Respondents from conducting discovery and providing any rebuttal expert testimony for the court to review. CP at 756. As such, the declaration was properly stricken.

Even if the court had not stricken the motion, Appellant's argument is moot because his opinions were inadmissible and were properly disregarded by the trial court. Dr. Namie's opinions were based on inadmissible hearsay, conclusory statements of fact and improper statements of law. A trial court's decision to disregard evidence which is inadmissible is reviewed de novo. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000).

CR 56(e) requires that affidavits or declarations submitted in a summary judgment proceeding must meet three requirements in order to be considered:

Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in

evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Conclusions of law and conclusory statements of fact must be disregarded. *P.U.D. of Lewis Cnty. v. WPPSS*, 104 Wn.2d 353, 361, 705 P.2d 1195 (1985); *Lambert v. Morehouse*, 68 Wn. App. 500, 507, 843 P.2d 1116, *review denied*, 121 Wn.2d 1022 (1993). A declarant's legal opinions or conclusions of law cannot be considered in a summary judgment motion. *Marks v. Benson*, 62 Wn. App. 178, 182, 813 P.2d 180 (1991); *Odessa Sch. Dist. 105 v. Ins. Co. of Am.*, 57 Wn. App. 893, 899, 791 P.2d 237 (1990). Speculative statements or argumentative assertions in declarations cannot be considered in passing upon motions for summary judgment. *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

Respondents not only requested the court to strike Dr. Namie's report because it had not been previously disclosed, the Respondents also objected to Dr. Namie's declaration because his opinions were inadmissible. The trial court properly disregarded his opinions because his declaration was based entirely on improper conclusions of law and fact. Dr. Namie is not the trier of fact thus his conclusions about whether Ms. Woods was subjected to a discriminatory environment are not admissible.

So in sum, Appellant's (1) failure to comply with RAP 10.3, (2) failure to provide Dr. Namie's report in a timely fashion (3) failure to provide opinions which are not based on inadmissible hearsay and improper conclusions of law and fact and (4) failure to provide any case law which supports the contention the court erred by not conducting a *Frye* hearing prior to striking the report for the above stated reasons amounts to a waiver of any appeal on this issue.

VI. CONCLUSION

The Pierce County Superior Court properly granted summary judgment in favor of the State of Washington and Department of Corrections. The order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of May, 2013.

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PROOF OF SERVICE

I certify that I had served a copy of the Brief of Respondents on appellant's counsel of record on the date below by having it served by e-mail and US Mail on the office of:

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

DATED this 15th day of, 2013, at Tacoma, Washington.



JODI ELLIOTT, Legal Assistant

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