

FILED
APR 19 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B.

No. 29043-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

KELLI GINN,

Appellant

vs.

STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION ,

Respondent

APPELLANT KELLI GINN'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT	1
II. CONCLUSION	7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 407, 693 P.2d 708 (1985).	1

I. ARGUMENT

Kelli Ginn writes this reply brief to correct errors made in the State of Washington's appeal brief.

At page 5, first paragraph, the State writes that Ginn claimed that "two male employees," in her presence, referred to hot dogs as penises and that Ginn never complained to management about the comment. The State of Washington avoids the fact that one of the "employees" making the rude comment was a manager. CP 889.

One of the State of Washington's principal arguments is that Kelli Ginn did not report Mark Brewster's offensive sexual remarks. The State fails to recognize why Ginn did not report most of Brewster's comments - Mark Brewster was the buddy of management, she knew that management would take no steps to correct the problem, and Brewster's conduct was so rampant that management knew or should have known of the conduct. The employer is responsible for the offensive remarks of an employee, who is not a manager, if the employer authorized, knew, or should have known of the harassment. **Glasgow v. Georgia-Pacific Corp.**, 103 Wn.2d 401, 407, 693 P.2d 708 (1985).

The State of Washington also ignores the fact that Kelli Ginn reported the presence of pornography and the conduct of Mark Brewster at least one time. CP 889. Kelli Ginn once complained to Tom Lenberg about Mark Brewster's behavior. CP 893. No action was taken. CP 893. Lenberg told Ginn that Brewster was her lead technician and she needed to follow his direction. CP 893. Thereafter, Brewster told Ginn that, if she had a problem, she was to come to him first. CP 890, 1. Ginn explained to Brewster that his demand was unreasonable. CP 891. Brewster ordered Ginn to adhere to his direction and required her to sign a letter that she would obey the chain of command. CP 891.

The State of Washington also ignores the following testimony: Managers Tom Lenberg and Tom Root went fishing with Brewster. CP 698, 778, 786. Lenberg's and Brewster's families barbecued together. CP 698. Department of Transportation Human Resources Consultant Julie Loughheed agreed that Department of Transportation managers played favorites depending upon their buddies. CP 719, 20.

The State of Washington, on page 19 of its brief, emphasizes that Kelli Ginn did not report the direction of management to her to be a cheerleader. But of course she did not report this incident to management,

because a manager was the one demanding she play the role of cheerleader. The State of Washington also claims that manager Tom Lenberg asked male employees to be a cheerleader. Kelli Ginn denies this testimony of Lenberg. The State presents no testimony from a man that Lenberg told him to be a cheerleader and no other employment evaluation, in which Lenberg encourages a male worker to be a cheerleader.

The State of Washington seeks to characterize Tom Lenberg's cheerleader comment as not relating to Kelli Ginn's being female. Nevertheless, when Tom Lenberg spoke to Ginn in person, Lenberg combined Ginn's gender with being a cheerleader. Beginning in 2003 and until Kelli Ginn left employment, Lenberg often commented that she was female and so she must be a cheerleader for management. CP 891. Kelli Ginn did not report these offensive comments, because she was told she could not complain up the chain of command. CP 891.

The State of Washington ignores the pervasiveness of the comments of supervisors and management in belittling female workers at the Department of Transportation. Kelli Ginn's direct supervisor Mark Brewster told Ginn that women do not belong working at the Department of Transportation. CP 892. Brewster commented to Ginn, ten to twenty

times, that women were not capable of performing the work. CP 892.

These comments by Mark Brewster offended Kelli Ginn and belittled her as a female worker. CP 892. On numerous occasions, Mark Brewster, in the presence of coworkers, said Kelli Ginn is stupid. CP 749, 50, 892.

The comments caused Kelli Ginn emotional distress and interfered in her work performance. CP 892.

Mark Brewster told Troy Riblett, when the two rode in a pickup, that, if Brewster had his way, no women would work at the Department of Transportation. CP 735, 6. Riblett mentioned the pickup comment to Kelli Ginn. CP 736. Riblett did not report the comment to upper management, because he “knew nothing would get done about it, so why bother?” CP 736, 7.

Ginn complained to manager Mike Kukes about Brewster’s teaching her how to drive a truck. CP 892. That same day, Brewster confronted Ginn as she left the shop. CP 892. Brewster stopped Ginn at the gate and said he was “fucking Brewster.” CP 892. Brewster told Ginn if she had a problem with him to talk to him alone. CP 892. When Shirley Bumpaous quit employment with the Department of Transportation, Mark

Brewster said to Riblett: "Well one done, two to go."¹ CP 736.

The State of Washington also ignores the facts that before Kelli Ginn began work at the Department of Transportation the working environment was already a cesspool. Management engaged in the rampant sexual slurs and ribbing.

The State of Washington boasts that it finally conducted an investigation into the conduct of Mark Brewster. But, the State ignores the fact that Department of Transportation management disagreed with and ignored the findings of the Department's own investigator Julie Loughheed. CP 682-3; 714-8. Management took no steps as a result of the investigation, other than to promote Mark Brewster. CP 694, 5, 779, 814.

The State of Washington argues that Kelli Ginn has no evidence that male employees, with injuries, were granted light duty, while management withheld light duty assignments from female employees. Nevertheless, Ginn personally observed that the injured male employees engaged in light duty assignments. CP 895. DOT Pasco employee Don Fast was granted light duty, for about three weeks, when he hurt his shoulder. CP 742, 743, 895. Fast worked around the office. CP 742.

¹ Presumably the "two" were the remaining female employees, Bobbie Sanders and Kelli Ginn.

Management also granted Jeff Bruce light duty, when Bruce twisted his ankle. CP 742, 3. Bruce was assigned the same tasks as Fast. CP 743. Ray Torres hurt his back and was granted light duty, for about three weeks. CP 742.

The State of Washington faults Kelli Ginn for failing to assign dates to the scandalous comments addressed to her or said in her presence. Nevertheless, Kelli Ginn knows that the "hot dog" comment occurred during the winter of 2004-5 and within the statute of limitations. CP 889. The cheerleader and women as inferior comments continued during Kelli Ginn's entire tenure with the Department of Transportation. CP 891.

The State of Washington ignores overwhelming testimony that the hostile work environment impacted Kelli Ginn's working conditions. Kelli Ginn encountered emotional distress at work, because of the harassment from Mark Brewster, Tom Lenberg, Tom Root, and Mike Kukes. CP 894. The stress at work caused her heart problems. CP 894. She felt as if she was having heart attacks. CP 894. Her neck and throat swelled; she encountered panic and anxiety attacks. CP 894. Ginn's doctor told her she had stress and he placed her on Proxycillin. CP 894. Kelli Ginn did not believe her physician that the hostile work environment

caused her physical symptoms, until, when off work for awhile because of carpal tunnel, the ailments went away. CP 894. When Ginn returned to work after two surgeries, she suffered panic attacks. CP 894. Because of the rude comments and threats from management, Kelli Ginn encountered difficulty in concentrating at her job. CP 894.

II. CONCLUSION

Kelli Ginn presented sufficient evidence to go to trial on her claims of hostile work environment, retaliation, discrimination in the conditions of employment, and constructive discharge. Ginn respectfully requests that the court reverse the superior court's granting of summary judgment.

Dated this 18th day of April, 2011.

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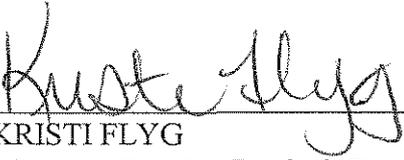
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CERTIFICATE OF SERVICE

I, Kristi L. Flyg, hereby certify that on the 18th of April, 2011, I caused to be served a true and correct copy of Appellant Kelli Ginn's Reply Brief, by the method indicated below, and addressed to the following:

- Hand-delivered
- First-Class Mail
- Overnight Mail
- Facsimile

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