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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 297004

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

ROCHELLE CORNWELL, APPELLANT

V.

ROSES AND MORE, a corporation, RESPONDENT

APPELLANT'S REPLY BRIEF

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In the Response Brief of Roses, the terms “undisputed”, “unrebutted”, and “uncontested” are stated fifteen times in a manner which is not consistent with the obligation of candor toward the tribunal. Respondent states “Defendant submitted six unrebutted declarations by Roses employees, managers, and customers...(Respondent Brief, page 12)...uncontested independent evidence that the customer complaints in fact happened (Respondent Brief, page 13)...the complaints are undisputedly established (Respondent Brief, page 17)...the undisputed declaration of Ms. Carr and Ms. French... (Respondent Brief, page 19).

We implore the court to please note the 6 page declaration of Ms. Cornwell in which she testifies as follows:

I have reviewed the declarations of the four (4) employees of Roses and More and the two (2) customers of Roses and More. They describe that my demeanor over the phone was horrible starting when I was hired in January, 2009 to the date of my termination. This is not true. It is incredible that I could be this horrible

beginning in January, 2009, and
nothing is recorded about it...they
have no record of monitored
calls...no record of bad phone
behavior in my employee file until
after I filed (an L&I) claim...(no)
counseling or warning at my
performance review (except) "Making
sure sales calls are being
made."...How can you not mention
phone conduct with customers when
Roses is concerned about (me
disclosing) my wages...or...singing
and dancing...(CP 77-82)

These false and conclusory Defense claims include the
baseless claim that Ms. Cornwell did not dispute that Rose's and
More decided to terminate her before her hand injury.
(Respondent's Brief, page 11) Roses states this despite Ms.
Cornwell's denial citing Roses own written records.

Respondent then asserts at page 11 that Ms. Cornwell
presented no facts other than her own personal opinion that her
work was satisfactory citing, *Griffith v. Schnietzer Steel*, 128

Wn.App at 447. Please recall that the employee Griffith admitted multiple costly failures and, in light of his admission, no other proof was necessary as noted in Appellant's opening brief. In the instant case, Appellant provided facts in the form of a written employee review by her employer which is a written record of Roses which is three months beyond the date Respondent now claims she was a poor employee and rude to customers and there are no written complaints in her performance review except "make sure sales calls are being made" (CP 82, Line 4). There is no record of unsatisfactory work performance. Clearly, this written record of the employer which Appellant notes is not the personal opinion of Rochelle but of Roses. The written record they have now is based upon declarations and affidavits which are dated eighteen months after the L&I claim.

In the repetition of the word "undisputed," Roses asks this Court to ignore what we assert are "facts" as follows;

1. Being rude to customers is a policy violation per Roses own written policy manual. (CP 78, Line 20-24)
2. Respondent claims rudeness to customers was known shortly after she was hired in January, however it was never recorded as required in her employee file. (CP 78, Line 14) This issue is not even addressed in the Response Brief of the employer.

3. Respondent claims there are “undisputed series of escalating customer complaints” (Respondent’s Brief, page 3) however, they were never mentioned in her 90 day review. In fact, the Respondent Attorneys never even mentioned the 90 day review in their brief. The complaints were documented 18 months after her L&I claim and are absolutely disputed by Rochelle (CP 82, Line 1-4)

While the words, undisputed, un-rebutted, and uncontested are repeated by Respondent fifteen times in total, Respondent does not devote one single word to explain:

- a) If all policy violations are required to be written and placed in the employee file, why are there none?
- b) Why is not one word written by the Respondent/employer about customer complaints in the 90 day (April) written review of her performance if the customer complaints began in January?
- c) Why is the only written comment about phones in the 90 day review, “MAKE SURE SALES CALLS ARE BEING MADE.”?

The Respondent's Brief is littered with conclusory claims such as (1) "the undisputed fact is that Roses did not terminate Ms. Cornwell because of the L & I claim." (Respondent Brief, page 1) (2) "An undisputed series of escalating customer complaints." (Respondent Brief, page 3)

Respondent then states at page 11, that Cornwell did not dispute that Roses decided to terminate her before her hand injury. (Respondent Brief, page 11) Appellant politely suggests this is a statement that continues to show a blatant disregard to the duty of candor owed to the tribunal as required by RPC 3.4. This issue has been disputed clearly in written documents and affidavits in response to the motion for Summary Judgment. Appellant reasonably expects that this will not be advanced again in written or oral argument in the Court of Appeals.

Appellant does not rest on simple denial of rudeness to customers. She has pointed out that this is a policy violation per Respondent's own documents. (CP 78) Pursuant to the employers own written documents, a policy violation is required to be in her employee file. (CP 78) Appellant points out that no one was asked to monitor her calls to confirm any problems with any customer. (CP 80)

Her supervisor, Chris Chandler, claims he prepared a note about being nicer to customers but he never brought it up in a performance review, it was never listed as a complaint, and never filed it in her employee file. Yet Respondent's attorney claims "a series of escalating customer complaints." (Respondent's Brief, page 11)

The Respondent/employer then argues that, in her opinion, Rochelle contends she was a model employee...with no reference to the record. There is no reference because there is no record.

First, the problem with candor continues. Appellant never used the words, "model employee" and clearly and simply denied the allegations of rudeness to customers. She points out as support the complete lack of any such reference in her written performance review. (CP 78-79) The complete lack of evidence of any such policy violation is required to be filed in her employee file. (CP 78) In her own affidavit Rochelle notes that she specifically reviewed the affidavits of the two customers and four employees all dated over a year after her injury and termination and specifically denies each claim. (CP 82, L 1-4)

The creation of false quotes and a false claim of non-denial, to shoe horn this case into prior case law should not be tolerated.

While the Respondent continues with the drumbeat of "uncontroverted independent evidence" they ask this court to ignore Appellant specific denials and to ignore the fact that such

claims are never documented in her file as required by Roses and More nor are they brought up in her 90 day performance review in April, ninety days after they declare this began.

Respondents claims of “abundant” “uncontroverted independent evidence” “no trier of fact could reasonable (sp) conclude that discrimination or retaliation was even a factor...to terminate.” (Respondent Brief, page 13-14)

Next, Respondent states at page 15, “Nowhere in the record does Roses argue that the customer complaints began on January 15, 2009, when Appellant was first hired.” (Respondent Brief, page 15) This is simply an untrue statement. Respondent’s candor problem continues. Kurt Goe, an employee of Roses provided a declaration which states in pertinent part as follows:

I...work...as a Sales Representatives (of Roses)
...for the last six years.

Rochelle was an employee...from January 2009
(when she was hired) to August 2009. (CP 48,
Line 1-2)

During Ms. Cornwell’s employment (January,
when she started, to August 2009) I routinely
received telephone calls from upset customers
complaining about Ms. Cornwell’s prior job
performance and rudeness. (CP 48, Line 3-5)

In a second declaration, Customer Carr states at follows:

I recall becoming very frustrated with...Roses new
employee (Rochelle started in January 2009)...Rochelle
was very rude, sarcastic and condescending... (CP 54
Line 1-3, 6-7)

I regret I have to take the time to correct opposing counsel
on the misstatements such as, “Nowhere in the record did Roses
argue that customer complaints began on January 15, 2009.”
(Respondent’s Brief, page 15) This does not meet the clear
definition of candor. I regret to point this out, however, if I don’t,
the Court could accept these blatant misstatements as fact and deny
Rochelle her right to a jury trial.

Respondent next argues that complaints of the two
customers and four employees are “undisputed” because they are
established by “sworn testimony.” (Respondent’s Brief Pg.17) In
other words, Respondent argues that, no trial and no assessment of
credibility is required because they have “sworn testimony” dated
over a year after she filed her L&I claim.

Of course, there is no case law cited to support this unusual
legal assessment. Respondent continues to misrepresent that the
declarations of Carr and French are “undisputed” (Respondent Brief,

page 19). Respondent makes this statement with full knowledge of the following affidavit by Appellant. (CP 82, Line 1-4)

I have reviewed the declaration of the four employees and the two customers of Roses...They describe that my behavior over the phone was horrible starting when I was hired in January 2009, to the date of my termination. This is not true and nothing is recorded about it. (CP 82 Line 1-3)
(emphasis added)

It appears the Respondent's claim of "undisputed" depends on what their definition of "undisputed" is.

Further, Appellant contends the only complaints made by her supervisor, Chandler, were disclosing her wages to others and singing and dancing in an unheated warehouse (which were not listed as the reason for termination.)

Further, when Rochelle states she repeatedly asked Mr. Chandler, "How am I doing?" during her employment, and Mr. Chandler responded, "Great." (CP 78) Contrary to the reckless use of "undisputed" by Respondent, Mr. Chandler never disputed this question and answer.

Respondent argues that the severity of the customer complaints was significant (Respondent's Brief, page 5) but apparently not significant enough to be placed in her employee file as required. Not significant enough to be noted in her 90 day review, which was 3 months beyond the time the two customers claim and employees claim complaints were being made and received. Not significant enough to qualify the written directive at her 90 day review "MAKE SURE SALES CALLS ARE BEING MADE." What effort would it take to complete the above directive by adding "politely" or "not rudely," if these customer complaints were true? In all of this disingenuous rhetoric about uncontested, where is the simple reasonable explanation for the absence of any written record in the 90 day review which states if an employee, "does not measure up to our standards" regarding attitude or performance, they can be "released" (CP 78, Line 5-7) Why is it that there is no complaint of rudeness from the other employees sitting right next to Rochelle on the common sales desk?

Other than repetitive conclusory words, Respondent is completely silent on these matters.

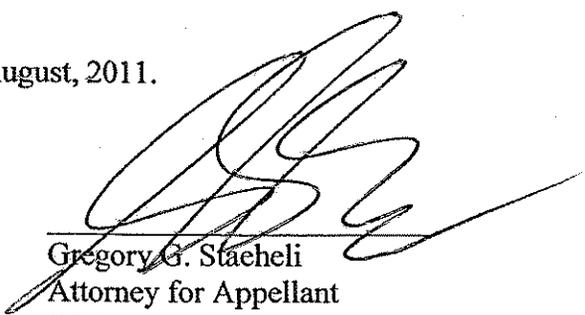
CONCLUSION

We ask the Court not to be confused by the baseless use of the terms undisputed, uncontested, etc. when Appellant points to the record to show that the use of these terms is totally lacking in candor.

There is a reason why our Legislators recognized the attempt by some employers to circumvent the Labor and Industry Law by discriminating against workers who file Labor and Industry claims and then intimidate other workers who see what happens if you do. This is a jury issue.

We ask that the Court of Appeals to reverse the decision granting Summary Judgment.

Dated this 2nd day of August, 2011.



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