

No. 30269-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

DEC 16 2011

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By: _____

ALBERT DAVIS, APPELLANT

V.

FRED'S APPLIANCE, a corporation, RESPONDENT

BRIEF OF APPELLANT

GREGORY G. STAEHELI

WSBA # 04452

Attorney for Appellant

301 W. Indiana Ave.

Spokane, WA 99205

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I. INTRODUCTION

Appellant, Albert Davis (hereinafter Davis), is a married heterosexual man who was terminated from Respondent's employment (hereinafter Fred's) after he had complained to upper management about repetitive slanderous statements by Fred's store manager in front of customers and other employees. The store manager's repetitive statements to Davis were, "Hey Big Gay Al" and "There goes Big Gay Al" and "Okay, Big Gay Al." After Davis complained and insisted on filing a written complaint with Fred's, he was fired. Fred's stated reasons for justifying the termination were specifically listed and provided to a state agency which later granted unemployment benefits to Davis.

Davis alleged 1) Wrongful Termination in Violation of Public Policies 2) Discrimination by Perceived Sexual Orientation 3) Retaliation Against Person Opposing Unlawful Discrimination 4) Slander. Fred's moved for Summary Judgment of all claims and the trial court granted a Summary Judgment of the entire case and struck over 50% of Davis's Affidavit. Davis then appealed the striking of testimony and the dismissal of all claims.

II. ASSIGNMENTS OF ERROR

1. In a motion for Summary Judgment, the trial court failed to require the Respondent-employer (the moving party) to show the absence of disputed issues of fact.

2. The trial court failed to resolved contested and disputed issues of fact in favor of the non-moving party (Davis). In fact, the trial court actually resolved all contested issues in favor of the moving party in a motion for Summary Judgment.
3. The trial court ignored case law which allows into evidence the outcome of an unemployment claim in a motion for Summary Judgment.
4. The trial court denied the admission of Fred's written objections to an unemployment claim which did not include new and disputed claims of bad behavior of Davis now asserted in a motion for Summary Judgment.
5. Approximately 13 days after the arguments and motion for Summary Judgment was heard, the court by letter struck over 50% of Davis's response affidavit all of which is relevant and admissible.
6. The trial court ignored new allegations never asserted before the State Employment Agency and dismissed the entirety of Davis's complaint which alleged four separate causes of action.
7. The trial court failed to make a necessary finding as to whether referring to a married man with children as a homosexual is capable of defamatory meaning.
8. The trial court resolved a jury issues as to whether the statements above are defamatory.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is it a violation of RCW 49.60 if Davis is subject to discrimination because he is a homosexual or is merely perceived as a homosexual? YES
2. In a motion for Summary Judgment did the trial court require the Respondent-employer (the moving party) to show the absence of disputed issues of fact? NO
3. Did the trial court fail to resolve contested and disputed issues of fact in favor of the non-moving party (the Appellant-employee)? YES.
4. When a manager participates in a work environment harassment, is it imputed to the employer? YES
5. Did the trial court actually resolve all contested issues in favor of the moving party in a motion for Summary Judgment? YES
6. Did the trial court ignore case law which allows into evidence the response to and the outcome of an unemployment claim in a motion for Summary Judgment? YES
7. Did the trial court deny admission of the Respondent Employer's written objections to an unemployment claim which did not include new and disputed claims of bad behavior of Davis now asserted in a motion for Summary Judgment? YES
8. Did the trial court in an Summary Judgment motion refuse to consider and then strike the outcome of a claim for unemployment

benefits in a motion for Summary Judgment and in disregard for the Supreme Court case of *Korslund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 125 P.3d 119 (2005)? YES

9. Did the trial court approximately 13 days after the arguments and motion for Summary Judgment was heard the court by letter strike over 50% of Davis's response affidavit all of which is relevant and admissible? YES
10. Did the trial court make a necessary finding as to whether referring to a married man, in the presence of unknown customers and known co-employees, as a homosexual is capable of defamatory meaning? NO
11. Once a statement is deemed capable of defamatory meaning, does a jury not the court decide whether a statement is defamatory? YES
12. In reviewing a Summary Judgment motion, does the Court of Appeals consider the pleadings, affidavits and depositions and engage in the same inquiry as the trial court? YES.
13. Is a retail store employee who for one year delivers appliances, from a warehouse, to six retail outlets qualified to express an opinion that one of the six stores is the busiest? YES
14. Is a retail store employee allowed to testify to a business routine of over one year? YES

IV. STATEMENT OF THE CASE

Appellant, Albert Davis (hereinafter Davis) was employed for one year as a delivery driver at Respondent Fred's Appliance. (CP 106, Line 23-27) Davis is a heterosexual male and is married to Leah Davis and together they have one son and one stepdaughter. (CP 106, Line 24-25) He also weighs over 300 lbs. (CP 107, Line 23-24)

Steve Ellis is a store manager at one of the six of Respondent's stores. (CP 107, Line 16-17) Fred's is an appliance sales business with one warehouse and six stores. (CP 107) After one year as a delivery driver to all six stores, Davis stated that the store managed by Ellis was, in his opinion, the busiest store and that Mr. Ellis, as a store manager, has the authority to direct Davis as a delivery driver to do various things in his store unless it conflicts with the warehouse schedule. (CP 108, Line 9-11). This has never been contested by Fred's.

The authority of the store managers was not only consistent with his one year history of experience as a delivery driver but it was also told to Davis by his supervisor Ed Miller. (CP 108, Line 9-11) These factual allegations were never contested in the actions described below. The trial court struck Davis's testimony on these points.

Respondent's Attorneys then provided a charitably misleading description of Davis' deposition testimony stating as follows:

Calling Mr. Davis "Big Gay Al" was not premised on his sexual orientation perceived or imagined. Mr. Davis said he is not homosexual or gay, and understood that statement was not meant to be reflective of his sexual orientation (CP 173) (opinion of Attorney Thilo, citing Davis Deposition, 46 4-47:4 55:11-14) (CP 50-51)

What the Defense cites is not the incident with Manager Ellis but what is cited is an incident with another employee who had explained his motivation came from a TV. show. The employee involved is an actual company employee in contrast to the Respondent's description of ("co-employee"- Manager Steve Ellis)

Nowhere in the cited reference does Davis say what is claimed by Attorney Thilo as to the meaning of the statement. Further in contrast to Attorney Thilo, Davis points out that this employee who made the statement apologized not once but twice. (CP 36 P. 51, CP 36 P.52 Line 1-6) There is no record of it ever being said again by the employee in contrast to "co-employee"

Manager Ellis.

Davis, by affidavit, asserts that, on three to four separate occasions between May 12, 2010 and May 20, 2010, Manager Ellis called Davis homosexual names in front of customers of Fred's and sales staff of Fred's (CP 107, Line 17-27). It is an uncontested fact that Ellis is a manager. (CP 108), Line 9-11) Respondent's attorneys misrepresented Manager Ellis to the trial court disingenuously as a "co-worker" for reasons set out in Law and Argument below.

Respondent's attorneys also asserted that "co-worker" Ellis "greeted" Davis in a jocular way 3 to 4 times. These "greetings" by the "co-worker" were made in front of customers of Fred's and employees of Fred's and included the following statements:

1. There goes Big Gay Al
2. Hey Big Gay Al
3. Ok, Big Gay Al

Respondent asks the Court of Appeals to not allow a jury to decide if they were greetings or slanderous statements.

Respondent sought successfully to have the Trial Court resolve these as greetings and mere jokes in a Motion for Summary Judgment. As a factual matter, Davis weighs over 300 lbs. (CP 107, Line 23-24) On one occasion three customers were within hearing distance of "co-worker" Manager Ellis when he said this

and the customers reacted with looks of uncertainty and discomfort. (CP 108, Line 2-5) Davis requested Manager Ellis stop referring to him as a homosexual and Ellis ignored him with more taunts. (CP 108, Line 14-16)

When Davis complained to his supervisor, Mike Fisher, about these taunts, Davis was then told that Fred's wanted Davis suspended for two weeks. (CP 108, Line 18-21). This has not been contested. Davis states these taunts occurred on 4 occasions in front of customers (CP 108, Line 2-22) Davis informed Fred's President, Steve Varness that he wanted to file a written complaint with Fred's. (CP 112, Line 17-18) He hoped it would discourage "co-worker" Manager Ellis from doing this again. (CP 109, Line 8-14)

Fred's arranged a meeting between Davis and Fred's Management and informed Davis that Manager Ellis wanted to apologize. (CP 110, Line 15-21) At the apology meeting, Manager Ellis first denied he made the statement. (CP 108, Line 26) When he was confronted with two witnesses who corroborated Davis's claims, Ellis said, "Well, if they think I said this, I apologize." (CP 109, Line 1-2) Ellis then turned to Davis and said, "I don't care about you or your problems, or what's going on in your life." (CP 109, Line 1-4)

Based on this, Davis, by affidavit, stated it was clear that Manager Ellis had no intention to stop humiliating him in front of customers and employees (CP 109, Line 4-7) Davis was told by Fred's President, Troy Varness, and others that Fred's "liked Davis and wanted to keep him" around but they did not want Davis to give them a written complaint (CP 109, Line 8-12) Davis wanted it in writing to stop any other employee from enduring this and discourage Manager Ellis from doing this. (CP 109, Line 11-13)

After Ellis' comment, Davis then went outside to sit in a truck. (CP 109, Line 17-18, CP 110, Line 22-23) Fred's President Varness then came to the truck asked Davis to get out and Davis complied. (CP 110, Line 22-24) Davis was then told to leave the premises and was subsequently fired for insubordination. (CP 116, Line 3-7)

Davis applied for unemployment compensation. (CP 116, Line 24-26) Fred's contested the application and supplied a written response to justify the termination claiming that Davis was fired for insubordination (CP 116, Line 25-26, CP 117, Line 1) The Employment Security Department determined that Fred's allegation of "misconduct" by Davis had not been established. (CP 119-123) Respondent contended that this was inadmissible in a motion for Summary Judgment. Davis also filed the written

records to the Trial Court to show a complete absence of any new misconduct allegations now asserted in a Motion to Dismiss.

The trial court was advised by Davis of the decision in *Korslund v. Dyncorp Tri-Cities Services*, 156 Wn.2d 168, 125 P.3d (2005). In *Korslund*, the Supreme Court allowed consideration of the findings and determination of the Employment Security Department which awarded unemployment benefits to Davis. (156 Wn.2d 175-176) (CP 117, Line 4)

The Trial Court ignored *Korslund*, supra, and also ignored the fact that the reasons cited for termination in this motion were never asserted to the Employment Security Department. The trial court then struck the employer's record of justifying the termination filed in the Employment Security Department and struck the evidence of the granting of benefits and struck the evidence of the employer's objection to benefits on a basis inconsistent with motion for Summary Judgment.

After striking Davis's response affidavit in response to new allegations from the employer, the trial court granted a Summary Judgment on all four claims asserted by Appellant.

Davis appealed the striking of his affidavit testimony and the Summary Judgment dismissal of all four claims.

V. LAW AND ARGUMENT

1. **In a motion for Summary Judgment, the trial court failed to require the Respondent employer to show the absence of disputed issues of fact. Further, the trial court resolved contested issues of fact to be resolved in favor of the non-moving party.**

In *Hallauer v. Certain*, 19 Wn.App. 372, 575 P.2d 732

(1978) the Court of Appeals ruled as follows at page 375:

It is well settled that a party moving for summary judgment must establish that there is no genuine issue as to any material fact and that the undisputed facts require judgment in his favor. (Emphasis added)

In *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961

P.2d 358 (1998) the Court of Appeals ruled as follows at page 22-23:

CR 56 (c) directs a court to grant summary judgment to a moving party “if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law” A material fact is one upon which the outcome of the litigation depends. *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)...In reviewing a summary judgment motion, the appellate court stands in the same position as the trial court and must consider all of the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 351, 779 P.2d 697 (1989).

There is not one request from the trial court to require the moving party to establish the absence of disputed issues of fact. The record is silent as to the slightest attempt by Respondent to argue, hint or suggest that there are no contested or disputed facts. Respondent simply asserted old and now new disputed facts in order to get a Summary Judgment. The records of disputed facts begins with the disputed claim of insubordination and, in Davis’s responses to the new allegations never asserted to the Employment Security Department, Respondent brought new and properly contested issues of fact and Davis responded. The trial court for reasons unknown struck Davis’s response to the new allegations

and the trial court struck the written evidence of employer's inconsistency in what was put before the Employment Security Department. The inconsistency is all created by the employer which gives one reason for termination with a state agency and then gives new reasons to the trial court.

2. The trial court ignored *Korslund v. Dyncorp Tri-Cities Services*, 156 Wn.2d 168, 125 P.3d and struck admissible evidence of Appellant.

The trial court struck and ignored Davis's Affidavit in response to new allegations never asserted by Fred's to the Employment Security Department. The trial court struck the written stated reasons for termination by Fred's to the Employment Security Department which then eliminated any argument that the new reasons didn't match the old reasons.

The trial court brushed aside common law on the point (*Korslund*) and, never required any statutory or common law theory from Fred's to justify the striking of this evidence. The Court of Appeals is entitled and required to consider all Davis's affidavit testimony despite the trial Judge striking the testimony.

The first basis of the Statutory claims are RCW 49.60.180, Discrimination Employment based upon sexual orientation and discrimination against a person opposing discrimination.

RCW 49.60.210, Unfair Practices-Discrimination against person opposing unfair practice, states as follows:

It is an unfair practice for any employer ... or other person to discharge, expel, or otherwise discriminate against any person because he or she has filed a charge, testified, or assisted in any proceeding under this chapter...

RCW 49.60.180, Unfair practice of employers, states as follows in pertinent part;

It is an unfair practice for any employer: ...
To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation ...

In *Barnes v. Washington Natural Gas*, 22 Wn. App. 576, 591 P.2d 461 (1979) the Court of Appeals ruled as follows:

[3] It is the intent of the legislature to prohibit discrimination in employment against a person with a sensory handicap. It would be an anomalous situation if discrimination in employment would be prohibited against those who possess the handicap but would not include within the

class a person “perceived” by employer to have the handicap.

The essence of unlawful employment discrimination is the application of unreasonable generalizations about people to the hiring, promotion and discharge of workers. Race, religious creed and sex are among the prohibited criteria for judging workers qualifications because of the prejudgments often made on the basis of these characteristics. Proscriptions of discrimination against handicapped persons were added to RCW 49.60 in 1973 because of similar prejudgments often made about persons afflicted with sensory, mental or physical handicaps, such as epilepsy.

Just as the person who is perceived as belonging to a noncaucasian racial or ethnic group may be discriminated against because of his or her perceived racial characteristics, a person who is perceived to be afflicted with epilepsy may be discriminated against because of his or her perceived handicap

even though that perception turns out to be false in either case. It would defeat legislative purpose to limit the handicap provisions of the law against discrimination to those who are actually afflicted with a handicap, such as epilepsy, and exclude from its provision those perceived as having such a condition. Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent. The intent of the law is to protect workers against such prejudgment based upon insufficient information. The law's application, therefore, should not be limited to those who actually have handicaps, excluding those who are discriminated against in the same way because they are only thought to have handicaps. It makes no difference to the employee whether he is discharged because he, in fact, has epilepsy

or that, the employer perceives or believes that he has. The employer has terminated the employment for the same reason—a reason which constitutes discrimination contrary to the provisions of the statute. The class protected by the statute is those persons whom the employer discharges or intends to discharge because he believes the person is afflicted with a “mental, sensory, or physical handicap.”

Appellant argues that public policy, expressed by the Act to eliminate and prevent discrimination in employment requires protecting from discriminatory practices both those perceived to be handicapped as well as those who are handicapped. We ask the Court of Appeals to apply the same reasoning of Barnes, supra, to this case.

3. The trial court refused to consider the outcome and claims in the state employment agency.

The claims in the unemployment department of Respondent were also subject to admission to point out that, since the filing of this court action, the Defendant now has generated new additional employee-witnesses who they never listed to the unemployment department. They raised new allegations never before submitted to

the Employment Security Dept. This evidence is appropriate for a jury to hear as it is inconsistent with the written justification to terminate Plaintiff. The new allegations from the Defense witnesses were denied by Davis in response to the Summary Judgment Motion. Davis, by affidavit, reviewed the affidavit of new Defense witnesses of Dan Atkinson, Scott Fitzgerald, Justin Hofeldt, Brad and Bradley Steinman and Dan Flake and denied each and every allegation. (CP 114, Line 19-26, CP 115, Line 1-26, CP 116 Line 1-27, CP 117 Line 1-9)

Despite the fact that these new witnesses were not included by Fred's in the response to the unemployment claim and the fact that , all these new allegations were denied by Davis and the trial court resolved on summary judgment motion issues of credibility against Davis. Inexplicably, the trial court struck the denials by striking out over 50% of the responding affidavit of Davis. . (CP 348, Line 16-28, CP 349, Line 1-28, CP 350, Line1-28, CP 351, Line 1-28, CP 352, Line 1)

In essence, Plaintiff responded to each an every declaration of the Defense witnesses who supplied affidavits and regarding the new denied events, and the court chose to strike 50% of the affidavit of Davis. Plaintiff asserts that in an appeal of a motion for Summary Judgment, the Court of Appeals engages in the same

inquiry as the trial court considering the pleadings, the depositions and the affidavits notwithstanding the ruling of the trial court.

Respondent's motion to strike was filed 3 days before the argument on the motion for summary judgment. The Court struck any reference to the records of the Washington State Employment Security Department and over 50% of the Davis's affidavit. (CP 348, Line 16-28, CP 349, Line 1-28, CP 350, Line 1-28, CP 351, Line 1-28, CP 352, Line 1)

In fact, Fred's was allowed to introduce affidavits of new witnesses which were Fred's employee witnesses regarding new claims of bad behavior by Davis which were never disclosed or asserted to the Washington State Employment Security Department. The trial court also ignored the common law that, in a motion for Summary Judgment, the trial is obliged to consider to the outcome of a contested unemployment claim in a motion for Summary Judgment.

Instead, the trial court allowed the Defense to submit new affidavits of their employees, which were never submitted to support their opposition to unemployment benefits. The trial court then struck Davis's response affidavit contesting the new allegations. The striking by the trial court was done in, some instances, line by line and in others entire pages of Davis's affidavit were struck out. After the motion was heard on 8/05/11,

on 8/16/11, then the written letter of the trial court was followed by orders striking testimony and granting the Summary Judgment as to all claims. To reiterate, the claims are as follows:

- a) Termination in Violation of Public Policies
- b) Discrimination Based Upon Perceived Sexual Orientation
- c) Retaliation Against a Person Opposing Discrimination
- d) Slander (defamation)

This appeal followed.

4. When a manager participates in a work environment harassment case, it is imputed to the employer.

In the instant case, the two lawyers for Fred's in court documents referred to Steve Ellis as a "co-worker". In fact, Ellis is a manager. It is charitable to refer to this as obfuscation but it should be frowned upon because it can mislead the Court of Appeals to the detriment of Appellant.

In *Glasgow v. Georgia Pacific*, 103 Wn.2d 401, 693 P.2d 708 (1985) our Supreme Court ruled as follows at page 406-407:

To establish a work environment sexual harassment case, the better reasoned rule is that an employee must prove the existence of the following elements.

1. The harassment was unwelcome. In order to constitute harassment, the complained of conduct must be unwelcome in the sense that the plaintiff-employee did not solicit or incite it, and in the further sense that the employee regarded the conduct as undesirable or offensive.
2. The harassment was because of sex. The question to be answered here is: would the employee have been singled out and caused to suffer the harassment if the employee had been of a different sex? This statutory criterion requires that the gender of the plaintiff-employee be the motivating factor for the unlawful discrimination.
3. The harassment affected the terms or conditions of employment. 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. The harassment must be sufficiently pervasive so as to alter the conditions of employment

and create an abusive working environment.

Whether the harassment as the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a questions to be determined with regard to the totality of the circumstances.

4. The harassment is imputed to the employer. Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof. To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s) the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a

pervasiveness of sexual harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment. As to element 4, the trial court found:

In the case at bar, [the employer] knew or should have known that [the male co-workers] unwelcome sexual advances and other verbal or physical conduct of his [sic] sexual nature were unreasonably interfering with [the plaintiffs'] work performance and/or created an intimidating, hostile, or offensive working environment. Further, no reasonable immediate or appropriate corrective action was taken to remedy the situation.

Respondent asserts that the records at the Washington State Department of Employment Security are confidential and not admissible in court.

Aside from the common law in Korslund, supra, RCW

50.13.040 states in pertinent parts as follows:

(1) An individual shall have access to all records and information concerning that individual help by the employment security department, unless the information is exempt from disclosure under RCW 42.56.410...

(3) An employing unit (employer) shall have access to any records and information relating to any decision to allow or deny benefits if...:

(b) If the decision is based on material information provided by the employing unit.

In the instant case, it is not contested that the complaints by Appellant were heard by his supervisors all the way to Steve Varness the corporation president.

The Glasgow case is also significant because the remedial action if it can be called that was not to have been reasonably calculated to end the harassment.

Davis was told Manager Ellis would apologize. He did not. Davis reasonably insisted that management accept a written

complaint of this and Davis was told, “we really like to have you around but we don’t want you to file a written complaint”.

Ellis then designated Davis by stating he did not care about him or his problems. Davis goes outside to his truck.

Davis asserted that he was fired after he complained of repeatedly being referred to as a homosexual in front of customers and employees. Respondent admitted he was fired and claimed the basis for termination was insubordination which was denied by Davis. The record is completely absent of any claim that Davis agreed he was terminated for insubordination. The record is silent of any argument by Respondent or demand by the trial court to meet the burden of showing no contested issues of fact.

In *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214,961 P.2d 358 (1998) the Court of Appeals ruled as follows at page 22-23:

CR 56 (c) directs a court to grant summary judgment to a moving party “if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law” A material fact

is one upon which the outcome of the litigation depends. *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)...In reviewing a summary judgment motion, the appellate court stands in the same position as the trial court and must consider all of the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 351, 779 P.2d 697 (1989).

In *Hallauer v. Certain*, 19 Wn.App. 372, 575 P.2d 732 (1978) the Court of Appeals ruled as follows at page 375:

It is well settled that a party moving for summary judgment must establish that there is no genuine issue as to any material fact and that the undisputed facts require judgment in his favor. (Emphasis added)

What the records shows is an argument by Respondent, the moving party, to resolve that the basis of termination was insubordination, which was contested by Davis and resolved in favor of Respondent in the Employment Security Department.

The trial court then ignored the case law requiring the court

in a motion for Summary Judgment to consider the unemployment agency determination. (Korslund, supra)

Further, the trial court refused to admit the employer's written objection to the Employment Security Department records which were completely silent to the affidavits of new claimed allegations against Davis by new witnesses and claims never disclosed to the state agency. The Respondent never contested to the state agency that homosexual references were said in front of customers unknown to Davis and employees who were known by Davis.

The trial court ruled generally that the Davis's statements were not made based upon "personal knowledge" despite the affidavit testimony of Davis that "I state the following based upon personal knowledge...and having worked at Fred's for one year as a delivery driver. (CP 106, Line 20-24)

The stricken lines with our responses are as follows:

Stricken Statement

This (store managed by Ellis) is the busiest of all stores in my opinion.

Response

Davis is testifying based also on his own experience doing the same job which requires Davis to move "appliances from the warehouse to the six stores of

Fred's Appliance. Davis also said after one year of experience independent of the fact that he was told by his supervisor Ed Schultz that store managers can order us to assist customers...we are also required to be available to the store manager if he wishes to have an appliance wrapped...or moved within the store...the manager can also order us to clean up messes...

Further, Supervisor Schultz never contested the above statement. The trial court ruled that despite one year of doing the same job, Davis was somehow not qualified to describe his job duties.

The trial court struck Appellant's affidavit that, with one year of experience at Fred's, the individual store managers, including Manager Ellis had authority to require delivery drivers to, such as Appellant, to do certain tasks in their stores on condition these tasks did not conflict with the warehouse schedule.
(CP 107, Line 6-9)

RULE 406. HABIT; ROUTINE PRACTICE:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to

prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Here ER 406 does not require corroboration and it is also clear that not one manager or other employee contradicted Appellant's statements that Manager Ellis can require him to perform duties in his store.

Davis worked in the same job for one year and was further advised of his duties per Supervisor Shultz and no case was cited by the Court to justify the striking of testimony. The actions of the Trial Court resulted in a violation of the Rules of Evidence. Davis's claim of his routine as a delivery driver and his duties and the Store Manager's supervisory authority was never challenged by any witness or court rule. Davis relies on ER 406 and asks that the Trial Court be reversed on this ruling.

Stricken Statement

Ellis made the point of making this (Big Gay AI) not in a back room but on the sales floor where customers were not only expected to be but who were present when he said this...

Response

In context, Davis asserts that Ellis called him

homosexual names approximately four times on three separated occasions. Davis points out the comments were not said in the back room. They were not said one on one. They were not said in any locker room where only employees could hear. The area and the audience are relevant in a slander claim and employment claims.

Respondent cited to the trial court *Coville v. Cobarc Services*, 73 Wn.App. 433 869 P.2d 1103 (1994) as support for the proposition that Davis could not show evidence of discrimination on the basis of perceived gender orientation.

In Coville the evidence showed at page 435-436 that Coville, a female, went to a basement room unlocked the door, turned on the lights and discovered her manager masturbating in the room. She reported the incident, the employer first took no action against the manager and then allowed the manager to resign. The matter proceeded to a jury trial.

The case was dismissed on the basis that it presented no evidence that her gender was the motivating factor under these circumstances or that the acts of the employer or manager under these circumstance were forbidden by RCW 49.60.

In Coville, the court ruled as follows at page 440-441:

Admittedly, there is evidence that Mrs.

Colville refused to return to work because she opposed Cobarc's handling of the basement room incident. However, the statute requires, additionally, that the opposition must be directed toward "practices forbidden by this chapter..."

RCW 49.60.210(1) Only opposition directed toward such practices is protected.

As discussed above, there is no competent evidence or reasonable inference that Mr. Leiferman's activity in the basement room was a practice forbidden by the Law Against Discrimination, RCW 49.60. Hence, Mrs. Coville's opposition to his conduct was not protected opposition activity. She failed to produce a prima facie case; therefore, the court did not err in directing a verdict against her retaliation claim...In this case, the intolerable act Mrs. Coville complains of is Mr. Leiferman's masturbation in the basement room. There is no competent evidence or reasonable inference that Cobarc performed any deliberate act in

creating this condition. There is no reasonable inference that Mr. Leiferman deliberately acted to create a condition under which Mrs. Coville would discover his conduct. In fact, he took considerable precautions in going down to a locked basement room rarely used by anyone else. The court did not err in directing a verdict against this claim.

Here, there is competent evidence of practices forbidden by RCW 49.60.180 and RCW 49.60.210. The statute prohibits termination because he has opposed practices forbidden by 49.60 or because he has filed a charge. The Coville case has simply no application to the facts of this case. Davis opposed perceived gender orientation discrimination. The motivation of Manager Ellis is an issue of fact for the jury not a Judge in a motion, the same applies to the motivations of Fred's in terminating Davis. These are jury issues to be resolved in a trial.

In the instant case, just as a person may be discriminated against on the basis of his "perceived" race, it really makes no difference to the employee if he is fired because he is of a certain race or is perceived to be of a certain race.

We ask this Court to apply this same standard as it relates to actual homosexuals or merely perceived homosexuals. The issue of whether the actions of the Manager and President were based on actual sexual orientation or perceived orientation or a mere joke is for the jury to decide as it relates to claims under RCW 49.60. It is also a jury issue as it relates to the claim of Slander.

In *Caruso v. Local*, 690 100 Wn.2d. 343,670 P.2d 240 (1983) also supports the conclusion that the jury not the Court decides the outcome of a defamation (slander) claim. In *Caruso* at 100 Wn. 2d 353 670 P.2d 240 (1983) the Supreme Court stated as follows at P. 100 Wn. 2d. 353-354:

...The imputation of a criminal offense involving moral turpitude had been held to be clearly libelous per se. *Ward v. Painter's Local 300*, 41 Wn.2d 859, 252 P.2d 253 (1953). The instant case is quite different. It deals with the rather vague areas of public confidence, injury to business, etc. in such cases.

Where the definition of what is libelous per se goes far beyond the specifics of charge of crime or of unchastely in a woman, into the

more nebulous area of what exposes a person to hatred, contempt, ridicule or obloquy, or deprive him of public confidence or social intercourse, the matter of what constitutes libel per se becomes, in many instances, a question of fact for the jury. (emphasis added)

Purvis v. Bremer's, Inc., 54 Wn.2d 743, 752, 344 P.2d 705 (1959). In all but extreme cases the jury should determine whether the article was libelous per se. *Miler v. Argus Pub'g Co.*, 70 Wn.2d 816, 820 n.3, 821 n.4, 490 P.2d 101 (1971); *Amsbury v. Cowles Pub'g Co.*, supra at 740.

Here the trial court decided an issue which is the province of the jury. It should be clear that calling a married man with two children, a homosexual in the presence of store customers unknown to the Plaintiff but for whom he could be delivering appliances, and further making the statements to fellow employees met the requirement that a jury decides whether this is defamatory in a trial not the Court in a motion.

The Trial Court ignored the claim of Slander and ignored the duties relating to the issue of Slander. The Appellant is a heterosexual male married to a woman and with whom they have one child and one step child. Appellant was called the homosexual name of “Big Gay Al” on repeated occasions before fellow employees and unknown customers. In fact, even in the Court written opinion, there is not even a reference to the claim of slander.

In *Robel v. Roundup Corp.* 148 Wn.2d 35, 59 P.3d 611 (2002) the Supreme Court stated as follows at P.55:

[16] Defamation. A plaintiff bringing a defamation action must prove “four essential elements: falsity, an unprivileged communication, fault, and damages.” *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981) cert. Denied, 457 U.S. 1124 (1982). Before the truth or falsity of an allegedly defamatory statement can be assessed, a plaintiff must prove that the words constituted a statement of fact, not an opinion.

See also 57 Wn.2d 213, 215 356 P.2d 97 (1960) and 77 Wn. App. At 44.

In the instant case, the words of Manager Ellis were not qualified with “In my opinion” or words to that effect. They were statements of fact to people who did not know Davis.

Were they jocular? In *Hoppe v. Hearst Corporation*, 53 Wn. App. 668, 770 P.2d 203 (1989) the Court of Appeals ruled as follows at p. 671-673:

Defamation of Claim

We first address whether the trial court erred in dismissing Hoppe’s defamation claim.

The threshold requirement in a defamation action is that the defendant must have made a defamatory communication. Unless this requirement is satisfied, there is no actionable defamation claim.

Ordinarily, a defamatory communication involves a false statement of fact. However, an expression of opinion can be defamatory if it implies that defamatory facts are the basis of the opinion. *Dunlap v. Wayne*, 105 Wn.2d 529, 538, 716 P.2d 842 (1986); *Camer v. Seattle Post-Intelligencer*, 45 Wn.

App. 29, 39, 723 P.2d 1195 (1986), review denied, 107 Wn.2d 1020, cert. Denied, 482 U.S. 916, 96 L. Ed. 2s. 677, 107 S. Ct. 3189 (1987); *Benjamin v. Cowles Pub'g Co.*, 37 Wn.App. 916, 921-22, 684 P.2d 739, review denied, 102 Wn.2d 1018 (1984); Restatement (Second) of Torts section 56, at 170 (1977). Humorous and satirical statements that imply defamatory facts can also be actionable. See *National Rifle Ass'n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1299 (S.D. Ohio 1983), cert. Denied, 467 U.S. 1252, 82 L. Ed. 2d 840, 104 S. Ct. 3534 (1984). A humorous or satirical writing will not result in defamation liability when... the communication may be understood only as good-natured fun, not intended to be taken seriously and in no way intended to reflect upon the individual. Thus a narration by a toastmaster at a banquet of the speaker whom he is introducing is not reasonably to be understood as defamation but only as a jest.

But if the same narrative is reported in a newspaper in such a way as to fail to make clear to its readers the circumstances under which it was related, it may become defamatory.

Restatement (Second) of Torts section 566, comment d, at 176, (1977)

[1,2] Whether an expression of opinion or a satirical column is capable of bearing a defamatory meaning by implying the assertion of undisclosed facts is a question of law for the court. Restatement, supra section 614, section 566, comment c, at 173; accord, *Swartz v. World Pub 'g Co.*, 57 Wn.2d 213, 215, 356 P.2d 97 (1960) (holding generally that it is for the court to decide whether a communication is capable of a defamatory meaning) In making this determination, the court should consider whether the allegedly defamatory expression, in context, could reasonably be understood as describing actual facts about the plaintiff. *Pring v. Penthouse Int'l, Ltd.*,

695 F.2d 438 442 (10th Cir. 1982), cert. Denied, 462 U.S. 132, 77 L. Ed. 2d 1367, 103 S. Ct. 3112 (1983); *Lane v. Arkansas By. Pub'g Co.*, supra.

Other factors for the court to consider include; (1) the meaning of the entire article, not merely a particular phrase or sentence; (2) the nature of the medium in which the statement was published, i.e., whether it is one in which statements of fact or statements of opinion are more likely to be found; and (3) the nature of the audience to whom publication was made, i.e., whether the statement appeared in the context of an ongoing public debate in which the audience is prepared for mischaracterizations and exaggerations. *Dunlap*, 105 Wn.2d at 539-540; *Camer*, 45 Wn. App. At 39-41.

Additional considerations, identified in *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984), cert. Denied, 471 U.S. 1127, 866 L. Ed. 2d 278, 105 S. Ct. 2662 (1985), are “whether the statement has a precise core of

meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous[;]: and whether the statement is capable of being objectively characterized as true or false[.]: Thus, “[I]nsofar as a statement lacks a plausible method of verification, [courts can conclude that] a reasonable reader will not believe that the statement has specific factual content.” *Ollman*, 750 F.2d at 979; see also *Benjamin*, 37 Wn. App. at 923.

Hoppe first contends that the Watson article is defamatory in that by use of the name “Hurley Herpes”, it implies that Hoppe has herpes. The trial court considered and properly rejected this contention. The identification of Hoppe as “Hurley Herpes” cannot be reasonably understood as describing an actual fact concerning Hoppe’s medical condition; nor can it be objectively characterized as true or false.

Pring v. Penthouse Int’l, Ltd., supra; *Ollman*

v. *Evans*, supra; *Benjamin v. Cowles Pub'g Co.*, supra. Moreover, the audience to whom the column was directed, i.e., Watson readers, knew Watson frequently used alliterative nicknames to refer to public figures. (emphasis added)

Here, the trial court was required to find, if the statements “Big Gay Al” said on a sales floor with customers unknown to Davis present and not in a locker room, were capable of defamatory meaning. If it was so capable, it goes to the jury not the trial court to decide if it is defamatory (slander). Instead, the trial court struck the affidavit of Davis in which he made the distinction of the sales floor and locker room.

In *Wood v. Battle Ground School District*. 107 Wn. App. 550, 27 P3d 1208 (2001) the court stated as follows at pg. 573-574:

...See *Caruso*, 100 Wn. 2d at 354; *Story*, 52 Wn. App. At 346. “A defamatory publication is libelous per se (actionable without proof of special damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit public confidence or social intercourse, or (2) injures him in his

business, trade, profession or office.”

Caruso, 100 Wn.2d at 353.

The court generally determines whether a statement is libelous per se but if the issue involves “the rather vague areas of public confidence, injury to business, etc.,” then it becomes a question of fact for the jury.

Caruso, 100 Wn.2d at 353. Whether Sharp’s statement was libelous per se involves this more vague area of public confidence and injury to wood’s pecuniary interest and, thus, it is a question for the jury.

We submit this question is resolved by a jury not the court.

In the Response to Summary Judgment, Respondent’s Attorneys provided a general assessment of Davis’s understanding of the homosexual references citing Davis deposition by page and line, i.e. that the statements were not meant to be reflective of his sexual orientation (CP 83, Line 20-24). The statements to which the Respondent refers relate to another employee (not Ellis) who made the same statement and apologized twice.

Additionally, intent is not an element of Slander or Defamation. The motive of the speaker is not an issue. The reasonable understanding of the listener, including three unknown

customers and known store employees is an issue. Further the trial court is required to consider the depositions submitted by the moving party.

The significance of this evidence is that the manager who can order about a delivery driver, can be a more intimidating slanderer than a mere “co-employee”, if I might steal a word from the Respondent.

The Respondent’s Motion for Summary Judgment requested that the trial court resolve whether the inferences in the language used was good faith, a joke (jocular). Appellant submits this is an issue for the jury. In *Sanders v. Day*, 2 Wn. App. 393, 468 P.2d 452 (1970) the Court of Appeals at 2 Wn. App. 398:

[4] Summary judgment procedures are not designed to resolve inferential disputes.

It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, et cetera, a summary judgment would not be warranted.

Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

Expressing no opinion as to the merits,
we hold that Sanders (the non-moving party)
is entitled to have the inferences drawn by
the trier of fact. At trial, of course, the
burden of persuasion will be hers.

Here the Respondent asserted that the inference to the
multiple references to “Big Gay Al” were jocular. Appellant notes
that he asked Manager Ellis to stop saying this, however, Ellis kept
saying it.

The burden of proof is on Davis at trial to prove the
inference that the words were slander and the conduct was
intentional or negligent and Appellant is entitled to have a jury
decide this, not a Judge in a Motion for Summary Judgment.

The trial court ignored the claim of Slander and never
concluded the words used were or were not slanderous. Appellant
cited the following two cases:

In *Mazart v. State*, 441 N.Y.S.2d 600 (1981) the New York
Court stated as follows at page 604:

Certainly those members of the University
community who did not personally know the
claimants would logically conclude that
claimants were homosexual since the letter
identified them as being members of the

“gay community.” The Court finds that a substantial number of the University community would naturally assume that the claimants engaged in homosexual acts from such identification (cf. *Nowark v. Maguire*, 22 A.D.2d 901, 255 N.Y.S.2d 318). The fact that homosexual acts between consenting adults may no longer be a crime in New York State (*People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936) does not lessen the impact of the publication of the letter in November of 1977. The Court, therefore, finds that the claimants were libeled per se (cf. *Nowark v. Maguire*, supra).

In *Nowark v. Maguire*, 255 N.Y.S.2d 318 (1964) a New York Court dealt with the statement, “You are both queers.” The Court ruled as follows at 255, N.Y.S.2d 318 at page 319:

The complaint alleges that the defendant, in the presence of plaintiff’s wife and others, said of and concerning this plaintiff: “You are both queers. Even your wife said you were odd and she was stuck with you. I’ll

take you to Court for bothering my even-year-old orphan.” In our opinion, these statements are slanderous per se (*Mencher v. Chesley*, 297 N.Y. 94, 100, 75 N.E.2d 257, 259, and cases there cited; *Brown v. Du Frey*, 1 N.Y.2d 190, 199, 151 N.Y.S.2d 649, 657, 134 N.E.2d 469, 474). Words charged to be defamatory are to be taken in their natural meaning, and the courts will not strain to interpret them in their mildest and most inoffensive sense in order to hold them non-libelous and non-slanderous (*Mencher v. Chesley*, supra). In “determining the capacity of these offending words to injure plaintiff, we must go beyond the dictionary definitions; and, no matter how defamatory some of the synonyms may seem when isolated, we must appraise their effect and impact in the fair context” of the words or statement “in their entirety” (*Greyhound Securities, Inc. v. Greyhound Corp.*, 11 A.D.2d 390, 392, 207 N.Y.S.2d 383, 386).

Here the trial court simply dismissed all claims which included the claims of slander without even performing its only task which was to simply determine if the words were capable of defamatory meaning. If the court did, it goes to the jury to decide if it's slanderous.

In *Fitzgerald v. Hopkins*, 70 Wn.2d 924, 425 P.2d 920 (1967) our Supreme Court stated as follows at page 929:

We have heretofore set forth the alleged defamatory words spoken and written by Plaintiff. In *Grein v. LaPoma*, 54 Wn.2d 844, 340 P.2d 766 (1959), we erased the distinction between the twin torts of libel and slander. The form of the statement is no longer important so long as a defamatory meaning is conveyed, published, or promulgated.

VI. CONCLUSION

The summary judgment in favor of the non-moving party should be reversed.

Dated this 16th day of December, 2011.



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