

FILED  
OCTOBER 13, 2014  
Court of Appeals  
Division III  
State of Washington

No. 326357

---

IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

LACY STORY-HOWE, a married individual,

Appellant,

v.

OKANOGAN COUNTY, and SHAWN MESSINGER and “JANE  
DOE” MESSINGER, husband and wife, and the martial  
community thereof,

Respondents.

---

APPELLANT’S OPENING BRIEF

---

Sean R. Esworthy, WSBA No. 42901  
Johnson, Gaukroger, Smith & Marchant, P.S.  
139 S. Worthen Street  
Wenatchee, Washington 98807  
Telephone: (509) 663-0031  
Fax: (509) 663-6003

Attorney for Appellant

**TABLE OF CONTENTS**

I. ASSIGNMENTS OF ERRORS AND ISSUES..... 1

    No. 1..... 1

    No. 2..... 1

    No. 3..... 2

    No. 4..... 2

II. STATEMENT OF THE CASE..... 2

    A. Chain of Command..... 2

    B. Chief Messinger’s Inappropriate Conduct toward Employee during Las Vegas Conference Included Jumping on Employee on Employee’s Hotel Bed and Unwanted Sexual Innuendo Regarding Masturbation Toys..... 3

    C. Chief Messinger’s Pre-Conference Workplace Conduct Directed at Subordinate Female Employee Prompted Warnings by County Officials..... 9

    D. Supervisor Stevens’ Retaliation..... 11

    E. County’s Newspaper Command and E-mail..... 13

    F. Undersheriff Somday’s Investigation..... 14

    G. Relevant procedural history..... 15

III. ARGUMENT..... 16

    A. Summary Judgment Standards..... 16

    B. Hostile Work Environment Claims Are Construed Liberally Pursuant to Washington Law and Material Facts Exist Regarding the Severity of Chief’s Conduct Directed at Subordinate Employee..... 16

1.	Chief Messinger’s conduct directed at subordinate female affected employee’s employment.....	17
2.	Chief Messinger’s conduct was imputed to Okanogan County and summary judgment was not appropriate as to the element of employer imputation.....	23
C.	The Trial Court Erred in Granting Summary Judgment as to Employee Storey-Howe’s Retaliation Claim as Material Facts were in Dispute.....	24
1.	Whether Okanogan County took an adverse employment action against Mrs. Storey-Howe was a question of fact and not appropriate for summary judgment.....	25
2.	There was a causal connection between Mrs. Storey-Howe’s protected action and the adverse employment action.....	27
D.	The Trial Court Erred in Granting Summary Judgment as to Employee Storey-Howe’s Constructive Discharge Claim.....	28
E.	The Trial Court erred in granting summary judgment as to Employee Storey-Howe’s negligent retention claim.....	31
IV.	ATTORNEY’S FEES AND COSTS.....	32
V.	CONCLUSION.....	33

**TABLE OF AUTHORITIES**

**Table of Cases (Washington)**

Adams v. Able Bldg. Supply, Inc., 114 Wn. App. 291, 57 P.3d 280 (2002)  
..... 17, 18, 19, 20, 22

Alonso v. Qwest Communications Co., LLC, 178 Wn. App. 734, 315 P.3d  
610 (2013)..... 20, 21, 23

Allstot v. Edwards, 116 Wn. App. 424, 65 P.3d 696 (2003)..... 29, 30, 31

Barnett v. Sequim Valley Ranch, LLC., 174 Wn. App. 475, 302 P.3d 500  
(2013).....28

Betty Y. v. Al-Hellou, 98 Wn. App. 146, 988 P.2d 1031 (1999)..... 31

Frisino v. Seattle School Dist. No. 1, 160 Wn. App. 765, 249 P.3d 1044  
(2011).....32

Haubry v. Snow, 106 Wn. App. 666, 31 P.3d 1186 (2001)..... 29, 30, 31

Hollenback v. Shriners Hospitals for Children, 149 Wn. App. 810, 206  
P.3d 337 (2009)..... 24, 27

Kahn v. Salerno, 90 Wn. App. 110, 951 P.2d 321 (1998)..... 24, 27

Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 325 P.3d 193 (2014)..16, 17

<u>Loeffelholz v. Univ. of Washington</u> , 175 Wn.2d 264, 285 P.3d 854 (2012)	
.....	16, 19, 22
<u>Riehl v. Foodmaker, Inc.</u> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	16
<u>Sangster v. Albertson's, Inc.</u> , 99 Wn. App. 156 991 P.2d 674 (2000)	
.....	16, 17, 20, 22, 23
<u>Washington v. Boeing Co.</u> , 105 Wn. App. 1, 19 P.3d 1041 (2000)...	20, 21

**Table of Cases (U.S. Supreme Court)**

<u>Burlington Northern &amp; Santa Fe Ry. Co. v. White</u> , 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).....	25, 26
<u>Faragher v. City of Boca Raton</u> , 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d. 662 (1998).....	18, 21
<u>Harris v. Forklift Sys., Inc.</u> , 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).....	17, 18
<u>Meritor Savings Bank, FSB v. Vinson</u> , 477 U.S. 57, 106 S.Ct. 2399, 106 L.Ed.2d 49 (1986).....	18, 19
<u>Oncale v. Sundowner Offshore Services, Inc.</u> , 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).....	18, 21
<u>Rogers v. EEOC</u> , 454 F.2d 234 (4th Cir.1971).....	19

**Table of Cases (U.S. District Courts)**

Corneveaux v. CUNA Mutual Ins. Group, 76 F.3d 1498 (10th Cir.1996) .....25

Hashimoto v. Dalton, 118 F.3d 671 (9th Cir.1997).....26

Knox v. Indiana, 93 F.3d 1327 (7th Cir.1996).....25

Ray v. Henderson, 217 F.3d 1234 (9th Cir.2000).....25

Spriggs v. Diamond Auto Glass, 242 F.3d 179 (4th Cir.2001)..... 19, 22

**Statutes**

RCW 49.60.....16

RCW 49.60.030(2)..... 32, 33

RCW 49.60.040(11)..... 24

RCW 49.60.210.....24

**Rules**

RAP 18.1.....32

**Other Authorities**

WPIC 35.50.....21

**I. ASSIGNMENTS OF ERROR AND ISSUES**

1. The Trial Court erred in granting Respondent/Defendant Okanogan County's ("Okanogan County") Motion for Summary Judgment and dismissing Appellant/Plaintiff Lacy Storey-Howe's ("Employee Storey-Howe") claim for Hostile Work Environment when disputed material issues of fact existed pertaining to whether Employee Storey-Howe's terms of conditions of employment were affected and whether Mr. Shawn Messinger's ("Chief Messinger") actions were imputed to Okanogan County, precluding summary judgment.
2. The Trial Court erred in granting Okanogan County's Motion for Summary Judgment and dismissing Employee Storey-Howe's claim for Retaliation when disputed material issues of fact existed as to whether Okanogan County engaged in an adverse employment action against Employee Storey-Howe and whether Employee Storey-Howe's reporting of sexual harassment and the adverse employment action were causally connected, precluding summary judgment.

3. The Trial Court erred in granting Okanogan County's Motion for Summary Judgment and dismissing Employee Storey-Howe's claim for Constructive Discharge when disputed material issues of fact regarding the intolerability of Employee Storey-Howe's working conditions based upon the hostile work environment and retaliation issues precluded summary judgment.
4. The Trial Court erred in granting Okanogan County's Motion for Summary Judgment and dismissing Employee Storey-Howe's claim for Negligent Retention when disputed material issues of fact regarding whether Okanogan County knew of Chief Messinger's sexually harassing behavior precluded summary judgment.

## **II. STATEMENT OF THE CASE**

### **A. Chain of Command.**

Employee Storey-Howe worked as a Communications Deputy for the Communications Department of the Okanogan County Sheriff's Department from 2009 until approximately September of 2011. CP at 54-55, 250-51.

Chief Messinger was employed by Okanogan County and managed the entire Communications Department from August 2006 until July 2011.

CP at 64, 206 as the Chief of Communications. Chief Messinger had the power and authority to hire, fire, and set schedules for all of the employees under his management, including the Sergeants who reported directly to him, and the Deputies who reported directly to those Sergeants, including Employee Storey-Howe. CP at 244, 251.

Mrs. Heather Almont (“Co-Worker Almont”) was also a Communications Deputy and co-worker of Employee Storey-Howe. Co-Worker Almont began working as a Communications Deputy for the Communications Department in about January of 2010. CP at 243-44.

Sergeant Jennifer Johnson (“Supervisor Johnson”) and Sergeant Patricia Stevens (“Supervisor Stevens”) were the direct supervisors of the Communications Deputies Co-Worker Almont, Employee Storey-Howe, and other Deputies in the department. CP at 54-55, 244, 251. The Sergeants were generally responsible for setting schedules, reprimanding and supervision of the Deputies. Id.

**B. Chief Messinger’s Inappropriate Conduct toward Employee during Las Vegas Conference Included Jumping on Employee on Employee’s Hotel Bed and Unwanted Sexual Innuendo Regarding Masturbation Toys.**

Chief Messinger supervised the Okanogan County Communications Department employees attending the Las Vegas, Nevada work conference (“Conference”). CP at 68, 253-54. Okanogan County paid for the County

employees to attend the Conference. Id. The Conference started on April 18, 2011 and lasted until April 23, 2011. CP at 214, 253-54. The employees that attended the Conference were Co-Worker Almont, Employee Storey-Howe, Mr. Patrick Baker, and Mr. Walt Stalder. CP at 254.

Chief Messinger's inappropriate conduct directed at his subordinates began on that trip while still in route to Las Vegas. For example, in the Spokane Airport, Chief Messinger repeatedly asked Employee Storey-Howe if he could buy her alcoholic drinks which Employee Storey-Howe repeatedly refused. CP at 182-83.

When the plane to Las Vegas landed, Chief Messinger pulled on Co-Employee Almont's hair and patted her on the head ultimately requiring Co-Employee Almont to request Chief Messinger to stop touching her. CP at 246, 254, 276.

Once in Las Vegas, the aforementioned Okanogan County employees, including Chief Messinger, stayed at the Paris hotel in adjoining rooms. CP at 246, 254. Employee Storey-Howe and Co-Employee Almont shared a room. Id.

On the first night in Las Vegas, Chief Messinger went to the hotel room shared by Employee Storey-Howe and Co-Employee Almont multiple times. CP at 254-56. Chief Messinger directed Employee Storey-Howe and Co-Worker Almont to leave their hotel door unlocked so that Chief

Messinger could have access to their room. CP at 246-47, 254-55. Chief Messinger's inappropriate conduct continued when he and the employees went to the mall. For example, Chief Messinger kicked Co-Employee Almont's knees, he touched Employee Storey-Howe in an unwelcome and uncomfortable manner by putting his arm around Employee Storey-Howe's torso and holding Employee Storey-Howe's hand. Id.

After the mall, the group went to dinner, and then split up. Id. Employee Storey-Howe returned to her hotel room alone. Id. While Employee Storey-Howe was alone in the hotel room, she changed to get ready sleep by changing into a t-shirt, without a bra, and into a pair of sweatpants. CP at 75, 184-89, 255-56.

Between approximately 10:30 p.m. to 12:00 a.m., an intoxicated Chief Messinger entered Employee Storey-Howe's room with an alcoholic drink in his hand. CP at 76. Employee Storey-Howe was still alone in the hotel room when Chief Messinger entered. CP at 255-56. Chief Messinger also brought Employee Storey-Howe's luggage to the room which, along with the others in the group, had been delayed in arriving in Vegas. Id.

Amongst other things, Chief Messinger asked Employee Storey-Howe what she would do if Co-Employee Almont brought a man back to their room that night. CP at 184-89, 255-56. Employee Storey-Howe was offended by the topic of conversation as she took it to be an inquiry into

whether she would stay or leave the room if Co-Worker Almont was going to have sex there that night. Id.

Employee Storey-Howe then opened her luggage while Chief Messinger lingered in her room and she noticed a Transportation and Security Administration inspection form, which she mentioned out loud. Id. In response, Chief Messinger stated to Employee Storey-Howe that if she had a “BOB” in her luggage, the inspectors would have seen it. Id. Employee Storey-Howe remarked to Chief Messinger that she did not understand what he was referring to by “BOB.” Id. Chief Messinger elaborated that “BOB” was an acronym for “Battery Operated Boyfriend,” otherwise known as a dildo or vibrator. Id.

In an attempt to get out of the situation, Employee Storey-Howe then attempted to text message another worker from the group because she was unnerved by being alone in her hotel room with Chief Messinger. Id. Employee Storey-Howe needed to plug in her nearly-dead cellular phone into the nearest electrical outlet, which was behind a nightstand next to her bed. Id. While Employee Storey-Howe was attempting to plug in her cellular phone into the outlet, Chief Messinger pushed her on her back on to the bed, jumped on top of her, rolled on top of her, and said, “Steamroller.” Id.

Having little choice, Employee Storey-Howe physically pushed Chief Messinger off of her body. Id. Chief Messinger then said something to the effect of, “You don’t want to wrestle? You’re no fun.” Id. Employee Storey-Howe told Chief Messinger to leave her hotel room, but he did not comply with her initial request. Id. Employee Storey-Howe told Chief Messinger to leave her hotel room, which he finally did. Id. Employee Storey-Howe found Chief Messinger’s conduct extremely offensive. Id.; see also CP at 83-84.

The next morning, Employee Storey-Howe reported the incident to one of her two direct supervisors, Supervisor Johnson. CP at 190, 256. Employee Storey-Howe advised Supervisor Johnson that she wanted to return home as a result of the conduct of Chief Messinger. Id. Supervisor Johnson advised Employee Storey-Howe to remain in Las Vegas. Id.

Chief Messinger went to Employee Storey-Howe’s room twice the morning after the incident described above. CP 247-48, 256-57. In the first instance, Co-Worker Almont answered the door and Chief Messinger questioned Co-Worker Almont on things such as the time she got back to the room, whom she had been with, and what she had to drink Id. Chief Messinger returned to the room approximately 15 minutes later and knocked on the door for about a minute. Id. Neither of the women answered

the door because they were getting dressed. Id. The group met for breakfast shortly thereafter. Id.

During the Conference, Chief Messinger attended a class that Co-Worker Almont and Employee Storey-Howe were signed up for and he sat next to them. CP at 257. Chief Messinger's attendance made Employee Storey-Howe very uncomfortable in light of his prior conduct and the fact that the course was designed for dispatchers like herself, not for people in the role of the Chief of Communications. Id.

On about the third day of the Conference, Chief Messinger apologized to Employee Storey-Howe for his conduct. Id. Employee Storey-Howe informed Chief Messinger that he had ruined the Conference for her. CP at 191. They returned to Okanogan from the Conference as scheduled. CP at 285-88.

After returning from the Conference, Employee Storey-Howe returned to work. CP at 91-92, 248, 258. Employee Storey-Howe was scheduled to work with Co-Worker Almont. Id. When Employee Storey-Howe arrived to work, Chief Messinger was present. Id. Only Employee Storey-Howe, Co-Worker Almont, and Chief Messinger were present in the Communications Department. Id. Chief Messinger was still the Chief of Communications at that time. CP at 212, 258. After about two hours, Supervisor Johnson came into the Communications Department office to

begin her shift. CP at 258-59. Supervisor Johnson informed Undersheriff Somday that Chief Messinger was at the office with Employee Storey-Howe. Id. Undersheriff Somday then told Chief Messinger to leave as Chief Messinger and Employee Storey-Howe were not to be working together due to Employee Storey-Howe's sexual harassment complaint. Id.

Due to Employee Storey-Howe's complaint and the subsequent investigation, Chief Messinger was given the option to be demoted or to resign. CP at 219, 258. Chief Messinger resigned and his last day of employment with Okanogan County was July 15, 2011. CP at 258.

**C. Chief Messinger's Pre-Conference Workplace Conduct Directed at Subordinate Female Employee Prompted Warnings by County Officials.**

Chief Messinger engaged in inappropriate behaviors while he was the Communications Chief prior to the Conference discussed below. CP 178-81, 243-46, 251-53. The majority of these behaviors were targeted towards Co-Worker Almont and began shortly after she was hired, which was about January of 2010. Id. Chief Messinger would stare at her, massage her shoulders, touch her back, and single her out for one-on-one conversations at the workplace. Id. Chief Messinger did not act the same way towards male employees. See CP at 252.

Chief Messinger did the majority of these things in the dispatch room of the Communications Department. CP at 245-46, 251-52. The

dispatch room was directly adjacent to the room where the Sergeants' offices were located and in clear view of the Sergeants' offices. Id.

Prior to the Conference, Supervisor Johnson had specific concerns about Chief Messinger and Co-Worker Almont being together at the Conference. CP at 254. Supervisor Johnson's concerns rose to the level that, prior to the Conference, she warned Chief Messinger that he needed to be on his best behavior at the Conference. CP at 252-53. After Employee Storey-Howe had made her sexual harassment complaint against Chief Messinger as discussed below, Supervisor Johnson said that she thought Chief Messinger's conduct would have been directed at Co-Worker Almont. Id.

Supervisor Johnson was not the only Okanogan County employee to have significant enough concerns about Chief Messinger's prior conduct directed at a female subordinate to justify taking the time to warn Chief Messinger to behave himself on the Vegas trip. Okanogan County Sheriff Frank Rogers and Okanogan County Undersheriff Joe Somday both had several "talks with [Chief Messinger] before he left on his trip to Las Vegas" and Undersheriff Somday specifically told Chief Messinger that "what happens in Vegas does not stay in Vegas." CP at 304. The mention of these talks with Chief Messinger comes after Undersheriff Somday provides examples to Chief Messinger, such as if it were Chief Messinger's wife or

daughter in Employee Storey-Howe's situation in the Las Vegas hotel room that night, in an attempt to explain the impropriety of Chief Messinger's actions to Chief Messinger. See CP at 304-05.

Despite this general knowledge by upper level County employees and these warnings directed to Chief Messinger, Okanogan County itself took no action to address Chief Messinger's behavior prior to the Las Vegas trip. See CP at 213-14, 253. In fact, Chief Messinger's behavior was generally understood as being "the way he is." See CP at 293; see CP at 290 (Chief Messinger's behavior holding Employee Storey-Howe's hand was "Shawn being Shawn"); see CP at 302 (Chief Messinger telling Undersheriff Somday, "[Y]ou know how I am," when questioned about kicking the female Deputies behind the knees).

#### **D. Supervisor Stevens' Retaliation.**

Prior to Employee Storey-Howe asserting her sexual harassment complaint against Chief Messinger, Employee Storey-Howe, and Supervisor Stevens had a good working relationship. CP at 242, 251, 258-60, 264. Supervisor Stevens was not rude to, or critical of, Employee Storey-Howe. Id. The two of them had received a Letter of Commendation from Sheriff Frank Rogers, the elected sheriff. Id. Employee Storey-Howe received favorable performance evaluations from Supervisor Stevens and Supervisor Johnson. CP at 267-73.

Sometime after Employee Storey-Howe had initially reported Chief Messinger's sexual harassment, but prior to May 4, 2011, Supervisor Stevens called Employee Storey-Howe into her office and told her that she should not pursue her sexual harassment complaint against Chief Messinger. CP at 192-93, 258-59, 300. Employee Storey-Howe pursued her complaint despite Supervisor Stevens' warning. CP at 258-59.

After Employee Storey-Howe followed through with her sexual harassment complaint despite Supervisor Stevens' warning, Supervisor Stevens began retaliating through hostile behavior directed toward Employee Storey-Howe. CP at 259-60. For example, the changes in Supervisor Stevens behavior included yelling at Employee Storey-Howe, picking up her on-the-job dispatch calls, physically standing behind Employee Storey-Howe during dispatch calls, and criticizing how she was performing her job. CP at 197-98, 259-60. Supervisor Johnson had no such issues or complaints about Employee Storey-Howe's performance following the sexual harassment complaint. Id.

In addition, Supervisor Stevens followed Employee Storey-Howe outside on her breaks and questioned who she was talking to or who she was messaging. Id. Supervisor Stevens additionally denied a co-worker a scheduling change because Supervisor Stevens thought that Employee Storey-Howe was the employee who asked the co-worker for the schedule

change as it would have included swap of half a shift with Employee Storey-Howe off of Supervisor Stevens' shift. Id. Supervisor Stevens said something to the effect of that she would work the full shift with Employee Storey-Howe. Id. Employee Storey-Howe reported some of Supervisor Steven's retaliatory conduct to Supervisor Johnson. Id. Even after Employee Storey-Howe reported Supervisor Stevens' conduct, Supervisor Steven's retaliatory behavior directed toward Employee Storey-Howe continued. Id. Employee Storey-Howe documented some of the instances of Supervisor Steven's behavior. CP at 197-98, 222.

**E. County's Newspaper Comments and E-mail.**

After word got out that Chief Messinger was resigning from the Communications Department, a local newspaper published an article on the subject. CP at 100, 344. Sheriff Rogers commented in the article that Chief Messinger was one of the best Communications Chiefs they had ever had. Id. Details about the sexual harassment later surfaced and Sheriff Rogers then commented in another article that Chief Messinger's departure from the Sheriff's office was a "career change" and that he "was not told to resign or be fired [,but] chose to leave on his own." Id.

Additionally, on May 31, 2011, Undersheriff Somday sent out an e-mail that asked all employees to wish Chief Messinger well upon his resigning. CP at 100, 347. This e-mail was different to other e-mails sent

out when employees resigned which would essentially only say that the employee had resigned. CP at 249, 349-50.

The sexual harassment, the retaliation by Supervisor Stevens' afterwards, and the front that Okanogan County was putting on towards the public caused Employee Storey-Howe to resign in September of 2011. CP at 262.

The impact of Okanogan County's treatment of the Plaintiff caused her to see a therapist, Dr. Arnold. CP at 100, 106, 196.

**F. Undersheriff Somday's Investigation.**

Undersheriff Somday performed an internal investigation into Employee Storey-Howe's sexual harassment claim against Chief Messinger. CP at 275-342. The investigation corroborated Employee Storey-Howe's complaint and resulted in substantiated findings of sexual harassment against Chief Messinger. CP at 276-77. The summary of the report states that Chief Messinger's behavior went beyond casual conversation of a benign nature, was sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), violated Okanogan County policy, and constituted sexual harassment. *Id.* Undersheriff Somday further noted that Chief Messinger's actions created an intimidating and offensive work environment, and that the Communications Deputies should not have to face a choice between their work and self-esteem, or a choice between

their jobs and their safety. Id. Additionally, the report indicates that any reasonable woman would find the behavior of Chief Messinger offensive. Id. The investigation catalogued many of the events that occurred prior to, and during, the Conference. CP at 275-342.

**G. Relevant Procedural History.**

Employee Storey-Howe brought suit on January 1, 2013 alleging hostile work environment, retaliation, constructive discharge, negligent retention/supervision, assault, and battery against Okanogan County. CP at 1-9.

Okanogan County moved for summary judgment on all claims against it on May 16, 2014. CP at 19-20.

The Honorable Judge John Hotchkiss of the Douglas County Superior Court heard the motion on June 17, 2014. He granted Okanogan County's motion as to all Employee Storey-Howe's claims against Okanogan County. CP at 368-69.

Employee Storey-Howe sought a certification for this appeal from the Douglas County Superior Court, which was granted on July 18, 2014. CP at 397-93.

### III. ARGUMENT

#### A. Summary Judgment Standards.

An order granting summary judgment is subject to de novo review. Loeffelholz v. Univ. of Washington, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). Summary judgment is only appropriate where there is a genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id. A material fact is one upon which the outcome of the litigation depends. Sangster v. Albertson's, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000). The evidence is viewed in the light most favorable to the nonmoving party. Loeffelholz, 175 Wn.2d at 271. Summary judgment in favor of the employer is seldom appropriate. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 144, 94 P.3d 930 (2004); see also Sangster, 99 Wn. App. at 160.

#### B. Hostile Work Environment Claims Are Construed Liberally Pursuant to Washington Law and Material Facts Exist Regarding the Severity of Chief's Conduct Directed at Subordinate Employee.

Chapter 49.60 RCW, Washington's Law Against Discrimination ("WLAD"), is designed to protect employees from sexual harassment. Sangster, 99 Wn. App. at 161. Sexual harassment may come in the form of a hostile work environment. See id. WLAD is to be construed liberally. Loeffelholz, 175 Wn.2d at 274. Additionally, to aid in interpretation of WLAD, Washington Courts have looked to Title VII of the Civil Rights Act

of 1964. Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 491, 325 P.3d 193 (2014). The Kumar Court wrote that federal cases are not binding on Washington Courts and that Washington Courts have almost always ruled that WLAD provides greater employee protections than its federal counterparts. Id.

The a prima facie case for hostile work environment are: (1) that there was an offensive, unwelcome contact, (2) that occurred because of sex or gender, (3) which affected the terms or conditions of employment, and (4) that can be imputed to the employer. Sangster, 99 Wn. App. at 161. The first two elements were not conceded by the County at summary judgment, but not affirmatively challenged either. CP at 26. The first two elements were not argued below and for purposes of this brief, we assume the first two elements are conceded by Okanogan County for the purposes of this briefing, but will reserve the right to address them in reply briefing if necessary.

**1. Chief Messinger's conduct directed at subordinate female affected employee's employment.**

As to the third element, whether the conduct affected the terms or conditions of employment is ordinarily a question of fact for a jury. See Adams v. Able Bldg. Supply, Inc., 114 Wn. App. 291, 296, 57 P.3d 280 (2002) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S.Ct. 367,

126 L.Ed.2d 295 (1993)). The Adams Court noted that a “civil rights code is not a ‘general civility code.’” Id. at 297 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d. 662 (1998) (writing that “[p]roperly applied, [these standards] 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’”) (internal citations omitted). Thus, to establish the third element, the conduct must be “both objectively abusive (reasonable person test) and subjectively perceived as abusive by the victim.” Adams, 114 Wn. App. at 297 (citing Harris, 510 U.S. at 21).

The reason why the severity or pervasiveness of the conduct is usually a question for the jury is because the totality of the circumstances test is context dependent and looks to community sensibilities. For example, the U.S. Supreme Court stated:

“Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.” Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81-82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

Further, the totality of the circumstances looks to conduct targeted at persons other than the plaintiff. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65-66, 106 S.Ct. 2399, 106 L.Ed.2d 49 (1986) (writing

that “Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele”) (citing Rogers v. EEOC, 454 F.2d 234, 241-42 (4th Cir.1971)); see also Spriggs v. Diamond Auto Glass, 242 F.3d 179, 184 (4th Cir.2001). The standard for linking discriminatory acts is not high and all that it required is that the acts have some relationship to each other. Loeffelholz, 175 Wn.2d at 276.

Chief Messinger’s behavior was much more egregious than that of other Washington cases where summary judgment was not appropriate. For example, in Adams the plaintiff’s claim was based primarily upon four instances of conduct which outlined the manager’s behavior. Adams, 114 Wn. App. at 293-94. The instances were (1) that the manager popped balloons placed in his office for his birthday and commented that he did not “have time for this crap;” (2) that at a meeting, he looked at his watch, swore, slammed a pencil, and stormed out of the room; (3) that when the plaintiff was helping another employee with her computer, the manager became annoyed, left his office while swearing, shouldered the plaintiff away from the computer, and argued with her; (4) and that when the plaintiff was removing merchandise from a box, he yanked it out of her hand, injured himself, and began swearing. Id. The Court wrote that “[i]t would be for a

jury to decide whether [the manager]'s exhibitions merely reflected a gruff, direct management style-as characterized by [the manager]-or were sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment.” Id. at 297.

Similarly, in Sangster, a supervisor did the following: suggest that the plaintiff order her shorts one size smaller; ask her to try on a dress in front of him; ask her, “[w]hat's the matter - didn't you get any last night?”; remark that she should join his mile high club; comment that the plaintiff should go for older men like himself and that she could travel with him; and used terms like “honey,” “sweetie,” and “little girl” in addressing the plaintiff and other female employees. Sangster, 99 Wn. App. at 162. The Sangster Court held that summary judgment was not appropriate on those facts. Id. at 163. Cf. Washington v. Boeing Co., 105 Wn. App. 1, 13, 19 P.3d 1041 (2000) (holding that plaintiff called “dear” and “sweet pea” in addition to statements by male employees regarding a possible EEO complaint brought by plaintiff regarding her objection to a sexually suggestive calendar not actionable as to sex-based hostile work environment claim).

In Alonso v. Qwest Communications Co., LLC, 178 Wn. App. 734, 749-50, 315 P.3d 610 (2013), a prima facie case for a hostile work environment was presented where the plaintiff's co-workers and

supervisors used racial epithets, said the plaintiff was “not a real Mexican” based upon his eating habits, and commented on his speech and accent. Cf. Washington, 105 Wn. App. at 19 (holding that plaintiff called “brillo head” once not actionable for racial hostile work environment case).

As stated above, the severity and pervasiveness test is really a common sense test. See Oncale, 523 U.S. at 81-82. Common sense dictates that what happened to Employee Storey-Howe was far beyond “normal” and certainly was not an “ordinary tribulation” that an employee should be expected to deal with at work. See Faragher, 524 U.S. at 788. Employee Storey-Howe was offended and any reasonable person in her situation would have been as well. CP at 256. Taken in the light most favorable to the non-moving party, the hotel room incident constituted a criminal assault. See WPIC 35.50 (Assault-Definition<sup>1</sup>). The power disparity between the

---

<sup>1</sup> WPIC 35.50: “[An assault is an intentional *[touching] [or] [striking] [or] [cutting] [or] [shooting]* of another person<sup>1</sup>, *with unlawful force,*] that is harmful or offensive *[regardless of whether any physical injury is done to the person]*. [A *[touching] [or] [striking] [or] [cutting] [or] [shooting]* is offensive if the *[touching] [or] [striking] [or] [cutting] [or] [shooting]* would offend an ordinary person who is not unduly sensitive.]]

[An assault is *[also]* an act<sup>1</sup>, *with unlawful force,*] done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. *[It is not necessary that bodily injury be inflicted.]*

[An assault is *[also]* an act<sup>1</sup>, *with unlawful force,*] done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.]

parties was readily apparent as Chief Messinger was the Chief of Communications, i.e., the head of the department, and Employee Storey-Howe was a deputy, i.e., the lowest ranking level of officer in the department. It should further be noted that the investigation report of Undersheriff Somday makes findings that Chief Messinger's actions created an intimidating and offensive work environment, and that the Communications Deputies should not have to face a choice between their work and self-esteem, or a choice between their jobs and their safety. CP at 276. Additionally, the report indicates that any reasonable woman would find the behavior of Chief Messinger offensive. Id.

This conduct here was worse than being called "honey" and "sweetie," and worse than throwing a temper tantrum and popping some balloons. See Sangster, 99 Wn. App. at 162; Adams, 114 Wn. App. at 293-94.

Outside of the hotel room incident, as stated above in Section II.C, Chief Messinger created a hostile work environment in regard to Co-Worker Almont. Again, a hostile work environment claim looks to the totality of the circumstances and the whole tapestry of conduct. Spriggs, 242 F.3d at 184; Loeffelholz, 175 Wn.2d at 276.

---

*[An act is not an assault, if it is done with the consent of the person alleged to be assaulted.]*"

Employee Storey-Howe was also subjected to Chief Messinger's conduct during the way to the Conference, and then was required to stay in the same circumstances after the assault.

Okanogan County knew there were issues surrounding Chief Messinger's conduct prior to the Conference in regard to his conduct towards Co-Worker Almont as stated in Section II.B and did nothing.

Here, material facts existed that should have precluded summary judgment against Employee Storey-Howe as to her hostile work environment claim.

**2. Chief Messinger's conduct was imputed to Okanogan County and summary judgment was not appropriate as to the element of employer imputation.**

It is presumed that vicariously liability exists for the employer where the employee creating the hostile work environment is of supervisory level or higher above the plaintiff. See Sangster, 99 Wn. App. at 164-65; see also Alonso, 178 Wn. App. at 620.

There is no legitimate argument here that Chief Messinger was not Employee Storey-Howe's supervisor or of higher station. Chief Messinger was the Chief of the Communications Department. CP 251, 177, 206. He had supervisory authority over Employee Storey-Howe including the ability to fire her and set her schedule. See id. Chief Messinger is considered a manager under the considerations laid out in Sangster. Sangster, 99 Wn.

App. at 164-65. For the purposes here, it should be presumed that the actions of Chief Messinger were the actions of Okanogan County. See id.

As Chief Messinger was acting as Okanogan County, summary judgment was not proper as to Employee Storey-Howe's hostile work environment claim.

**C. The Trial Court Erred in Granting Summary Judgment as to Employee Storey-Howe's Retaliation Claim as Material Facts were in Dispute.**

Retaliatory practices are prohibited by WLAD. See RCW 49.60.210 (making it "an unfair practice for any employer ... [to] discriminate against any person because he or she has opposed any practices forbidden by this chapter"). An employer "includes any person acting in the interest of an employer, directly or indirectly...[.]" See RCW 49.60.040(11). A cause of action for retaliation under WLAD requires a showing (1) that the employee participated in a statutorily protected activity, (2) that the employer took adverse employment action against the employee, and (3) that the activity and the adverse action were causally connected. Hollenback v. Shriners Hospitals for Children, 149 Wn. App. 810, 821, 206 P.3d 337 (2009). The retaliation must be a substantial factor behind adverse employment action. Kahn v. Salerno, 90 Wn. App. 110, 128-29, 921 P.2d 321 (1998).

Employee Storey-Howe engaged in the statutorily protected activity of reporting sexual harassment under WLAD. This element was not

challenged at the Trial Court level and we will not be argued here, but will reserve the right to address it in reply briefing if necessary. See CP at 31.

**1. Whether Okanogan County took an adverse employment action against Employee Storey-Howe was a question of fact and not appropriate for summary judgment.**

As for the second element, what constitutes an adverse employment action is broader in the retaliation context than in the discrimination context. Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In the retaliation context, an adverse employment action is any action that may have dissuaded a reasonable worker from making or participating in a claim of discrimination. Id.

The severity of the retaliation goes to the issue of damages, not liability. See Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir.2000). “There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint.” Id. (citing Knox v. Indiana, 93 F.3d 1327, 1334-35 (7th Cir.1996)). Retaliation can take such forms as moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services, cutting off challenging assignments, or requiring employee to jump through hoops to obtain her severance benefits. See Knox, 93 F.3d. at 1334; see also Corneveaux v. CUNA Mutual Ins. Group, 76 F.3d 1498, 1507 (10th Cir.1996).

The threshold inquiry is, in the light most favorable to the plaintiff, whether if it were known that the complained of actions would be taken against an employee who reported sexual harassment, would that employee be dissuaded from reporting sexual harassment. See Burlington Northern, 548 U.S. at 68.

If supervisors were regularly allowed to target employees who engaged in protected acts such as reporting sexual harassment by belittling them, exercising control over their schedules and schedule changes, and generally do things that were technically within their power, but with a design to harass and intimidate a specific employee, then the purpose of the anti-retaliation provision (to ensure that employees are completely free from coercion against reporting unlawful practices) would be defeated. See Burlington Northern, 548 U.S. at 67-68; see also Hashimoto v. Dalton, 118 F.3d 671, 675 (9th Cir.1997) (giving of negative employment reference in retaliation against protected activities was actionable).

The thrust of Employee Storey-Howe's retaliation complaint is that Supervisor Stevens told her sometime prior to May 4, 2011 that she should not press the issue of the complaint against Chief Messinger. CP at 258-59, 300, 323. After this happened, Supervisor Stevens' behavior towards Employee Storey-Howe was markedly different as outlined in section II.D in the scope of her employment. Despite reporting Supervisor Stevens'

behavior to Supervisor Johnson, there was no impact on Supervisor Stevens' behavior. CP at 259.

When viewing the facts in the light most favorable to the non-moving party, there is a legitimate question here as to whether Employee Storey-Howe's supervisor began singling her out specifically because she brought or maintained her sexual harassment complaint against Chief Messinger. Additionally, Employee Storey-Howe was constructively discharged by the totality of the events outlined in Section II. To uphold summary judgment would be to allow Supervisor Stevens' and similar practices as a matter of law and allow a supervisor a method of retaliating against their subordinate employees. Summary judgment should have been denied as material facts precluded it.

**2. There was a causal connection between Employee Storey-Howe's protected action and the adverse employment action.**

As to the third element, whether there was a causal connection between Supervisor Stevens' treatment of Employee Storey-Howe and her reporting of sexual harassment. The timing of an adverse action and the protected activity suggests an improper motive. See Kahn v. Salerno, 90 Wn. App. 110, 130–31, 951 P.2d 321 (1998). An employer will rarely reveal that they were motivated by retaliation. Hollenback, 179 Wn. App. at 823.

As previously stated, the only intervening incident preceding Supervisor Stevens' behavior change was Employee Storey-Howe's sexual harassment complaint. In addition to the timing of the adverse action, here, Supervisor Stevens made a statement to Employee Storey-Howe telling her not to proceed with her sexual harassment claim which Employee Storey-Howe, which Employee Storey-Howe did anyway. CP at 258-59, 300, 323. This occurred before May 4, 2011. *Id.* The two did not work together until mid-July. CP at 222-23, 258-59. It was after that point, when the two began working together again that Supervisor Stevens' attitude towards Employee Storey-Howe changed. *Id.*

Viewed in the light most favorable to the non-moving party, Supervisor Stevens' statement along with the timing of her actions gives rise to an inference of a retaliatory motive making summary judgment improper.

**D. The Trial Court Erred in Granting Summary Judgment as to Employee Storey-Howe's Constructive Discharge Claim.**

A cause of action for constructive discharge requires showings that (1) the employer engaged in a deliberate act or pattern of conduct, (2) that the act or pattern of conduct made working conditions intolerable, and (3) that due to the intolerable working conditions, a reasonable person would have felt compelled to resign. Barnett v. Sequim Valley Ranch, LLC., 174

Wn. App. 475, 485, 302 P.3d 500 (2013). The question of whether the working conditions were intolerable is one for the trier of fact and not subject to summary judgment unless there is no competent evidence to support the claim. Haubry v. Snow, 106 Wn. App. 666, 677-78, 31 P.3d 1186 (2001). The intolerable element may be shown by aggravated circumstances or a continuous pattern of discriminatory treatment. Id.

When looking to Washington case law for guidance, summary judgment was improper here. In Haubry, 106 Wn. App. at 670-74, the plaintiff alleged that her employer engaged in acts of sexual harassment. She alleged that around the time she was hired in 1995, her employer would look at her in an offensive way and that he would put his hands on her shoulders. Id. Later, the employer touched the plaintiff inappropriately on her thigh, waist, and leg. Id. The employer made inappropriate comments such as that if she wanted a “great orgy,” that she should go to the Black Diamond Bakery to have a cinnamon roll. Id. The plaintiff eventually quit and brought a constructive discharge claim against the employer. Id. The Appellate Court reversed the Trial Court’s decision to dismiss at summary judgment holding that the question of whether the plaintiff’s working conditions were intolerable was one for the trier of fact. Id. at 677.

In Allstot v. Edwards, 116 Wn. App. 424, 433-34, 65 P.3d 696 (2003), the plaintiff, a police officer, alleged constructive discharge based

upon three things. He was pepper sprayed twice as part of a training exercise where he was supposed to be pepper sprayed. Id. He claimed the town refused to resolve his claim for back wages. Id. He alleged that the police chief withheld information on drug cases from the plaintiff which created a situation that was “not good” for the plaintiff, although the policy applied to all officers in the police department and not just the plaintiff. Id. The third fact, alone, created a question of fact for the jury, but when considering the other two facts, summary judgment as to the plaintiff’s constructive discharge claim was especially improper. Id.

Here, the facts as previously stated are that Employee Storey-Howe was subjected to a hostile work environment due to the actions of the Chief Messinger. After Chief Messinger resigned, Supervisor Stevens took up his torch and targeted Employee Storey-Howe for reporting and/or following through with her sexual harassment complaint.

Further, instead of abstaining from making comments to the press or supporting the victim of sexual harassment, Okanogan County came out in the press in support of Chief Messinger. See CP at 260-61, 344-45. Additionally, upon his resignation, a County-wide e-mail was sent out saying something to the effect of if you see Chief Messinger, wish him well in his future endeavors. CP at 347. As Okanogan is a relatively small town,

Employee Storey-Howe felt especially uncomfortable after Okanogan County essentially supported Chief Messinger.

Whether the conditions were intolerable is a question of fact. Haubry, 106 Wn. App. at 677-78. While a resignation is presumed voluntary, that presumption may be rebutted with competent evidence. See Allstot, 116 Wn. App. 424, 433, 65 P.3d 696 (2003). Here, there is competent evidence establishing that the actions of creating a hostile work environment, retaliating against, and otherwise victimizing Employee Storey-Howe were taken purposefully by Chief Messinger, Supervisor Stevens, and Okanogan County. When viewing the facts in the light most favorable to the non-moving party, and when contrasting the facts here to those of Allstot, summary judgment was not appropriate as to Employee Storey-Howe's constructive discharge claim. See Allstot, 116 Wn. App. at 433-34.

**E. The Trial Court erred in granting summary judgment as to Employee Storey-Howe's negligent retention claim.**

An employer may be liable for the harm caused by an unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries. Betty Y. v. Al-Hellou, 98 Wn. App. 146, 148-49, 988 P.2d 1031 (1999).

Here, as argued above, Okanogan County knew of Chief Messinger's nature and character towards Co-Worker Almont and feared he may sexually harass her as demonstrated by their warnings to him. Okanogan County took no official action to correct or prevent his behavior. Further, Okanogan County did not provide its employees adequate sexual harassment training. CP at 246, 53.

Taken in the light most favorable, it was these actions and omissions to act which allowed Chief Messinger, who had known issues with Co-Worker Almont, to transfer those issues into what culminated in an assault against Employee Storey-Howe in the hotel room.

Under these facts, Okanogan County's motion for summary judgment on the cause of action for negligent retention should be denied.

#### **IV. ATTORNEY'S FEES AND COSTS**

RCW 49.60.030(2) grants plaintiffs who are injured under WLAD costs and reasonable attorney's fees. RCW 49.60.030(2) (granting "[a]ny person ... injured by any act in violation of this chapter ... a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person ... together with the cost of suit including reasonable attorneys' fees..."); See also RAP 18.1 (allowing attorney's fees on appeal if provided for by law).

Under Frisino v. Seattle School Dist. No. 1, 160 Wn. App. 765, 786, 249 P.3d 1044 (2011), if Employee Storey-Howe ultimately establishes injury, she requests the costs and reasonable attorney's fees incurred for this appeal be awarded to her. See RCW 49.60.030(2).

**V. CONCLUSION**

For the aforementioned reasons, the Trial Court erred in granting summary judgment for Okanogan County as to Employee Storey-Howe's hostile work environment, retaliation, constructive discharge, and negligent retention claims and the Trial Court's decisions should be reversed and vacated. Employee Storey-Howe is also requesting her costs and attorney's fees for this appeal in the event that she establishes injury under RCW 49.60.030(2).

Respectfully submitted this 13<sup>th</sup> day of October, 2014.

Johnson, Gaukroger, Smith & Marchant, P.S.

By:

  
Sean R. Esworthy, WSBA No. 42901  
Attorney for Appellant



1 To: Counsel for Defendant Okanogan County  
2 Heather Yakely, Attorney at Law  
3 Evans, Craven, & Lackie, P.S.  
4 818 W. Riverside Avenue, Suite 250  
5 Spokane, WA 99201-0910

6 by e-mailing a true and accurate copy to [HYakely@ecl-law.com](mailto:HYakely@ecl-law.com).

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
  
Barbara A. Coffin

SIGNED AND SWORN TO before me this 13<sup>th</sup> day of October, 2014, by Barbara A. Coffin.

Signature of   
Notary Public  
Printed Name: Sean R. Esworthy  
Commission expires: 07/29/2016

