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COURT OF APPEALS
DIVISION ONE

74367-8

OCT 26 2016

No. 74367-8-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION ONE

DEBI O'BRIEN,
SANDRA FERGUSON
MARGARET BOYLE,

Appellants,

v.

ABM INDUSTRIES, INC.
ABM PARKING SERVICES, INC.
LEONARD CARDER AND JANE DOE CARDER AND THE
MARITAL COMMUNITY THEREOF,

Respondents.

APPEAL FROM THE KING COUNTY SUPERIOR COURT
AT SEATTLE

The Honorable William Downing, Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The appellant, Debi O'Brien, asks the Court to reverse the trial court's rulings granting three Defendants' motions for summary judgment, denying Plaintiff's CR 56(f) motion for continuance, and imposing CR 11 sanctions on the plaintiff, Debi O'Brien and her two attorneys. The first part of this Reply discusses Respondents' material misrepresentations concerning the evidentiary record. The second part of this Reply responds to the Respondent's arguments for affirming the trial court's rulings denying Plaintiff's CR 56(f) motion and granting CR 11 sanctions. The third part of this Reply responds to Respondents' argument that the retaliation claim is time-barred.

II. RESPONDENTS MAKE MATERIAL MISREPRESENTATIONS REGARDING EVIDENTIARY RECORD

A. The Following Corrections Apply to the Respondents' Misrepresentations of the Evidentiary Record.

(1) ***"Ms. O'Brien originally reported to Assistant Branch Manager Dan Lawson, with a dotted line on the organizational chart to the Senior Branch Manager, Hugh Koskinen."*** Resp. Br., at 4.

Correction: This is a material misrepresentation of fact, insofar as it masks the significant role of Hugh Koskinen and thereby, minimizes the role of the individual defendant, Leonard Carder, in causing the hostile work environment as retaliation for protected activity. In her deposition, O'Brien testified that after she was hired for the position of HR Coordinator/Operations Manager, she had a direct reporting

relationship to Carder, as well as to Koskinen and Lawson, while performing her duties as Operations Manager. CP 1524-25. She testified that she reported to Madeline Kwan and Vivian Smith, while performing her HR manager duties. CP 1849-50. The salient point is that, regardless of any *solid or "dotted line on the organizational chart"*, Carder had authority over O'Brien during the entire time she worked at ABM Parking, and he also had authority over the other Operations managers who engaged in the conduct that O'Brien claims affected the terms and conditions of her employment (i.e., Koskinen, Lawson, Purvis, Ketza, Howery).

Below are citations to portions of the record which support this material fact of Carder's authority and thus, his role in the hostile work environment and termination.

- Koskinen and Lawson both left ABM Parking in April 2010 and October 2010 (respectively). Matt Purvis replaced Koskinen as Branch Manager, but this did not happen until May, 2011, leaving no one in the chain of command *between* O'Brien and Carder for the year after Koskinen left ABM Parking.
- Madeline Kwan testified that Carder created the position and approved hiring O'Brien for that position. CP 1526. She also testified that—even after Carder was promoted to Executive Vice President and Rod Howery assumed some of Carder's responsibilities—Carder controlled the budget for the region; Rod Howery continued to answer to him; and Howery continued to work in the San Francisco office, while Carder continued to work in the Seattle office where Debi O'Brien and the new Branch Manager, Matt Purvis, both worked. CP 1560-64.

- The substance of Matt Purvis' testimony establishes that he reported to Leonard Carder and Rod Howery as Branch Manager for the Seattle/Bellevue Branch (not just to Rod Howery). CP 1449-59.
 - Purvis was in communication with Carder about the problems at the Pacific Place Garage. CP 1459.
 - Purvis testified that it was Leonard Carder who directed him to assign Debi O'Brien to resolve problems at the Pacific Place Garage. Id.
 - Purvis testified that he first learned about the suspicious (phony) validation tickets being used at the Pacific Place Garage, because Debi O'Brien reported the matter to him. Purvis stated: **"I knew it was an unsettling amount of tickets. Did I know the amount? No."** CP 1457.
 - Purvis testified that on February 6, 2013, Leonard Carder directed him to re-circulate a broadcast e-mail that was initially circulated to ABM Parking employees in July 2012. He testified that he followed Carder's instruction, and that the e-mail he transmitted directed ABM Parking employees not to speak to members of the press if they were contacted, but to refer the press to designated ABM employees who were named in the e-mail. CP 1480-82.
 - Purvis testified that after he sent out the e-mail, Debi O'Brien came to him and informed him that she had just been contacted by a reporter, and that she had followed the instructions set forth in the e-mail. CP 1482-83.
 - Purvis testified that he immediately informed Carder about the call that O'Brien had just received from the reporter, and that later that day, O'Brien was terminated by ABM Parking. CP 1483-86.
- (2) ***"Mr. Carder's duties did not include supervising operational employees below the branch management level, and Ms. O'Brien never reported to Mr. Carder; he was never her direct supervisor."***
 Resp. Br., at 4 (underline emphasis included).

Correction. This supports O'Brien's case against Carder. Indeed, this statement is an admission by Respondents that Carder was in fact,

O'Brien's direct supervisor, because it is not disputed that O'Brien was an operational employee at the branch management level. Her job title was "HR Coordinator/Operations Manager". Therefore, Carder and O'Brien had a direct reporting relationship.

- Carder had direct authority over Debi O'Brien, Hugh Koskinen, Matt Purvis, Paulette Ketza, and Rod Howery. See Resp. Br., at 4.
- As Assistant Branch Manager, Lawson did not report directly to Carder, but was a direct report of Koskinen's. Id.
- Becky Livermore—the location manager of the Expedia Garage who directly supervised Melody Dillon (discussed, *infra*)— did not report directly to Carder, but had a direct reporting relationship with Hugh Koskinen.

(3) ***"As of May 2011 ...Matt Purvis became Ms. O'Brien's direct supervisor...and reported to Rod Howery."*** Resp. Br., at 5.

Correction. This statement is misleading, and only partially accurate. As discussed above, Purvis reported to Leonard Carder after he was promoted to Branch Manager. He also appears to have reported to Rod Howery in the performance of certain duties as Branch Manager. However, the material fact is this: Leonard Carder continued to have authority over everyone in the *Seattle/Bellevue Branch, regardless of the presence of Rod Howery.* CP 1055, 1560-62 (Kwan Dep.)

- Carder was everyone's boss. This is what O'Brien states in her sworn declaration. CP 1842-76. Based on 13 years of employment at ABM, O'Brien testifies to her personal knowledge that Carder was her boss, and that Carder was the boss of Koskinen, Ketza, Purvis, and Lawson, all of whom engaged in conduct which she alleges created a hostile work environment. As a whole, her declaration establishes that Carder was a very involved manager in running the day-to-day affairs of operations at the Seattle/Bellevue Branch. In her dual HR/Operations role, she reported to Madeline Kwan and Vivian Smith when performing her HR duties, and to Carder and Koskinen when performing her Operations duties. She further testified that Koskinen would frequently become angry and hostile toward her when he was not pleased with her decisions or actions as an HR manager, and that at such times, he would

retaliate, for example, by giving her unwarranted write-ups and taking other actions which negatively affected her and interfered with the performance of her job duties. Koskinen's own testimony when he was deposed during the federal-court case, supported much of what O'Brien alleges. He revealed that his attitudes toward HR personnel—generally—were not at all positive, and that he expressed the view that he only needed to consult HR if he planned to fire someone. He described a very close reporting relationship between him and Carder, including the fact that he kept Carder informed about anything of importance that went on in the Branch, and that Carder routinely and personally intervened in responding to employees' complaints by what Koskinen referred to as "escalating" and "de-escalating". In effect, Carder would meet with the employees who had complaints, and pressure them to not make waves. Based on this record, a reasonable jury could conclude that Koskinen's negative views and attitudes toward "HR" were also held by Carder, and that Carder directed the retaliation by Koskinen and the other Operations managers which created the hostile work environment O'Brien alleges she experienced after early 2009.

- (4) ***"There is no evidence that Mr. Carder knew about Ms. Dillon's complaint; in fact, he was not aware of the complaint by Ms. Dillon, or of Ms. O'Brien's involvement in responding to the complaint."*** Resp. Br., at 5.

Correction. This statement is not supported by the record. On the contrary, there is a great deal of persuasive evidence which establishes that Carder knew about Dillon's sexual harassment complaint and O'Brien's protected opposition activity. Carder's source of information was Hugh Koskinen.

- Hugh Koskinen testified that he worked under Carder and in the same office as Carder. He also stated that it was his standard practice to keep Carder informed about all type of employees' complaints, but especially complaints sexual harassment complaints. CP 1583-85.
- Koskinen testified that he observed Carder's management style when dealing with employee's complaints, which he described as "escalation" and "de-escalation" process and went on to explain

that in practice, this meant that employees' complaints were escalated *by Koskinen to Carder*, and Carder would routinely meet with the complainant to discuss the matter, which would often result in "de-escalation" of the complaint (i.e., the employee's grievance would go away, or somehow be resolved after meeting with the boss of Operations for the region). CP 1584-87. He also testified that the "whole idea was Leonard's", referring to the CSI Program and "mandate" of 10 inspections per week which was imposed on O'Brien. CP 1591.

- Melody Dillon testified during her deposition that she was subjected to a hostile work environment by her direct supervisors, Becky Livermore and Hugh Koskinen, in retaliation for complaining of sexual harassment by two male co-workers. Dillon testified that she was soon forced to resign due to severity of the retaliation directed against her by Koskinen and Becky Livermore (the location managers), after she made a sexual harassment complaint against two male co-workers. CP 1638-1724.
- Melody Dillon testified to an incident of being intimidated by an executive of ABM Parking, and the evidence suggests that this executive was Leonard Carder. She testified that one day, she was summoned to the corporate office in downtown Seattle to meet with a high-level executive. This incident took place after she made her sexual harassment complaint, but before she left her employment at ABM Parking. She described the effect of this meeting with this older man (she was 25 at the time) as "highly intimidate[ing]" to her. Although she could not state one way or the other whether the man with whom she met was named "Leonard Carder", she described this person and his office where the meeting took place, in sufficient detail so that O'Brien had the basis to testify in her sworn declaration (discussed supra) that the person was more likely than not, Leonard Carder. O'Brien's testimony identifying Carder as the person Dillon referred to in her deposition as the "fancy man", is also consistent with Hugh Koskinen's testimony that such interventions into personnel matters or complaints were routine for Carder. Id.
- After she complained about the sexual harassment by two of her male co-workers, Melody Dillon testified to the forms of retaliation she experienced, which are strikingly similar to the forms of retaliation that were experienced by O'Brien. For example, Dillon

was forced to perform walk-through inspections, floor-by-floor, of all 10 stories of the Expedia Garage where she worked as a bookkeeper. She was made (by Koskinen and Livermore) to sign an agreement promising to get along with her harasser, Danny Hernandez. After her complaint about sexual harassment, she received a series of unwarranted write-ups. She testified to her subjective experience of feeling very frightened when she had to do these walk-throughs of the garage, stated that many parts of the garage were dark and isolated, and there was tension at the time, with her male co-workers due to the complaint she had made, and she feared that she might be “jumped” in the garage, but she did the inspections anyway; then was criticized by her supervisor for not doing the inspections quickly enough. Thus, the treatment of Dillon and O’Brien was very similar after their protected activity. They were given a dangerous and frightening job duty, they were given a series of unwarranted write-ups, subject to increased scrutiny in the performance of these duties, and Dillon was forced to quit, while O’Brien soldiered on, until she was finally terminated. This is evidence on the record, of a pattern and practice; with the common denominators being Koskinen and Carder exercising authority over these women. Id.

- During Hugh Koskinen’s deposition, he testified that he worked closely with Carder, revered Carder, observed and admired Carder’s management practices, and endeavored to emulate Carder. CP 1595 (Koskinen’s resignation letter of April 2010). He also testified that it was his job to keep Carder informed about all employees’ complaints, especially sexual harassment complaints. CP 1585 (“Just as standard practice”, he stated that he would have informed Carder about Dillon’s complaint and he also stated: would be “I would be real surprised if I didn’t bring [Dillon’s complaint] to his attention”). Id. Koskinen’s testimony revealed that he harbored deep feelings of resentment and hostility toward employees in Human Resources, including but not limited to Debi O’Brien. CP 1595. Given his admiration for Carder, his attitudes toward HR were more likely than not, a mirror of the views held by his boss—Leonard Carder.
- Koskinen testified to his personal knowledge of Carder’s animus toward Debi O’Brien, and further testified that because of this animus, he often needed to defend O’Brien to Carder. CP 1591-92.

- O'Brien testified in her sworn declaration to the fact that even during his deposition which was taken in early 2015 (during the federal-court case against the two ABM corporations), Koskinen angrily glared at her, and that this made her very uncomfortable, even though she was no longer in a subordinate working relationship with him. CP 1845-46.

(5) ***“Although other branch location managers also performed ‘walk-through’ inspections, Ms. O’Brien contends that this was retaliatory because she felt that doing ‘walk-throughs’ of the parking lots managed by ABM Parking was unsafe.”*** Resp. Br., at 6.

Correction. This statement is misleading. First, because the location managers in the branch did not perform comparable inspections of the garages. Second, because O'Brien's fears for her own safety are mischaracterized by Respondents as a purely subjective feeling that she was unsafe, when in fact, her subjective experience of feeling frightened in the garages was a reasonable, logical response to the objective facts and circumstances, and the dangerous conditions she encountered when she inspected the garages. The trial court's conclusion that the garage inspections were not a form of retaliation, but were “anticipatable duties” of the job, was improper, because this issue was squarely within the province of the jury. Based on the record, a reasonable jury could conclude that O'Brien was placed at risk of being attacked and injured, or even killed while inspecting the garages; that the garage inspections were not in fact, “anticipatable duties”, but instead, that Carder invented the CSI program in order to retaliate and force O'Brien to quit because she was engaging in protected opposition activity in her HR role.

- No other managers were treated the same as O'Brien (i.e., no one else was required to do walk-through inspections of all the ABM garages in the Seattle/Bellevue area and then prepare written reports on each one, then submit those reports to Carder for review and comments). The record does not support Respondents' claim that any of the location managers at the garages performed comparable duties to O'Brien. Instead, the record shows that O'Brien was singled out by Carder, who personally invented the CSI program, made her solely responsible for it, and then ratcheted up the quota for inspections to 10 garages per week, which even Koskinen conceded was not attainable. Carder created the CSI

Program and gave O'Brien the quota to meet, soon *after* she assisted with the response to Dillon's complaint. CP 1844-45.

- Respondents cite to Hugh Koskinen's deposition testimony to support their argument that other employees at ABM Parking were required to perform garage inspections. But Koskinen admits in his deposition that although he looked at the garages when he drove through, and gave verbal feedback or instructions to location managers, he did not do floor-by-floor walking inspections in every garage (as O'Brien was required to do); nor did he write detailed reports about his observations and submit them to Carder (as O'Brien was required to do). CP 834-35.
 - Melody Dillon was the only other person who was given a similar assignment as O'Brien. After she complained about sexual harassment, she was required by Livermore and Koskinen to do floor-by-floor walking inspections of the Expedia Garage. CP 1630-32. But this fact supports (rather than contradicts) O'Brien's claim that the assignment was retaliatory. Like O'Brien, Dillon was required to do these walk-throughs after she made an EEO complaint. O'Brien was required to do 10 inspections per week after she assisted HR in addressing Dillon's EEO complaint. Both women received a series of unwarranted write-ups after their protected activity. This is evidence of a pattern and practice by Carder and the ABM defendants. The *common denominator is Koskinen and Carder* who had authority over both women, and Koskinen gave them these dangerous assignments.
- (6) ***"By her own admission, Ms. O'Brien never reported any concerns about what she observed at the Pacific Place Garage to anyone other than her supervisor, Matt Purvis."*** Resp. Br., at 7.

Correction. This statement is supported by the record; however, it does not support the conclusion Respondents advocate (i.e., they claim it supports their contention that O'Brien was not subject to retaliation for reporting accounting irregularities or possible mismanagement, theft, or embezzlement of the City's parking revenues from operations at the Pacific Place Garage). Below, material parts of the record are discussed, which are persuasive evidence of retaliation related to the Pacific Place Garage, and wrongful termination of O'Brien in violation of public policy.

- After she was assigned to the Pacific Place Garage, it is not disputed that O'Brien reported her efforts and findings at the PPG to Purvis, and Purvis communicated these reports to Carder. CP 1457-60.
- Matt Purvis testified that Carder gave instructions to him to assign O'Brien to resolve the problems at the Pacific Place Garage—which he did. CP 1459.
- O'Brien testified about the steps she took to investigate the problems she observed at the PPG, and how she reported what she found to Purvis. But she testified that Purvis failed to provide the support necessary for her to succeed, and it was in this context that O'Brien testified that she finally "just gave up". CP 750-59.
- O'Brien testified about the steps she took to investigate the problems she observed at the PPG, and how she reported what she found to Purvis (who would in the ordinary course of business, pass the information on to Carder). She testified that Carder and Purvis failed to provide the support necessary for her to succeed, and it was in this context that O'Brien testified that she finally "just gave up". Id.

(7) ***"She never told Mr. Purvis that she believed there was 'probable theft' occurring; rather, she 'just told him that there's something wrong.'"***
Resp. Br., at 7.

Correction. This refers to O'Brien's deposition testimony, but it is misleading because Respondents take the words out of context. Read *in context*, O'Brien's words do not support the Respondents' position that O'Brien did not engage in protected activity, or did not report the fraud or mismanagement she was seeing at the Pacific Place Garage. The record shows that O'Brien reported her findings about the phony validation cards (inter alia) to Matt Purvis, who was Carder's direct report. It was understood by Purvis that because the validation cards could not be identified as being used or paid for by any actual tenants at the Pacific Place Shopping Center, this was evidence of possible mismanagement, theft, or embezzlement of the City of Seattle's parking revenues. This piece of the bigger puzzle about the Pacific Place Garage scandal, was borne out by Impark's audit which was conducted by O'Brien's daughter (Bernadette Stickle), shortly after ABM Parking lost the contracts with the City. When Stickle was deposed in the federal

case against the ABM companies, she testified that she was, at least in part, personally responsible for Impark's discovery of the \$30,000 per month of lost revenues. CP 1759-1841. At the time (we now know), the City of Seattle was on the verge of selling the PPG at a loss to a group of developers. This information was contained in a story which was published by the Seattle Times on February 4, 2013 (i.e., just 2 days before O'Brien received the reporter's call and was terminated). CP 238-40. Subsequently, the City's plan to sell the property to the developers was scuttled. The City Council's decision to halt the sale was reported by the Seattle Times on in April 3, 2013 (two months after O'Brien's termination). CP 242-43. After her termination, O'Brien was interviewed by Detective Thompson of the Seattle Police as part of the City's investigation of ABM's mismanagement or fraud. O'Brien's daughter, Stickle, was suddenly terminated from Impark under suspicious circumstances, and this occurred on the same day that O'Brien met with Detective Thompson. CP 223-27.

- (8) ***"Ms. O'Brien provided no evidence that she has a medical condition requiring a workplace accommodation, or that she gave notice to ABM Parking that she had a condition requiring accommodation."***

Correction. This statement is contradicted by the record of evidence which was before the trial court at summary judgment. See relevant portions of the record cited and discussed below.

- The documentary evidence shows that Ms. O'Brien sent an e-mail to her managers which referred to her physical limitations after she learned that she was going to be required to work at the Spokane Fair in 2012. CP 1916.
- O'Brien requested and received a reasonable accommodation in 2009 and was not required to work the Fair after that; thus, her managers had reason to know that she had a disability, and they understood, or should have understood that her e-mail was a request for a reasonable accommodation. CP 188.
- O'Brien testified that she engaged in the interactive process in 2012 when she proposed a specific reasonable accommodation to her managers (to drive the bus), and that her managers rejected her proposal. CP 204-205.

- After Ketz and Howery received O'Brien's e-mail, they did not ask her for any additional information about her physical limitations, or nature of her physical condition or what type of accommodations she might need. Instead, Ketz e-mailed O'Brien back, and reassured her that she would be accommodated. In this context, O'Brien wrote Ketz back stating: "All my needs have been met." However, when she got to the Spokane Fair, no accommodation was provided and she was forced to work long hours in the field, performing job duties which could aggravate her medical condition. CP 204-205.
- O'Brien conceded at her deposition that once she was at the Fair, she did not repeat her request for a reasonable accommodation. She explained that she did not "want to be [perceived by her co-workers as] a whiner", and explained that her co-workers would have overheard her request on the walkie-talkie system that was being used, which was the only way to communicate while she was out in the field. Furthermore, she had already requested the accommodation from Ketz, and therefore, to do so again would have been futile. In contrast to O'Brien, Ketz was treated more favorably, and was allowed to work from the office during the Fair, because she was pregnant. But O'Brien was required to work two 12- hour days and one 8-hour day waving her arms, standing in the hot sun, directing traffic. These duties could aggravate her medical condition. CP 202-206.

(9) ***"The reduction in force was not implemented in October 2012 as planned. The delay was initially due to scheduling issues, as Ms. Kwan and Mr. Howery wanted to travel to Seattle together to deliver the reduction-in-force news."***

Correction. O'Brien does not dispute that there was a RIF which was implemented by ABM in October 2012 due to a corporate reorganization, but O'Brien's job was not eliminated and she was not affected by the October 2012 RIF. It was *5 months after the RIF* that she was terminated, and this final termination took place after several years of being subjected to a hostile work environment. CP 183-227 (O'Brien's testimony describing the severe and pervasive conduct which interfered with her performance and altered the terms and conditions of her employment).¹ Furthermore, her termination occurred on the

¹ Respondents complain in their brief, that this excerpt (CP 183-230) from O'Brien's deposition transcript requires the Court to search the record to locate the portions

very same day she was contacted by the newspaper reporter about the fraud at the Pacific Place Garage (i.e., February 6, 2013). Based on this record, a reasonable jury could find pretext.

- O'Brien's position was not eliminated as part of that RIF, although other employees were laid off in October 2012.
- Madeline Kwan testified that O'Brien was targeted for termination as part of the October RIF, but that her termination date was delayed for 5 months. Kwan testified that the reason for the 5-month delay in taking the action that was allegedly decided by Rod However, in consultation with Kwan, before October 2012, resulted from the need for Kwan to travel from San Francisco to Seattle to personally inform O'Brien that her position was being eliminated. But when Kwan was asked a follow-up question by Plaintiff's counsel, about whether she did or did not actually travel to Seattle at any time during the 5-month period between October 2012 and February 6, 2013, Kwan testified that she could not recall one way or the other.
- In their response brief on this appeal, Respondents elaborate (for the first time) on Kwan's answer to this question. The elaboration is self-serving (i.e., they state that Kwan and Howery "wanted to travel to Seattle together to deliver the reduction-in-force news"). Supposedly, this was the reason for the 5-month delay in carrying out the termination after others were laid off in October. The record shows that a genuine dispute of material fact exists on the question of whether the October RIF was the true reason for O'Brien's termination, or was mere pretext for unlawful reasons. A reasonable jury could find that Kwan's testimony on this point is not credible, that the termination was unlawful, and the RIF was mere pretext.
- Kwan testified that Vivian Smith—an employee of ABMI and the Vice President of HR—had to approve all terminations, in accordance with ABM's corporate policy. However, the termination document which was ABMI's final approval for O'Brien's termination, was signed by Vivian Smith on February 7, 2013—the

relevant to [her argument]. Resp. Br., at 25. However, the entire except is relevant to Plaintiff's hostile work environment claim because she is describing in detail, the conduct that created a hostile work environment and there were many forms of retaliation employed against her by Carder's direct reports.

day after O'Brien was terminated. CP 1573. First, based on this record, a reasonable jury could find that ABMI was O'Brien's employer, since Vivian Smith was employed by ABMI, and she had to approve matters of hiring and firing for ABM Parking. CP 1564. Secondly, a reasonable jury could conclude from the date on the termination paperwork, that the RIF was mere pretext, and that O'Brien's termination was motivated by unlawful reasons in violation of the WLAD and other public polies, such as the Seattle Municipal Code and the RCWs which earmark parking revenues collected, to specific public purposes. CP 229-233.

- Respondents claim that Howery (not Carder) was the decision-maker who eliminated O'Brien's position, but this claim is not consistent with the record as a whole—which contains persuasive evidence that the true decision-maker was Carder. For example, as previously discussed, Kwan testified that Howery answered to Carder for everything; even after Carder became EVP. Thus, Howery's decision (assuming it was his decision) to eliminate O'Brien's position had to be approved by Carder. Furthermore, Carder as the true decision-maker is consistent with the undisputed fact that Carder created Plaintiff's position in the first place, and her salary was paid from the budget that he continued to control at the time her position was eliminated. CP 1560-62. Based on the record, a reasonable jury could conclude that the termination of O'Brien on February 6, 2013, was motivated by the desire (of Carder and/or Howery) to keep O'Brien from disclosing what she knew about the fraud or mismanagement that was occurring at that the Pacific Place Garage under ABM's management.

(10) ***“ABMI did not make any employment decisions for ABM Parking.”***

Correction. This statement of fact is flatly contradicted by the record.

- It is not disputed that Smith was an executive of ABMI.
- Smith's approval was required before ABM Parking could terminate O'Brien. Thus, ABM Industries could hire/fire ABM Parking employees. CP 1564.
- O'Brien testified that in performing her HR duties, she reported up the HR chain of command, to Kwan and Smith.

- Kwan testified that she was an “advisor” to O’Brien when O’Brien performed her HR duties. CP 1055. If true, Kwan’s testimony adds credence to O’Brien’s allegation that Carder was the one who was really in control, even though she was an HR manager. HR personnel, such as Vivian Smith and Madeline Kwan, were not in a position to protect her from Carder.
- O’Brien testified that she complained to Vivian Smith (an executive VP of ABMI in Houston) after she learned that Hugh Koskinen had recorded her personal telephone conversation and played it for her co-workers. After this, O’Brien testified that the harassment did not stop and the environment became even more hostile. CP 982, **

(11) ***“Ms. O’Brien alleges that in approximately March or April of 2009, in her capacity as a Human Resources representative, she was asked by Mr. Koskinen to assist in responding to a complaint made by an employee Melody Dillon. ...Although it was Mr. Koskinen who directed Ms. O’Brien to write up the two valets, Ms. O’Brien alleges that in 2009 and 2010 Mr. Koskinen and Mr. Carder, subjected her to a ‘hostile work environment’ because of her actions in writing up the two valets at Mr. Koskinen’s direction.”*** Resp. Br., at 5.

Correction. This statement does not support the respondents. First, Ms. O’Brien’s deposition testimony shows that she did not have a very clear recollection of who gave her the instruction to write up the valets in response to Dillon’s complaint. Second, the confusion was understandable because at the same time, Koskinen and Livermore were engaged in a campaign to create a hostile work environment for Dillon Koskinen and they dragged O’Brien into this effort. Koskinen became angry at O’Brien while she was handling the Dillon complaint (accusing her of being improperly influenced by a relationship with Dillon’s mother), and he informs of his intention to fire Dillon. He rebukes O’Brien for an e-mail she forwarded to Livermore, passing on Kwan’s advice not to force Dillon to disclose confidential medical information). Finally, even if Koskinen was the one who instructed O’Brien to write up the valets, this would not be inconsistent with O’Brien’s theory of the case (i.e., that Koskinen and Carder wanted her to be involved in the handling of employee complaints because she was an “HR Manager” and this would put a stamp of legitimacy on their unlawful methods of dealing with employees who make EEO complaints). In other words, O’Brien’s theory comes down to this:

Carder and Koskinen wanted her to be their “HR puppet”; not a real HR manager who would oppose their unlawful activities and ensure ABM Parking’s compliance with the law (i.e, the WLAD or other worker-safety laws. Koskinen’s behavior in handling the situation involving Jason Reidt (i.e., the gas-leak incident) shows a pattern of Koskinen using O’Brien to achieve unlawful ends. For example, Koskinen consulted O’Brien about the situation with Jason Reidt (because he planned to fire Reidt and wanted HR’s imprimatur), but then Koskinen became angry with O’Brien when she did not rubber-stamp his plan to fire Reidt. He was temporarily prevented from terminating Reidt, but later, Koskinen found a way to fire Reidt, anyway—using a different pretext. CP 1596 (Hugh writes to Debi: “I know I asked you to get *somewhat* involved in this incident and you have fulfilled your obligation as it relates to this matter.” (Emphasis added))

- B. The trial court erred when it usurped the role of the jury and concluded (inter alia) that the garage inspections were “not outside the scope of [O’Brien’s] anticipatable duties”.

The Summary Judgment Order states as follows:

“For each discrimination claim, the plaintiff must have evidence that an adverse employment action was taken against her. She asserts two such actions: her termination in February 2013 and her being subjected to a work environment that was purportedly hostile. Certainly, termination of employment is an adverse employment action but the asserted hostility does not seem sufficiently ‘severe and pervasive’ to meet the requirements of the law. The purported ‘ostracism’ and being ‘glared at’ are uncorroborated, purely subjective and insufficient; the parking lot inspections do not seem to be outside the scope of anticipatable duties.” App., Ex. 11 (CP 2154) (Emphasis added).

The garages inspections were dangerous, given the totality of the circumstances. The trial court’s conclusion that the garage inspections were “anticipatable duties” is not a finding that they were

safe duties, for O'Brien or anyone else. Furthermore, the trial court's conclusory statement implies that giving the assignment to O'Brien (or Dillon) was reasonable rather than a pretext for retaliation, whereas a reasonable jury could conclude otherwise. Finally, it is not true that the duties were not "anticipatable", since the HR Coordinator/Operations Manager position was newly-created when O'Brien was hired for it in 2007, and the CSI program did not exist at the time, and the duties of the CSI Program evolved over time in a way which made them more onerous, including the quota of 10 per week, in 2009. None of this could have been anticipated.

The deposition transcript of O'Brien contains the following testimony about the CSI program:

Question: "Did you or anyone else have the job before you of inspecting garages?"

Answer: "No. That was mine. I designed the form and Leonard kind of told me what he wanted me to do and---"

Question: "So that job of inspecting garages then was --- you were the first person to have done that?"

Answer: "As far---as I know." CP 213, 12-25.

Question: "Is it your understanding that you were the first person ever to have done that?"

Answer: "Yes, as far as I know." 214:1-3.

Question: "So it was kind of invented for you then? "

Answer: “I believe so.” 214: 5-9.

Question: “Did you believe that the garage assignment was kind of intended to punish you?”

Answer: “ In a sense. I felt like it was used to---you know, later I felt like it was used by putting the ten a week stipulation on it, that was very hard for me to meet. And I think it became a tool to just—one more thing to be able to get at me.” CP 214; 18-25, CP 215: 1-2.

III. THE COURT SHOULD REVERSE THE TRIAL COURT’S RULING GRANTING DEFENDANTS’ MOTION TO STRIKE

A. Standard of Review is De Novo.

As part of its order granting Defendants’ Motions for Summary Judgment, the trial court partially granted the defendants’ motion to strike Debi O’Brien’s declaration in support of her opposition brief. See App., Ex. 11 (CP 2152-2156). This is subject to *de novo* review. This Court has repeatedly announced that the *de novo* standard of review is to be used by an appellate court when reviewing trial court rulings made in conjunction with a summary judgment motion.² According to this standard, the trial court’s ruling striking large, but unspecified portions of O’Brien’s declaration, should be reversed.

The trial court’s order states, in relevant part, as follows:

“As the Court observed at the [summary judgment] hearing, much in that 34-page document is accurately characterized as ‘conclusory’ or ‘speculative’ and ‘lacking foundation. ***Without going through the declaration line-by-line, portions falling into those categories***

² *Rice v. Offshore Systems, Inc.*, 167 Wn.Ap. 77, 86, 272 P.3d 865 (Div. 1, 2012); (citing, *Momah v. Bharti*, 144 Wash. App. 731, 749, 182 P.3d 455 (2008)).

have been disregarded by the Court. To that extent, the [defendants'] Motion to Strike is granted." See, App., Ex. 11 (emphasis added).³

The court's order does not state specifically, which parts of the declaration were disregarded, or which parts were considered by the trial court when it granted summary judgment. Moreover, the judgment which was presented by Defendants and entered on December 15, 2015, incorrectly indicates that the trial court considered the (entire) "Declaration of Debi O'Brien in Support of Plaintiff's Opposition to Defendants' Motions for Summary Judgment" as the basis for its decision to grant summary judgment. See App., Ex. 12.

B. The statements in the declaration are based on O'Brien's personal knowledge and are admissible evidence.

Respondents argue that the trial court's ruling on the defendants' Motion to Strike should be affirmed because O'Brien's declaration is "conclusory", "speculative" and "lacking in foundation". Resp. Br., at 25. But this is not true. O'Brien's testimony is based on personal knowledge because as she states therein, she was employed by ABM for 13 years, and worked under Leonard Carder from 2007 to 2013.

C. The statements in the declaration about other witnesses' testimony are offered as evidence that CR 11 sanctions were not warranted because Plaintiff and her attorneys conducted a good faith investigation into the facts before the lawsuit was filed in State

³ CP 2153 (quoting, Order on Defs' Motion for Summary Judgment, p.2)

Court; and the excerpts of the deposition transcripts of these witnesses were part of the record before the trial court at summary judgment.

There was a good faith investigation into the facts before this lawsuit was filed. Judge Coughenour and Judge Zilly decided that claims against the individual managers could be brought in State court, but not federal court. The evidence discovered by Plaintiff during the federal case provided a basis for the lawsuit, and *Antonius* was the legal basis for joining the individual managers.

IV. O'BRIEN'S RETALIATION CLAIM IS NOT TIME-BARRED.

Respondents' assert that the retaliation claim is time-barred. This argument has no merit. O'Brien handled Dillon's complaint in 2009 (her opposition activity); The hostile work environment began in 2009, and continued until February 6, 2013; the date ABM Parking terminated her, telling her the termination was due to a "reorganization" or "reduction-in-force". Therefore, the limitations period did not begin to run until February 6, 2013. According to the Supreme Court's in *Antonius*⁴, the acts from 2009 to February 6, 2013—which created the hostile work environment alleged by O'Brien—were one unitary, indivisible act and the statute of limitations did not begin to run until the date of O'Brien's

⁴ *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004).

termination. Thus, the 3-year limitations period did not expire until February 6, 2016. The case was filed March 20, 2015, within the limitations period. Respondents argument is without merit. The retaliation claim is not time-barred.

V. CONCLUSION

The trial court's rulings should be reversed and this case should be remanded for further proceedings and trial on the merits.

DATED THIS 26th day of October, 2016.

Respectfully submitted,

By: /s/Sandra L. Ferguson
Sandra L. Ferguson
Attorney for Appellants, WSBA #27472

DECLARATION OF SERVICE

On said day below, I caused to be served on the following, a true and accurate copy of the Appellants' Opening Brief, in Court of Appeals Cause No. 74367-8 (KCSC 15-2-06791-5 SEA) for service on the following individuals in the manner set forth below:

Counsel for Respondents, Shannon Phillips
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Method of Delivery

via Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington and the United States that the forgoing is true and correct.

Executed this 26th day of October, 2016 at Seattle, WA

/s/ Sandra L. Ferguson

Sandra L. Ferguson