

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**LEANNE LUMPER,**

**Appellant,**

**v.**

**EDMO DISTRIBUTORS,  
INCORPORATED, a Washington  
corporation,**

**Respondent.**

**No. 29338-6-III**

**Division Three**

**UNPUBLISHED OPINION**

Kulik, C.J. — Leanne Lumper appeals the summary judgment dismissal in favor of Edmo Distributors, Incorporated, of her complaint of sexual harassment and disability discrimination.

Because Ms. Lumper failed to establish a prima facie case of sexual harassment or disability discrimination, we affirm summary judgment.

**FACTS**

Edmo Distributors, Incorporated, is a world-wide distributor of aircraft avionics equipment and supplies. Leanne Lumper worked as an order desk employee at Edmo

from April 27, 2004, to April 25, 2008. Ms. Lumper's duties included taking orders, assisting customers with questions about specific parts, working back orders, and inputting orders into the computer system.

The Edmo executive management team included Jeff Christensen, president; Ken Sidles, vice president of operations; Fred Lopez and Tim Gump, directors; and Bob Meeker, chief financial officer (CFO) and human resources (HR) director.

Employees at Edmo included Kirk Leffingwell, operations manager and order desk co-supervisor; Ted Augustine, customer service manager; Jason Hendrickson, order desk supervisor; Nick Fisher, customer service worker and Ms. Lumper's trainer; and Corey Kromm and Shawn Moon, customer service workers.

Edmo's employee manual contained the company policy on sexual harassment. Edmo's policy reads: "Any employee who feels that they are a victim of sexual harassment . . . should bring the matter to the immediate attention of their supervisor or to any member of Edmo's management." Clerk's Papers (CP) at 83. The manual also addressed employee performance, stating that poor productivity or job performance would not be tolerated. Deliberately causing poor workmanship, defective work, or slowing of production was grounds for immediate termination. Ms. Lumper testified she had received a copy of Edmo's employee manual and agreed to read and abide by the

conditions therein.

While working at Edmo, Ms. Lumper had problems with reading, writing, and spelling. She could not remember people's names and had trouble getting telephone calls to the right people. She made mistakes approximately six times per day. Edmo's supervisors often counseled Ms. Lumper on her work performance. In a 2007 e-mail to her trainer, Mr. Fisher, Ms. Lumper mentioned that she suffered from dyslexia and that she told Edmo's management of her dyslexia when she was hired.

On a few occasions, Ms. Lumper complained about problems with her coworkers to Edmo management. In 2006, Ms. Lumper sent an e-mail to her supervisor, Mr. Hendrickson. She complained that Mr. Fisher told her to answer her telephone and to stop getting up from her desk. Ms. Lumper said she did not want to be told how bad she was doing her job. She also complained that a coworker, Mr. Moon, transferred telephone calls to her when he knew the calls did not belong to her and laughed at her even though he claimed to be laughing at nothing.

Ms. Lumper complained again in 2007. She sent an e-mail to Mr. Hendrickson and Mr. Augustine, saying she was tired of her coworkers asking why she did not answer the telephones and erroneously transferring calls to her.

In late March 2008, Ms. Lumper's problems with her coworkers escalated and

resulted in another complaint. Ms. Lumper requested a meeting with Mr. Meeker, CFO and HR director for Edmo. At the meeting, Ms. Lumper told Mr. Meeker that Mr. Moon and Mr. Fisher were harassing her with derogatory comments about her mistakes. This was the first time Ms. Lumper complained to Mr. Meeker, although she told him at the meeting that the conduct had occurred over the last few years.

In a follow-up meeting on April 1, Ms. Lumper met with Mr. Meeker and Edmo's president, Mr. Christensen. Ms. Lumper complained that Mr. Augustine called her a "Fucking Bitch," coworkers belittled her, Mr. Moon made her feel stupid, and Mr. Fisher announced that Ms. Lumper "can't even read." CP at 192. Mr. Christensen told Ms. Lumper that he would investigate the complaints.

In another related meeting on April 3, Ms. Lumper met with Mr. Sidles, Edmo's vice president of operations. Mr. Sidles told Ms. Lumper that Edmo was addressing her allegations. Ms. Lumper said her treatment in the office had improved, but still thought coworkers' conversations were directed at her.

On April 17 and 18, additional follow-up meetings occurred between Ms. Lumper, Mr. Meeker, and Edmo's president, Mr. Christensen. During both meetings Ms. Lumper said the overall situation had improved. She also expressed a new concern about vulgarity in the workplace. In response, Mr. Sidles sent out a company-wide e-mail

reminding employees that vulgarity in the workplace was inappropriate.

Finally, on April 25, Ms. Lumper went to Mr. Meeker's office and stated she had had it and was leaving. She left before her shift ended, without permission. Edmo's management understood she had quit her job, and accepted her resignation. Nevertheless, on April 28, 2008, Ms. Lumper returned to work and alleged she had not quit. Edmo did not rehire her. Ms. Lumper filed suit against Edmo, alleging multiple claims of employment discrimination and wrongful termination.

*Disability Discrimination.* Ms. Lumper maintains that she suffers from dyslexia. She bases her diagnosis on statements made by teachers before Ms. Lumper was old enough to read. She alleges she informed Edmo of her disability when she was hired. However, Ms. Lumper admits she never asked anyone at Edmo to make any changes in her job requirements to accommodate her disability.

Ms. Lumper contends that her coworkers made fun of her because of her disability. In pretrial depositions, she testified: "They cussed at me, called me stupid, called me a fucking bitch, saying I can't read, turning the ringer up very loud on my phone, . . . hitting me in the back of the head with a football, everything I touch I fuck up." CP at 146. She alleged that someone put tacks on the seat of her chair. She testified that the harassment happened often and that she continually complained of the

conduct. To support her allegations, she submitted multiple e-mails and her personal notes documenting the harassing conduct.

Edmo disputes Ms. Lumper's allegations that Edmo's managers and employees engaged in discriminatory treatment of Ms. Lumper because of a disability. Edmo alleges that Ms. Lumper took offense to being told to do her job. Edmo also denies that Ms. Lumper continually complained of offensive conduct. When Ms. Lumper did make a complaint about job performance issues, Edmo contends it took prompt action to alleviate problems perceived by Ms. Lumper.

*Sexual Harassment.* As foundation for her sexual harassment claim based on a hostile work environment, Ms. Lumper relies on her statements from her pretrial depositions as proof that harassing conduct occurred. Ms. Lumper said that Mr. Fisher commented on the size of her breasts and on the size of her bottom, on the picture of a woman's body featured on break.com and on the size of his own genitals.

Ms. Lumper also stated that Mr. Leffingwell, Mr. Augustine, Mr. Fisher, and Mr. Kromm had pornographic websites on their computers. Additionally, she said that she received e-mails from coworkers that she considered to be sexually offensive. Nevertheless, she admits to sending e-mails with nude pictures and dirty jokes back to coworkers and writing comments on them. Ms. Lumper also said that she was offended

by profanity used at Edmo. But she admits to making a profane gesture to a coworker and using profanity in e-mails she sent while at work to her mother.

Ms. Lumper could not remember when the offensive conduct occurred, but said it was daily. Ms. Lumper admits that she never complained about sexual harassment or discrimination to any of the directors of Edmo. As for alleged sexual comments, she admits she never reported them in writing or otherwise to anyone at Edmo, even though the manual required her to do so. Additionally, in the two years of sending numerous personal e-mails from her work computer addressed to her mother, Ms. Lumper admits that the e-mails never documented sexual harassment. To justify her failure to report any harassment, Ms. Lumper alleges that she was told by Mr. Hendrickson, Mr. Augustine, and Mr. Leffingwell that she would be fired if she complained to upper management.

Edmo denies Ms. Lumper's allegations of sexual harassment. Furthermore, Edmo maintains it could not have knowledge of sexual harassment because Ms. Lumper failed to report any incidents of sexually offensive conduct. Mr. Sidles testified that he worked in the same area as Ms. Lumper and never witnessed any improper interaction. Mr. Christensen said that he personally told Ms. Lumper in 2007 that she could come to him if she ever had any problems at Edmo. Upon hearing of other concerns from Ms. Lumper, Edmo contends it performed a serious investigation of the allegations.

Ms. Lumper filed suit against Edmo, alleging multiple claims of employment discrimination and wrongful termination. The court granted Edmo summary judgment on all claims. Ms. Lumper appeals the summary judgment ruling contending that the record demonstrates genuine issues of fact as to whether Edmo subjected Ms. Lumper to sexual harassment and disability discrimination.<sup>1</sup>

#### ANALYSIS

Summary judgment may be affirmed if there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. *Washington v. Boeing Co.*, 105 Wn. App. 1, 7, 19 P.3d 1041 (2000). “All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. We review questions of law de novo.” *Id.* (Footnote omitted.) A material fact is one upon which the outcome of the litigation depends, in whole or part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

In discrimination cases, summary judgment is often inappropriate because the Washington law against discrimination (WLAD), chapter 49.60 RCW, “‘mandates liberal construction’ and the evidence ‘will generally contain reasonable but competing

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<sup>1</sup> Edmo moved to strike Ms. Lumper’s reply brief because it was late filed. We deny Edmo’s motion and grant Ms. Lumper’s motion for a retroactive extension of time to file her reply brief.



inferences of both discrimination and nondiscrimination that must be resolved by a jury.’” *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App.18, 27, 244 P.3d 438 (2010) (footnote omitted) (quoting *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999); *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007)), *review denied*, 171 Wn.2d 1020 (2011). “In order for a plaintiff alleging discrimination in the workplace to overcome a motion for summary judgment, the worker must do more than express an opinion or make conclusory statements.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). “To defeat summary judgment, the employee must establish specific and material facts to support each element of her prima facie case.” *Sangster v. Albertson’s, Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000).

*Sexual Harassment Claim.* Under the WLAD, an employer cannot discriminate against any person in terms or conditions of employment because of sex.

RCW 49.60.180(3). Sexual harassment claims are characterized as either quid pro quo harassment or hostile work environment claims. *Payne v. Children’s Home Soc’y*, 77 Wn. App. 507, 511 n.2, 892 P.2d 1102 (1995). In a sexual harassment hostile work environment claim, the employee must first identify and prove the offensive conduct. *Doe v. Dep’t of Transp.*, 85 Wn. App. 143, 148, 931 P.2d 196 (1997). Then, the employee must demonstrate that the conduct was (1) offensive and unwelcome,

(2) occurred because of sex or gender, (3) affected the terms or conditions of employment, and (4) can be imputed to the employer. *Washington*, 105 Wn. App. at 10.

To avoid summary judgment, Ms. Lumper must show there is a genuine issue of material fact as to every element of her claim. Nevertheless, because summary judgment is rarely appropriate in a sexual discrimination case, we review all elements of her claim.

*Proof of Offensive Conduct.* Ms. Lumper must give specific instances of offensive conduct. “Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed.” *Robinson v. Pierce County*, 539 F. Supp. 2d 1316, 1325 (W.D. Wash. 2008). In most sexual harassment cases, the injured employee relies heavily on his or her testimony as well as some supporting evidence. *See Schonauer v. DCR Entm’t, Inc.*, 79 Wn. App. 808, 813-16, 905 P.2d 392 (1995).

In her complaint and in pretrial testimony, Ms. Lumper gives these six specific instances of conduct which may be related to a sexual harassment claim: (1) receiving e-mails with sexual content, (2) the use of profanity in the workplace, (3) seeing pornographic images on coworkers’ computers, (4) hearing comments made by coworkers about their penis size and about the image of a woman on a computer website, (5) being called a “fucking bitch,” and (6) having a comment made about the size of her breasts and a comment about her bottom.

Ms. Lumper's proof of harassing conduct comes primarily from her testimony. She also offers personal and work-related e-mails for support. However, except for the "fucking bitch" comment, these e-mails do not document the above-mentioned specific instances of sexual conduct. Ms. Lumper did not provide any other statements or any other evidence to prove the conduct occurred.

When viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, we regard Ms. Lumper's testimony as insufficient to establish a question of material fact as to whether the conduct occurred. We, thus, affirm the trial court's summary judgment in favor of Edmo.

Ms. Lumper fails to establish a prima facie case for her sexual harassment based hostile work environment claim. She has not provided evidence that would create an issue of material fact as to each element of the claim.

*Hostile Work Environment Claim/Disability Claim.* The WLAD prohibits an employer from discriminating against an employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(3). To establish a cause of action for a disability-based hostile work environment claim, the plaintiff must prove that (1) he or she was disabled within the meaning of the antidiscrimination statute, (2) the harassment was unwelcome, (3) it was because of disability, (4) it affected the terms and

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conditions of employment, and (5) the discrimination was imputable to the employer.

*Robel v. Roundup Corp.*, 148 Wn.2d 35, 45, 59 P.3d 611 (2002). The central point in a disability-based hostile work environment case is whether the employer acted with a discriminatory intent or motive. *Parsons v. St. Joseph's Hosp. & Health Care Ctr.*, 70 Wn. App. 804, 807, 856 P.2d 702 (1993).

(1) *Recognizable Disability*. Under RCW 49.60.040(7)(a), the antidiscrimination statute, “disability” means the presence of a sensory, mental, or physical impairment that:

- (i) Is medically cognizable or diagnosable; or
- (ii) Exists as a record or history; or
- (iii) Is perceived to exist whether or not it exists in fact.

Whether a person is disabled is traditionally a question for the trier of fact.

*Rhodes v. URM Stores, Inc.*, 95 Wn. App. 794, 799, 977 P.2d 651 (1999). A factual issue can be decided as a matter of law on the question of the presence of a disability if, based on expert medical documentation and state of mind, reasonable minds could only make one decision. *Id.* The burden is on the employee to present a prima facie case of discrimination, including medical evidence of a handicap. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 642, 9 P.3d 787 (2000), *overruled in part on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). The employee may not rely on speculation, but must set forth specific facts that sufficiently rebut the moving party’s

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contentions. *Simmerman v. U-Haul Co. of Inland Nw.*, 57 Wn. App. 682, 687, 789 P.2d 763 (1990) (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

To qualify as disabled under RCW 49.60.040(7)(a)(i), the plaintiff is required to present some credible evidence of a disability. *Simmerman*, 57 Wn. App. at 687. Ms. Lumper admits she was never diagnosed with a disability. She bases her diagnosis on a comment made by a grade school teacher before Ms. Lumper was even old enough to read. Ms. Lumper's testimony regarding a comment made by an unnamed teacher more than two decades ago does not suffice as credible evidence to establish that Ms. Lumper is disabled.

Ms. Lumper presented no admissible medical proof of a disability. During summary judgment proceedings, Ms. Lumper submitted notes from a psychologist to support her disability claim. However, the trial court struck the psychologist's notes as hearsay and inadmissible for lack of authentication. Ms. Lumper did not assign error to the trial court's evidentiary determination and made no argument in that regard in her initial brief. Failure to argue or discuss an assignment of error in an opening brief results in an abandonment of the issue. *Dickson v. U.S. Fidelity & Guaranty Co.*, 77 Wn.2d 785, 787, 466 P.2d 515 (1970). She cannot address the issue for the first time in her reply

brief. *Id.* at 787-88. With no documented proof of a disability, Ms. Lumper cannot rely on her own testimony as evidence of her disability under RCW 49.60.040(7)(a)(i).

Furthermore, Ms. Lumper fails to provide evidence to support her contention that Edmo perceived her as disabled under RCW 49.60.040(7)(a)(iii). “If the employee is relying on perception to establish disability, the employer, not the employee, must perceive the disability.” *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 810, 6 P.3d 30 (2000). An employee merely stating that she perceived a problem is not enough. *Id.* The only evidence that Ms. Lumper presents to establish that Edmo perceived her as disabled is an e-mail telling her trainer that she had a problem with dyslexia. She admits she never asked Edmo to make any changes to her job. Ms. Lumper provides no evidence to show that Edmo treated her as if she had a disability. Hence, Ms. Lumper fails to show she is disabled.

The result of this first element is dispositive. Ms. Lumper fails to present evidence that classifies her as disabled under RCW 49.60.040(7)(a). She has not established her prima facie case for disability discrimination. We do not address the remaining four elements.

Summary. We affirm the trial court’s decision granting summary judgment in favor of Edmo on both the sexual harassment based hostile work environment claim and

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the disability discrimination claim.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Sweeney, J.

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Korsmo, J.