IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROCHELLE CORNWELL,	)	**No. 29700-4-III**
Appellant,	)	
	)	**Division Three**
v.	)	
ROSES & MORE, a corporation,	)	**UNPUBLISHED OPINION**
Respondent.	)	

Brown, J. — Rochelle Cornwell appeals the trial court's summary dismissal of her employment wrongful termination and discrimination suit against Roses and More (Roses). She contends the trial court erred by failing to recognize that material facts remain. We agree, and reverse.

FACTS

Because we review a summary judgment dismissal we must view the admissible facts most favorably for the nonmoving party, Ms. Cornwell. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). The facts are drawn consistently with this standard of review.

In January 2009, Ms. Cornwell was hired by Roses to work as a sales person in

the supply department. Chris Chandler was Ms. Cornwell's manager. Ms. Cornwell was provided a copy of Roses' employee manual and read it carefully. It partly provided for Mr. Chandler to review her performance after a 90-day "Introductory Period." Clerk's Papers (CP) at 99. Mr. Chandler would monitor Ms. Cornwell day-to-day, partly to ensure she provided "courteous service" and would "impose consequences tailored to the circumstances" so she could get a sense of how he perceived her performance. CP at 100, 103. The manual allowed for telephone monitoring, but Roses did not actually monitor the telephones. Failure to abide by the Manual would result in "appropriate disciplinary action." CP at 102. "A written record of all policy violations is maintained in each individual's personnel file." *Id.*

Ms. Cornwell constantly asked Mr. Chandler how she was doing and, until her work injury on July 29, 2009, he replied, "you are doing great." CP at 78. She received one verbal and written warning in April 2009 that coincided with her 90-day review that detailed disruptive workplace conduct (singing, dancing, and wandering off), staying on task to ensure sales calls were made, and not discussing her wages with other employees.

On July 29, 2009, Ms. Cornwell reported her work-place hand injury to Roses and left to see a doctor where she completed a worker's compensation benefits form. She was allowed to return to work with no restrictions except to wear a hand/wrist brace. On July 31, she was placed on restricted duty and, in turn, Roses placed her on light duty. Mr. Chandler vacationed August 5-12.

On August 11, 2009, Ms. Cornwell received a document signed by Mr. Chandler dated August 4, 2009 (six days after her injury), noting he had heard customer complaints and he had spoken to her "many times on the floor about being nicer to customers." CP at 83. Ms. Cornwell swore in her affidavit: "This never happened." *Id.* Also on August 11, Ms. Cornwell's doctor ordered her off work for seven days. When she returned to work on August 19, 2009, her employment was terminated. At the time of her termination, Roses demanded she sign a termination letter partly specifying: "This decision is based on numerous documented performance issues." CP at 42. Roses unsuccessfully challenged Ms. Cornwell's worker's compensation claim.

In December 2009, Ms. Cornwell sued Roses for wrongful discharge in violation of stated public policies including RCW 49.17.160, and for discrimination on the basis of a physical handicap in violation of RCW 49.60.180. She alleged the reasons claimed by Roses for termination were a pretext for retaliation for pursuing worker's compensation benefits and a pretext for discrimination on the basis of a physical handicap.

In December 2010, sixteen months after Ms. Cornwell's termination, Roses filed six even-dated customer and employee declarations alleging that, beginning in April 2009, Roses continuously informed Ms. Cornwell of complaints but her performance did not improve; rather, complaints escalated by early July 2009. They also allege that the decision to terminate Ms. Cornwell's employment was made in early July 2009.

Job-performance evidence predating Ms. Cornwell's injury is limited to two notes

(Exhibit A from Chandler's Declaration) from April 15, 2009 documenting Mr. Chandler "took Ms. Cornwell into the small conference room" to discuss proper work behaviors. CP at 41. The notes documented Ms. Cornwell's acknowledged counseling about disruptive work-place behavior, ensuring sales calls were made, and not wandering off, as noted above. No evidence predating her injury indicates that Roses had received customer complaints about Ms. Cornwell or that she received warnings about customer complaints. And, nothing in the record shows Ms. Cornwell was ever told before her injury to be "nicer to customers."

Roses moved for summary judgment on December 29, 2010, based on the newly signed declarations. Ms. Cornwell responded to the motion for summary judgment and filed an affidavit denying the rude behavior claimed by the customers. She specifically denied ever being told that her telephone behavior was inappropriate or that customers had complained about her. The trial court reasoned no question of fact existed about whether a legitimate reason for the termination existed and nothing in the record other than conjecture and speculation to indicate the termination was retaliatory. It granted summary judgment in favor of Roses, dismissing Ms. Cornwell's claims. Ms. Cornwell appealed.

ANALYSIS

The issue is whether the trial court erred in deciding no material facts remained and summarily dismissing Ms. Cornwell's claims for disability discrimination and wrongful termination.

We review a trial court's grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Barker v. Advanced Silicon Materials*, *LLC*, 131 Wn. App. 616, 623, 128 P.3d 633 (2006). Summary judgment is proper if no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The motion should solely be granted if, from all the evidence, reasonable persons could reach but one conclusion. *Vallandigham*, 154 Wn.2d at 26.

"The moving party bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharms.*, *Inc*., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is a defendant, it may meet this initial burden by showing that there is an absence of evidence to support the plaintiff's case. *Id*. at 225 n.1. If the moving-party defendant meets this initial burden, then the inquiry shifts to the plaintiff. *See Young*, 112 Wn.2d at 225*; Vallandigham*, 154 Wn.2d at 26; *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988) ("Only after the moving party has met its burden . . . does the burden shift to the nonmoving party.") The plaintiff then bears the burden of showing sufficient facts to establish the existence of every essential case element required at trial. *Young*, 112 Wn.2d at 225. In making

this responsive showing, the plaintiff cannot rely on mere allegations, speculation, or argumentative assertions, but must set forth specific facts showing a genuine issue. *Little v. Countrywood Homes, Inc*., 132 Wn. App. 777, 780, 133 P.3d 944 (2006); *Baldwin v. Sisters of Providence in Wash.*, *Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

The essential elements of disability discrimination in a termination context are that the plaintiff was disabled, the plaintiff was terminated, the plaintiff was doing satisfactory work, and the termination occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Anica v. Wal-Mart Stores*, *Inc.*, 120 Wn. App. 481, 488, 84 P.3d 1231 (2004). The essential elements of wrongful termination as retaliation for filing a worker's compensation claim are that the plaintiff exercised the statutory right to pursue worker's compensation benefits, the employer knew of the claim, the plaintiff was then terminated, and any legitimate reason for termination is pretext. *Id*. at 490-92.

Here, the parties dispute whether Roses terminated Ms. Cornwell for a lawful reason, specifically, whether she was terminated for being rude to customers (and therefore not doing satisfactory work) or whether that reason was pretext.

Ms. Cornwell first contends the trial court erred in not requiring Roses to assume the initial summary judgment burden. We agree. Indeed, Roses' summary judgment motion fails to mention or address this initial burden. Roses repeatedly argued during the hearing that Ms. Cornwell had the initial burden. The court incorrectly adopted that

analysis. Roses mistakenly repeats this analysis here.

Roses is required to show an absence of evidence to support Ms. Cornwell's case. The purported lawful reason for termination here was being rude to customers on the phone. Thus, Roses' initial burden would be to show an absence of evidence contradicting their alleged bona fide concern about customer complaints in the spring and summer of 2009. Roses argued Ms. Cornwell's solely relied on her self-serving statement that she was not rude to customers. But Ms. Cornwell correctly argues that, in addition to her own recollection, inferences can be drawn from the absence of contemporaneous customer complaints or disciplinary action combined with the temporal coincidence of her work-related injury and discharge. Further, we must accept that Mr. Chandler reassured Ms. Cornwell she was doing great. And nothing but unrelated matters was discussed with her during her 90-day review. We are required under our standard of review to accept the reasonable inferences from these circumstances. That leaves a credibility dispute that must be left for a fact-finder unless reasonable minds could reach but one conclusion. We are in the same position as the trial court when considering summary judgments and we cannot reach but one conclusion about these facts.

Moreover, construing the facts in favor of Ms. Cornwell, a material fact issue remains regarding pretext. Even if we were to accept the stated reason for discharge as not disputed, the timing of her discharge and circumstances of her work-related injury raise an inference of pretext.

Finally, Roses relies heavily on *Griffith v. Schnitzer Steel Industries,* 128 Wn. App. 438, 115 P.3d 1065 (2005), for the proposition that lack of documentation does not create a triable fact in a wrongful termination case. In *Griffith,* the terminated employee admitted he had discussions with the employer about each justification for his termination before his termination. As Ms. Cornwell contends, there was no such admission here. The case is distinguishable. Here, the lack of documentation is consistent with Ms. Cornwell's position. And, *Griffith* was not decided on summary judgment. Given all, we conclude summary judgment was improper under this record.

Reversed.

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.

_____
Brown, J.

I CONCUR:

_____
Siddoway, J.