No. 29700-4-III

Korsmo, A.C.J. (dissenting) — Rochelle Cornwell failed to demonstrate that a genuine issue of material fact existed because she produced no evidence to rebut her employer's showing that there was a legitimate reason for her discharge. Accordingly I would affirm.

The correct analytical framework for summary judgment in an employment discrimination case was laid out by this court in *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 60 P.3d 106 (2002). First, the employee must make out a prima facie case of retaliation—this establishes a rebuttable presumption of discrimination. *Id.* at 618. "The evidentiary burden then shifts to the employer to produce admissible evidence of a legitimate, nondiscriminatory, nonretaliatory reason for the discharge." *Id.* If the employer is able to do this, then the rebuttable presumption vanishes, and the burden shifts back to the employee, who must then create a genuine issue of material fact by showing that the employer's stated reason for the adverse discrimination was pretextual. *Id.* at 619. If the employee fails to do this, the employer is entitled to dismissal as a

matter of law. *Id.*

Here, it is apparent from the record that Ms. Cornwell has made a prima facie case of employment discrimination based upon the timing of her termination vis-a-vis her request for worker's compensation. It is equally apparent from the six affidavits submitted by Roses & More (Roses) that it has shown a nondiscriminatory reason for the discharge—customer dissatisfaction and the threat of lost business. Thus, the burden to produce some evidence demonstrating pretext shifted to Ms. Cornwell. *Id.*

Ms. Cornwell could have met this burden with evidence that: (1) the reasons stated by Roses have no basis in fact, (2) even if based in fact, Roses' actions were not motivated by these reasons, or (3) the reasons are insufficient to motivate an adverse employment decision. *Id.* It is axiomatic that the party opposing a motion for summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, *or in having its affidavits considered at face value*." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (emphasis added). Accordingly, Ms. Cornwell must provide *some* affirmative evidence outside of her affidavit to meet this burden.

In *Renz*, the appellant was terminated for alleged customer service issues. *Renz*, 114 Wn. App. at 616. Her employment discrimination suit was dismissed on summary

judgment. *Id*. at 617. On appeal, this court held that she had provided sufficient cumulative evidence to meet her burden of demonstrating pretext. The evidence included coworker testimony regarding the quality of her work and the inferences to be drawn from her alleged customer service issues in relation to her *recently completed* 90-day evaluation. *Id*. at 624-625.

Here, unlike in *Renz*, the cumulative record in this case does not support Ms. Cornwell's assertion of pretext. Although she argues that the absence of a contemporaneously created document outlining customer complaints creates an inferential question of fact, there is no showing that Roses was under an obligation to document customer complaints or that it was required to inform employees when such complaints occur. Roses' policies merely require it to document any *disciplinary action* taken, up to and including termination. Clerk's Papers (CP) at 100-102. Here, the only disciplinary action taken in response to the customer complaints and threats of lost business was Ms. Cornwell's termination. CP at 42. Thus, the absence of contemporaneous documentation of customer complaints is irrelevant.

Nor does the "temporal coincidence" between her request for worker's compensation and her termination support her burden. The sequence of events as alleged is what creates Ms. Cornwell's prima facie case; it is not sufficient to sustain her burden

to provide some evidence of pretext. As in *Renz*, she could have submitted affidavits from coworkers or from customers, or any other form of affirmative evidence to corroborate her affidavit. However, she did not do so, and the mere coincidence of her request and her termination, along with the general denial in her affidavit, are simply insufficient to meet her burden. She cannot rely upon the presumption that constituted her prima facie case to establish a pretext in rebuttal of the employer's case.

Finally, it is argued that pretext may also be inferred because the reason behind Ms. Cornwell's termination is in stark contrast to what she was told at her 90-day review. However, the record shows that customer complaints occurred throughout her employment, which necessarily includes the time after her April evaluation. In particular, one customer's affidavit states that she informed Roses of her refusal to work with Ms. Cornwell in July 2009—three months after the 90-day review. CP at 54. At a minimum, this single post-evaluation complaint was sufficient to provide a legitimate reason for her discharge, and she has not met her burden to provide any evidence of pretext involving it.

I respectfully dissent.

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Korsmo, A.C.J.