IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BERYL FERNANDES, a single, person, Appellant, v. JAY MANNING, Director, Department of Ecology, and the DEPARTMENT OF ECOLOGY and THE STATE OF WASHINGTON, Respondents.	)	NO. 66962-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 14, 2011

Leach, A.C.J. — Beryl Fernandes appeals the dismissal on summary judgment of her claims against the Department of Ecology and Jay Manning ("Ecology") for race discrimination, retaliation, and hostile work environment under the Washington Law Against Discrimination (WLAD)[1] and for wrongful discharge in violation of public policy. Because Ecology produced sufficient evidence of a legitimate, nondiscriminatory reason for its decision to terminate Fernandes and she failed to rebut that explanation, the trial court did not err in dismissing the WLAD claims. And because she failed to present evidence that Ecology violated the WLAD, the trial court did not err by dismissing the wrongful discharge claim. We affirm.

FACTS

[1] Chapter 49.60 RCW.

Beryl Fernandes was born to parents from the West Indies and raised in Zanzibar, East Africa. She describes herself as a person of color with a very rich, multicultural heritage.

In January 2003, Fernandes applied for the position of Ecology Regional Director of the Southwest Regional Office. Then Deputy Director Linda Hoffman and Director Tom Fitzsimmons agreed that Fernandes was the best candidate for the position and hired her in March.

Soon after arriving on the job, Fitzsimmons gave Fernandes a list of "Significant Results Expected in 2003." These included "developing effective working relationship with your colleagues on the [Resource Management Team (RMT)] and all the key staff for the region." The RMT consisted of Ecology program supervisors for various projects within the region who reported directly to Ecology headquarters, not to Fernandes.

Conflicts between Fernandes and the RMT arose within weeks of her appointment. To address these conflicts, Fernandes and the RMT agreed to two three-hour "mini-retreats" facilitated by a regional director from a different region of Ecology. The first miniretreat went well; the second, which took place in September 2003, did not go well in Fernandes's view. The next day, Fernandes wrote an e-mail to Fitzsimmons, stating that her problems with the RMT were "serious" and "won't simply go away with time." She declared, "I have never

been treated with such hostility, resentment and disrespect as I have by this RMT when in a group setting. The pack mentality is mean-spirited and cruel." Fernandes suggested hiring an outside consultant to help resolve the situation.

In October, Fitzsimmons accepted a position as the Governor's chief of staff, and Hoffman succeeded him as Ecology's Interim Director. On October 12, Hoffman wrote an e-mail to Fitzsimmons discussing Fernandes's six-month evaluation. In that e-mail, Hoffman indicated that she had

> been getting unsolicited reports from a number of RMT members and program managers that things are definitely not better. She does not collaborate and problem solve with the group, she really isn't to the point of being effective in managing cross program issues, problems and projects and some of her behaviors are working against that.

Hoffman asked Fitzsimmons to "help . . . to make it clear, if she doesn't seem to realize it, that the issues with the RMT are a significant problem that, if not addressed, will get in the way of her's [sic] and the team's effectiveness." Hoffman also reported that she thought Fernandes's idea to engage an outside consultant was a "very good idea."

Hoffman and Fernandes worked together to hire an outside consultant, but their disagreement about the consultant's scope of work delayed the process for many months. Hoffman indicated that Fernandes became "more and more focused on having the consultant address organizational structure"[2] rather than

[2] Fernandes does not dispute Ecology's characterization, which is

limiting the scope of work to Fernandes's relationship with the RMT.

Meanwhile, Hoffman sought Employee Services Director Joy St. Germain's advice. In January 2004, St. Germain sent a letter to Hoffman concerning termination. That letter outlined general policy and legal concerns surrounding a decision to terminate at-will employees. St. Germain testified that the letter was drafted at a time when Hoffman was seeking advice on a number of options for action, which, according to Hoffman, included hiring the outside consultant. Hoffman's declaration states that she had not decided to terminate Fernandes until later, in late summer or early fall of 2004.

In April, Fernandes and Hoffman were finalizing the selection criteria for an outside consultant when Fernandes reported that she was being subjected to "bullying, an abusive situation, and . . . [was] terrified." In a meeting a few days later, Fernandes reiterated these concerns to Hoffman. Hoffman informed Fernandes that

> I will not tolerate bullying and abusive behavior in our workplace and I need to look into this. As the Director, I have been notified of actions which may be in violation of agency policy. Civil Service law and agency policy require me to conduct investigations of alleged employee misconduct in accordance with applicable legal and regulatory requirements in a prompt, thorough and impartial manner while recognizing and observing all employee's rights.

In response to these complaints, Hoffman then deferred hiring an outside

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supported by e-mail correspondence in the record.

consultant and instead hired an outside investigator to look into Fernandes's allegations of employee misconduct.

An independent employment attorney conducted the investigation and, after interviewing 20 employees and reviewing numerous documents, produced a report ("the Boodell report"). The Boodell report concluded there was "no credible evidence to suggest a violation of Agency policies or a violation of state and federal laws prohibiting discrimination based on a protected classification." The report further concluded that no credible evidence supported Fernandes's perceptions of bullying, abusive behavior, and a hostile work environment. Hoffman, after reviewing the report, concluded that "there has not been a violation of agency policies by any member of the [RMT]" and that "there has been no violation of state and federal laws prohibiting discrimination based on a protected classification."

Fernandes met with Hoffman and St. Germain on October 4, 2004. Hoffman gave Fernandes the option of resigning in lieu of termination. Hoffman based her decision on her conclusion that Fernandes failed to satisfy the position's performance expectations and had continuing communication and interpersonal problems with the RMT. Fernandes resigned two days later. Hoffman then appointed Dick Wallace, a Caucasian male, as regional director.

Fernandes sued Ecology in October 2007, alleging wrongful discharge;

discrimination based on age, race, and gender; hostile work environment; disparate treatment; and unlawful retaliation. The trial court granted Ecology's motion for summary judgment, dismissing Fernandes's claims with prejudice. She appeals.

STANDARD OF REVIEW

We review a summary judgment order de novo, engaging in the same inquiry as the trial court.[3] Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues exist as to any material fact and the moving party is entitled to judgment as a matter of law.[4] Where, as here, a defendant moves for summary judgment and shows an absence of evidence to support an essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence sufficient to establish the existence of the challenged element of that party's case.[5] Where the plaintiff fails to do so, summary judgment is proper "'since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'"[6]

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[3] Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).

[4] CR 56(c); Torgerson v. N. Pac. Ins. Co., 109 Wn. App. 131, 136, 34 P.3d 830 (2001).

[5] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

[6] Young, 112 Wn.2d at 225 (quoting Celotex Corp., 477 U.S. at 322-23).

ANALYSIS

Discrimination

Fernandes assigns error to the trial court's dismissal of her race discrimination claim, brought under RCW 49.60.180.[7]

RCW 49.60.180(2) makes it unlawful for employers "[t]o discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin . . . or the presence of any sensory, mental, or physical disability." When analyzing discrimination claims under this statute, Washington courts apply the McDonnell Douglas Corp. v. Green[8] burden-shifting protocol. Under this protocol, the plaintiff must first present a prima facie case of discrimination. If the plaintiff does this, a "'legally mandatory, rebuttable presumption' of discrimination temporarily takes hold, and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation"[9] for its action. If the defendant

[7] Fernandes refers to this cause of action as "racial discharge under RCW 49.60.180."

[8] 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); see Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180, 23 P.3d 440 (2001) ("Washington courts have largely adopted the federal protocol announced in McDonnell Douglas for evaluating motions for judgment as a matter of law in discrimination cases brought under state and common law, where the plaintiff lacks direct evidence of discriminatory animus."), overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006); see also Jones v. Kitsap County Sanitary Landfill, Inc., 60 Wn. App. 369, 371, 803 P.2d 841 (1991); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 363, 753 P.2d 517 (1988).

meets this burden, the presumption "drops out of the picture," and the burden shifts back to the plaintiff to show that the reason asserted by the employer is pretextual.[10] These burdens of proof are burdens of production, not of persuasion.[11]

Only if both parties meet these intermediate burdens of production and produce evidence of reasonable competing inferences of discrimination and nondiscrimination should the case proceed to trial.[12] Washington courts apply the "hybrid-pretext" standard,[13] which provides for summary dismissal when the "'record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer's reason [i]s untrue and there [i]s abundant and uncontroverted independent evidence that no discrimination ha[s] occurred.'"[14]

To establish a prima facie case of unlawful discrimination, the plaintiff must show that (1) she belonged to a protected class, (2) she was discharged or

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[9] Hill, 144 Wn.2d at 181 (citation omitted) (quoting Tex. Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 254 n.7, 101 S. Ct. 1089, 67 L. Ed.2d 207 (1981)).

[10] Hill, 144 Wn.2d at 182 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)).

[11] Barker v. Advanced Silicon Materials, LLC, 131 Wn. App. 616, 623-24, 128 P.3d 633 (2006).

[12] Barker, 131 Wn. App. at 624.

[13] Hill, 144 Wn.2d at 185-86.

[14] Milligan v. Thompson, 110 Wn. App. 628, 637, 42 P.3d 418 (2002) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)).

suffered an adverse employment action, (3) she had been doing satisfactory work, and (4) she was replaced by someone not in the protected class.[15] Here, Fernandes claims she met this initial burden because she was a member of a protected class, was discharged, was performing her work satisfactorily, and was replaced by a white male.

The State disagrees. According to the State, Fernandes failed to prove the third element of her prima facie discrimination claim. Alternatively, the State contends it produced ample evidence of a legitimate, nondiscriminatory explanation for its adverse employment action, which Fernandes failed to rebut.

Both parties cite to Fernandes's six-month job performance evaluation, which gave her mixed reviews. It states, "You have done a very good job in orienting yourself to the agency and the position." However, the evaluation continues,

> You have noted, Beryl, that the relationship with RMT is your current biggest challenge on the job. We agree, and want to emphasize that being an effective regional director means you need to be an effective internal team leader. These difficult internal relationships are a significant problem which, if not addressed, will get in the way of your, and the team's effectiveness in managing projects and issues in the region.
>
> We are pleased to hear of your intent to engage an outside management facilitator/coach. It is important to get outside assistance to work with you on this problem. You have stated that long-standing relationship and other issues have made it easily the

[15] Jones, 60 Wn. App. at 371.

> most contentious group you have encountered. Typically when relationships deteriorate, all of the parties own parts of the problem. We would encourage you to keep an open mind about possible changes you can make that could lead to improvement.

Viewing this evidence in the light most favorable to Fernandes, it is possible to infer that Fernandes performed her duties as regional director satisfactorily. The evaluation, however, is not strong evidence of satisfactory work. Therefore, Fernandes presented a weak prima facie case of race discrimination.

In contrast, Ecology produced abundant evidence of a legitimate, nondiscriminatory reason for terminating Fernandes. "When an employee is both [hired] and fired by the same decision makers within a relatively short period of time, there is a strong inference that he or she was not fired due to any attribute the decision makers were aware of at the time of the [hiring]."[16] Here, the parties agree that Hoffman participated in the decision to hire Fernandes. We thus presume that Hoffman terminated Fernandes for reasons other than those having to do with her race.

In addition, Fernandes ultimately failed to fulfill Ecology's performance expectations of her. Fernandes does not dispute that Ecology considered a successful regional director to be highly skilled and collaborative and able to "extract key issues from technically and emotionally complex situations in order to suggest and facilitate constructive paths forward." But according to the

[16] Griffith v. Schnitzer Steel Indus., Inc., 128 Wn. App. 438, 453, 115 P.3d 1065 (2005).

Boodell report,

> Many of the witnesses complained that Ms. Fernandes fails to communicate with them when she goes out into the field and fails to provide any feedback about what she did while out in the field. The majority of the RMT members also shared with me their resentment over Ms. Fernandes frequently rescheduling and canceling meetings. Many of them advised me that her frequent canceling or rescheduling of meetings was a "standing joke" amongst the RMT members. The majority of the RMT members also describe her as "autocratic and demanding." Many of the RMT members shared with me their belief that she is uncomfortable with the matrix system of management and acts "like we all should report to her."

The report further states, "None of the witnesses corroborated any of Ms. Fernandes' allegations of abusive and hostile behavior. In fact, all of the witnesses interviewed perceived her allegations as her inability to accept criticism." Many RMT members were "concern[ed] that there has been a serious deterioration in the trust and communication" and that the relationship between them and Fernandes had deteriorated to the point of becoming "unfixable."

Moreover, the Boodell report concludes that Fernandes's allegations against the RMT were wholly without merit. The report states,

> There is no credible evidence to suggest a violation of Agency policies or a violation of state and federal laws prohibiting discrimination based on a protected classification or characteristic. While Ms. Fernandes perceives that she has been subjected to bullying and abusive behaviors, the evidence adduced during this investigation indicates that her perceptions are not well grounded.

Similarly, the report found that Fernandes's allegations against Hoffman are

"entirely without merit. All of the credible evidence indicates that Ms. Hoffman's actions were legitimate and reasonable, and none of the witnesses interviewed supported Ms. Fernandes' perception of events as they relate to Ms. Hoffman."

In summary, the Boodell report, an independent investigation conducted by a third party, excluded discriminatory bias on the part of the RMT or Hoffman. Ecology, therefore, established a legitimate, nondiscriminatory reason for firing her. Because Ecology met its intermediate burden under McDonnell Douglas, the burden shifts to Fernandes to come forward with evidence of pretext, which she fails to do.

As proof of pretext, Fernandes cites the memo St. Germain sent to Hoffman regarding termination. But this memo does not provide evidence of pretext. Rather, it outlines standard procedures and broad legal concerns germane to terminating at-will employees. It does not contain any language from which a reasonable inference can be drawn that a decision to terminate Fernandes had in fact been made.[17] If anything, the memo illustrates Ecology's

[17] The memo states in relevant part,

> - Exempt, "at-will" positions serve at the pleasure of the agency Director and therefore, you do not need to go through the Loedermill process nor provide specific reasons for your decision;
> - Recommended is providing less specific information, for if you give a lot of reasons for your decisions, you run the risk that the reasons could be seen as pretext for some other purpose;

commitment to providing a safe work environment by emphasizing its preference that employees file hostile work environment reports without fear of retaliation. Also, the evidence shows that at the time St. Germain drafted the memo, Hoffman was considering termination as one option among many, including hiring an outside consultant.

Given the weakness of Fernandes's discrimination claim, Ecology's strong demonstration of a legitimate, nondiscriminatory reason for termination, and the

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. . . .

- If challenged later, (e.g., lawsuit), you may need to give reasons and the basis and foundation for your decision, with concrete examples. If sued, we would need to demonstrate that the person was terminated for legitimate, non-discriminatory reasons. . . . What measurable criteria can be shown that was used to assess her performance? Show the evidence of poor interactions. You can call our specific performance deficiencies, and show that clear expectations and assistance was provided by you and many others who want her to succeed.

. . . .

- There are some liabilities/risk with our direct knowledge of a hostile work environment for employees, and alleged discriminatory remarks being made. We can look at our obligation under our policies on a safe work environment to pursue some action.

. . . .

- Advice . . . : get back to the two employees and acknowledge that you heard what they said and that you want to let them know that you plan to take some action to resolve these issues. That this is confidential, please do not share our conversations. You will not be retaliated against. Encourage them to file a hostile work environment incident report.

paucity of evidence regarding pretext, no rational trier of fact could conclude that Ecology's decision to discharge her was racially motivated in violation of the WLAD.

Retaliation

Next, Fernandes assigns error to the trial court's dismissal of her unlawful retaliation claim under RCW 49.60.210.

RCW 49.60.210(1) states, "It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter." The same McDonnell Douglas burden-shifting protocol applies to this claim:[18] if Fernandes establishes a prima facie case, then Ecology must rebut it by presenting evidence of a legitimate, nondiscriminatory reason for the adverse employment decision.[19] If Ecology meets this burden, then Fernandes must present evidence that Ecology's adverse employment decision is pretextual.[20]

To establish a prima facie case of retaliation, the plaintiff must show that

[18] Hill, 144 Wn.2d at 180 (Washington courts have adopted McDonnell Douglas for evaluating claims brought under the WLAD); see also Davis v. W. One Auto. Grp., 140 Wn. App. 449, 460-61, 166 P.3d 807 (2007) (applying the McDonnell Douglas burden-shifting scheme to a statutory claim of retaliation).

[19] Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 70, 821 P.2d 18 (1991).

[20] Hill, 144 Wn.2d at 180-81.

(1) she engaged in statutorily protected activity, (2) an adverse action was taken, and (3) there is a causal link between her activity and the adverse employment action.[21] The threshold for proof of causation is low: the plaintiff need only show that her involvement in the statutorily protected activity was a "substantial factor" in the employer's decision to retaliate.[22]

Fernandes contends reporting the RMT's hostile behavior constitutes a protected activity. She alleges two adverse actions: Hoffman's decision to hire an outside investigator and the decision to terminate her. Fernandes argues the causal connection "is established by the timing of the investigation, which came on the heels of [her] complaints," and was "clearly designed to generate the pretext for her firing." These arguments fail for several reasons.

First, given the undisputed facts regarding Fernandes's allegations of bullying and abusive behavior, no part of Hoffman's decision to hire an independent investigator can be seen as an adverse action. The parties agree that civil service laws and Ecology policy require an investigation when an employee makes a hostile work environment claim.

And even though termination is an adverse employment action, Fernandes's causation argument lacks merit. While "proximity in time between

[21] Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App. 774, 797, 120 P.3d 579 (2005).

[22] Allison v. Housing Auth. of City of Seattle, 118 Wn.2d 79, 95-96, 821 P.2d 34 (1991).

the protected activity and the [adverse] employment action" may support an inference of retaliation,[23] Fernandes cites no case law holding that timing alone is sufficient to raise a material issue of fact regarding that claim, and we decline to adopt such a rule here.[24]

Furthermore, as discussed above, the Boodell report establishes a legitimate, nondiscriminatory reason for Ecology's decision to fire Fernandes, and Fernandes fails to meet her burden to show pretext. Aside from her self-serving speculation and bald assertion, the record contains no evidence supporting an inference that Hoffman retaliated against Fernandes for reporting alleged incidents of abusive behavior. Because a party opposing summary judgment may not rely on pure speculation and conjecture,[25] Fernandes raises no genuine issue of material fact on this claim. The trial court, therefore, did not err in dismissing this claim on summary judgment.

Hostile Work Environment Based on Race

Fernandes also assigns error to the trial court's dismissal of her hostile work environment claim.

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[23] Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 862, 991 P.2d 1182 (2000).

[24] Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wn. App. 344, 353, 71 P.3d 233 (2003) (where a party fails to cite to relevant authority, appellate courts generally presume that the party found none).

[25] Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

To establish a hostile work environment based on race, a plaintiff must prove that (1) she was subject to unwelcome harassment, (2) the harassment was due to her race, (3) the harassment affected the terms and conditions of her employment, and (4) the harassment is imputable to Ecology.[26] Fernandes's claim fails on the second prong.

While a conflict clearly existed between Fernandes and her colleagues at Ecology,[27] Washington law does not guarantee a stress-free workplace.[28]

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[26] Domingo v. Boeing Emps. Credit Union, 124 Wn. App. 71, 84, 98 P.3d 1222 (2004).

[27] Fernandes fails to point to any specific conduct that constitutes harassment. Without citing to the record, she alleges that, unlike the Caucasian managers, she was "harassed by her coworkers" and "yell[ed] and scream[ed] at" and "subject[ed] to hours long interrogations" by Hoffman. The support for these claims appears to come from Fernandes's declaration, which states,

> [Hoffman] yelled at me within earshot of my subordinates and other senior staff. She stormed into my office without warning early on Monday morning, April 18, 2004, literally foaming at the mouth while yelling only a few inches from my face, making threatening hand gesture and blocking the doorway when I tried to go to the bathroom for relief. She was totally out of control.

And in her deposition, she testified that she was "subjected by . . . Hoffman to over seven hours of interrogation over three different sessions" and that

> [Hoffman] was saying something different so she spent seven hours grilling me, trying to put words in my mouth and saying, well, you said this, you didn't say that, but just know you said—trying to put a different stamp on it and say this is why she waited one—one year to do this.

[28] Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 243, 35 P.3d 1158 (2001).

Furthermore, the Boodell report provides overwhelming evidence that racial bias had nothing to do with Fernandes's treatment and termination.

Because Fernandes presented no admissible evidence that her hostile treatment was due to her race, the trial court did not err in dismissing this claim.

Wrongful Discharge in Violation of Public Policy

Finally, Fernandes assigns error to the trial court's dismissal of her wrongful discharge claim.

Wrongful discharge in violation of public policy is a common law claim sounding in tort that correlates with the statutory claim of retaliation.[29] Fernandes contends that the WLAD embodies Washington's public policy against discrimination and that Ecology violated that policy when it violated the WLAD. But, as explained above, Ecology did not violate the WLAD. As a result, there is no violation of any public policy. The trial court properly dismissed Fernandes's claim for wrongful discharge.

CONCLUSION

Because Fernandes failed to establish a genuine issue of material fact with respect to each of her claims, we affirm the trial court's summary dismissal of her causes of action.

[29] Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984).

Leach, A.C.J.

WE CONCUR:

Dwyer, J.

Grosse, J.