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

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| ALBERT DAVIS and LEAH DAVIS, husband and wife, | ) | No. 30269-5-III |
| Appellants, | ) | |
| v. | ) | PUBLISHED OPINION |
| FRED'S APPLIANCE, INC., a corporation, | ) | |
| Respondent. | ) | |

Sweeney, J. — This appeal follows the summary dismissal of a suit for employment discrimination. The suit is based on claims of retaliatory discharge, discrimination, and defamation. A co-worker or store manager (the parties dispute his authority with the defendant employer) referred to a heterosexual employee as "Big Gay Al." That name apparently comes from a popular television program. The employee took umbrage at the references. The employer ordered the supervisor to apologize. The apology did not go well and the employee was ultimately fired after an outburst of anger.

We conclude that the perception of homosexuality is not protected by the law against discrimination. We conclude that there is no showing of retaliation. And we conclude that the comments are not defamatory per se and, accordingly, the employee had to show actual damage and failed to do so. We therefore affirm the summary dismissal of the suit.

FACTS

Albert Davis worked as a delivery driver for Fred's Appliance, Inc., in Spokane, Washington, between June 2009 and May 25, 2010. His job was to pick up appliances from a warehouse and deliver them to Fred's Appliance stores and customers. Mr. Davis is heterosexual and married.

Steve Ellis was the sales manager or store manager at the Monroe Street store. He supervised other sales people and he was also a salesman. Mr. Ellis could ask delivery drivers to wrap appliances in plastic and help load appliances into customer cars, but Mr. Ellis had no authority to punish employees who did not do what he asked. He had no authority to hire or fire other employees. He did not help create company policies or business and marketing strategies. He had no authority to execute Fred's Appliance's contracts.

Mr. Davis delivered some appliances to the Spokane Valley store on May 14, 2010. Mr. Ellis was there. As Mr. Davis came into the room, Mr. Ellis said, "Hey, there

is Big Gay Al." Clerk's Papers (CP) at 55. Some onlookers laughed. Mr. Davis said, "Excuse me?" and Mr. Ellis replied, "Hey, Big Gay Al." CP at 55. The store manager, Rick Hurd, "just stood there and shook his head." CP at 55. Salesman Brent Steinhauer was present and he was not laughing. Nearby customers looked uncomfortable. Mr. Davis did not say anything to Mr. Ellis. He made his delivery and left the store. He was "humiliated and embarrassed." CP at 57. He "just wanted to get out of the situation." CP at 57.

Mr. Davis saw Mr. Ellis at the Spokane Valley store again on May 15. Mr. Ellis again called Mr. Davis "Big Gay Al." CP at 58. Mr. Davis told Mr. Ellis to stop. Mr. Ellis explained, "Well, it's from South Park." CP at 58. Mr. Davis replied, "I don't like that show. I don't think it's funny," and said "Don't call me Big Gay Al anymore." CP at 58.

On Friday, May 20, 2010, Mr. Ellis greeted Mr. Davis with, "Hey, Big Gay Al." CP at 60. Mr. Davis replied, "Hey, I thought I had already asked you to stop?" CP at 60. According to Dallas Martin, Mr. Davis's delivery partner, Mr. Davis yelled and swore at Mr. Ellis. Mr. Martin told Mr. Davis to calm down. They left and Mr. Davis remained upset. Mr. Davis said that Mr. Martin lied about him yelling and swearing.

Mr. Ellis called Michael Fisher after the last incident. Mr. Fisher was the

operations manager for Fred's Appliance. Mr. Ellis told Mr. Fisher that Mr. Davis loudly used swear words in front of customers. Mr. Fisher then called Ed Miller. Mr. Miller is Mr. Davis's direct supervisor. Mr. Fisher told Mr. Miller to suspend Mr. Davis if the allegations were true. Mr. Miller met with Mr. Davis and Mr. Davis explained the history of the "Big Gay Al" comments. Mr. Miller called Mr. Fisher and relayed what Mr. Davis told him. Based on that conversation, Mr. Fisher did not think it was appropriate to suspend Mr. Davis until more was known. Mr. Miller did not suspend Mr. Davis. Mr. Davis may have told Mr. Miller at this time that he wanted to write a more formal complaint about Mr. Ellis.

Mr. Fisher told Troy Varness about the problem on Monday, May 24, 2010. Mr. Varness is Fred's Appliance's general manager. Mr. Varness spoke to Mr. Davis later that day. Mr. Davis explained the problem and did not deny that he yelled and swore at Mr. Ellis on May 20. Mr. Varness told Mr. Davis that Mr. Ellis would apologize to him. He also told Mr. Davis that he had the right to make a more formal complaint. According to Mr. Davis, Mr. Varness said, "Al, I would really like to keep you around here. We like you." CP at 237. Mr. Davis took that as a veiled threat that he should not file a written complaint. Mr. Davis also recalled that he said that he "would hold off on [a] written complaint and give [Mr. Ellis] the opportunity to apologize." CP at 155.

Mr. Varness and Mr. Fisher both met with Mr. Ellis the next day because Mr. Ellis was not at work on May 24. Mr. Varness told Mr. Ellis that the name calling was inappropriate and unprofessional. He told Mr. Ellis that he must apologize to Mr. Davis. When Mr. Davis arrived later in the morning, Mr. Fisher took him and Mr. Ellis outside for the apology. The facts surrounding the apology are disputed.

According to Mr. Fisher, Mr. Ellis offered an apology and Mr. Davis became agitated, paced back and forth, and cracked his knuckles. Mr. Fisher said that Mr. Davis yelled at Mr. Ellis: "you're a f****** punk; you give me no respect." CP at 23. Mr. Davis began walking to his truck while yelling that he did "not need to put up with this shit" or "disrespect" and that he called Mr. Fisher a "f****** pr***." CP at 24.

Dan Atkinson, a salesman for another company, saw the exchange. He was sitting in his car with the window down while waiting to meet with Fred's Appliance management. He heard Mr. Davis shout and swear at Mr. Ellis and Mr. Fisher. He said that he saw Mr. Ellis and Mr. Fisher try to calm Mr. Davis, but the situation escalated to a point where Mr. Atkinson got out of his car and asked if they needed help. He ran inside to get Mr. Varness.

Mr. Varness ran outside at Mr. Atkinson's prompting. He heard Mr. Davis yell, "that f****** punk—he did not mean it," and "He is not sincere." CP at 18. Mr.

Varness told Mr. Davis to calm down, but Mr. Davis yelled, "I know my rights. I am going to sue you." CP at 18. Mr. Davis, while yelling, walked to and got inside his delivery truck. Mr. Varness told him that he could not drive "in such an emotional state" and to get out of the truck. Mr. Varness recalled that Mr. Davis said, "I have never walked off a job before, but I am walking off this one" and headed down the street. CP at 18.

Mr. Davis's story is different. According to Mr. Davis, Mr. Varness was at the entire meeting. Mr. Ellis offered an insincere apology and Mr. Davis told him, "I didn't appreciate it, that I felt his apology wasn't sincere, and that I had a lot of stuff going on at this time." CP at 75. After a brief exchange, Mr. Davis said that he was going to file a written complaint and walked away. He admitted that he threatened to sue. He denied cracking his knuckles, acting agitated or angry, calling Mr. Ellis a "f****** punk" or saying that Mr. Ellis "didn't mean it." CP at 75.

At that point, according to Mr. Davis, he walked to his delivery truck and Mr. Varness and Mr. Fisher followed. Mr. Davis told Mr. Varness that he did not need to put up with being called "Big Gay Al." He admitted that he may have said, "shit." CP at 336. He denied that he yelled other obscenities. He also denied the "walking off the job" comment. CP at 254. He said that Mr. Varness or Mr. Fisher told him to go home.

Mr. Varness and Mr. Fisher later agreed that Mr. Davis's behavior could not be tolerated and that he should be terminated. The final decision was Mr. Fisher's. Later that day, Mr. Fisher fired Mr. Davis. He told Mr. Davis that Mr. Davis's behavior earlier in the day was the reason.

Mr. Davis sued. Fred's Appliance moved for summary judgment. Mr. Davis responded with his own affidavit and a letter from the State of Washington Employment Security Department. Fred's Appliance moved to strike various portions of the affidavit and the entire Employment Security Department letter. The court granted the motions to strike and granted the motion for summary judgment.

DISCUSSION

Order Striking Portions of Mr. Davis's Affidavit

We review the admissibility of evidence in summary judgment proceedings de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The court cannot consider inadmissible evidence when ruling on a motion for summary judgment. *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 512 P.2d 1126 (1973). Affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). And an affidavit cannot be

used to create an issue of material fact by contradicting prior deposition testimony. *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999). The court here struck a letter from the Employment Security Department and parts of Mr. Davis's affidavit because they were inadmissible evidence or contradicted Mr. Davis's deposition testimony.

Mr. Davis seems to contend that the court struck parts of his affidavit, not because they were inadmissible, but because the court wanted to avoid genuine issues of material fact. Except for two parts of his affidavit, Mr. Davis does not explain why the stricken evidence should have been admitted. *See* Br. of Appellant at 28, 30. Of the two parts that Mr. Davis does address with specific arguments, neither is preserved for appeal because Mr. Davis did not object to the court's decision to strike. RAP 2.5(a).

Mr. Davis also argues that the court improperly struck a letter from the Employment Security Department. The letter informed Mr. Davis that he was entitled to unemployment benefits. Mr. Davis contends that *Korslund v. DynCorp Tri-Cities Serv., Inc.*,[1] holds that the department's findings and conclusions are admissible. Br. of Appellant at 14, 18-20, 28. But *Korslund*'s only mention of the department's findings and conclusions is in its recitation of the facts. *Korslund*, 156 Wn.2d at 175-76. What

[1] 156 Wn.2d 168, 125 P.3d 119 (2005).

little *Korslund* says about the findings and conclusions of the department is dicta.

The letter was inadmissible for two reasons: first, because RCW 50.32.097 says the findings, determinations, conclusions, declarations, and final orders of Employment Security Department agents are not admissible; and second, the letter contains two levels of hearsay. "'Hearsay'" is an out-of-court statement made "to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802, 803. Hearsay in public records or reports is admissible if the record or report is certified. ER 803; RCW 5.44.040. The letter here includes hearsay because the declarant is an unknown Employment Security Department employee and that employee repeats the declaration of other witnesses. The letter is also not a certified copy. *See* RCW 5.44.040.

Alternatively, Mr. Davis suggests that the letter should have been admitted because it had some impeachment value. Br. of Appellant at 18-20. Evidence used for impeachment will not support the elements of a cause of action. *Turngren v. King County*, 104 Wn.2d 293, 306, 705 P.2d 258 (1985). Moreover, the letter merely repeats the positions that Mr. Davis and Fred's Appliance have maintained throughout this suit. And, except for Mr. Davis, the letter fails to identify who provided the information. It would then have no impeachment value in any event.

The court properly excluded the letter.

Hostile Work Environment

We review summary judgments de novo and conduct the same inquiry as the trial court. *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 88, 272 P.3d 865, *review denied*, 174 Wn.2d 1016 (2012). We then consider all facts and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Folsom*, 135 Wn.2d at 663.

Mr. Davis alleged that Fred's Appliance subjected him to a hostile work environment and terminated his employment in violation of the Washington law against discrimination (WLAD), chapter 49.60 RCW. Br. of Appellant at 21-24; CP at 6 (citing RCW 49.60.180)); CP at 133-34. To establish a hostile work environment claim, an employee must allege facts proving that harassment (1) was unwelcome, (2) was because he is a member of a protected class, (3) affected the terms and conditions of his employment, and (4) was imputable to his employer. *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). There is no dispute that the "Big Gay Al" comments were unwelcome. The rest of the elements are the concern here.

A. *Protected Class*

Mr. Davis alleges that Mr. Ellis harassed him because Mr. Ellis perceived Mr. Davis as homosexual. The WLAD prohibits discrimination on the basis of sexual orientation. RCW 49.60.180. "'Sexual orientation'" is statutorily defined as "heterosexuality, homosexuality, bisexuality, and gender expression or identity." RCW 49.60.040(26). The statute defines "'gender expression or identity'" as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth." RCW 49.60.040(26). Here, there is no question that Mr. Davis belongs to a protected class because he is heterosexual. However, a hostile work environment claim requires that he be discriminated against because of his sexual orientation. *See Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985). Mr. Davis was not harassed because he is heterosexual. The question raised by the contentions here is whether the WLAD prohibits discrimination based on *perceived* sexual orientation.

We look to the statute's plain language to give effect to the legislative intent. *Calhoun v. State*, 146 Wn. App. 877, 885, 193 P.3d 188 (2008). The statute's language is only open to judicial interpretation if it is ambiguous. *Id.* The WLAD also requires liberal construction to accomplish its purpose. RCW 49.60.020; *Marquis v. City of*

*Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996). One of the purposes is to eliminate and prevent employment discrimination. RCW 49.60.010. Nothing in the WLAD should "be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights." RCW 49.60.020.

Fred's Appliance relies on the statute's language to argue that it does not prohibit *perceived* sexual orientation discrimination. Br. of Resp't at 27. And the statute makes no mention of perception in its definition of "sexual orientation." This suggests to us that the legislature intended perception to come into play only in gender identity discrimination, but not in discrimination based upon homosexuality or heterosexuality. *See* RCW 49.60.180.

Mr. Davis argues that the prohibition against sexual orientation discrimination should be applied to those who are discriminated against due to perceived sexual orientation because the court upheld a similar rule related to perceived disabilities. Br. of Appellant at 15-18 (citing *Barnes v. Washington Natural Gas Co.*, 22 Wn. App. 576, 591 P.2d 461 (1979)). In *Barnes*, the court held that a person who did not have epilepsy, but who was perceived as having epilepsy, had a cause of action under the WLAD. 22 Wn. App. at 583. At the time, the WLAD defined "handicap" as: "'presence of a sensory,

mental, or physical handicap.'" The Human Rights Commission had interpreted "handicap" as applying to any disability "'perceived to exist, whether or not it exists in fact.'" *Id.* at 579 (citing former WAC 162-22-040). The court upheld the commission's interpretation of disability. It relied on the WLAD's mandate of liberal construction. It also relied on the rule that, when an agency is charged with enforcing a statute, that agency's interpretation of the statute should be given great deference. *Id.* at 581; *see Retail Store Employees Union, Local 1001 v. Washington Surveying & Rating Bureau*, 87 Wn.2d 887, 898, 558 P.2d 215 (1976).

However, the statutory context of "sexual orientation" at issue here is different than that of "handicap" in *Barnes*. Here, a definition of "gender expression or identity" is embedded in the definition of "sexual orientation." RCW 49.60.040(26). "Gender expression or identity" explicitly includes perception. RCW 49.60.040(26) ("having or being *perceived* as having a gender identity" (emphasis added)). If "being perceived" is read into the definition of "sexual orientation," then "being perceived" in the definition of "gender expression or identity" would be meaningless. We presume when the legislature uses different words it intended a different meaning. *State v. Keller*, 98 Wn. App. 381, 384, 990 P.2d 423 (1999), *aff'd*, 143 Wn.2d 267, 19 P.3d 1030 (2001).

We therefore conclude that "perceived sexual orientation" is not a protected class

and therefore Mr. Davis is not a member of a protected class.

B. *Terms and Conditions of Employment*

Mr. Davis must also show that the conduct here was so severe or pervasive that it affected the terms and conditions of employment. *Washington v. Boeing Co.*, 105 Wn. App. 1, 10, 19 P.3d 1041 (2000). That is a question of fact. *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 296, 57 P.3d 280 (2002). To determine whether conduct was severe or pervasive enough to affect the terms and conditions of employment, we look at the totality of the circumstances, including the frequency and severity of harassing conduct, whether it was physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interfered with the employee's work performance. *Boeing*, 105 Wn. App. at 10. "Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law." *Id.* And the conduct must be objectively and subjectively abusive. *Adams*, 114 Wn. App. at 297.

The uncontested facts show that Mr. Ellis called Mr. Davis "Big Gay Al" three times in one week. Mr. Ellis did not physically threaten or physically humiliate Mr. Davis. He uttered something offensive. He made a casual reference, albeit a highly inappropriate reference, to a television character. Again, considering the utterances here

in a light most favorable to Mr. Davis, we are led to conclude that the utterances were only casual, isolated, and trivial. *See Boeing*, 105 Wn. App. at 10.

C. *Harassment Imputed to Employer*

Harassment is imputed to an employer in one of two ways. *See Glasgow*, 103 Wn.2d at 407. First, it can be imputed to the employer if the harasser is an owner, partner, corporate officer, or manager. *Id.* Second, it can be imputed to the employer if the harasser is the plaintiff's supervisor or co-worker if the employer "authorized, knew, or should have known of the harassment and . . . failed to take reasonably prompt and adequate corrective action." *Id.*

First, Mr. Davis argues that Mr. Ellis's harassment should be imputed to Fred's Appliance because Mr. Ellis is a manager. Br. of Appellant at 21. The two-part rule for imputing harassment suggests that there is some difference between managers and, collectively, supervisors and co-workers. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 854-55, 991 P.2d 1182 (2000). At some point in an employer's chain of command, there will be little distinction between a manager and a supervisor. *Id.* at 856. Thus, to automatically impute harassment to an employer, the manager's rank in the company's hierarchy must be high enough that the manager is the employer's alter ego. *Id.* at 855-56 (front-end manager at 1 of Costco's 200 warehouses could not be imputed

to Costco); *Boeing*, 105 Wn. App. at 11-12 (flight-line managers were not high enough in Boeing's chain of command to impute their harassment to Boeing).

Mr. Ellis is alternatively called "store manager" and "sales manager." CP at 107-08, 173-74. But Mr. Davis presents no evidence to rebut the employer's showing that Mr. Ellis is essentially a supervisor. Mr. Ellis's authority is limited to the sales staff in his store; but even there, he cannot fire or hire any sales employees. Mr. Ellis had no authority to punish employees. Moreover, Mr. Ellis did not help create company policies or business and marketing strategies, and he had no authority to execute Fred's Appliance's contracts. Mr. Ellis held a higher position than Mr. Davis but there is no evidence that Mr. Ellis was the employer's alter ego.

Second, Mr. Davis argues that the harassment should be imputed because Fred's Appliance knew of the harassment and failed to take reasonably prompt and adequate corrective action. Br. of Appellant at 25-26. He contends that Fred's Appliance's corrective action was inadequate because Mr. Ellis ultimately gave an insincere apology and Mr. Varness discouraged Mr. Davis from writing a more formal complaint. Br. of Appellant at 25-26.

We read the record differently. Mr. Ellis made the last "Big Gay Al" comment on a Thursday. Mr. Fisher and Mr. Miller learned of the comments on the same day. Mr.

Fisher told Mr. Varness about them on the following Monday. On that same day, Mr. Varness discussed the issue with Mr. Davis and told Mr. Davis that Mr. Ellis would apologize. The following day, Mr. Varness and Mr. Fisher met with Mr. Ellis, told him that his comments were unacceptable and that he would apologize to Mr. Davis. The apology obviously did not go well, but nonetheless we conclude that Fred's Appliance took prompt and adequate steps to stop Mr. Ellis's inappropriate remarks.

Mr. Davis also suggests that Fred's Appliance did not act reasonably because Mr. Varness discouraged him from filing a written complaint. There is no evidence that Mr. Varness discouraged Mr. Davis from filing a more formal complaint. Mr. Davis testified that he did not tell Mr. Varness that he wanted to file a written complaint. According to Mr. Davis, Mr. Varness said, "Al, I would really like to keep you around here. We like you," and Mr. Davis took that as a veiled threat that he should not file a written complaint. The comment does not amount to a threat.

Termination—Pretext

Mr. Davis argues that his retaliation claim should not have been dismissed because the reason for his termination presents genuine issues of material fact. Br. of Appellant at 26. RCW 49.60.210(1) prohibits discharging or otherwise discriminating against an employee "because he or she has opposed any practices forbidden by this chapter, or

because he or she has filed a charge, testified, or assisted in any proceeding under this chapter."

An employee must prove that (1) he engaged in statutorily protected opposition activity, (2) the employer took adverse employment action, and (3) the employer took adverse employment action because of the opposition activity. *Delahunty v. Cahoon*, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992). If the employee makes a prima facie case, then the burden shifts to the employer to set forth some evidence that it acted for legitimate, nondiscriminatory reasons. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991).

We have already concluded that discrimination based on perceived sexual orientation discrimination is not protected by the WLAD. We need not then address the question of retaliation for protected activity since any activity would not be protected.

Defamation

A threshold requirement of defamation is that the alleged defamatory statement be a statement of fact and not just opinion. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002). But the line between fact and opinion is sometimes blurry. So there is a three-part test to determine whether a statement is actionable. *Dunlap v. Wayne*, 105 Wn.2d 529, 539, 716 P.2d 842 (1986). We must consider: "(1) the medium and context

in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts." *Id.* Whether a statement is one of fact or opinion is a question of law unless the statement could only be characterized as either fact or opinion. *Id.* at 540 n.2.

Opinion is more likely in certain contexts. The workplace can be a place that invites "exaggeration and personal opinion." *Id.* at 539; *Robel*, 148 Wn.2d at 57. The statements here were comments made by one employee to another in the workplace. Mr. Ellis made his comments as Mr. Davis entered the room. The comments were apparently intended to be comical or perjorative, or both.

The second factor addresses the listener expectations and what the listener would reasonably perceive about the statement. *Dunlap*, 105 Wn.2d at 539. Co-workers and customers heard the statements. Mr. Davis had been delivering appliances to Fred's Appliance stores for nearly a year at the time Mr. Ellis made his comments. His co-workers were likely familiar enough with Mr. Davis to know that he was not gay. Customers could not have known whether Mr. Davis was gay, but would not have gathered that Mr. Davis was gay from Mr. Ellis's comments. In the first incident, customers looked uncomfortable after Mr. Ellis made his comments. Mr. Davis presumes that they were uncomfortable because they thought that Mr. Davis was gay. But in

context it is more likely that they looked uncomfortable because they recognized that calling a co-worker "Big Gay Al" is inappropriate. In the second incident, Mr. Ellis explained that "Big Gay Al" is from a television program, South Park. Overhearing customers would have understood the statement as a joke or popular cultural reference and not necessarily a reflection on Mr. Davis's sexual orientation. In the third incident, Mr. Ellis again said, "Hey, Big Gay Al," and Mr. Davis replied, "Hey, I thought I asked you to stop?" In that situation, a customer overhearing it would have perceived that Mr. Davis was the object of some teasing and not necessarily gay.

The third and most crucial factor addresses whether a listener unknown to the plaintiff can judge the truthfulness of the statement. *Id.* at 530-40. While some customers could have taken the statement "Big Gay Al" as a truthful statement, the first and second factor suggest that the statements amounted to unwanted co-worker joking or teasing. *See Robel*, 148 Wn.2d at 57 (citing *Ollman v. Evans*, 242 U.S. App. D.C. 301, 750 F.2d 970, 985 (1984)). Considering the totality of the circumstances, the court correctly concluded that Fred's Appliance was entitled to judgment as a matter of law on Mr. Davis's defamation claim.

Mr. Davis also failed to make out a prima facie case of defamation. Once the plaintiff establishes that a statement of fact was made, he must prove four elements:

falsity, an unprivileged communication, fault, and damages. *Eubanks v. N. Cascades Broad.*, 115 Wn. App. 113, 119, 61 P.3d 368 (2003). "The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists." *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

Mr. Davis failed to make a sufficient showing of damages. Mr. Davis seeks special damages, but he failed to raise any specific, material facts to support this element of defamation. *See id.* He also seeks general damages for "mental distress, anguish, humiliation, and loss of enjoyment of life." CP at 6. General damages are recoverable only from defamation per se. *See Haueter v. Cowles Publ'g Co.*, 61 Wn. App. 572, 578, 811 P.2d 231 (1991). However, imputation of homosexuality is not defamatory per se; defamation per se generally requires imputation of a crime or communicable disease. *Boehm v. American Bankers Ins. Group, Inc.*, 557 So. 2d 91, 94-95 (Fla. Dist. Ct. App. 1990); *Wilson v. Harvey*, 164 Ohio App. 3d 278, 285-86, 842 N.E.2d 83 (2005).

We affirm the summary dismissal of the suit.

Sweeney, J.

I CONCUR:

Brown, J.