

73365-6

73365-6

No. 73365-6

**COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON**

---

ANNE L. BAILEY,

*Plaintiff/Appellant,*

v.

KENT SCHOOL DISTRICT,

*Defendant/Respondent.*

---

APPELLANT'S OPENING BRIEF

---

Susan B. Mindenbergs  
WSBA No. 20545  
Attorney for Appellant Anne L. Bailey

119 First Avenue South, Suite 200  
Seattle, Washington 98104  
Phone: (206) 447-1560  
Fax: (205) 447-1523  
Email: smindenberglaw@juno.com

FILED  
JUN 15 2011  
CLERK OF COURT  
JULIA M. HARRIS

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	3
A.	The trial court erred when it dismissed Appellant’s hostile work environment – retaliation based claim finding that Appellant’s complaints about her co-worker’s treatment of disabled students of color was not protected activity.....	3
B.	The trial court erred when it dismissed Appellant’s WLAD retaliation charge finding that Appellant sustained no adverse employment action when she was demoted and when the actions of Respondent led to Appellant’s constructive discharge. The trial court erred when it found that even if Appellant could show an adverse employment action, she failed to demonstrate pretext.....	3
C.	The trial court erred when it dismissed Appellant’s FMLA claim where KSD refused to allow her to apply for FMLA leave, refused to allow her to return to work after her doctor released her more than three weeks before the end of the school term, and then failed to offer her an equivalent job.....	4
III.	STATEMENT OF THE CASE.....	5
A.	Ms. Bailey states a hostile work environment claim based on the hostility she experienced from a co-worker when Ms. Bailey advocated for disabled students of color.....	7
1.	Ms. Bailey’s school-level attempts to resolve the retaliatory hostility caused by her efforts to protect students of color were unsuccessful.....	7

2.	Ms. Bailey agreed to engage in mediation with her co-worker, but mediation was unsuccessful.....	14
B.	Ms. Bailey’s efforts to obtain an accommodation and her EEOC charge were met with retaliatory animus.....	15
1.	KSD’s reaction to Ms. Bailey’s request for an accommodation was unreceptive.....	15
2.	In November 2012, Ms. Bailey filed a charge of discrimination with the EEOC under the Americans with Disabilities Act.....	18
3.	No accommodations were offered at the December 10, 2012 meeting.....	18
4.	On January 3, 2013, General Counsel Lind’s verbal attack on Ms. Bailey when she returned to work after months of medical leave for her psychological injuries led Ms. Bailey’s medical provider to recommend she not return to hostile workplace.....	20
C.	Ms. Bailey’s FMLA rights were violated when she was denied FMLA protection, then not allowed to return to work when released, and finally offered a non-equivalent position.....	22
1.	In August 2012, KSD refused to allow Ms. Bailey to apply for FMLA leave.....	22
2.	KSD refused to allow Ms. Bailey to return to work when her health care provider released her to return on January 3, 2013.....	23
3.	KSD offered Ms. Bailey a substitute position, which was not equivalent to her teaching and Curricular Leader position.....	24

	4.	KSD refused to allow Ms. Bailey the right to return to work after health care provider released her to return to work on January 3, 2013, more than three weeks before the end of the school semester at Kent-Meridian High School.....	25
IV		ARGUMENT OF COUNSEL.....	25
	A.	The trial court erred when it granted summary judgment for KSD as summary dismissal is seldom appropriate in employment discrimination cases brought under Washington Law Against Discrimination (WLAD).....	25
	B.	The trial court erred when it granted summary dismissal of Ms. Bailey hostile work environment – retaliation based claim that arose due to her attempts to protect students from race and disability discrimination.....	26
	1.	Ms. Bailey repeatedly notified KSD that the harassment was unwelcome.....	27
	2.	Ms. Bailey’s actions were protected conduct.....	28
	3.	The harassment was pervasive and adversely affected Ms. Bailey’s job.....	28
	4.	KSD is liable for the harassment because Ms. Bailey repeatedly complained of it and KSD took no remedial action.....	29
	C.	The trial court erred when it found that KSD did not engage in retaliation against Ms. Bailey for seeking an accommodation and for filing a charge of discrimination with the Equal Employment Opportunity Commission when KSD refused her accommodation, demoted her after she made her request, and forced her out of the workplace with intimidation by KSD’s General Counsel.....	30

1.	Ms. Bailey engaged in a series of protected actions.....	30
2.	As a result of Ms. Bailey’s protected conduct, KSD adversely affected her employment.....	31
3.	There exists a causal link between Ms. Bailey’s protected activity and the adverse employment action she sustained.....	33
D.	The trial court erred when it held that KSD did not violate Ms. Bailey’s FMLA rights when it refused to allow her to apply for leave protected by FMLA, by denying her right to return to work, and by offering her a non-equivalent job when her doctor released her to return.....	35
1.	KSD interfered with Ms. Bailey’s FMLA rights by denying her the right to apply for FMLA leave until she exhausted all paid leave.....	36
2.	KSD refused to allow Ms. Bailey to return to work when her doctor released her, in violation of the FMLA.....	38
3.	When Ms. Bailey provided notice that she was released to work on January 3, 2013, the District failed to offer her an “equivalent position.”.....	39
4.	Ms. Bailey suffered “negative consequences” as a result of attempting to return to work from her FMLA leave.....	40
E.	Appellant Bailey is entitled to her reasonable attorney fees on appeal pursuant to RAP 18.1(a).....	41
V.	CONCLUSION.....	41

**TABLE OF AUTHORITIES**

**UNITED STATES SUPREME COURT**

*Nevada Dept. of Human Resources v. Hibbs*,  
538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003)..... 37

**UNITED STATES COURT OF APPEALS – NINTH  
CIRCUIT**

*Bachelder v. Am. W. Airlines*, 259 F.3d 1112  
(9th Cir. 2001)..... 40

*Coons v. Secretary of U.S. Dept. of Treasury*, 383 F.3d 879  
(9th Cir. 2004)..... 31

*Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116  
(9th Cir. 2008)..... 28

*Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022  
(9th Cir.1998)..... 28

*Ray v. Henderson*, 217 F.3d 1234, n.3 (9th Cir. 2000)..... 1, 28

*Sanders v. City of Newport*, 657 F.3d 772 (9th Cir. 2011)..... 36

*Xin Liu v. Amway Corp.*, 347 F.3d 1125 (9th Cir.2003)..... 35

**UNITED STATES CIRCUIT COURT OF APPEALS –  
OTHER CIRCUITS**

*Russell v. N. Broward Hosp.*, 346 F.3d 1335  
(11th Cir. 2003)..... 37

<i>Strickland v. Water Works and Sewer Board City of Birmingham</i> , 239 F.3d 1199 (11th Cir. 2001).....	37
--	----

**UNITED STATES DISTRICT COURT**

<i>Wanamaker v. Westport Bd. of Educ.</i> , 899 F.Supp.2d 193(D.Conn.2012).....	39
--	----

**SUPREME COURT OF WASHINGTON**

<i>Allison v. Hous. Auth.</i> , 118 Wn.2d 79, 821 P.2d 34 (1991).....	30, 41
--	--------

<i>Antonius v. King County</i> , 153 Wn.2d 256, 103 P.3d 729 (2004).....	27
---	----

<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000).....	30
--	----

<i>Loeffelholz v. Univ. of Wash.</i> , 175 Wn.2d 264, 285 P.3d 854 (2012).....	27
---	----

<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	26
---	----

<i>Robel v. Roundup Corp</i> , 148 Wn. 2d 35, 74 n.24, 59 P.3d 611 (2002).....	31
---	----

<i>Scrivener v. Clark College</i> , 181 Wn.2d 439, P.3d 541 (2014) .....	4, 25, 26
---	-----------

<i>Xieng v. People’s Nat. Bank of Washington</i> , 120 Wn.2d 512, 844 P.2d 339 (1993).....	41
---	----

**WASHINGTON STATE COURT OF APPEALS**

<i>Alonso v. Qwest Communications Co., LLC.</i> , 178 Wn. App. 734, P.3d 610 (2014).....	27
---	----

<i>Currier v. Northland Services, Inc.</i> , 182 Wn.App. 733, 332 P.3d 1006 (2014).....	1, 30, 31
<i>Davis v. Fred's Appliance, Inc.</i> , 171 Wn. App. 348, 287 P.3d 51 (2012).....	29
<i>Estevez v. Faculty Club of the Univ. of Wash.</i> , 129 Wn. App. 774, 120 P.3d 579 (2005).....	30
<i>Rice v. Offshore Sys., Inc.</i> , 167 Wn. App. 77, 272 P.3d 865 (2012).....	26
<i>Sangster v. Albertson's, Inc.</i> , 99 Wn. App. 156, 991 P.2d 674 (2000).....	26
<b>UNITED STATES CODE</b>	
29 U.S.C. 2612(a).....	35, 36
29 U.S.C. 2614(a).....	35, 38
29 U.S.C. 2615(a).....	35, 37
29 U.S.C. 2617(a)(2).....	36
29 U.S.C. 2618.....	38
<b>UNITED STATES CODE OF FEDERAL REGULATIONS</b>	
29 C.F.R. § 825.215(e).....	39
29 C.F.R. § 825.220(a)(1).....	40
<b>REVISED CODE OF WASHINGTON</b>	
RCW 49.60.....	<i>passim</i>
<b>WASHINGTON COURT RULES</b>	
RAP 18.1.....	2, 41, 42

## I. INTRODUCTION

Appellant Anne L. Bailey seeks reversal of the April 9, 2015 King County Superior Court order dismissing her claims against the Respondent Kent School District (KSD). The issues on appeal are: 1) does an employee state a claim for retaliation-based hostile work environment under the Washington Law Against Discrimination (WLAD) when her protected class status is based on her advocacy for disabled students who are in a protected class; 2) in order to avoid summary dismissal of a claim of retaliation under the WLAD, what constitutes an adverse employment action and what evidence is required to show pretext; and 3) is the Family Medical Leave Act (FMLA) violated where an employee is disallowed from applying for leave, is disallowed from returning to work when released by doctor, and when offered a “non-equivalent” job.

In its April 9, 2015 order dismissing Ms. Bailey’s hostile work environment claim, the trial court ruled that Ms. Bailey was not engaged in protected activity when she complained about the adverse treatment she witnessed her co-worker inflicting on disabled students of color. The trial court erred in dismissing Ms. Bailey’s hostile work environment – based on retaliation claim.<sup>1</sup>

---

<sup>1</sup> See *Currier v. Northland Services, Inc.*, 182 Wn.App. 733, 745-46, 332 P.3d 1006 (2014) citing with approval *Ray v. Henderson*, 217 F.3d 1234, 1240 n.3

In the same April 9, 2015 order, the trial court dismissed Ms. Bailey's claim for retaliation for seeking an accommodation, complaining about KSD's failure to accommodate her disability, and for filing an EEOC charge. The trial court found no adverse employment action where KSD refused to allow her to return to work when her doctor had released her to return and the hostility she faced when she attempted to return led to her constructive discharge.

The trial court erred when it determined that the substitute position offered to Ms. Bailey was an "equivalent position" to the one to which she planned to return when her FMLA leave concluded—a requirement under the FMLA. The trial court so ruled where the administrator responsible for KSD Human Resources admitted that the substitute position and Ms. Bailey's former job were not equivalent. The trial court erred when it dismissed Ms. Bailey's FMLA claim. Ms. Bailey respectfully requests this Court reverse the trial court's dismissal of her case and remand for trial. She also seeks attorney fees on review pursuant to RAP 18.1 and RCW 49.60.030(2)

---

(9th Cir. 2000) ("an employee's complaints about the treatment of others 'is considered a protected activity, even if the employee is not a member of the class that he claims suffered from discrimination, and even if the discrimination he complained about was not legally cognizable.'")

## II. ASSIGNMENTS OF ERROR

- A. The trial court erred when it dismissed Appellant's hostile work environment – retaliation based claim finding that Appellant's complaints about her co-worker's treatment of disabled students of color was not protected activity.**

**Issue Pertaining to First Assignment of Error:** Was Appellant engaged in protected activity when she protested what she believed to be disparate treatment of students of color enrolled in Respondent's Special Education program?

**Issue Pertaining to First Assignment of Error:** Under the WLAD, does Appellant state a cause of action for hostile work environment – retaliation based claim where Appellant is not in a protected class but sustains hostility from a co-worker for Appellant's advocacy for students who are in a protected class?

- B. The trial court erred when it dismissed Appellant's WLAD retaliation charge finding that Appellant sustained no adverse employment action when she was demoted and when the actions of Respondent led to Appellant's constructive discharge. The trial court erred when it found that even if Appellant could show an adverse employment action, she failed to demonstrate pretext.**

**Issue Pertaining to Second Assignment of Error:** Under the WLAD, does Appellant sustain an adverse employment action when Respondent's hostility toward Appellant after she sought an

accommodation and filed an EEOC charge led to Appellant's constructive discharge?

**Issue Pertaining to Second Assignment of Error:** Under the WLAD, has Appellant met her burden to satisfy the pretext prong under the *McDonnell Douglas* framework where she presented a genuine issue of fact that the employer's articulated reason for its action is pretextual and has offered evidence that discrimination was a substantial factor motivating the employer to engage in the adverse employment action?<sup>2</sup>

**C. The trial court erred when it dismissed Appellant's FMLA claim where KSD refused to allow her to apply for FMLA leave, refused to allow her to return to work after her doctor released her more than three weeks before the end of the school term, and then failed to offer her an equivalent job.**

**Issue Pertaining to Third Assignment of Error:** Does Appellant's claim that Respondent KSD refused to allow her to apply for FMLA until all her paid leave was exhausted state a cause of action under the FMLA?

**Issue Pertaining to Third Assignment of Error:** Does Appellant's claim that she was not allowed to return to work when her doctor released her state a cause of action under the FMLA?

---

<sup>2</sup>See *Scrivener v. Clark Coll.*, 181 Wn. 2d 439, 441-42, 334 P.3d 541, 544 (2014).

**Issue Pertaining to Third Assignment of Error:** Is Respondent's offer of a position in the district's substitute pool "equivalent" for purposes of the FMLA where the Respondent's Human Resources director admitted that the substitute position was not equivalent and where Appellant would not be afforded a paid stipend for the Curricular Leader duties?

**Issue Pertaining to Third Assignment of Error:** Does Appellant's constructive discharge constitute a negative consequence under the FMLA?

### **III. STATEMENT OF THE CASE**

On February 3, 2014, Appellant Anne Bailey brought suit against Respondent Kent School District (KSD) seeking compensation for damages arising out of her employment. Ms. Bailey brought claims of hostile work environment and retaliation in violation of the Washington Law Against Discrimination (WLAD). She also brought a claim that KSD violated her Family Medical Leave Act (FMLA) rights when she was denied FMLA leave, when she was not allowed to return to work when released, and when she was offered "non-equivalent" work.

Ms. Bailey worked for KSD from November 2005 until January 4, 2013. CP 267; CP 283 She was the Curricular Leader of the Kent-Meridian High School Special Education Department. CP 302. She is an

experienced special education teacher who holds a Masters degree plus 90 additional class hours. CP 268.

Wade Barringer, Ph.D., is the principal of Kent-Meridian High School. At the time of Ms. Bailey's termination, Dr. Barringer had been the principal for four years. CP 146. Dr. Barringer chose Ms. Bailey to be the Curricular Leader for the Special Education Department at Kent-Meridian. CP 304. He trusted Ms. Bailey and thought she was an excellent teacher. CP 300-301. Dr. Barringer relied on Ms. Bailey for leading the Special Education Department, calling her "my rock." CP 323.

When Ms. Bailey was Curricular Leader, she improved the Special Education Department at the school. CP 304. KSD decided to have curricular leaders as opposed to department heads who generally oversaw budgets and other things like supplies. CP 301. By contrast, a KSD curricular leader was someone with more knowledge and with more responsibility over the curriculum as well as the functionality of the department. CP 301. In her role as Curricular Leader, Ms. Bailey produced standardized documentation and formalized processes within Special Education that improved the functioning of the department and which are still in place today. CP 304. Dr. Barringer selected Ms. Bailey as Curricular Leader because of her ability to "advocate for kids; her

knowledge of special education and special education law; and her experience and work ethic.” CP 302. He chose her because he wanted to take the department in a different direction – “take the department to the next level as far as compliance (with special education laws), as far as organization, as far as leadership.” CP 303. As Curricular Leader, Ms. Bailey demonstrated leadership in meetings and provided the staff with professional development in a collaborative leadership style. CP 305.

In terms of compliance with Special Education laws, the educational program for each student is documented in each student’s Individualized Education Program (IEP), which is developed by the team of educators, administrators, and family members involved with each student. The Individuals with Disabilities in Education Act (IDEA) requires that the team be involved in any modification of the student’s IEP. CP 389.

**A. Ms. Bailey states a hostile work environment claim based on the hostility she experienced from a co-worker when Ms. Bailey advocated for disabled students of color.**

**1. Ms. Bailey’s school-level attempts to resolve the retaliatory hostility caused by her efforts to protect students of color were unsuccessful.**

As Curricular Leader, Ms. Bailey was responsible for assisting with scheduling based on student placement decisions made by the IEP teams for students receiving special education services within the master

schedule prepared by Dr. Barringer. CP 390. Scheduling students was complicated because Kent-Meridian High School had a highly transient student population. CP 231. The turnover was greater than at any other school in the District and likely any other school in the state. CP 389.

Tabitha Browning, Ms. Bailey's co-worker, was a special education teacher at Kent-Meridian High School. CP 267. Although Ms. Bailey experienced bullying and intimidating conduct from Ms. Browning over the years about a variety of issues, Ms. Bailey finally made a formal complaint against Ms. Browning when Ms. Browning engaged in a pattern of disparate treatment of students of color with regard to placement issues that Dr. Barringer either could not or would not resolve. CP 272-276.

In her formal complaint, Ms. Bailey outlined some of Ms. Browning's conduct. Ms. Bailey explained that when Ms. Browning attended staff meetings, she was rude and disrespectful to Ms. Bailey—making snide comments under her breath and initiating sidebar conversations while Ms. Bailey was presiding. CP 271. Ms. Browning would try to take over the staff meetings and made comments intended to make Ms. Bailey look incompetent. CP 271. Ms. Browning took bets that Ms. Bailey did not have it "in her" to be department head and that she would not last even two week or two months. CP 271. Ms. Browning undermined Ms. Bailey by complaining about her to her colleagues and to

building administrators. CP 271. Ms. Browning routinely circumvented department protocol causing disruptions in the department that left Ms. Bailey responsible to explain the persistent placement issues to building administrators. CP 271. Ms. Bailey was forced to revisit placement items over and over because of Ms. Browning's constant interference. CP 271-272. Ms. Browning's incessant maligning and bullying of Ms. Bailey frequently left Ms. Bailey in tears, with daily migraine headaches and disrupted sleep patterns. CP 271.

In the two school years before Ms. Bailey formally complained, Ms. Browning regularly disputed the placement decisions made by the IEP team—seeking either to exclude students of color from her class or move them out of her class once they had been placed. Ms. Bailey complained that Ms. Browning circumvented department protocol regarding IEP decisions and special education placement and scheduling, and pressed staff to make or change decisions particularly with students of color. CP 272-276. Ms. Bailey attempted to enlist Dr. Barringer's assistance in her efforts toward the resolution of the issues she had with Ms. Browning. CP 238-239.

Ms. Bailey believed that Ms. Browning was treating students of color differently than she treated Caucasian students. CP 226. For example, when an African American student transferred into Kent-

Meridian High School and required the specially designed mathematics program offered by Ms. Browning, Ms. Browning refused to allow the student to take her class indicating that the student had behavior issues. CP 226.

Ms. Browning singled out African American students for discipline and criticism that she did not impose on other students. Ms. Browning targeted an African American male student for shuffling his feet and for turning around to speak, and she even forbid him from eating his breakfast in class. Other, non-African American students were allowed to be off task, talk, and eat in class. CP 227. When the African American student's sibling transferred to Kent-Meridian, Ms. Browning refused to allow the new student even to enter her classroom when the student was assigned to Ms. Browning class. Instead, she made the student go to the library to take an assessment test to see if she was placed correctly even using an outdated test that was no longer used by KSD and when the student was not feeling well. CP 227-228. Students of color were the only students about whom Ms. Browning resisted placement in her class. CP 230.

Ms. Bailey attempted to resolve her concerns about what she perceived to be Ms. Browning's unfair treatment of students of color by meeting directly with Ms. Browning. CP 34-35. In the 2011-2012 school

year, Ms. Bailey sought a meeting with Ms. Browning to discuss Ms. Browning's refusal to allow a certain student of color into her class. Ms. Browning responded that the student took up too much time and that he did not belong in her class. CP 35. Ms. Bailey was concerned about the student because Ms. Browning repeatedly told the student that he was misplaced and that he could not do the math assigned in her class. CP 274-275. Ms. Bailey had spent considerable time working to support that student's other teachers, meeting with all of them and the student's mother to provide support for the teachers and student. *Id.* Ms. Browning told Ed Bailey, the paraprofessional in her classroom, within hearing of other students in the class, that she did not want a certain African American female student in her class. She said the student did not belong there. CP 226-227.

Simultaneous with the tension caused by Ms. Browning, the workload Ms. Bailey carried was excessive. CP 232, CP 236. Ms. Bailey informed Dr. Barringer that there were not enough hours in the day to both teach and be the Curricular Leader. CP 236. She was working in excess of 80 hours per week. CP 236. Ms. Browning's harassment and bullying undermined Ms. Bailey's leadership and interfered with her caseload and the placement of students of color. CP 237. Although the issues came to a head at the end of the 2012 school year, the excessive workload and Ms.

Bailey's concerns about Ms. Browning's conduct regarding the placement of students of color were made known to Dr. Barringer in a letter she sent to him the previous school year.

In February 2011, Ms. Bailey wrote a letter to Dr. Barringer outlining her issues with Departmental workload and a problematic co-worker. In the letter, Ms. Bailey proposed a Curricular Leader/Coordinator position. CP 233-234. The purpose of that position would have been to allow coordination of all the functions Ms. Bailey was currently performing without the burden of having either a case load or class load. CP 235-236. Ms. Bailey did not ask Dr. Barringer for the position. Rather, she merely outlined the proposed job. CP 235. Dr. Barringer was open to the possibility of a non-teaching Curricular Head position. CP 157. In addition to the proposal, Ms. Bailey's letter identified with some specificity the problems Ms. Browning was causing due to her discriminatory conduct, without actually naming Ms. Browning. CP 237. Although Ms. Bailey brought her complaints about Ms. Browning to Dr. Barringer's attention, he indicated that he did not want to know about it. CP 238-239.

In Ms. Bailey's June 2012 complaint to Dr. Barringer, she named several of the students against whom she believed Ms. Browning was discriminating—several African American students and two Hispanic

students. CP 272-276. Dr. Barringer claimed he was unaware that Ms. Bailey's complaints about Ms. Browning suggested racial discrimination against students until he read Ms. Bailey's June 2012 letter. CP 310. Dr. Barringer respected Ms. Bailey's opinion, but indicated that he did not recall anyone else bringing Ms. Browning's discriminatory conduct to his attention. CP 312. Dr. Barringer trusted Ms. Bailey and never had reason to believe that she would tell him anything that was not accurate. CP 309. Several parents of the students of color complained to Ms. Bailey about Ms. Browning's conduct toward their children. CP 32. Although the parents did not specifically claim race discrimination, they complained that they believed Ms. Browning was treating their children differently from other students. *Id.* Several students of color also complained to Ms. Bailey about the treatment they were receiving from Ms. Browning. CP 33.

Although Ms. Bailey told Dr. Barringer in February 2011 that her health had been impacted by her work at Kent-Meridian, he claims he did not understand that her health was compromised by the stress of her job and the problems with Ms. Browning until he read the June 2012 letter. CP 306. Irrespective of the impact the issues were having on Ms. Bailey, Dr. Barringer did not think he could conduct mediation between Ms. Bailey and Ms. Browning because of his relationship with the two

teachers. CP 316-317. So, Dr. Barringer turned the June 2012 complaint over to the Director of Labor Relations, Robin Davis—the administrator responsible for conducting investigations of misconduct. CP 312-313; CP 315. Unfortunately, Mr. Davis was an employee new to education who was unfamiliar with Special Education laws. CP 342-343. Instead of investigating Ms. Bailey’s complaints, Mr. Davis contacted the Kent Education Association—the teacher’s local union to arrange mediation. CP 317.

**2. Ms. Bailey agreed to engage in mediation with her co-worker, but the mediation was unsuccessful.**

Instead of moving forward with the mediation immediately, on June 19, 2012 the teacher’s union asked Ms. Bailey to withdraw her complaint against Ms. Browning. CP 222. When she refused, the union president called Ms. Bailey and threatened that she would receive a letter of direction or discipline if she did not withdraw the complaint. CP 222.

The mediation was then scheduled for August 2012. CP 46. The mediation did not go well and there was no resolution. Ms. Bailey left the mediation very upset. CP 47.

At that juncture, Ms. Bailey understood that she was going to get no assistance from either her supervisor or her union. CP 238-239; CP 222. KSD also offered no assistance to Ms. Bailey. Instead, KSD

deferred to the union and declined to investigate Ms. Bailey's allegations. CP 342. After the failed mediation, Ms. Bailey followed her medical provider recommendation to begin a medical leave of absence. CP 246. In late August 2012, Ms. Bailey provided the District with a memo from her doctor indicating that she would have to refrain from working until the doctor reevaluated her on or about October 1, 2012. CP 247.

**B. Ms. Bailey's efforts to obtain an accommodation and her EEOC charge were met with retaliatory animus.**

**1. KSD's reaction to Ms. Bailey's request for an accommodation was unreceptive.**

Dr. Barringer chose Ms. Bailey to be the Curricular Leader because he "was impressed with the direction and the drive that she had for taking that department in a different direction" as far as compliance, organization, and leadership. CP 302-303. While Ms. Bailey was teaching and serving as Curricular Leader, Dr. Barringer trusted Ms. Bailey and listened to her. CP 309. Before she left on medical leave in August 2012, Ms. Bailey conferred with Dr. Barringer about how best to transition back to work. She told him then that due to the tremendous workload, her doctor thought a non-teaching position that focused on administrative duties in Special Education would be the most effective way to clear up the backlog of IEPs and assist her transition back into the school. CP 318. Dr. Barringer agreed that she could do the program a

service by not being responsible for a class load and instead concentrating on leading the department and ensuring that the IEPs complied with federal law and the students were receiving the programs outlined in their IEPs. CP 390. But, Dr. Barringer said that he would have to get approval for the non-teaching position from KSD's Special Education Administration. CP 318. When Dr. Barringer consulted with Kim Haley, KSD Executive Director of Inclusive Education, about the accommodation Ms. Bailey sought, he told Ms. Haley that Ms. Bailey was a great leader and that "she's having some health concerns" and "doesn't feel like she can return as a full time teacher." CP 321. Dr. Barringer also mentioned to Ms. Haley the problems Ms. Bailey was having with Tabitha Browning. CP 322.

On November 1, 2012, Dr. Barringer and Ms. Bailey spoke telephonically about her anticipated return to work. CP 320, CP 253. KSD did not approve her non-teaching position. CP 322. When Dr. Barringer told Ms. Bailey KSD did not approve the non-teaching position, he further told her that she would have to either return to full-time teaching or resign. He told her that when she returned to work she would no longer be the Curricular Leader / Department Head. CP 252. Finally, and surprising to Ms. Bailey, he told her that she had what he called "emotional problems." CP 253. Ms. Bailey was unprepared for Dr.

Barringer's attitude—it was unlike the “warm, caring, collegiate tone in how he would normally speak” to her. Instead, it was “cold, distant, more stern, very unlike how he normally spoke” to her. CP 252. After consulting with her health care provider, it was decided that she was not ready to return to work. CP 390.

A few days after the telephonic conference Ms. Bailey had with Dr. Barringer on November 1, 2012, Dr. Barringer met informally with Eduardo Bailey. CP 404. Apologizing for the way he spoke to Ms. Bailey, Dr. Barringer told Mr. Bailey that he (Dr. Barringer) had not “switch[ed] the way he worked overnight.” CP 405. Dr. Barringer said that the “investigation was complete” and that his own job was on the line and that he had to do what District administrators told him to do. CP 405. Dr. Barringer concluded by saying that he thought the building was his to run, but he said, “they” (KSD) were running it. CP 405. Dr. Barringer told Mr. Bailey that the comment that Ms. Bailey had to return to work and teach full time or resign was from “Human Resources” and the “District.” CP 405.

Ms. Bailey's health care providers assisted her in applying for FMLA leave to begin on November 2, 2012 with an expected return date of February 4, 2013. CP 279-282. The diagnosis communicated to KSD

by Ms. Bailey's health care provider was "adjustment disorder with mixed anxiety and depression due to bullying environment at work." CP 282.

**2. In November 2012, Ms. Bailey filed a charge of discrimination with the EEOC under the Americans with Disabilities Act.**

On November 9, 2012, believing that Dr. Barringer's response and attitude and her demotion from the paid Curricular Leader position was motivated by KSD's antipathy toward her disabling condition and her requests for accommodations, Ms. Bailey filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). CP 221. The charge was delivered to the Kent School District Office. The General Counsel's Office distributed Ms. Bailey's charge to several Kent School District administrators the same day they attended a meeting with Ms. Bailey and her counsel on December 10, 2012 to discuss Ms. Bailey's requests for accommodations. CP 347-348. According to Mr. Lind, the EEOC charge "would have been highly relevant that people get it as soon as possible." CP 348.

**3. No accommodations were offered at the December 10, 2012 meeting.**

On November 27, 2012, Ms. Bailey's counsel wrote a letter to KSD seeking the accommodations she had been denied by Dr. Barringer on November 1, 2012 and notifying KSD that they had failed to engage in

the requisite “interactive process.” CP 210-211. After both the EEOC charge was filed and Ms. Bailey’s lawyer contacted the District, KSD requested a meeting with Ms. Bailey to discuss the accommodations she requested. CP 206. Ms. Bailey and her lawyer met with several Kent School District administrators on December 10, 2012. At the meeting, Ms. Bailey renewed her request for a non-teaching position for the remainder of the school year. CP 349. General Counsel Lind responded that a non-teaching position was impossible and that she would be required to return to teaching three classes a day, which was one more than she had taught the previous spring term. CP 213, CP 349. Believing that she was strong enough psychologically to return to the school and wanting to get back to work, Ms. Bailey agreed to return to Kent-Meridian High School as a teacher and Curricular Leader in January 2013 with no accommodations. CP 213-215.

In a letter dated December 17, 2012, Mr. Lind stated that Ms. Bailey could return when the new semester began on January 28, 2013. CP 519-521. On December 21, 2012, Ms. Bailey’s doctor released her to return to work on January 3, 2013. CP 523. Ms. Bailey reported to KSD that she was released to return and indicated that she wanted to return to work on January 3, 2013 in order to plan for the second semester. CP 528.

**4. On January 3, 2013, General Counsel Lind's verbal attack on Ms. Bailey when she returned to work after months of medical leave for her psychological injuries led to Ms. Bailey's medical provider recommending she not return to hostile workplace.**

Ms. Bailey arrived at Kent Meridian High School on January 3, 2013. Ms. Bailey went to Dr. Barringer's office at about 7:00 a.m. CP 327. Dr. Barringer told Ms. Bailey that he had no assignments for her at that moment, but that he was going to be meeting with General Counsel Lind and that he would get back to her. CP 285. Dr. Barringer told Ms. Bailey that he had to do what Mr. Lind told him to do as his job was on the line. CP 285. Dr. Barringer let Ms. Bailey know that he would talk to her later that morning.

At approximately 9 a.m., Ms. Bailey walked by the conference room where Dr. Barringer was working. Dr. Barringer was talking on the telephone; Ms. Bailey joined him in the conference room and sat at the conference table. CP 285. Dr. Barringer said that Mr. Lind wanted to talk to Ms. Bailey. Dr. Barringer put Mr. Lind on speakerphone. CP 285-286. Mr. Lind began the conversation in a loud, aggressive manner saying that he wanted to speak with Ms. Bailey. CP 288.

Ms. Bailey asked for representation. CP 286-287. Mr. Lind responded that she did not need representation because he was not going to ask her any questions. CP 353-354; CP 286-287. Mr. Lind then

demanded to know if Ms. Bailey had spoken to her attorney that morning. CP 287. She quietly said yes. CP 288. He continued the aggressive interrogation by indicating that she should not listen to her attorney, saying, “[y]our attorney is not your employer; we are your employer.” Mr. Lind demanded to know if Ms. Bailey understood. Mr. Lind continued to admonish Ms. Bailey in a loud voice saying that she could not be at work that day. CP 288. He told her that she could stay at work that day, but that she would not be paid for the work. CP 288. Mr. Lind shouted at Ms. Bailey:

3 You are not authorized to be here  
4 today. Do you understand? . . . . You may stay  
5 for the day, but you will not be paid. Do you  
6 understand? You have no curricular leader duties, you  
7 have no teaching assignment, no classrooms,  
8 instructional duties. You are not authorized to be  
9 here. You were told to report to Human Resources for  
10 substitute assignments. Do you understand?

CP 288. Mr. Lind engaged in this loud and aggressive admonishment and berating of Ms. Bailey knowing that she was returning to work after months of medical leave for anxiety and depression. CP 356-357.

After Mr. Lind engaged in this communication with Ms. Bailey, Ms. Bailey’s counsel notified him that in her opinion he had violated the Rules of Professional Conduct, section 4.2, by engaging in communication

with Ms. Bailey about the subject matter of the representation. CP 206, CP 217.

Two days later, despite all of Mr. Lind's protestations that there were no duties for Ms. Bailey, on January 6, 2013, Dr. Barringer sent an email to Ms. Bailey informing her that he might have duties for her and that she could return to work the following week. CP 157.

As a result of the hostile confrontation with Mr. Lind, Ms. Bailey's health care provider directed Ms. Bailey to refrain from returning to Kent School District. CP 283. Thereafter, Ms. Bailey's medical provider gave KSD notice that she could no longer work in the District because of the hostility. CP 283.

**C. Ms. Bailey's FMLA rights were violated when she was denied FMLA protection, then not allowed to return to work when released, and finally offered a non-equivalent position.**

**1. In August 2012, KSD refused to allow Ms. Bailey to apply for FMLA leave.**

Ms. Bailey had learned about federal FMLA protections from her health care provider. CP 390. She knew that her job would be protected when she returned from FMLA leave and that those same protections may not be available under leave not governed by FMLA. CP 390. In August 2012 when Ms. Bailey inquired about taking FMLA leave, KSD Human Resources Department told Ms. Bailey that she could not apply for FMLA leave until she exhausted all of her paid leave. CP 255-256. Judith

Weaver, the Human Resources employee responsible for FMLA leaves for teachers during the 2012-2013 school year, acknowledged that KSD requires teachers to exhaust all paid leave before FMLA leave can be activated. CP 366-367; CP 423. Ms. Bailey's medical leave from KSD was unprotected by FMLA regulations between August 2012 and November 2012, when her paid leave was exhausted.

After engaging in the telephonic conference with Dr. Barringer on November 1, 2012, Ms. Bailey's health care provider recommended she continue to take medical leave from work. CP 390. So, in November 2012 just before her paid leave expired, Ms. Bailey was allowed to apply for FMLA leave. CP 256.

**2. KSD refused to allow Ms. Bailey to return to work when her health care provider released her to return on January 3, 2013.**

When Remi Gallevo, M.D., Ms. Bailey's physician, released her to return to work effective January 3, 2013, Ms. Bailey notified the School District that when she returned on January 3, 2013, she would be engaging in planning for the second semester. CP 523; CP 528. Mr. Lind responded that Ms. Bailey could not return to her teaching duties on January 3, 2013, but that she could return on that date as a substitute teacher in the substitute teacher pool. CP 525-526. Ms. Bailey responded

that her health care providers dictated the January 3, 2013 return date and that her return should be governed by her doctor's release. CP 528.

**3. KSD offered Ms. Bailey a substitute position, which was not equivalent to her teaching and Curricular Leader position.**

Mr. Lind notified Ms. Bailey that she could contact Robert "Keith" Beeman, the Assistant Superintendent for Human Resources, to be assigned as a substitute teacher when she returned to work. CP 351. Dr. Beeman admits that a special education substitute position is not equivalent to Ms. Bailey's teaching assignment at Kent Meridian-High School. ("It's [substitute work] not equivalent in the terms that a teacher would think of that...") CP 374. There was no guarantee that a substitute position would have been available for Ms. Bailey between her scheduled return to work and the end of the academic semester. CP 372. Moreover, a substitute job would neither allow Ms. Bailey to engage in her Curricular Leader position duties nor entitle her to the Curricular Leader stipend. CP 391.

Dr. Beeman testified that he is unaware of any other tenured teacher being offered a substitute position when their medical leave ended. CP 372. Requiring a tenured teacher returning from medical leave to take a position as a substitute violates the terms of the employees' collective bargaining agreement (CBA). CP 391. Requiring a tenured teacher

returning from medical leave to take a substitute position also violates the leave policies and procedures of the Kent School District. CP 375-379.

4. **KSD refused to allow Ms. Bailey the right to return to work after her health care provider released her to return to work on January 3, 2013, more than three weeks before the end of the school semester at Kent-Meridian High School.**

Ms. Bailey's return date was more than three weeks before the end of the semester, which was scheduled to end on January 25, 2013. CP 154. Ms. Bailey proposed a comprehensive list of job duties that she could perform between her return and the end of the semester. The job duties she proposed were the same duties she performed as Curricular Leader, a position to which she was to be returned at the conclusion of her FMLA leave. CP 391. Dr. Beeman noted that no other teacher returning from medical leave was denied the opportunity to return to work when released to return and required to await the beginning of a new semester. CP 307.

#### IV. ARGUMENT OF COUNSEL

- A. **The trial court erred when it granted summary judgment for KSD as summary dismissal is seldom appropriate in employment discrimination cases brought under the Washington Law Against Discrimination (WLAD).**

As the Washington Supreme Court ruled in September 2014, summary judgment to an employer is seldom appropriate in WLAD cases because of the difficulty of proving a discriminatory motivation. *Scrivener*

*v. Clark College*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014) citing *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144, 94 P.3d 930 (2004); *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000) (“Summary judgment should rarely be granted in employment discrimination cases.”); see also *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 90, 272 P.3d 865 (2012) (When the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation.).

The *Scrivener* court noted:

To overcome summary judgment, a plaintiff only needs to show that a reasonable jury could find that the plaintiff's protected trait was a substantial factor motivating the employer's adverse actions. *Riehl*, 152 Wn.2d at 149, 94 P.3d 930. ‘This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence.’ *Id.*

*Scrivener*, 181 Wn.2d at 445. As shown below, Ms. Bailey more than meets her burden of production on her WLAD claims of hostile work environment and retaliation.

**B. The trial court erred when it granted summary dismissal of Ms. Bailey’s hostile work environment – retaliation based claim that arose due to her attempts to protect students from race and disability discrimination.**

To establish a *prima facie* hostile work environment claim, a plaintiff must allege facts proving that (1) the harassment was unwelcome, (2) the harassment was because the plaintiff was a member of a protected

class, (3) the harassment affected the terms and conditions of her employment, and (4) the harassment is imputable to the employer. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 275, 285 P.3d 854 (2012). Harassment is only actionable if it is sufficiently pervasive as to alter the conditions of employment and create an abusive working environment. *Alonso v. Qwest Communications Co., LLC.*, 178 Wn. App. 734, 749, 315 P.3d 610 (2014) citing *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004).

**1. Ms. Bailey repeatedly notified KSD that the harassment was unwelcome.**

Ms. Bailey had been reporting the harassment for several years. CP 238-239. In a written complaint filed in February 2011, Ms. Bailey made it clear that the harassment she was enduring at work because of her attempts to protect disabled students was not welcome. CP 237. Ms. Bailey made it clear to Dr. Barringer that the ongoing harassment was negatively impacting her health and thereby adversely affecting the terms and conditions of her employment. CP 79. Finally, in June 2012, Ms. Bailey drafted a 12-page letter to Dr. Barringer setting forth her complaints about the students she was trying to protect and the resulting hostility. CP 272-276.

**2. Ms. Bailey's actions were protected conduct.**

As to the protected class element, discriminatory conduct directed at an individual other than the plaintiff may be relevant to a hostile work environment claim. *Ray v. Henderson*, 217 F.3d 1234, 1246 (9th Cir. 2000) (retaliation for complaining about discriminatory treatment of female employees stated a case for retaliation based hostile work environment where male plaintiff was subjected to repeated and derogatory statements for his support of the female employees). See also, *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1123 (9th Cir. 2008) citing *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033–34 (9th Cir.1998). Ms. Bailey's protected class status arises out of her actions to protect the disabled students of color.

**3. The harassment was pervasive and adversely affected Ms. Bailey's job.**

Ms. Bailey was the continuous target of Ms. Browning's wrath over Ms. Bailey's advocacy for the students of color that Ms. Browning was resisting teaching. Ms. Browning berated Ms. Bailey, maligned her to her co-workers and administrators, undermined her leadership authority, and increased Ms. Bailey's workload exponentially because of Ms. Browning continued resistance to allowing disabled students of color to participate in her class. Ms. Bailey attempted to resolve the issue of Ms.

Browning's disparate treatment of students of color with Ms. Browning and with Dr. Barringer, but Ms. Browning persisted and continued to harass and bully Ms. Bailey because of her advocacy. Ms. Browning's continued harassment led Ms. Bailey to seek medical attention for her psychological condition.

**4. KSD is liable for the harassment because Ms. Bailey repeatedly complained of it and KSD took no remedial action.**

As to the fourth element, here Ms. Browning's ongoing harassment of Ms. Bailey was well known to the employer. Ms. Bailey complained frequently to Dr. Barringer—a supervisory administrator with the Defendant Kent School District. See *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 363, 287 P.3d 51 (2012) (where the employer's alter ego knows of harassment and takes no remedial action, liability is imputed to the employer.)

Ms. Bailey ultimately was diagnosed with depression and anxiety resulting from the harassment. The trial court erred when it concluded that Ms. Bailey's efforts on behalf of disabled students of color did not rise to the level of protected activity.

**C. The trial court erred when it found that KSD did not engage in retaliation against Ms. Bailey for seeking an accommodation and for filing a charge of discrimination with the Equal Employment Opportunity Commission when KSD refused her accommodation, demoted her after she made her request, and forced her out of the workplace with intimidation by KSD's General Counsel.**

Under RCW 49.60.210(1), a plaintiff must show that (1) she engaged in statutorily protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between her activity and the other person's adverse action. The first element describes opposition to "any practices forbidden by" RCW 49.60. When a person reasonably believes she is opposing discriminatory practices, RCW 49.60.210(1) protects that person whether or not the practice is actually discriminatory. A plaintiff proves causation by showing that retaliation was a substantial factor motivating the adverse employment action. *See Currier v. Northland Services, Inc.*, 182 Wn. App. 773, 742-43, 332 P.3d 1006 (2014) citing *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005); *Ellis v. City of Seattle*, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000); *Allison v. Hous. Auth.*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991).

**1. Ms. Bailey engaged in a series of protection actions.**

Ms. Bailey engaged in statutorily protected conduct when she complained that her co-worker treated students of color in a disparate

manner. *Currier*, 182 Wn.App. 182 Wn. App. at 738 (independent contractor truck driver harassed and fired after hearing and ultimately reporting repeated racist comments from co-workers about co-workers of color). She also engaged in protected activity when she sought an accommodation from KSD. *See Coons v. Secretary of U.S. Dept. of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004) (Making a request for an accommodation is a protected activity.) In November 2012, Ms. Bailey engaged in protected activity when she filed a charge of discrimination with the EEOC and when she notified KSD that she was being treated differently than other similarly situated teachers. See RCW 49.60.210.

**2. As a result of Ms. Bailey's protected conduct, KSD adversely affected her employment.**

After her complaints about Ms. Browning and in response to her accommodation request, Dr. Barringer demoted Ms. Bailey and told her that she would have to return to work and teach a full load of class or resign. *See Robel v. Roundup Corp*, 148 Wn. 2d 35, 74 n.24, 59 P.3d 611 (2002) (a demotion may constitute an adverse employment action.) He also told her that she had "emotional problems." After Dr. Barringer apologized to Mr. Bailey for his November 1, 2012 communication with Ms. Bailey, it was clear to Ms. Bailey that Dr. Barringer was merely the vehicle for the retaliation she was undergoing from KSD.

Believing that the demotion and failure to accommodate was a violation of the Americans with Disabilities Act, Ms. Bailey filed a charge of discrimination with the EEOC, which is also protected activity. RCW 49.60.210 provides, in relevant part:

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

RCW 49.60.210(1).

Then, in a November 27, 2012 correspondence, Ms. Bailey's counsel complained that the District had failed to accommodate Ms. Bailey's disabling condition and that she believed she was being treated differently than other employees. After Ms. Bailey met with several administrators on December 10, 2012, she was told that she could not return to work when her doctor released her to return to work, which is an adverse employment action. As Curricular Leader of the Special Education Department of Kent-Meridian High School, Ms. Bailey knew other employees who returned from medical leave and were allowed to resume their normal work duties with no interruption despite returning close to end of the semester. CP 391.

**3. There exists a causal link between Ms. Bailey's protected activity and the adverse employment action she sustained.**

On November 1, 2012, in her first communication with Dr. Barringer after Ms. Bailey sought an accommodation, he told her that he was relieving her of her Curricular Leader job and that she would have to return to work teaching a full load or resign. He also told her she had "emotional problems." Ms. Bailey filed her EEOC charge on November 9, 2012. Less than three weeks later, she complained that the District had failed to accommodate her. All the administrators who attended the December 10, 2012 meeting to discuss her accommodation request were provided copies of Ms. Bailey's EEOC charge the day of the meeting. CP 325-326. On January 3, 2013, KSD told Ms. Bailey she could not return to work even though her doctor released her.

KSD engaged in further retaliation against Ms. Bailey by offering her a non-equivalent substitute position. CP 371-372. The District's offer of a substitute position for a tenured teacher violated both the District's personnel policies and the teacher's Collective Bargaining Agreement (CBA). CP 391. According to Dr. Beeman, no other tenured teacher had been required to perform substitute teacher duties upon returning from medical leave.

KSD's final retaliation occurred on January 3, 2013 when Ms. Bailey returned to the workplace to learn what duties Dr. Barringer had for her to do. Instead of having a professional conversation with Ms. Bailey about what Dr. Barringer had for her to do, Ms. Bailey was met with Mr. Lind's fury. All Dr. Barringer had to say to Ms. Bailey was that he had nothing for her to do; she would have quietly left the workplace. CP 391. He told Ms. Bailey that he had to do what Lind told him to do because his job was on the line. CP 285.

Even if Mr. Lind had spoken to Ms. Bailey in violation of the Rules of Professional Conduct but in a reasonable manner, she would have followed his instructions and returned on the date prescribed by Dr. Barringer. But, Mr. Lind did not speak to Ms. Bailey in either a professional or a reasonable manner. Instead, Mr. Lind, speaking for the agreed to return to work with no accommodation just so she could get back to work with the students who needed her. CP 392. Even Dr. Barringer appeared shocked by Mr. Lind's demeanor. During Mr. Lind's Kent School District, engaged in a loud, berating, admonishing, and threatening tirade toward Ms. Bailey. Mr. Lind engaged in this conduct even though he was quite aware that she was returning to work from a severe anxiety and depression that had been ongoing for several months. CP 356-357. He also knew that Ms. Bailey was largely compliant and had rant, Dr. Barringer began answering questions

for Ms. Bailey who had been remained largely mute during the tirade. CP 288-289. The trial court’s dismissal of Ms. Bailey’s retaliation claim was error.

**D. The trial court erred when it held that KSD did not violate Ms. Bailey’s FMLA rights when it refused to allow her to apply for leave protected by FMLA, by denying her right to return to work, and by offering her a non-equivalent job when her doctor released her to return.**

The FMLA creates two interrelated substantive employee rights: first, the employee has a right to use a certain amount of leave for protected reasons, and second, the employee has a right to return to his or her job or an equivalent job after using protected leave. *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1122 (9th Cir. 2001) (citing 29 U.S.C. §§ 2612(a), 2614(a)). The Court in *Bachelder*, 29 U.S.C. § 2615(a) described two very different ways to protect these substantive rights; the claims are “interference” and “retaliation.” *Id.* at 1124; *see also Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1133 & n. 7 (9th Cir.2003).

Ms. Bailey’s Family Medical Leave Act claim arises under 29 U.S.C. § 2615(a)—entitlement or interference theory. For an “interference claim” or an “entitlement claim,” an employee need only establish that: 1) she was eligible for the FMLA protections, 2) her employer was covered by the FMLA, 3) she was entitled to leave under the FMLA, 4) she provided sufficient notice of her intent to take leave,

and 5) her employer denied her the benefits to which she was entitled. *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir. 2011). The employer's intent in an interference claim is irrelevant. *Sanders*, 657 F.3d at 778; *Liu*, 347 F.3d at 1135.

Ms. Bailey presents ample evidence that she was denied the FMLA leave protections to which she was entitled when 1) KSD refused to allow her to apply for leave until she exhausted her paid leave, 2) KSD refused to allow her to return to her position when released by her doctor, and 3) KSD failed to offer her either her former job or an equivalent job.

**1. KSD interfered with Ms. Bailey's FMLA rights by denying her the right to apply for FMLA leave until she exhausted all paid leave.**

The trial court erred when it failed to address the fact that Ms. Bailey was denied Family and Medical Leave Act of 1993 (FMLA) protections for approximately four months after seeking FMLA leave. The FMLA entitles eligible employees to take up to 12 workweeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition." 29 U.S.C. § 2612(a)(1)(C). The FMLA creates a private right of action to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," [29] § 2617(a)(2), should that employer "interfere with, restrain, or deny the exercise of FMLA rights," [29] §

2615(a)(1).” *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 724-725, 123 S.Ct. 1972, 1976, 155 L.Ed.2d 953 (2003).

Although not a strict liability statute, “[a]ny violation of the FMLA itself or of the Department of Labor regulations constitutes interference with an employee’s rights under the FMLA.” *Id.* In an interference claim, an “employee must show only that [s]he . . . was entitled to the benefit denied.” *Russell v. N. Broward Hosp.*, 346 F.3d 1335, 1340 (11th Cir. 2003).

Ms. Bailey sought FMLA leave in August 2012. Instead of granting her FMLA leave, the District required Ms. Bailey to exhaust all her paid leave before allowing her to apply for FMLA leave. CP 366-367.

The Eleventh Circuit court found this unlawful:

Neither Congress nor the Department of Labor could have intended ... to allow employers to evade the FMLA by providing their employees with paid sick leave benefits. Otherwise, when an employee misses work for an illness that qualifies under both his employer’s paid sick leave policy and the FMLA, his employer could elect to have the absence count as paid sick leave rather than FMLA leave and would then be free to discharge him without running afoul of the Act.

*Strickland v. Water Works and Sewer Board City of Birmingham*, 239 F.3d 1199, 1205 (11th Cir. 2001).

**2. KSD refused to allow Ms. Bailey to return to work when her doctor released her, in violation of the FMLA.**

The FMLA provides that an employee returning to work following FMLA leave is entitled “to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” 29 U.S.C. § 2614(a)(1)(B). Instead, the District first refused to allow Ms. Bailey to return to work at all until the beginning of the new semester scheduled to begin on January 28, 2013. Then, the District offered her a substitute teaching position, which was inconsistent with her collective bargaining agreement, the District’s leave policies and procedures, and was not equivalent to her teaching/Curricular Leader position at Kent-Meridian High School.

The trial court erred when it found that KSD met its FMLA obligations even though it disallowed Ms. Bailey to return to work more than three weeks before the end of the semester. 29 U.S.C. § 2618(d)(1)(A) allows a school district to require an employee to remain on leave until the end of the semester only if the employee is released to return within the last three weeks of the semester. Ms. Bailey was released to return to work on January 3, 2013, which is more than three weeks before the end of the semester that was scheduled to end on January 25, 2013. CP 154-155. Moreover, Ms. Bailey was not asking that classes of students be reconstituted when she returned on January 3, 2013—she

suggested that she could engage in Curricular Leader duties and plan for the upcoming new semester to benefit the students and the department.

It was obvious the District had work that Ms. Bailey could have done to benefit both the students and the department. Coincident with General Counsel Lind being given notice that his communication with Ms. Bailey violated the Rules of Professional Conduct, Dr. Barringer found “meaningful work” for her to do in the “gap time” before the semester ended. CP 157-158. As Dr. Barringer explained to Ms. Bailey on January 3, 2013 when he said he had no duties for her, he had to do what Mr. Lind told him to do, because his job was on the line. CP 285.

**3. When Ms. Bailey provided notice that she was released to work on January 3, 2013, the District failed to offer her an “equivalent position.”**

The trial court erred when it found that a substitute teaching position was equivalent to Ms. Bailey’s teaching/Curricular Leader job. “An equivalent position is one that is ‘virtually identical’ to the employee’s former position ‘in terms of pay, benefits, and working conditions,’ and it ‘must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.’ *Wanamaker v. Westport Bd. of Educ.*, 899 F.Supp.2d 193, 206 (D.Conn.2012); *see also* 29 C.F.R. § 825.215(e) (“[a]n equivalent position must have substantially similar

duties, conditions, responsibilities, privileges and status as the employee's original position"). A substitute-teaching job is not equivalent to the job of a teacher who has teaching responsibilities and is a Curricular Leader of a Special Education Department. The District's Assistant Superintendent of Human Resources, Keith Beeman, agrees—a substitute position is not equivalent. CP 374.

**4. Ms. Bailey suffered “negative consequences” as a result of attempting to return to work from her FMLA leave.**

Where an employee is subjected to “negative consequences . . . simply because [s]he has used FMLA leave,” the employer has interfered with the employee's FMLA rights under 29 C.F.R. § 825.220(a)(1); *Liu*, 347 F.3d at 1136; *Bachelder*, 259 F.3d at 1124. When Ms. Bailey attempted to return to work on January 3, 2013, she encountered the wrath of General Counsel Charles Lind. Mr. Lind directed that Ms. Bailey could not return to her position. He yelled at her, admonished her, berated her, insulted her, and then dismissed her. Mr. Lind engaged in this conduct with Ms. Bailey knowing that she was just returning from medical leave for psychological injuries that had taken months out of her work life. The negative consequence she sustained was that she lost the profession she had worked so hard to attain. Mr. Lind's conduct was the culmination of KSD's hostility toward Ms. Bailey because of her efforts to protect students and then to protect herself. Ms. Bailey's medical providers

concluded she could not safely return to this workplace leading to her constructive discharge—a negative consequence.

**E. Appellant Bailey is entitled to her reasonable attorney fees on appeal pursuant to RAP 18.1(a).**

RAP 18.1 provides for an award of fees on review where a statute authorizes such an award. *Xieng v. People's Nat. Bank of Washington*, 120 Wn.2d 512, 533, 844 P.2d 339 (1993). Ms. Bailey seeks fees on review pursuant to RAP 18.1 and RCW 49.60.030(2). “RCW 49.60.030(2) does not expressly authorize for attorney fees on review, but it has been interpreted as authorizing such an award.” (*Xieng*, 120 Wn.2d at 533, quoting *Allison v. Housing Authority*, 118 Wn. 2d 79, 98, 821 P.2d 34 (1991)). Therefore, Ms. Bailey is entitled to recover the fees she incurred in her appeal of this matter.

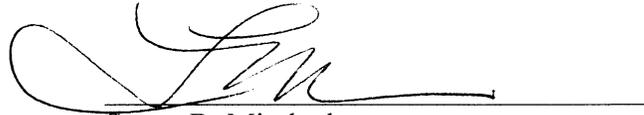
**V. CONCLUSION**

The trial court erred in dismissing Ms. Bailey’s three causes of action. First, the trial court erred when it failed to recognize her retaliation-based hostile work environment claim. Second, the trial court erred when it ignored the adverse employment actions and the evidence of pretext. Third, the trial court erred when it disregarded the admitted FMLA violations and when it found the job offered Ms. Bailey was equivalent to the job she held before taking FMLA leave.

For all the reasons set forth above, Ms. Bailey respectfully requests this Court reverse the summary dismissal of her causes of action and remand this case back to the trial court for a trial on the issues. Ms. Bailey asks this Court to rule that she is entitled to fees on review pursuant to RAP 18.1 and RCW 49.60.030(2).

Dated this 3rd day of August, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Mindenbergs', is written over a horizontal line.

Susan B. Mindenbergs

WSBA No. 20545

Attorney for Appellant Anne L. Bailey