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STATE OF WASHINGTON

No. 33956-1

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PAULA KING TYNER, individually,

Appellant,

vs.

THE STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND
HEALTH SERVICES (DSHS); RAINIER SCHOOL; LARRY
MERXBAUER, in his individual capacity; JAN BLACKBURN, in her
individual capacity; JODY PILARKSI, in her individual capacity; and
TINA FLEISCHER, in her individual capacity,

Respondents.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
The Honorable John A. McCarthy

APPELLANT'S REPLY BRIEF

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ORIGINAL

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS i

II. TABLE OF AUTHORITIES ii

III. MOTION TO STRIKE 1

A. The Respondent Should be Precluded from Arguing That
the Individually
Named Defendant Should be Dismissed Due to a Failure to
Properly Raise
the Issue at the Trial Court Level. 1

IV. COUNTER STATEMENT OF FACT 2

V. ARGUMENT 5

A. Introduction 5

B. Plaintiff’s First Amendment Claim 6

C. Plaintiff Was a Victim of an Actionable Adverse
Employment Decision 8

D. Qualified Immunity 10

E. Plaintiff’s Claim Pursuant to 49.60.210 12

V. CONCLUSION 13

II. TABLE OF AUTHORITIES

Cases

American Discount Corp. v. Shucker, 129 Wn. App. 345, 347 n1, 120 P. 3d 96 (2005) 2

Bishop v. State, 77 Wn. App. 228, 234-35, 889 P. 2d 959 (1995). . . . 4

Burlington Northern and Santa Fe Railroad Co. v. White, _ U.S. - 126 S. Ct. 2405 _ L. Ed. 2d __ (June 22, 2006) 11

Chateaubriand v. Gaspard, 97 F.3rd 1218, 1222 (9th Cir. 1996) 10

Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801,809, 828 P. 2d 549 (1992) 2

Garcetti v. Ceballos, _ U.S. __. 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) 9

Kastanis v. Educational Employees Credit Union, 122 Wn. 2d 483, 490, 859 P. 2d 26 (1993)7

Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn. 2d 302, 898 P. 2d 284 (1995). 7

Rankin v. Pearson, 483 U.S. 378, 1075 Ct., 2891 97 L. Ed 2d 315 (1987).8

Steckle v. Motorola, Inc. 730 F. 2d 392 (9th Cir. 1983) 6

U.S. v. Lanier, 520 U.S. 250. 1175 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) 12,13,14

Other Authorities

42 U.S.C. § 1983. 1

WPI 330.01 5,6

WPI 330.05 12

RCW 49.60.210 12,13

III. MOTION TO STRIKE

A. The Respondent Should be Precluded from Arguing That the Individually Named Defendant Should be Dismissed Due to a Failure to Properly Raise the Issue at the Trial Court Level.

At pages 48-49 of Respondent's opening brief, it is argued that individual named Defendants, with the exception of Defendant Jody Pilarski, should be subject to dismissal due to insufficiency of proof. (Respondent's brief, p. 49-50). It is respectfully submitted that such efforts to have the individually named Defendants (with the exception of Tina Fleisher) is improper given the fact that the Defendants failed to properly raise the issue at the Trial Court level. If one closely examines Respondent's motion for summary judgment, filed below, it is noted Respondents' only sought the dismissal of Respondent Tina Fleisher due to insufficiency of evidence within their opening material. (See CP 20-21). In response to that and, other issues raised in the Respondent's opening summary judgment materials, Plaintiff in a general sense addressed causation principles under § 1983 and wherein it has been alleged that there has been a "conspiracy" to violate civil rights, actionable under 42 U.S.C. § 1983. (CP 127-129). There was argument with respect to the actions of the individual Defendants other than Ms. Fleisher, but clearly such arguments were not fully developed as to the individual

actors as thoroughly as it would have been done had dismissal been sought of all of the individually named Defendants due to factual insufficiency.

It was only in Respondents' reply brief that it was urged that individual Defendants Merxhauer and Blackburn should be dismissed due to insufficiency of evidence. (CP 854-855). It is respectfully submitted that such efforts to seek dismissal of individually named Defendants based on arguments raised for the first time appear in a reply brief in a summary judgment proceeding, is simply inappropriate, and has the potential of being a fundamental denial of due process. It is well recognized that an issue which is raised for the first time in a reply brief comes too late to warrant consideration by the Court. See Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801,809, 828 P. 2d 549 (1992). See also American Discount Corp. v. Shucker, 129 Wn. App. 345, 347 n1, 120 P. 3d 96 (2005)(prohibition against raising issues for the first time in a reply brief is applicable to summary judgment proceedings and summary judgment proceedings which are subject to appeal).

As such, the Appellate Court should not consider the individual liability of Defendants Merxhauer and Blackburn due to Respondents' failure to properly raise the issue below. In support of such a position, it is respectfully and humbly suggested that the portion of Respondents' reply brief which raises such issue should simply be stricken.

IV. COUNTER STATEMENT OF FACTS

Appellant , above named, stands by her statement of facts set forth within her original opening brief. Such statement of facts is supported by the factual record herein, or reasonable inferences therefrom.

This is not a difficult case. As set forth in Appellant's opening brief, the facts reveal that Appellant, upon learning of a potential claim of sexual harassment, involving subordinate coworkers, even though it was not a core part of her job duties, attempted to conduct an investigation into an untoward event occurring at the work place between the two subordinate employees. The investigation ultimately resulted in revelations from Ms. Paeper which indicated that she may have been a victim of sexual harassment at the hands of co-worker Ed Densmore. Mr. Densmore, in what can only be characterized as a gross act of insubordination, blunted the investigation by refusing to meet with Ms. Tyner to provide his side of the story. Instead, Mr. Densmore, according to correspondence authored by himself, attempted to do an end around the investigation by contacting Ms. Tyner's superior, Jody Pilarski to discuss matters well beyond Ms. Tyner's editing of his work product. (CP 260-261).

As clearly set forth in a memo authored by Mr. Densmore dated March 7, 2001, on March 6, 2001, Mr. Densmore called Ms. Pilarski to tell her about the "cold war" between him and Ms. Tyner and that it was creating

stressful job conditions.

Mr. Densmore's March 7, 2001 memorandum, which is set forth at the clerk's papers at page 260 speaks for itself, and creates a strong indication that in fact there was communication between Mr. Densmore and Ms. Pilarski, with respect to the subject matters which were lately subject to Mr. Densmore's alleged revelations which occurred on or about March 8, 2001 and March 9, 2001, as reflected in materials set forth at clerk's papers 260-263.¹ To the extent that Ms. Pilarski is trying to contend that Mr. Densmore never spoke to her with respect to anything other than excessive editing, there is at a minimum issues of credibility.

Apparently Ms. Pilarski had an axe to grind against Ms. Tyner when she learned that Ms. Tyner was seeking an outside investigation of the sexual harassment allegations against Mr. Densmore, was more than willing to play along with Mr. Densmore's efforts to undercut Ms. Tyner who could have been perceived as the driving force behind the sexual harassment investigation.

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While the Respondents have tended to cast Ms. Tyner's actions towards Mr. Densmore as being some form of "harassment", on their face, such allegations are not matters that would be worthy of any form of investigation and are simply indications that Ms. Tyner (at most) was a strict supervisor who was demanding that Mr. Densmore do his job. As the Court is well aware, the law does not require that an employer provide a stress free work environment. See Bishop v. State, 77 Wn. App. 228, 234-35, 889 P. 2d 959 (1995).

In the instant matter, contemporaneous documentation show Ms. Pilarski's interactions with Ms. Tyner became extremely hostile. (CP 634-635). The events that occurred during the course of meetings between Ms. Pilarski and Ms. Tyner and her representative provide a linkage between Appellant's protected speech and the subsequent adverse employment decisions that followed. During the course of the conversations that occurred on March 8, 2001, it is clear that Ms. Pilarski was extremely confrontational with respect to Appellant's concerns that Ms. Pilarski would not properly investigate the sexual harassment allegations. As reflected at clerk's papers at page 635, during the course of this conversation, Ms. Tyner at least on two occasions asked Ms. Pilarski whether or not she was angry with her, only to have Ms. Pilarski not respond to the question, and return to the issue of Ms. Tyner's concerns that Ms. Pilarski would not do a proper investigation of the sexual harassment allegations. It is respectfully submitted that the events occurring during the course of that meeting alone establish a factual issue as to Ms. Pilarski's motivations and the motivation for the events that occurred thereafter.

It was **the next day** that Ms. Tyner was placed on alternative assignment and forever removed from her job duties at Rainier School. (CP 649).

Finally, in reply to Respondents' recitation of the facts, it is

emphasized that the Respondents simply ignore the fact that even after it was determined that Ms. Tyner had engaged in no misconduct as a result of the harassing investigation that was launched against her, she was still not allowed to return to Rainier School in a position that she was entitled to bump to within the RIF process. (CP 521-522).

With respect to the remainder of the factual dispute in this matter, it is simply noted that as the nonmoving party, who was subject to a motion for summary judgment, all facts must be construed in the light most favorable to the Appellant and at a minimum there are factual issues with respect to the impropriety of the motivations that launched the harassing investigation of Ms. Tyner into matters such as whether or not she utilized “sticky notes” to communicate to her staff. It is respectfully suggested that one could easily conclude that in fact the behavior of this employer was so irrational with respect to Ms. Tyner, that the only explanation could be that there was a retaliatory motive behind it.

V. ARGUMENT

A. Introduction.

While Defendants appear to be critical of the method and manner in which Appellant uses precedent, particularly the case of Steckle v. Motorola, Inc. 730 F. 2d 392 (9th Cir. 1983), the matter of which they are critical, is not set forth as a quote and is a reasonable interpretation of propositions set forth

within Steckle. Further, the Respondent throughout makes a fundamental error of asserting that Respondent has the burden of proving that the proffered justifications for the employers actions were “pretext”. That is not the law. Fundamentally, an employee can establish the existence of an improper employment decision by making a showing that an impermissible motive was a “substantial factor” in the adverse employment decision, even though other factors may have come into play. See WPI 330.01, see also Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn. 2d 302, 898 P. 2d 284 (1995). Further, the prima facie case/pretext analysis which had its origins in federal law are not the elements of Plaintiff’s claim. See generally, Kastanis v. Educational Employees Credit Union, 122 Wn. 2d 483, 490, 859 P. 2d 26 (1993). Such a presumption predicated analysis, was simply a vehicle developed to aid an aggrieved employee, who may have been a victim of an unlawful employment decision, who otherwise might have difficulties in proving such claims. Such an analysis was never intended to set forth the elements upon which the Plaintiff has the burden of proof. See generally comments to WPI 330.01. While Appellant is not saying that it is “impossible” for an employee to have summary judgment granted in its favor in an employment case, the case law is very clear that the employee should be given every benefit of the doubt with respect to the proof. Ultimately, the issue is whether or not there are competing inferences from

which a Plaintiff could prevail and it is simply inappropriate for a Trial Court to engage in trial by affidavit when considering summary judgment in an employment case.

B. Plaintiff's First Amendment Claim.

Whether or not Appellant's speech constitutes a matter of public concern was fully addressed in Appellant's opening brief. It is noted that the Respondents are fundamentally wrong that a speaker's personal opinions and belief do not necessarily reflect matters of public concern, even when they occur within the work setting. As in Rankin v. Pearson, 483 U.S. 378, 1075 Ct., 2891 97 L. Ed 2d 315 (1987), even in the workplace, a public employee may express opinions with respect to matters of political, social, or other concerns to the community. In that case, the employee's speech which was protected was essentially her opinion that the President of the United States was worthy of assassination.

Further, it is very clear that the Respondent desire to take Ms. Tyner's comments which implicate the need for a proper investigation for a sexual harassment claim out of context. Before making this comment, Ms. Tyner had been informed by Patty Paeper , that not only had Mr. Densmore acted rudely towards her on February 15, 2001, but also of other action, which caused the Human Resources professional, at the meeting with Ms. Paeper and Ms. Buse, to express the concern that Mr. Densmore's conduct

constituted “sexual harassment”. *CP 514-515). Placed in context, Ms. Tyner’s comments with respect to Ms. Pilarski’s investigative abilities, profoundly implicates something other than just simply an opinion that Ms. Tyner’s supervisor had an inability to perform her job.

Further, the recent Supreme Court opinion in Garcetti v. Ceballos, ___ U.S. ___, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) does not change the analysis in the instant case. Frankly, the Garcetti v. Ceballos case reaffirms the basic proposition that when an employee expresses his view privately at work, rather than publically, is not a dispositive issue, in determining the potential status of speech.

Further, the Garcetti v. Ceballos opinion at pages 1961-62 qualifies the notion that speech made pursuant to job duties can be categorically excluded from protections. The core issue in Garcetti v. Ceballos is whether or not the employee is “actually expected to perform” the potentially protected act as part of their job duties, as opposed to an overly broad interpretation of what an employee’s job duties might be.

Here, while it could be said as a supervisor, Ms. Tyner had an obligation to speak out against potential sexual harassment, it was not a core function of her job duties to engage in sexual harassment type investigations, or to make a determination as to whether or not such investigation should be performed at the institution or by utilizing outside resources. In sum, the

Garcetti v. Ceballos opinion provides very little guidance and is clearly not dispositive of any element of the instant case.

Further, the Respondents simply have it wrong as to whether or not they are entitled to a “Pickering balance” automatically applies. As indicated by Chateaubriand v. Gaspard, 97 F.3d 1218, 1222 (9th Cir. 1996), it is still incumbent upon the employer, (as with any other claim or defense), to have actual factual support for the utilizations of the balancing test. If one examines page 30 of Respondent’s brief, it is very clear that the Respondent have no factual basis upon which to put the “Pickering balance” at issue. The only thing that is set forth at page 30 is lawyer argument without a scintilla of citation to anything within the record supporting such argument. It is respectfully suggested that a public employees first amendment right are simply not so ephemeral that they can be defeated by post hoc lawyer argument that has no basis within the factual record. In other words, the “Pickering balance test” simply does not allow the destruction of first amendment rights to be predicated on phony lawyer argument.

C. Plaintiff Was a Victim of an Actionable Adverse Employment

Decision.

As previously noted, Respondent simply failed to recognize that the end result of the irrational behavior that occurred in this case was the fact that Appellant’s career path was effectively destroyed, when she was not allowed

to return to Rainier School to work in her chosen profession of dealing with people with developmental disabilities.

Further, the recent U.S. Court opinion in Burlington Northern and Santa Fe Railroad Co. v. White, U.S. - 126 S. Ct. 2405 _L. Ed. 2d __ (June 22, 2006), should be viewed as the final nail in the coffin of arguments such as being made by Respondent herein. Even without the Burlington Northern and Santa Fe Railroad Co. v. White opinion, the Respondent's contention that Respondent was not a victim of an adverse employment decision borders on the frivolous.

In the Burlington Northern and Santa Fe Railroad Co. v. White case, the U.S. Supreme Court resolved a split amongst the Circuit Courts with respect to the issue of what constituted "an adverse employment action," actionable pursuant to the anti-retaliation provision of Title VII. In the Burlington Northern and Santa Fe Railroad Co. v. White case, as in the instant case, the employee was a victim of a retaliatory job reassignment to less favorable job duties. Further, the Court found that a suspension of the employee which had been remedied by reinstatement with back pay, was still actionable, because of the non-economic harm done. As it made very clear by the Burlington Northern and Santa Fe Railroad Co. v. White case, retaliatory employment actions short of discharge are clearly actionable adverse employment actions.

Finally, with respect to causation, such issues are fully briefed within Appellant's opening brief and it is noted that factual issues as to causation clearly exist within the instant matter. Within one day of Ms. Pilarski confronting Appellant and expressing dissatisfaction with Appellant's speech, Appellant was placed on alternative assignment to be subject to an investigation on allegations ranging from the trivial to the grossly untimely. Those facts alone should have been enough to cause the Trial Court to deny summary judgment.

D. Qualified Immunity.

The most coherent formulation of qualified immunity under § 1983 is set forth in the U.S. Supreme Court's opinion in U.S. v. Lanier, 520 U.S. 250, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). The U.S. Supreme Court in U.S. v. Lanier observed:

Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is "fundamentally similar" at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under §241 or §242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. See United States v. Guest, (prior cases established right of interstate travel, but later case was the first to address the deprivation of this right by private persons); United States v. Saylor, 322 U.S. 385 (1944) (pre Screws; prior cases established right to have legitimate vote counted, whereas later case involved dilution of legitimate votes through casting of fraudulent ballots); United States v. Classic, 313 U.S. 299, 321 -324 (1941) (pre Screws; prior

cases established right to have vote counted in general election, whereas later case involved primary election); see also *Screws*, supra, at 106 (stating that *Classic* met the test being announced).

But even putting these examples aside, we think that the Sixth Circuit's "fundamentally similar" standard would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling. This danger flows from the Court of Appeals' stated view, 73 F. 3d, at 1393, that due process under §242 demands more than the "clearly established" law required for a public officer to be held civilly liable for a constitutional violation under §1983 or *Bivens*, see *Anderson v. Creighton*, 483 U.S. 635 (1987) (*Bivens* action); *Davis v. Scherer*, supra, at 183 (§1983 action). This, we think, is error.

In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants "reasonably can anticipate when their conduct may give rise to liability," *id.*, at 195, by attaching liability only if "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson*, supra, at 640. So conceived, the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying §242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. See, e.g., *Mitchell v. Forsyth*, supra, at 530-535, and n. 12. But general statements

of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful," *Anderson, supra*, at 640. As Judge Daughtrey noted in her dissenting opinion in this case, "[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." 73 F. 3d, at 1410 (quoting *K. H. Through Murphy v. Morgan*, 914 F. 2d 846, 851 (CA7 1990)); see also *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (due process requirements are not "designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited"); *Williams v. United States*, 341 U.S. 97, 101 (1951) (holding that beating to obtain a confession plainly violates §242). In sum, as with civil liability under §1983 or *Bivens*, all that can usefully be said about criminal liability under §242 is that it may be imposed for deprivation of a constitutional right if, but only if, "in the light of pre existing law the unlawfulness [under the Constitution is] apparent," *Anderson, supra*, at 640. Where it is, the constitutional requirement of fair warning is satisfied.

In the instant matter, the law provided sufficient "fair warning" that retaliating against someone who raised a concern with respect to the method and manner in which allegations of sexual harassment are to be investigated is worthy of first amendment protections. Further, the touch tone for qualified immunity ultimately is whether or not the public officials acted in a "reasonable" manner, give the current state of law. It is respectfully and humbly submitted that if one objectively examines what

occurred in the instant case, is indicative of substantial “irrational” behavior that is clearly, in light of existing precedent, something that neither needs to be condoned nor provided a free pass.

E. Plaintiff’s Claim Pursuant to 49.60.210.

It is respectfully and humbly submitted that Appellant, who initially acted as an investigator, on the Paeper/ Densmore sexual harassment allegations clearly falls within the protection of RCW 49.60.210 due to such participation. See WPI 330.05 and comments thereto. In addition, her advocacy with respect to the need for outside investigation could be reasonably construed as oppositional activity in light of the context in which her concerns arose. Again, in context, Ms. Tyner was aware that Ms. Paeper’s allegations went beyond rude behavior occurring on one day, and she had been informed by a Human Resources professional that such behavior may constitute “sexual harassment”. She had also been trained that outside investigative services were available and it would be reasonably clear that such outside investigative services would bring a level of sophistication to the process that would be unavailable to a rank and file manager such as Ms. Pilarski. As it is, once an outside investigation was conducted, that outside investigator ultimately reached the wrong conclusion with respect to whether or not sexual harassment occurred in the form of lewd “belly bumping”. Further, the Respondents contend Appellant was “investigated”

because they had some kind of “legal obligation” to provide a “workplace free from discrimination harassment for every employee”. However, if one actually looks at the matters investigated with respect to the Appellant, there simply are no facially valid claims within the allegations regarding anything that would be unlawful. As such, it is hard to understand Respondent’s position that they had some form of “legal obligation” to investigate matters that at best would constitute, in the opinion of some, bad management practices. To the extent that any allegations could be construed that Ms. Tyner somehow was creating a sexual hostile work environment to her subordinate employees, any such allegations certainly were not amongst the core issues raised by Mr. Densmore initially, a scintilla of factual support, or even an identifiable victim who was attempting to seek redress. Again, it is noted that an employer simply had no obligation to provide employees a stress free work environment, particularly when it comes to individuals who apparently have performance and behavioral problems such as Mr. Densmore, who in response to simple efforts to meet with him to discuss the events regarding the February 15, 2003 interaction with Ms. Paeper, insubordinately refused to meet with his boss.

While the Respondents attempting to cast their behavior as being behaviors which were done for legitimate concerns, if one takes the substantial overview and objective review of the facts developed in the record below, a

reasonable jury could easily conclude that the actions taken towards Appellant were retaliatory, mean spirited, and involved a shocking waste of taxpayer resources, solely reach the illegitimate ends of destroying Ms. Tyner's careers.

VI. CONCLUSION

For the reasons stated above, and within within Appellant's opening brief, the decision of the Trial Court which granted Respondent's motion for summary judgment should be reversed and this case remanded for a trial on Appellant's claims that her first amendment rights to freedom of speech were violated and that RCW 49.60.210 was violated by the outlandish actions of the Respondents. While it is acknowledged that there may be competing inferences within the record from which the Respondents may ultimately prevail, it can equally be said that there are reasonable inferences and facts within this record which indicate that Appellant was subject to vicious violations of her rights.

Respectfully submitted this 8th day of September, 2006.

A handwritten signature in black ink, appearing to read 'Paul A. Lindenmuth', written over a horizontal line.

Paul A. Lindenmuth, WSBA#15817

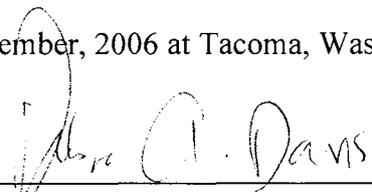
Attorney for Appellant/ Plaintiff

Certificate of Service

I, DEBRA A. DAVIS, certify under penalty of perjury under the laws of the State of Washington, that I am a Legal Assistant at *The Law Offices of Ben F. Barcus* and that on this same date I sent via facsimile *and* deposited for delivery via ABC/Legal Messengers, true and correct copies of Appellant's Reply Brief in the above-captioned case addressed to:

Glen A. Anderson, Esq.
Office of the Attorney General
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DATED this 8th day of September, 2006 at Tacoma, Washington.



Debra A. Davis

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