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COURT OF APPEALS

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NO. 33956-1

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

PAULA KING TYNER,

Appellant,

v.

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 PILARSKI, in her individual capacity; and
TINA FLEISCHER, in her individual capacity,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESTATEMENT OF ISSUES.....3

III. STATEMENT OF FACTS.....4

 A. Background Facts.....4

 B. Facts Relevant to Plaintiff’s Placement On Alternate Assignment5

 C. Ed Densmore Alleges That The Plaintiff Created A Hostile Work Environment For Himself And The Other Employees She Supervised8

 D. Plaintiff’s Position Is Subject To A Reduction In Force While The Investigation Regarding The Hostile Work Environment She Allegedly Created Was Ongoing.12

IV. LAW AND ARGUMENT.....14

 A. Summary Judgment Standard14

 B. The Trial Court Correctly Concluded That The Plaintiff’s Speech Was Not Protected By The First Amendment.....18

 1. Plaintiff’s opinion that Jodi Pilarski does not conduct thorough investigations is not speech on a matter of public concern.19

 2. Plaintiff’s speech fell within her duties and therefore is not protected under the U.S. Supreme Court’s ruling in *Garcetti v. Ceballos*.24

 3. Plaintiff’s interest in criticizing her supervisor’s investigatory abilities does not outweigh the State’s interest in maintaining the appearance of fairness and impartiality in the workplace.....28

C. Plaintiff's Placement On Alternative Assignment While She Was Being Investigated For Creating A Hostile Work Environment Was Not An Adverse Employment Action.....	32
D. The Trial Court Correctly Concluded That The Plaintiff Failed To Present Sufficient Evidence To Meet Her Prima Facie Burden Of Demonstrating That Her Speech Was A Substantial Motivating Factor For The Alleged Retaliatory Acts.	34
E. The Defendants Had Legitimate Non-Retaliatory Reasons For Conducting An Investigation And Placing The Plaintiff On Alternate Assignment.....	37
F. Defendants Are Entitled To Qualified Immunity From Plaintiff's 42 USC §1983 First Amendment Claim Because There Is No Clearly Established Right To Criticize A Supervisor's Investigatory Abilities.....	40
1. There is no law clearly establishing that criticizing one's supervisor or speaking pursuant to one's official duties constitutes speech on a matter of public concern.	40
2. Defendants are entitled to qualified immunity because it is not clear the plaintiff's speech is entitled to protection when the Pickering balancing test is applied.	43
G. Plaintiff Did Not Engage In Any Oppositional Activity Subject To Protection Under RCW 49.60.210.....	45
H. Tina Fleisher Was Properly Dismissed Because She Did Not Participate In The Allegedly Retaliatory Activities And She Is Not An Employer For Purposes Of RCW 49.60.120.....	48
I. The Trial Court Correctly Dismissed Defendant Merxbauer Because He Did Not Personally Participate In The Alleged Retaliatory Acts.....	49

J.	The Trial Court Correctly Dismissed Defendants Merxbauer, Blackburn and Fleisher as Plaintiff Failed To Present Evidence They Were Aware Of The Allegedly Protected Speech That Forms The Basis For Plaintiff's First Amendment And RCW 49.60.210 Retaliation Claims	49
V.	CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Allison v. Housing Authority</i> , 118 Wn.2d 79, 821 P.2d 34 (1991).....	46
<i>Altschuler v. City of Seattle</i> , 63 Wn. App. 389, 819 P.2d 393 (1991).....	41
<i>Arnett v. Kennedy</i> , 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974).....	29
<i>Bart v. Telford</i> , 677 F.2d 622 (7th Cir. 1982)	33
<i>Binkley v. City of Tacoma</i> , 114 Wn.2d 373, 787 P.2d 1366 (1990).....	passim
<i>Brawner v. City of Richardson</i> , 855 F.2d 187 (5th Cir. 1988)	40
<i>Brewster v. Bd. of Educ. of Lynnwood</i> , 149 F.3d 971 (9th Cir. 1998)	41
<i>Burgess v. Pierce County</i> , 918 F.2d 104 (9th Cir. 1990)	44
<i>Ceballos v. Garcetti</i> , 361 F.3d 1168 (9th Cir. 2004)	24, 25, 27
<i>Chateaubriand v. Gaspard</i> , 97 F.3d 1218 (9th Cir. 1996)	21, 44
<i>Cochran v. City of Los Angeles</i> , 222 F.3d 1195 (9th Cir. 2000)	20
<i>Coghlan v. American Seafoods Co., LLC</i> , 413 F.3d 1090 (9th Cir. 2005)	17

<i>Connick v. Meyers</i> , 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)....	19, 20, 28, 42
<i>Coville v. Cobarc Services, Inc.</i> , 73 Wn. App. 433, 869 P.2d 1103 (1994).....	46
<i>Crady v. Liberty Nat'l Bank & Trust Co. of Indiana</i> , 993 F.2d 132 (7th Cir. 1993)	32
<i>DeGuiseppe v. Vill. of Bellwood</i> , 68 F.3d 187 (7th Cir. 1995)	32
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989).....	21
<i>Edwards v. Dep't. of Transp.</i> , 66 Wn. App. 552, 832 P.2d 1332 (1992).....	21
<i>Francom v. Costco Wholesale Corp.</i> , 98 Wn. App. 845 review denied, 141 Wn.2d 1017, 10 P.3d 1071 (2000).....	46
<i>Garcetti v. Ceballos</i> , 126 S.Ct. 1951, 74 USLW 4257 (2006)	25, 26, 27
<i>Gibson v. King County</i> , 397 F. Supp. 2d 1273 (W.D.Wash. 2005).....	16, 17
<i>Gilbrook v. City of New Westminster</i> , 177 F.3d 839 (9th Cir. 1999)	44
<i>Grimwood v. Univ. of Puget Sound</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	15, 39
<i>Hannula v. City of Lakewood</i> , 907 F.2d 129 (10th Cir. 1990)	41
<i>Havekost v. U.S. Dep't. of Navy</i> , 925 F.2d 316 (9th Cir. 1991)	24

<i>Hill v. BCTI</i> , 144 Wn.2d 172, 23 P.3d 440 (2001).....	16, 38, 39, 48
<i>Huskey v. City of San Jose</i> , 204 F.3d 893 (9th Cir. 2000)	49
<i>Johnson v. Evangelical Lutheran Good Samaritan Society</i> , 2005 WL 2030834, 6 (D. Or. 2005)	17
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 P.2d 321 (1998).....	46
<i>Keyser v. Sacramento City Unified School Dist.</i> , 265 F.3d 741 (9th Cir. 2001)	49
<i>King v. Atiyeh</i> , 814 F.2d 565 (9th Cir. 1987)	48
<i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454, 98 P.3d 827 (2004).....	14, 32, 34
<i>Malo v. Alaska Trawl Fisheries, Inc.</i> , 92 Wn. App. 927, 965 P.2d 1164 (1998).....	48
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).....	38, 39
<i>Meyer v. University of Wash.</i> , 105 Wn.2d 847, 719 P.2d 98 (1986).....	29
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002).....	38, 45, 48
<i>Mitchell v. Forsyth</i> , 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).....	40
<i>Moran v. State</i> , 147 F.3d 839 (9th Cir. 1998)	passim
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).....	18

<i>Munday v. Waste Mgmt. of N. Am. Inc.</i> , 126 F.3d 239 (4th Cir. 1997)	32
<i>Nelson v. Pima Community College</i> , 83 F.3d 1075 (9th Cir. 1996)	34
<i>Pickering v. Board of Education</i> , 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).....	19
<i>Rankin v. McPherson</i> , 483 U.S. 378, 107 S. Ct. 2891 97 L. Ed. 2d 315 (1987).....	20, 28
<i>Ray v. Henderson</i> , 217 F.3d 1234 (9th Cir. 2000)	32
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).....	16
<i>Rendish v. City of Tacoma</i> , 123 F.3d 1216 (9th Cir. 1997)	21
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002).....	32
<i>Roe v. City and County of San Francisco</i> , 109 F.3d 578 (9th Cir. 1997)	20
<i>Romero v. Kitsap County</i> , 931 F.2d 624 (9th Cir. 1991)	41
<i>San Diego v. Roe</i> , 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410, (2004).....	19
<i>Steckl v. Motorola, Inc.</i> , 703 F.2d 392 (9th Cir. 1983)	16
<i>Vasquez v. State</i> , 94 Wn. App. 976, 974 P.2d 348 (1999).....	48
<i>Waters v. Churchill</i> , 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1984).....	19, 29, 31

<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	passim
<i>White v. State</i> , 78 Wn. App. 824, 898 P.2d 331 (1995).....	18, 40
<i>Wilmot v. Kaiser Aluminum & Chem. Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	38, 46
<i>Wilson v. State</i> , 84 Wn. App. 332, 929 P.2d 448 (1996).....	passim
<i>Wright v. Illinois Dep't of Children & Family Servs.</i> , 40 F.3d 1492 (7th Cir. 1994)	20

Statutes

RCW 49.60	2, 45
RCW 49.60.210	passim

Rules

42 USC § 1983.....	2
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I. INTRODUCTION

This lawsuit arises out of plaintiff's employment as a Developmental Disabilities Administrator I (DDA I) at the Rainier School in Buckley. In March 2001, plaintiff was placed on alternate assignment, with no loss in pay or benefits in the Region 5 DSHS headquarters, as a result of complaints that the plaintiff created a hostile work environment for the employees she supervised. During the investigation plaintiff's DDA I position at Rainier School was eliminated due to budget reductions resulting in consolidation of administrative responsibilities for the living units at the school.

Plaintiff alleges the investigation and her placement on alternate assignment were retaliation for a request she had made that her supervisor, Jodi Pilarski, not be assigned to investigate a claim of sexual harassment involving two of the plaintiff's subordinates, Patty Paeper and Ed Densmore. Specifically, plaintiff requested that an outside investigator conduct the investigation because she believed Ms. Pilarski did not conduct "thorough" investigations. Plaintiff alleged causes of action for violation of her First Amendment right to free speech and retaliation for engaging in protected activity in violation of RCW 49.60.210. Named as defendants were the State, the Department of Social and Health Services

(DSHS); Rainier School; Larry Merxbauer (Rainier School Superintendent); Jan Blackburn (Rainier School Acting Superintendent); Jodi Pilarski and one of the plaintiff's subordinates, Tina Fleisher.

Defendants moved for summary judgment on the following grounds¹:

1. Tina Fleischer did not personally participate in any of the allegedly retaliatory activities and was not an "employer" subject to suit under Chapter 49.60 RCW;
2. Plaintiff could not establish a prima facie case of retaliation in violation of her First Amendment right of free speech because:
 - a. Her request that Jodi Pilarski not investigate the incident involving Paeper and Densmore was not a matter of public concern; and
 - b. Her interest in making the request did not outweigh the schools interest in managing personnel issues under the Pickering balance test;
3. The individual defendants were entitled to qualified immunity from the plaintiff's 1st Amendment claim brought under 42 USC § 1983;
4. The plaintiff did not engage in protected activity as defined by RCW 49.60.210;
5. There was no adverse employment action taken against the plaintiff; and
6. There were legitimate, non-retaliatory reasons for the actions taken in regard to plaintiff's employment.

Plaintiff filed a lengthy opposition to defendants' motion.

Significantly, plaintiff presented no evidence that Larry Merxbauer or Tina Fleisher personally participated in any retaliatory acts. Plaintiff also

failed to present evidence that Ms. Fleisher, Mr. Merxbauer or Jan Blackburn were aware of plaintiff's allegedly protected speech. As a result, the defendants asserted in their reply that the failure to provide this evidence was an additional basis for dismissing the claims against defendants Fleisher, Merxbauer and Blackburn. The trial court granted the defendants' motion on all grounds and this appeal ensued.²

II. RESTATEMENT OF ISSUES

1. Whether the trial court correctly concluded that the plaintiff's speech was not on a matter of public concern because the plaintiff's personal opinion of her supervisor's investigatory abilities concerned an internal personnel issue and was not relevant to a public evaluation of the agency's performance?
2. Whether the plaintiff's speech relating to who should investigate an allegation of sexual harassment involving her subordinates occurred during the discharge of her duties as a supervisor and therefore is not protected speech?
3. Whether plaintiff's interest in criticizing her supervisor outweighs the Rainier School's interest in allowing supervisors to manage personnel disputes and ensuring that responses to complaints of harassment are viewed as being fair and impartial?
4. Whether the trial court correctly concluded the defendants were entitled to qualified immunity because there is no clearly established constitutional right to request that a supervisor's

¹ Defendants also moved for summary judgment on the grounds that the State, DSHS and the Rainier School are not "persons" subject to liability under 42 USC § 1983. Plaintiff has not appealed the court's order granting defendants' motion on that basis.

² VRP 60-62. Plaintiff's implicit assertion that the trial judge granted the defendant's motion based on a lack of understanding of the law is not borne out by the report of proceedings as a whole or the portion cited by plaintiff (VRP 60-62) at Appellant's Br. p 20.

responsibilities be assigned to a third party based on a personal opinion that the supervisor is not “thorough”?

5. Whether the trial court correctly concluded that requesting an outside investigator for a personnel investigation because the plaintiff didn't believe her supervisor did “thorough” investigations was not protected activity under RCW 49.60.210?
6. Whether the trial court correctly concluded that the plaintiff failed to present evidence that her speech was a substantial motivating factor for the allegedly retaliatory actions?
7. Whether the trial court correctly concluded that the investigation of the plaintiff and her placement on alternate assignment were legitimate non-discriminatory non-retaliatory responses to an allegation that she had created a hostile work environment for the employees she supervised?
8. Whether the trial court correctly concluded that the investigation into allegations that the plaintiff created a hostile work environment for the employees she supervised, and her placement on alternate assignment, were not adverse employment actions?
9. Whether the trial court correctly concluded that individuals who did not participate in the alleged retaliatory acts should be dismissed?
10. Whether the trial court correctly concluded that individuals who had no knowledge of the plaintiff's allegedly protected speech should be dismissed?

III. STATEMENT OF FACTS

A. Background Facts.

Rainier School is a DSHS residential facility for individuals with developmental disabilities. CP 71. Residents live in “cottages” which are organized into Program Area Teams or PATs. CP 71-72. There are 28

cottages on the grounds and there are currently three PAT (A, C and E) CP 72. Up until April 15, 2002 there were four PAT's when the fourth PAT, PAT B, was dissolved due to legislative budget cuts. CP 72.

Each PAT consists of staff such as psychologists, medical providers, Habilitation Program Administrators (HPAs), and others who provide services to the residents of the cottages in that PAT. CP 72. The first line supervisor of these individuals is a Developmental Disabilities Administrator I (DDA I). CP 72. The DDA I reports to a Developmental Disabilities Administrator II (DDA II) who reports directly to the Superintendent of the school. CP. 72.

Plaintiff was a DDA I assigned to PAT B in February of 2001. CP 72. Her supervisor was DDA II Jodi Pilarski. CP 72. The Superintendent was Larry Merxbauer, although he was on extended leave due to medical issues. As a result, Jan Blackburn was the Acting Superintendent during the period relevant to the plaintiff's claims in this action. CP 52.

B. Facts Relevant to Plaintiff's Placement On Alternate Assignment

On February 15, 2001, an incident occurred between two employees the plaintiff supervised, Ed Densmore, who was an HPA in PAT B and Patricia Paeper, who was a Psychology Assistant in PAT B. CP 49. Mr. Densmore became upset when Ms. Paeper handed him a

survey regarding the diet of clients on his caseload and he allegedly yelled at Ms. Paeper. CP 49. A psychologist, Larry Thompson, brought the issue to the attention of the plaintiff that same day. CP 192-198.

On February 22, 2001, Jodi Pilarski met with the plaintiff to discuss the procedures necessary for coverage while Ms. Pilarski was on vacation from February 23 through March 5, 2001. CP 73. During their conversation, the plaintiff informed Ms. Pilarski that there had been an incident involving Densmore and Paeper and that, as the first line supervisor, she would handle it. CP 73, 198. Plaintiff did not provide any details as to what had occurred at that time. CP 73.

During the course of the next week, plaintiff attempted to schedule a meeting between herself, someone from Human Resources, Densmore and Paeper. CP 198. A meeting was held on March 1, 2001, with plaintiff, Paeper, Thompson, and Buss, from Human Resources, present. CP 34. Densmore did not attend. CP 198. During the meeting, Paeper alleged that the incident of February 15, 2001, was part of an ongoing pattern of harassing behavior by Mr. Densmore. CP 34.

Sharon Buss discussed the results of the meeting with her supervisor, Lester Dickson, and Acting Superintendent Blackburn. CP 34, 60. The three of them agreed that Ms. Paeper's allegations could be construed as raising an issue of sexual harassment. CP 34, 60. As a

result, a decision was made to have Ms. Paeper file an incident report so that a formal investigation into her allegations could occur. CP 34, 60.

Ms. Buss contacted the plaintiff on March 1, 2001, and requested her to direct Ms. Paeper to file an incident report. CP 34. During that conversation, plaintiff asked that Ms. Pilarski, who as the supervisor of the unit would be responsible for investigating the incident, not be assigned to do the investigation because the plaintiff believed Ms. Pilarski, “did not do thorough investigations.” CP 34, 202, 516. While plaintiff argues she also told Ms. Buss that Ms. Pilarski was “potentially biased” there is no evidence in the record to support that argument.³ Plaintiff may have believed Ms. Pilarski was biased, but the undisputed evidence establishes that she told Ms. Buss only that she did not believe Ms. Pilarski would do a “thorough investigation”. CP 34, 202, 516. Plaintiff’s concerns apparently were the result of her feeling that Ms. Pilarski inadequately responded to two prior issues she had raised involving her personally⁴.

³ Appellant’s Brf at page 10.

⁴ The first involved an incident in June of 2000 where someone had placed a memo detailing the plaintiff’s leave usage in the mail slot of each member of PAT B’s mail slot. CP 72-73, 195. This incident was investigated by Cynthia Purdy of the school’s investigation unit who was unable to determine the source of the memo. CP 72-73, 77-78, 196. Ms. Purdy’s recommendation was that the PAT Director, Ms. Pilarski, hold a meeting to discuss respecting others’ privacy. CP 77-78. Plaintiff informed Ms. Pilarski she did not desire to have such a meeting. CP 72-73.

The second item, was a complaint she had made regarding a psychologist in PAT B, Steve Bailey, who she found to be intimidating. CP 202. Apparently, the plaintiff was unsatisfied with Ms. Pilarski’s direction that this was something to be worked out between the employees concerned. CP 515.

Management decided to abide by school policy, rather than plaintiff's personal request, and assigned the investigation into the Paeper/Densmore incident to Ms. Pilarski. CP 60, 34, 38-47. Ms. Paeper filed her incident report on March 7, 2001. CP 49. On March 8, 2001, Ms. Pilarski placed Ed Densmore on alternate assignment. His work station was relocated and he was required to have an escort when he needed access to PAT B headquarters. CP 73-74.

Ms. Pilarski began her investigation into the Paeper/Densmore incident by interviewing the plaintiff and Mr. Densmore on March 8, 2001. CP 727. Ultimately, it was determined that there was no evidence to substantiate Ms. Paeper's allegations of sexual harassment. CP 74. However, it was determined that Mr. Densmore's behavior had been unprofessional and he was required to attend classes in Anger Management, Handling Emotions and Sexual Harassment. CP 74.

C. Ed Densmore Alleges That The Plaintiff Created A Hostile Work Environment For Himself And The Other Employees She Supervised

Ms. Pilarski's first step in investigating Patty Paeper's allegation that Ed Densmore had sexually harassed her was interview the plaintiff. CP 727. Ms. Pilarski did so to learn what occurred at the March 1, 2001 meeting, what Ms. Paeper's allegations were and what knowledge, if any, the plaintiff had as to the incidents Ms. Paeper was complaining about.

CP 727, 634-635. Ms. Pilarski asked a series of questions regarding if and when the plaintiff was aware of any of the alleged incidents and what response, if any, the plaintiff had taken as a result of any knowledge the plaintiff may have had. CP 727. Ms. Pilarski believed this information was relevant to how she would address the situation and in the event Ms. Paeper pursued any legal action. CP 727. Ms. Pilarski was aware that as a supervisor, the plaintiff had a responsibility to take action in response to any sexual harassment she was aware of. CP 727.

Ms. Pilarski next interviewed Ed Densmore who had yet to make a statement or be interviewed regarding the February 15, 2001 incident. CP 727. During the course of that interview, Mr. Densmore unexpectedly disclosed that the plaintiff was creating a hostile work environment for him and others in the unit supervised by the plaintiff. CP 727. Mr. Densmore described a number of specific behaviors he felt were hostile, threatening and/or intimidating. CP 727-28, 57-58. Mr. Densmore also related that the plaintiff had inappropriate physical contact with a male staff member in the past. CP 728.

Mr. Densmore's allegations caught Ms. Pilarski by surprise as she had not heard similar complaints about plaintiff in the past. CP 727. In the past, Mr. Densmore and another employee complained about what they perceived as excessive editing of their written product by the

plaintiff. CP 179, 180, 382-386. Because part of the plaintiff's job was to ensure the quality of the written product produced by the employees she supervised, Ms. Pilarski informed these employees that they needed to address those issues with the plaintiff. CP 179, 180, 382-386. In contrast to the prior complaints, Mr. Densmore's new complaints did not relate to differences of opinion about work product but rather the way plaintiff treated and interacted with staff. CP 57-58.

When Mr. Densmore made his allegations during the March 8, 2001 interview Ms. Pilarski stopped the meeting and immediately conveyed the information to Human Resources Director Lester Dickson and Acting Superintendent Blackburn. CP 728. As a result, Ms. Blackburn directed that an incident report regarding Mr. Densmore's allegations be prepared and ordered Ms. Pilarski to investigate the allegations. CP 728. The incident report was prepared by another employee, Phyllis Thompson, who was present during Ms. Pilarski's interview of Mr. Densmore. CP 56-58.

Ms. Blackburn also authorized placement of the plaintiff on alternate assignment away from the work area while the allegations of harassment were investigated. CP 52. This was a routine response any time harassment allegations were made against a supervisor. CP 52. Plaintiff was assigned to DSHS Region 5 Headquarters in Tacoma with no

loss in pay or benefits. CP 52. In addition, her workday was shortened to allow her time for the commute and she was reimbursed for her commute mileage. CP 52.

Whether intentional or not, plaintiff misrepresents the sequence of events described above in order to create the impression that Ms. Pilarski utilized the Paeper/Densmore investigation as a vehicle for retaliating against plaintiff. On page 12 of her brief, plaintiff alleges that Mr. Densmore was secretly communicating with Ms. Pilarski and complaining about how the plaintiff was supervising him. Plaintiff cites a memo written by Mr. Densmore about a phone conversation between he and Ms. Pilarski on March 6, 2001, where he asked when the “coldwar” was going to be over as support for this proposition. (Appellant’s Brf p 12 citing CP 260). There is no further information about this call in the record that would support the proposition that Mr. Densmore was “secretly communicating” with Ms. Pilarski or that he was doing anything other than complaining generally about the plaintiff. CP 260.

More importantly, plaintiff affirmatively misrepresents the record, and the facts, when it is suggested Mr. Densmore alleged he was subject to a hostile work environment, or raised any of the specific complaints he did in the interview of March 8, 2001, when he spoke to Ms. Pilarski on the phone on March 6, 2001. (Appellant Brf p 12). Through juxtaposing the

disclosures made at the March 8, 2001 meeting immediately after mentioning the March 6, 2001 phone call plaintiff misleadingly suggests that the information provided to Ms. Pilarski on March 8th was actually provided to her on March 6, 2001. Plaintiff then drives home the misrepresentation by stating, "Armed with such information, Ms. Pilarski became extremely hostile and accusatory towards Ms. Tyner at the commencement of the March 8, 2001, meeting." (Appellant's Brf p 12).

The claim that Ms. Pilarski knew Mr. Densmore would allege he was subject to a hostile work environment, or any of the specific acts he alleged created that environment, prior to her meeting with the plaintiff on March 8, 2001 is false and contrary to evidence in the record. The undisputed facts establish that Ms. Pilarski did not learn of any of Mr. Densmore's allegations until after her meeting with the plaintiff on March 8, 2001 when she interviewed Ed Densmore. CP 727.

D. Plaintiff's Position Is Subject To A Reduction In Force While The Investigation Regarding The Hostile Work Environment She Allegedly Created Was Ongoing.

Twenty-one employees were interviewed regarding the allegation plaintiff had created a hostile work environment for the employees she supervised. CP 730-834. Most if not all the allegations were confirmed by several employees and additional concerns were raised as well. CP 730-834. As a result, several Conduct Investigation Reports were issued

and plaintiff was provided with the opportunity to refute the allegations in an administrative hearing. While no violations of policy were found-the hearing officer, Anita Delight, was deeply concerned about the plaintiff's management style due to the number of employees alleging they had experienced their work environment as being hostile. CP 725.

While the investigation was proceeding, plaintiff's DDA I position was eliminated as the result of a Reduction in Force (RIF). CP 60-61. Due to legislative budget reductions, Rainier School was required to reduce operating expenses including a reduction in the number of staff employed at the school. CP 60-61. A decision was made in early 2001, prior to the incidents involving plaintiff to eliminate one of the PATs. CP 52-53. As a result of the elimination of a PAT, several staff positions were eliminated including one of the four DDA I positions at the school. CP 60.

Pursuant to the Merit System Rules, Rainier School is required to follow the same RIF procedures as any other state agency. CP 60. This means that when a position is eliminated, the least senior person in that job classification is the one who loses their position. CP 60. In the case of the DDA I position eliminated at the Rainier School, the plaintiff was the least senior person in the DDA I job class and as a result, she was subject

to a RIF effective May 31, 2002. CP 60-61. Plaintiff had a right to appeal that decision, but did not exercise that right. CP 61.

IV. LAW AND ARGUMENT

A. Summary Judgment Standard

Plaintiff's discussion of the standard for summary judgment in employment cases is largely irrelevant because the issues raised by the defendants' motion are questions of law for the court and the relevant facts are undisputed. For example, whether plaintiff's speech was on a matter of public concern, and whether the employee's interest in the speech outweighs the employer's interest in promoting efficiency in the public service it performs are questions of law for the court. *White v. State*, 131 Wn.2d 1, 11, 929 P.2d 396 (1997). What constitutes protected activity pursuant to RCW 49.60.210 is a question of law. The applicability of qualified immunity to a particular situation is a question of law. *White v. State*, 78 Wn. App 824, 837, 898 P.2d 331 (1995), *affirmed on different grounds*, 131 Wn.2d 1 (1997). Finally, what constitutes an adverse employment action is a question of law. *See Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004).

The one area it is necessary to discuss the standard for granting summary judgment relates to the issue of discriminatory motive. Specifically, whether plaintiff has presented sufficient evidence to meet

her prima facie burden of establishing a discriminatory motive, and what is necessary to rebut the employer's legitimate non-discriminatory reasons for its actions.

Plaintiff relies on older case law suggesting that summary judgment is inappropriate if there are factual motivational inquiries. Plaintiff's position is erroneous as shown by the Supreme Court affirming summary judgment in *White* based on plaintiff's failure to establish her speech was a motivating factor in the transfer she complained of. *White*, 131 Wn.2d 17. Once the defendant presents evidence of a legitimate non-discriminatory reason for the employment decision, plaintiff must present competent, admissible evidence establishing that the proffered reasons are pretextual in order to survive summary judgment. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 364-365, 753 P.2d 517 (1988)

Similarly, plaintiff is wrong to assert that *Steckl* stands for the proposition that;

summary judgment may be appropriate on such claims if (and only if) the Appellant wholly fails to bring forth any specific facts that would call into the question whether the employers so-called legitimate reasons for the adverse employment decisions are pretextual

Plaintiff provides no page citation to the case for this proposition, because *Steckl* does not contain such language. *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983).

Even if such language did appear in *Steckl*, it would be inconsistent with the more modern view that even where an employee produces some evidence of pretext, other factors may still warrant judgment as a matter of law. *See Hill v. BCTI*, 144 Wn.2d 172, 182-87, 23 P.3d 440 (2001), following *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). With some evidence of pretext, the court must still consider whether additional factors undermine the employee's competing inference of discrimination, justifying dismissal as a matter of law. *Hill*, 144 Wn.2d at 186, citing *Reeves*, 530 U.S. at 148-49. Those factors include:

- The strength of the employee's prima facie case;
- The probative value of the proof that the employer's explanation is false; and
- Any other evidence that supports that employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id.

Plaintiff incorrectly asserts, "very little evidence is needed for a plaintiff to overcome summary judgment in cases involving employment discrimination or unlawful discrimination". Plaintiff cites *Gibson v. King County*, 397 F. Supp. 2d 1273, 1277 (W.D.Wash. 2005) for this

proposition. While this trial court ruling does contain language to this effect, plaintiff's assertion that it creates a broad "very little evidence" standard is misleading given the clarification provided by the court later in the opinion. In discussing plaintiff's burden of demonstrating that defendants' articulated non-discriminatory reasons are pretextual the court identifies the correct standard as follows:

A plaintiff need offer "very little" direct evidence to raise a genuine issue of material fact, but where a plaintiff relies on circumstantial evidence, that evidence must be "specific and substantial" to defeat the employer's motion for summary judgment.

Gibson, 397 F. Supp. 2d 1278 citing *Johnson v. Evangelical Lutheran Good Samaritan Society*, 2005 WL 2030834, 6 (D. Or. 2005) citing *Coghlan v. American Seafoods Co., LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005).

Plaintiff is not relying on direct evidence to rebut the defendants' legitimate non-discriminatory reasons for the actions taken but rather is relying on circumstantial evidence. Thus, her burden is to produce specific and substantial evidence, which she failed to do. As discussed herein, the type of circumstantial evidence relied upon by plaintiff, proximity in time between the alleged speech and retaliatory act, has repeatedly been rejected as a basis upon which to deny summary judgment.

B. The Trial Court Correctly Concluded That The Plaintiff's Speech Was Not Protected By The First Amendment

To present a *prima facie* case of retaliation in employment based on the exercise of First Amendment rights, a public employee must demonstrate that (1) the speech involved is protected by the First Amendment, and (2) the speech was a substantial or a motivating factor in the adverse employment decision. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *White v. State*, 131 Wn.2d 1, 10, 929 P.2d 396 (1997). If the employee meets this burden, then the burden shifts to the employer to prove that it would have made the same adverse employment decision even in the absence of the employee's protected conduct. *White*, 131 Wn.2d citing *Mt. Healthy*, 429 U.S. at 287 and *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990).

Thus, the first inquiry before the court is whether the speech involved is protected by the First Amendment which is a question of law. *White*, 131 Wn.2d at 11, citing *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990). There are two steps in this determination. First, the court decides whether the speech touches on a matter of public concern. *White*, 131 Wn.2d at 11; *Moran v. State*, 147 F.3d 839, 846 (9th Cir. 1998). If it does not, then the First Amendment is not implicated at

all and, “it is unnecessary . . . to scrutinize the reasons for [an employee’s] discharge.” *Id.*; *Connick v. Meyers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Only if the speech touches on a matter of public concern must the reviewing court proceed to the second step and determine whether the employee’s interest in expressing herself outweighs her employer’s interest in preventing potential work place disruption. *Moran*, 147 F.3d at 846; *San Diego v. Roe*, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410, 416, (2004).

In striking that balance, courts apply the *Pickering* balancing test:

The question of whether speech of a government employee is constitutionally protected expression necessarily entails striking “a balance between the interests of the [employee] as a citizen, in commenting on matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

Mt. Healthy, 429 U.S. at 284, quoting *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *see also Waters v. Churchill*, 511 U.S. 661, 668 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1984).

1. Plaintiff’s opinion that Jodi Pilarski does not conduct thorough investigations is not speech on a matter of public concern.

Whether an employee’s speech addresses a matter of public concern is determined by the content, form and context of the statement,

as revealed by the whole record. *Connick*, 461 U.S. at 142; *White*, 131 Wn.2d at 11. The content of the speech is the most important factor. *Id.*, citing *Wright v. Illinois Dep't of Children & Family Servs.*, 40 F.3d 1492, 1501 (7th Cir. 1994). The court, not a jury, must decide as a matter of law whether the speech relates to an issue of public concern. *Rankin v. McPherson*, 483 U.S. 378, 386 n. 9, 107 S. Ct. 2891 97 L. Ed. 2d 315 (1987); *Binkley*, 114 Wn.2d at 382.

A public employee's speech or expressive conduct deals with a matter of public concern when it can be fairly considered as relating to a matter of political, social or other concern to the community. *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1206 (9th Cir. 2000). The focus must be upon whether the public or community is likely to be interested in the particular expression, or whether it is more properly viewed as essentially a private grievance. *Roe v. City and County of San Francisco*, 109 F.3d 578 (9th Cir. 1997). Speech that deals with complaints over internal affairs is not protected when it is not relevant to the public's evaluation of a governmental agency's performance. *Cochran*, 222 F.3d at 1200. In other words, the court must ask the following question: Was the employee acting as an aggrieved employee, attempting to rectify problems in the employee's working environment, or was he or she acting as a concerned citizen bringing a wrong to light? *Edwards v. Dep't. of Transp.*, 66 Wn.

App. 552, 560, 832 P.2d 1332 (1992) citing *Binkley v. Tacoma*, 114 Wn.2d 373, 385, 787 P.2d 1366 (1990).

Cases where speech was found to be on a matter of public concern involve speech regarding wrongful conduct such as the misuse of public funds, wastefulness, inefficiency in managing and operating government, or discriminatory conduct. Examples include speaking out against illegal campaign activity (*Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996)), abuse of nursing home patients (*White*, 131 Wn.2d at 1), disclosures of agency budgetary decisions (*Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989)), and making allegations of discriminatory conduct (*Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997)).

On the other hand, where the speech is focused on an individual or supervisor, it is more in the form of a personal grievance which does not involve a matter of public concern. See *Binkley*, 114 Wn.2d at 385; *Meyer v. University*, 105 Wn.2d 847, 851, 719 P.2d 98 (1986). For example, complaints that a supervisor did not follow procedures in assigning tasks and had a disdainful and disrespectful attitude toward employee input do not raise matters of public concern. *Binkley*, 114 Wn.2d at 384. Similarly, speech that offers the speaker's personal opinions or beliefs does not implicate matters of public concern, especially when it occurs in the work setting. *Wilson v. State*, 84 Wn. App. 332, 342, 929 P.2d 448 (1996).

Plaintiff's opinion that Jodi Pilarski did not conduct thorough investigations was not speech on a matter of public concern. Plaintiff was not acting as a concerned citizen bringing a wrong to light, she was suggesting who should investigate a workplace dispute based on her own personal biases. The plaintiff's speech did not involve the disclosure of misfeasance, malfeasance or nonfeasance and is not factual in nature. See *Wilson*, 84 Wn. App. at 346. Moreover, the speech did not raise matters of public concern as to how the Rainier School was being operated or managed.

While the public may have an interest in allegations of fraud, misconduct or discrimination that has actually occurred, an internal communication by a public employee of her own opinion about her supervisor's investigatory abilities is not of public interest. Particularly so when those opinions do not disclose actual misconduct, mismanagement or waste, but rather are prospective opinions that the supervisor may not do something as well as they ought to. It is difficult to imagine any criticism of a supervisor that would not constitute speech on a matter of public concern, if an opinion that a supervisor is "not thorough" does. Just as in *Binkley* and *Wilson*, plaintiff's speech regarding her supervisor's management abilities does not involve a matter of public concern because

it is an opinion focused on deprecating her supervisor internally rather than disclosing an instance of governmental wrongdoing.

Plaintiff misdirects the inquiry by implying that speech regarding internal personnel disputes is only unprotected if it relates to a personal interest of the plaintiff. (Appellant's Brf pp 30 and 32). Plaintiff's argument is misguided as the focus is on the content of the speech, not on whether the plaintiff has a personal interest in the outcome of the dispute which gives rise to the speech. While it is more likely that speech will be a matter of personal concern when the dispute involves the plaintiff that does not mean the speech is protected simply because the occasion for the speech arises as the result of an issue involving a third party.

Plaintiff is correct that speech regarding the treatment of a co-worker or job conditions of a co-worker may be protected.⁵ However, plaintiff's speech was not about Ms. Paeper being treated unfairly or being discriminated against. She offered her opinion, based on her biases, as to who should be assigned to do an investigation. The public would have no more interest in her opinion about Ms. Pilarski's investigatory abilities or who conducted the investigation than they would about any other day-to-

⁵ Plaintiff cites *Thomas v. City of Beaverton*, 379 F.3d 802, 808-09, (9th Cir. 2004) and *Hyland v. Wonder*, 972 F.2d 1129, 1138 (9th Cir. 1992).

day operational decision of management⁶. Plaintiff's speech related to an operational decision as to how a personnel issue would be procedurally handled. To the extent there was any dispute, it was a dispute over an internal management decision which did not involve protected speech. *See Havekost v. U.S. Dep't. of Navy*, 925 F.2d 316, 318 (9th Cir. 1991).

2. Plaintiff's speech fell within her duties and therefore is not protected under the U.S. Supreme Court's ruling in *Garcetti v. Ceballos*.

In an effort to elevate her speech to something above a disagreement with a management decision due to personal bias, plaintiff goes to great lengths to explain the virtues of her suggestion that an outside investigator be assigned to the investigation. Plaintiff explains how an appropriate investigation should be done by a public employer enforcing anti-discrimination laws, and how an investigation of a hostile work environment complaint may relieve the employer of liability potentially saving the public treasury. Plaintiff explains how an appropriate investigation not only protects the rights of the alleged victim but also the rights of the alleged harasser. Plaintiff appears to contend that the speech is related to her official duties and is therefore protected. (AB 30) *citing Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004) at 1174-75.

⁶ Plaintiff herself has admitted that she was not concerned that management would not respond adequately to the allegations of harassment. CP 204-205.

Defendants do not disagree that a supervisor, such as the plaintiff, has a responsibility to ensure that incidents or allegations of sexual harassment are appropriately reported, investigated and responded to. One of a supervisor's duties is to manage workplace disputes and ensure civility between the workers they supervise which includes the duty to report sexual harassment and make recommendations as to how to respond to it. If in fact the plaintiff was simply making a recommendation as to how to handle Ms. Paeper's complaint, rather than criticizing her supervisor's investigatory abilities as she seems to suggest, then she was acting pursuant to her duties as a supervisor and her speech is not protected.

Plaintiff cites to *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), for the proposition that speech occurring during the performance of an employees duties is protected under the First Amendment. The United States Supreme Court has now reversed the Ninth Circuit decision in *Ceballos* and specifically held;

We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the constitution does not insulate their communications from employer discipline.

Garcetti v. Ceballos, 126 S.Ct. 1951, 1960, 74 USLW 4257 (2006).

Garcetti involved a deputy district attorney who recommended that a criminal case be dismissed because he believed there were serious misrepresentations in an affidavit made for purposes of obtaining a search warrant. *Garcetti*, 126 S.Ct. at 1955. Plaintiff alleged that after his recommendation and testimony about the affidavits accuracy he was subjected to retaliation. *Garcetti*, 126 S.Ct. at 1956. When the plaintiff brought suit, the District Court granted summary judgment on the basis that because the speech occurred in the course of the plaintiff's employment duties, it was not entitled to First Amendment protection. *Id.*

The Ninth Circuit reversed on the basis that the plaintiff's speech, which cited what he believed was governmental misconduct, was inherently a matter of public concern. *Garcetti*, 126 S.Ct. at 1956. The Ninth Circuit did not consider whether the plaintiff's speech was made in his capacity as a citizen. *Id.* In reversing the Ninth Circuit, the Supreme Court focused not on the content of the plaintiff's speech but rather on whether the plaintiff was speaking as a concerned citizen or as an employee performing his duties. *Garcetti*, 126 S.Ct. at 1959-60. The court held that when an employee makes statements pursuant to his official duties, the speech is not protected by the First Amendment. *Id.*

The court reasoned that restricting speech that owes its existence to the employee's professional responsibilities does not infringe any liberties

the employee may have enjoyed as a private citizen. *Garcetti*, 126 S.Ct. at 1960. Thus, the plaintiff in *Garcetti* did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges and preparing filings. *Id.* By the same token, he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. *Id.*

Like the plaintiff in *Garcetti*, the plaintiff here was not acting as a concerned citizen when she recommended that an outside investigator be hired to investigate a workplace dispute involving two of her subordinates. As a supervisor, and member of the management team, the proper resolution of workplace disputes falls within the plaintiff's responsibilities as a government employee. Regardless of plaintiff's description of her motives, she was not speaking as a concerned citizen but rather as a government employee executing her duties when she expressed her opinion as to how Ms. Paeper's complaint should be handled. As a result, her speech is not protected under the First Amendment pursuant to *Garcetti* and the trial court should be affirmed.

3. Plaintiff's interest in criticizing her supervisor's investigatory abilities does not outweigh the State's interest in maintaining the appearance of fairness and impartiality in the workplace.

Even if plaintiff's speech had some public concern value, the Constitution would not afford plaintiff protection unless that value was greater than the defendant's interest in managing personnel issues efficiently. *Connick*, 461 U.S. at 147-48; *Wilson*, 84 Wn. App. at 347. This is a question of law for the court. *Rankin*, 483 U.S. at 386; *Binkley*, 114 Wn.2d at 382.

The extent to which the employer must justify its competing interest in efficiently delivering the public service it performs is reduced by the magnitude of the public concern value of the employee's speech. *Wilson*, 84 Wn. App. at 347, citing *Binkley*, 114 Wn.2d at 383. Where the employee's speech is only tangentially of public concern, the employer's burden is lighter. *Id.* The time, manner, place, and context of the employee's speech are relevant factors in the analysis. *Wilson*, 84 Wn. App. at 347, citing *Rankin*, 483 U.S. at 388.

The United States Supreme Court has recognized that, in conducting the *Pickering* balance, courts must grant public employers "wide discretion and control over the management of its personnel and internal affairs." *Connick* 461 U.S. at 151, quoting *Arnett v. Kennedy*, 416

U.S. 134, 168, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974). “This includes the prerogative to remove employees whose conduct hinders efficient operation and do so with dispatch.” *Id.* Actual disruption need not be shown, and deference is given to government predictions of harm. *White*, 131 Wn.2d at 15, citing *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 1887, 128 L. Ed 2d 686 (1994) and *Meyer v. University of Wash.*, 105 Wn.2d 847, 851, 719 P.2d 98 (1986).

Here plaintiff’s speech related to a personnel issue which the Supreme Court has recognized is an area where public employers must be granted wide discretion. The school’s interests in efficiently and effectively managing personnel issues would be frustrated if supervisors were not permitted to investigate and resolve personnel issues. The potential for disruption caused by the plaintiff’s speech is evidenced by the very points she makes when attempting to argue in support of her claim that her speech was on a matter of public concern.

Plaintiff correctly identifies the important role a thorough, fair and impartial investigation plays when an allegation of sexual harassment is made. Such an investigation affords due process to the parties involved and may resolve the issue short of litigation if done properly and perceived as fair and impartial by the affected parties. As plaintiff correctly points

out, if done poorly, the investigation fails to resolve the problem and may result in lawsuits and further assaults on the public treasury.

It takes little imagination to see how an investigation can be undermined from the very beginning if one supervisor states the supervisor assigned to do the investigation will not do a thorough investigation. One or both parties may be predisposed to question the investigation regardless of the outcome. This increases the likelihood that the outcome of the investigation will be challenged rather than accepted and litigation will ensue. Plaintiff's speech not only undermines management's response to the sexual harassment allegations, it also undermines Ms. Pilarski as a supervisor. Having one supervisor say another will not do a thorough investigation of an allegation of misconduct involving employees they both supervise creates an impression of ineffective management.

Plaintiff erroneously argues that the employer must show actual disruption in order to put the *Pickering* balancing test at issue. Plaintiff asserts, "what is at issue here is whether or not the speech created disruption, not whether or not government has the right to make various decision". (AB 36.) Plaintiff goes on, "What is at issue, is whether or not the speech disrupted any operations of government and the defense in this instance has absolutely failed to articulate an interest that was disrupted by

the speech.” (AB 37.) Controlling precedent shows the plaintiff is wrong. Actual disruption need not be shown and deference is given to government predictions of harm. *White*, 131 Wn.2d at 15. A defendant is only required to show the potential for disruption in order to invoke the balancing test. *Waters v. Churchill*, 511 U.S. 661, at 673;; *Moran*, 147 F.3d at 846.

Similarly misplaced is plaintiff’s contention that the government must present evidence that it made a reasonable prediction of disruption when making the adverse employment decision. If such a requirement existed, courts would never engage in the *Pickering* balancing in cases in which the employer denied retaliation. Logically, if the employer is not taking the allegedly adverse action as a result of the speech they would not engage in any effort to determine if the speech would be disruptive. Therefore, the evidence plaintiff claims must be produced would not exist. However, it is clear that courts engage in *Pickering* balancing even where the employer denies the adverse action was related to the speech. *See White*, 131 Wn.2d 14-15. This is logical because the court must find that the speech is protected, which requires application of the *Pickering* balancing test, in order for the plaintiff to have a First Amendment free speech claim. *See Moran* 147 F.3d at 849.

C. Plaintiff's Placement On Alternative Assignment While She Was Being Investigated For Creating A Hostile Work Environment Was Not An Adverse Employment Action.

Washington courts have defined "adverse employment action." According to our supreme court, discrimination requires "an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004) citing *Robel v. Roundup Corp.*, 148 Wn.2d 35, 74 n. 24, 59 P.3d 611 (2002). In *Kirby*, the court held that investigatory and disciplinary measures were not adverse employment actions because they did not have a tangible impact on Kirby's workload or pay. *Id.* at 465.

Federal law provides further guidance. An actionable adverse employment action must involve a change in employment conditions that is more than an "inconvenience or alteration of job responsibilities." *DeGuissepe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995), quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132 (7th Cir. 1993), such as reducing an employee's workload and pay, *Ray v. Henderson*, 217 F.3d 1234, 1243-44 (9th Cir. 2000). In contrast, yelling at an employee or threatening to fire an employee is not an adverse employment action. See *Munday v. Waste Mgmt. of N. Am. Inc.*, 126 F.3d 239, 243 (4th Cir. 1997).

Plaintiff cites cases involving actions that involve significant changes which are more than an “inconvenience or alteration of job responsibilities.” Those cases involve permanent transfers that impact job responsibilities,⁷ permanent restrictions of duty which impair promotional opportunities,⁸ or refusal to allow an employee to rescind a resignation.⁹ Additionally, where an employer engages in a campaign of harassment that amounts to a hostile work environment, that may be considered an adverse employment action. *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982).

None of these cases are inconsistent with *Kirby* or *Ray* because they all involve actions that either permanently affect employment conditions such as pay or workload, or involve a hostile work environment. Plaintiff in the present case was not subject to any permanent loss of pay or benefits, was not demoted or fired and did not have her job responsibilities permanently altered. Further, plaintiff does not even allege she was subjected to a hostile work environment.

Plaintiff was temporarily placed on alternate assignment pending the outcome of an investigation into complaints made about her supervision. It should not be forgotten the rationale for doing so was to

⁷ *Allen v. Scribner*, 812 F.2d 426, 428 Amended 828 F.2d 1445 (9th Cir. 1987)

⁸ *Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir. 1989).

⁹ *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002).

protect the employees she allegedly harassed and cut off any liability her actions created. To the extent she was inconvenienced, she was accommodated by having her work-day shortened and being reimbursed for mileage. The present case is just like *Kirby* where the court found that disciplinary actions and investigations did not rise to the level of an adverse employment action for purposes of a discrimination claim. *Kirby*, 124 Wn. App. at 465. Similarly, plaintiff's placement on alternate assignment pending the outcome of the investigation does not constitute adverse action for purposes of her retaliation claims.

D. The Trial Court Correctly Concluded That The Plaintiff Failed To Present Sufficient Evidence To Meet Her Prima Facie Burden Of Demonstrating That Her Speech Was A Substantial Motivating Factor For The Alleged Retaliatory Acts.

Plaintiff bears the burden of proving her speech was a substantial motivating factor in her alternate assignment. *White*, 131 Wn.2d at 17. In meeting this burden she may not rely on speculation, she must produce evidence to support her contentions. Plaintiff offered no such evidence at the trial court level and essentially relied on the temporal relationship between her speech and the alternate assignment. The mere fact that speech precedes an employment decision does not create an inference that the decision was motivated by the speech. *White*, 131 Wn.2d at 167, citing *Nelson v. Pima Community College*, 83 F.3d 1075 (9th Cir. 1996).

Realizing that timing alone is inadequate, plaintiff attempts to create an illusion of retaliation by alleging that complaints had been made about her supervisory style prior to her speech but that nothing had been done about them. The desired inference is that, the differing response after the speech must have been motivated by retaliation.

Plaintiff's contention is without merit because the complaints prior to the speech related to plaintiff's review and editing of her subordinate's reports. These were managerial functions which fell within the plaintiff's job duties, thus, the appropriate response was to have the employees work this out with the plaintiff. The complaints after the speech related to allegations of a hostile work environment and inappropriate sexual physical contact. Such allegations are of an entirely different nature and demand a different kind of response. The motivation was to respond to a complaint that could potentially give rise to liability against the employer, not retaliate against the plaintiff. Defendants were simply fulfilling their obligation to investigate allegations of a hostile work environment and provide a workplace free of harassment.

Plaintiff also cites to the difference in treatment between her and Mr. Densmore as a basis for concluding that her speech was a motivating factor for her placement on alternate assignment. Specifically, that the plaintiff was moved to the regional headquarters whereas Mr. Densmore's

work station was moved within the Rainier School. This difference in treatment is explained by the fact that the plaintiff was a supervisor alleged to have created a hostile work environment for her entire staff. She could not be left in a supervisory role and the logical thing to do was to move her off location pending the outcome of the investigation.

Mr. Densmore on the other hand was a non-supervisory employee alleged to have harassed a single co-worker. The institutional need was to isolate him from contact with that co-worker, not remove him from a supervisory position and contact with a number of subordinates. This was accomplished by removing Mr. Densmore from the work unit and requiring him to be escorted whenever he may encounter his alleged victim. These prophylactic measures while not the same as those applied to the plaintiff were sufficient to meet the institutional need. Due to the difference in the positions held by, and the allegations involving plaintiff and Mr. Densmore, there is no evidentiary value in comparing how they were treated.

Finally, plaintiff alleges Ms. Pilarski "essentially admitted" that she intended to investigate plaintiff because of her comments that Ms. Pilarski would, "blow off" the investigation. (Appellate's Brf p 43.) No evidence is cited in support of this assertion because none exists. Ms. Pilarski did ask the plaintiff if she had told Sharon Buss that she (Pilarski)

would “blow off” the investigation. Given that Ms. Pilarski was told plaintiff made the statement and human nature being what it is, one would be suspicious if she had not asked. However, there is no evidence that she in any way stated or admitted she was investigating the plaintiff.

Ms. Pilarski did ask a number of questions about the plaintiff’s knowledge of the incidents involving Ed Densmore and Patty Paeper, and the plaintiff’s response to those incidents. As already indicated, such questions were relevant if for no other reason than the potential liability that might exist if the plaintiff had failed to identify and respond to incidences of sexual harassment involving employees she supervised. While the plaintiff may have believed Ms. Pilarski was investigating her, Ms. Pilarski did not admit to doing so, and the plaintiff’s belief does not amount to evidence sufficient to defeat a motion for summary judgment.

E. The Defendants Had Legitimate Non-Retaliatory Reasons For Conducting An Investigation And Placing The Plaintiff On Alternate Assignment.

Even if this court disagrees with the trial court’s conclusion that plaintiff failed to present evidence of a prima facie case, summary judgment still was proper because the defendants presented uncontroverted evidence of a legitimate, non-discriminatory reason for plaintiff’s placement on alternate assignment and the investigation of which she complains. Specifically, the undisputed fact that an allegation

was made that she created a hostile work environment for the employees she supervised. Curiously, plaintiff's brief completely fails to address the legitimate, non-discriminatory reasons for the actions she complains of and her obligation to rebut those reasons by presenting evidence of pretext. Perhaps that is because she knows she cannot dispute the fact that management had an obligation to respond to the complaints about her.

The basic evidentiary burden-shifting protocol established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), for deciding cases alleging discrimination in employment applies to First Amendment and RCW 49.60.210 retaliation claims. *Mt. Healthy*, 429 U.S. at 287; *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991). In the typical case, where there is no direct evidence of discrimination or retaliation, the employee must satisfy the first intermediate burden by producing the facts necessary to support a prima facie case. *Hill v. BCTI*, 144 Wn.2d at 180-81; *Milligan v. Thompson*, 110 Wn. App. 628, 42 P.3d 418 (2002) (*Milligan II*)(burden-shifting scheme is the same for retaliation and discrimination claims).

Once the employee establishes a prima facie case, the burden of proof shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *Hill*, 144 Wn.2d at 181-82. Once

such a reason is identified, the presumption of discrimination is rebutted. *Id.* The burden of production shifts back to the employee to show that the proffered reason “was in fact pretext.” *Hill quoting McDonnell Douglas*, 411 U.S. at 804, 93 S. Ct. at 1817. “If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law.” *Hill*, 144 Wn.2d at 182 *citing Grimwood*, 110 Wn.2d at 365.

Plaintiff’s complaints relate to her placement on alternate assignment after Ed Densmore alleged she created a hostile work environment for him and other employees she supervised. Plaintiff may criticize the motives and credibility of Mr. Densmore, as she did in the trial court, however, that matters little to the defendants.¹⁰ The Rainier School, just as any other employer, has a legal obligation to provide a workplace free from discrimination and harassment for every employee. The school can ill afford to ignore the complaints of any employee given the potential liability and ramifications that result from doing so. Once Mr. Densmore alleged his supervisor created a hostile work environment, the school had to investigate his claims. The only prudent act was to remove the plaintiff from the workplace and her supervisory position pending the outcome of that investigation. The trial court correctly found

¹⁰ The fact that a number of other employees confirmed Mr. Densmore’s allegations undermines any attack on his credibility as well as solidifying the reasonableness of defendant’s response to his allegations.

that defendants' fulfillment of their legal obligation to provide a workplace free of discrimination was a legitimate non-discriminatory reason for placing the plaintiff on alternate assignment while Mr. Densmore's claims were investigated.

F. Defendants Are Entitled To Qualified Immunity From Plaintiff's 42 USC §1983 First Amendment Claim Because There Is No Clearly Established Right To Criticize A Supervisor's Investigatory Abilities

1. There is no law clearly establishing that criticizing one's supervisor or speaking pursuant to one's official duties constitutes speech on a matter of public concern.

Public officials are immune from suit unless the "law clearly proscribed the actions" they took. *Wilson*, 84 Wn. App. at 349, citing *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). The applicability of qualified immunity to a particular individual is a question of law. *White v. State*, 78 Wn. App. 824, 837, 898 P.2d 331 (1995), *review granted*, 128 Wn.2d 1024 (1996). A plaintiff seeking to rebut a defendant's claim of qualified immunity must demonstrate that the defendant's conduct interfered with a clearly established constitutional right. *White*, 78 Wn. App. at 837.

"Clearly established" means that the contours of the right were so obvious at the time the official acted, that a reasonable official would have understood that what he was doing violated that right. *Wilson*, 84 Wn. App. at 349-50, citing *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988) (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.

Ct. 3034, 97 L. Ed. 2d 523 (1987). The plaintiff “must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant’s actions were clearly prohibited.” *Wilson*, 84 Wn. App. at 350, citing *Altshuler v. City of Seattle*, 63 Wn. App. 389, 395, 819 P.2d 393 (1991) (quoting *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990)), *review denied*, 118 Wn.2d 1023 (1992).

Here, the relevant “right” at issue is not the generic First Amendment right to free speech or the right to be free from speech-based retaliatory discharge. The pertinent question is whether plaintiff’s interest in criticizing her supervisor or requesting that she not investigate a personnel matter was so “clearly established” in March 2001 that the unlawfulness of investigating complaints about the plaintiff would have been sufficiently “apparent” to defendants that they could not “have reasonably believed that their particular conduct was lawful.” *Moran*, 147 F.3d at 845, citing *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991) (“[R]egardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not ‘clearly established’ or the officer could have reasonably believe that his particular conduct was lawful.”).

Qualified immunity almost always applies in First Amendment retaliation cases due to the context-intensive, case-by-case balancing that is required. *Brewster v. Bd. of Educ. of Lynnwood*, 149 F.3d 971, 981 (9th Cir. 1998) (reversing denial of summary judgment and granting immunity

where lack of closely analogous case law addressing First Amendment retaliation claim did not clearly establish employee's right to speak). "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52. It gives officials flexibility to act in areas where the law is unclear without fear of being sued. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

Mistaken judgments are permitted under this standard. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law... ." *Anderson*, 483 U.S. at 638. [I]f officers of reasonable competence could disagree on [the relevant] issue, immunity should be recognized." *Id.*

Plaintiff cannot establish that she had a clearly established constitutional right to impugn her supervisor's investigatory skills. Quite to the contrary, the available case law clearly indicates that personal opinions as to management styles and practices are not entitled to constitutional protections. *See Wilson*, 84 Wn. App. 332.

Similarly, there is no clearly established right giving protection to speech made pursuant to an employees public duties as evidenced by the Supreme Court's recent decision in *Garcetti*. Given that the Supreme Court reversed the 9th circuit's decision giving protection to such speech, it could not have been clearly established in 2001 that an employees speech pursuant to their duties was entitled to constitutional protection. As previously stated, plaintiff's recommendation as to how to handle an

investigation into allegations of employee misconduct fell within the scope of her duties and is not entitled to constitutional protection.

2. Defendants are entitled to qualified immunity because it is not clear the plaintiff's speech is entitled to protection when the Pickering balancing test is applied.

Even if plaintiff's speech was a matter of public concern, because of the employer's interests in preserving the integrity of investigations of employee misconduct, a reasonable manager would not have known they were violating the plaintiff's constitutional rights by disciplining her for her speech because of the balancing required under *Pickering*. Whether or not defendants violated plaintiff's "clearly established rights depends on the balancing that *Pickering* entails. *Moran*, 147 F.3d at 845; *Chateaubriand*, 97 F.3d at 1224. As already discussed, the defendants substantial interest in maintaining the integrity of the investigation and the supervisory authority of Ms. Pilarski outweighed any interests plaintiff had in criticizing Ms. Pilarski's investigatory abilities. At the very least, the plaintiff's interest in her speech did not so clearly outweigh the defendants interests that it would be apparent the plaintiff's speech was entitled to constitutional protection. As stated in *Moran*, because of the balancing required under *Pickering*, the law will rarely be sufficiently established to deny qualified immunity. *Moran*, 147 F.3d at 847.

Plaintiff's argument on qualified immunity is confusing at best. She begins by claiming, without citing to any authority, that a whole host of federal case law exists denying qualified immunity in this context.

(Appellant's Brf p. 44.) It is unclear what plaintiff means by "in this context." If plaintiff means in the First Amendment context generally, then plaintiff is wrong. *Moran* states the exact opposite. *Moran*, 147 F.3d 847. If Plaintiff means in the context of criticizing a supervisor, defendants are unaware of any such case law and plaintiff has not cited any.

None of the cases cited by plaintiff involve speech even remotely similar to the plaintiff's speech in this case. *Burgess* involved a fire marshall who spoke out against the passage of ordinances he believed to conflict with state laws. *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990). *Chateaubriand* involved speech about illegal campaign activities. *Chateaubriand v. Gaspard*, 97 F.3d at 1218. *Gilbrook* involved union opposition to cuts in a fire department's staff and budget that were allegedly politically motivated. *Gilbrook v. City of New Westminster*, 177 F.3d 839 (9th Cir. 1999). None of these cases can be viewed as giving rise to a clearly established constitutional right to either criticize your supervisor or request an outside investigation of a personnel dispute. Indeed, plaintiff's attempt to rely on these clearly inapplicable cases is testament to the fact that there is no such clearly established constitutional right and the *Moran* court's observation that constitutional rights of free speech are rarely clearly established for purposes of qualified immunity.

Plaintiff concludes her argument by stating that it will be for the jury to determine, "whether or not such speech was the motivating animus behind the adverse employment decision." (Appellant's Brf p. 45.)

Plaintiff is simply wrong. Motive is not a consideration in a qualified immunity analysis. The only consideration is whether the constitutional right is clearly established and whether a reasonable public official would know their conduct is unlawful. In the present case, the alleged constitutional right to criticize ones supervisor is not clearly established. Even if it were, a reasonable public official would not know that taking action against the plaintiff as the result of such speech would be unlawful due to the balancing required under *Pickering*.

G. Plaintiff Did Not Engage In Any Oppositional Activity Subject To Protection Under RCW 49.60.210

An employer may not retaliate against an employee for opposing the employer's discriminatory practices or for filing a discrimination claim against the employer. RCW 49.60.210. It is an unfair practice for any employer to discriminate against any person because he or she has opposed forbidden practices or because he or she has filed a charge against the employer, RCW 49.60.210.

To make out a prima facie case of retaliation, a plaintiff must show that: (1) he or she engaged in a statutorily protected activity; (2) an *adverse employment action* was taken; and (3) there is a *causal link* between the employee's activity and the employer's adverse action. *Milligan v. Thompson*, 110 Wn. App. at 638-39 (citing *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862 review denied, 141 Wn.2d 1017,

10 P.3d 1071 (2000)); *Coville v. Cobarc Services, Inc.*, 73 Wn. App. 433, 439. 869 P.2d 1103 (1994); *Kahn v. Salerno*, 90 Wn. App. 110, 129, 951 P.2d 321 (1998) *review denied*, 136 Wn.2d 1016. Plaintiff need not show that retaliation was the only cause of the adverse employment action, but she or he must establish that it was, at a minimum, a substantial factor. *Allison v. Housing Authority*, 118 Wn.2d 79, 85-96, 821 P.2d 34 (1991).

The burden-shifting scheme for retaliatory discharge is the same as for discrimination claims. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991). Plaintiff must make out a prima facie case, defendant must present evidence of a nonretaliatory reason for its actions, and then plaintiff must present evidence that the reason is pretextual.

Plaintiff cannot establish a prima facie case of retaliation in the present case because she did not engage in any statutorily protected activity. In order to constitute protected activity, the plaintiff's complaints or opposition must be to conduct that at least arguably violates the law against discrimination. *Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321 (1998).

The plaintiff in the present case did not complain about behavior that actually or arguably violated the law against discrimination. She did not complain about or oppose harassment or discrimination, she did not

bring harassment or discrimination to the attention of management and she did not testify in opposition to harassment or discrimination. She made a suggestion as to who should investigate an allegation of harassment. At best, she made a complaint about the person chosen to do the investigation. Management's choice of a person to investigate an allegation of harassment does not actually or arguably violated the law against discrimination. Consequently, opposing that choice assuming that was what the plaintiff was doing, does not constitute protected activity under RCW 49.60.210.

Even if the plaintiff is found to have engaged in protected activity the same reasons that support dismissal of her First Amendment claim support dismissal of her RCW 49.60.210 claim. Specifically, she cannot establish causation, an adverse employment action or that the defendants legitimate non-retaliatory reasons for the complained of actions are pretextual.

Plaintiff's suggestion that her satisfaction of a prima facie case of retaliation precludes summary judgment is wrong. (Appellant's brief p. 48.) Plaintiffs establishment of a prima facie case only shifts the burden to the employer to articulate a legitimate, non-retaliatory motive for the adverse action. If the employer meets this burden, then the plaintiff must meet the ultimate burden of establishing that the employers legitimate

non-retaliatory reasons for the action are pretextual. *Milligan*, 110 Wn. App. at 638; *Vasquez v. State*, 94 Wn. App. 976, 984 fn. 3, 974 P.2d 348 (1999). If plaintiff fails to meet his burden, then summary judgment for the employer should be granted. *Milligan* 110 Wn. App. at 139 citing *Hill*, 144 Wn.2d at 182, 186.

H. Tina Fleisher Was Properly Dismissed Because She Did Not Participate In The Allegedly Retaliatory Activities And She Is Not An Employer For Purposes Of RCW 49.60.120

Tina Fleisher was a subordinate of the plaintiffs who was gone on vacation at the time of the acts plaintiff complains of. The undisputed evidence established that she did not participate in the acts plaintiff complains of. Defendant Fleisher moved for summary judgment on two grounds in addition to those previously identified.

First, because she did not affirmatively participate in the alleged deprivation of constitutional rights she could not be liable under § 1983 for any First Amendment violation. *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987). Second, Ms. Fleisher cannot be liable under RCW 49.60.210 because Chapter 49.60 applies only to employers, not to co-workers such as Ms. Fleisher. *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn. App. 927, 930-31, 965 P.2d 1164 (1998).

Plaintiff has not assigned error to the courts dismissal of Ms. Fleisher on these grounds nor presented any argument related thereto.

Presumably, she has abandoned these claims and in any event, the order with respect to Ms. Fleisher should be affirmed as it is correct.

I. The Trial Court Correctly Dismissed Defendant Merxbauer Because He Did Not Personally Participate In The Alleged Retaliatory Acts

Plaintiff failed to present any evidence that defendant Merxbauer was involved in the decision to investigate the allegations against the plaintiff or place her on alternate assignment. This was yet another basis for granting summary judgment to defendant Merxbauer. Similar to Ms. Fleisher, plaintiff has not assigned error to this portion of the trial courts order. Summary judgment for defendant Merxbauer should be affirmed.

J. The Trial Court Correctly Dismissed Defendants Merxbauer, Blackburn and Fleisher as Plaintiff Failed To Present Evidence They Were Aware Of The Allegedly Protected Speech That Forms The Basis For Plaintiff's First Amendment And RCW 49.60.210 Retaliation Claims

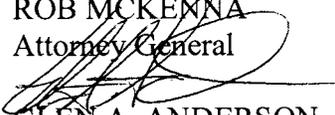
It is well established by the law, as well as common sense, that a person must know of the protected speech before they can retaliate for it and be held liable. *Keyser v. Sacramento City Unified School Dist.*, 265 F.3d 741, 749 (9th Cir. 2001); *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000). This same logic applied to a retaliation claim brought pursuant to RCW 49.60.210. In the present case, plaintiff presented no evidence to establish that defendants Merxbauer, Blackburn or Fleisher

knew of the plaintiff's allegedly protected speech. As a consequence, they could not possibly have retaliated against her. The trial court correctly dismissed defendants Blackburn, Fleisher and Merxbauer on this ground also and should be affirmed.

V. CONCLUSION

The trial court correctly granted summary judgment in this case because the undisputed evidence shows that the plaintiff was placed on alternate assignment and investigated because of a complaint she created a hostile work environment for the employees she supervised, not because of any protected speech or activity she allegedly engaged in. The trial court also correctly determined that the speech the plaintiff engaged in was not protected under either the First Amendment or RCW 49.60.210, that the plaintiff failed to establish causation or rebut the defendant legitimate non-retaliatory reasons for the actions taken and that the plaintiff was not subject to an adverse employment action. For all these reasons, the decision of the trial court should be affirmed.

RESPECTFULLY Submitted this 22nd day of June, 2006.

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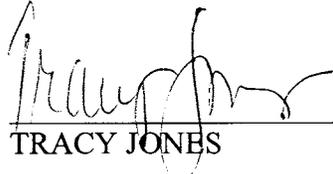
PROOF OF SERVICE

I certify that I served a copy of the *Brief of Respondents* on all parties or their counsel of record on the date below via United States Mail, proper postage affixed, as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of June, 2006, at Lacey, WA.



TRACY JONES

FILED
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BY [Signature]
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