No. 34357-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JANE DOE I,
Appellant,

vs.

THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES; WESTERN STATE HOSPITAL; BARRETT GREEN; and WASHINGTON FEDERATION OF STATE EMPLOYEES, COUNCIL 28, LOCAL 793,
Respondents.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error

1. The trial court erred in granting the motions for summary judgment of defendants/respondents State of Washington (State), the Washington Federation of State Employees (Union) and Barrette Green (Green) and dismissing appellant Jane Doe I's[1] case in its entirety based on the statute of limitations.

Issues Pertaining to Assignment of Error

1) Whether genuine issues of material fact exist, precluding summary judgment, with regard to:

a) The accrual and/or expiration of the statute of limitations pertaining to RCW 49.60 et seq., also known as the Washington Law Against Discrimination (WLAD), which prohibits discrimination in the workplace based on sex, in light of the Washington State Supreme Court's decision in *Antonius v. King County,* 153 Wn.2d 256, 103 P.3d 729 (2004), the continued employment of the sexual harasser Barrette Green and the facts of this case;

b) The accrual and/or expiration of the statute of limitations pertaining to the tort of outrage;

c) The accrual and/or expiration of the statute of limitations pertaining to the tort of negligent retention and supervision of an employee or agent and to the tort of invasion of privacy.

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[1] Jane Doe I has been identified as Linda Salazar throughout prior investigations and throughout discovery. Salazar will be used for ease of reading.

2) Whether, for summary judgment purposes and viewing the facts in the light most favorable to Jane Doe I as the non-moving party:

a) Respondent Green's conduct constitutes sexual harassment under WLAD;

b) Green's conduct constitutes retaliation under WLAD;

c) Green can be held personally liable for sexually harassing conduct against Jane Doe I under WLAD;

d) Respondent State and the Union are liable for the sexually hostile work environment suffered by Jane Doe I while an employee at Western State Hospital;

e) Green's conduct satisfies the elements of the tort of outrage;

f) The State and the Union's actions and/or omissions satisfy the elements of the tort of outrage;

g) The State and the Union's actions constitute retaliation under WLAD and the whistleblower statute, RCW 42.40.020;

h) The State violated Jane Doe I's right to privacy by disclosing her name together with information of a highly offensive nature to both Jane Doe I and to a reasonable person, in violation of express assurances of confidentiality.

i) The State and the Union negligently retained and/or supervised Green when it knew or should have known that he was unfit and otherwise dangerous to female employees including Jane Doe I;

I. STATEMENT OF THE CASE

A. Barrette Green's History Of Sexual Harassment At Western State Hospital And Within The Union

Barrette Green began working for the Department of Social and Health Services at Western State Hospital (WSH) in August of 1988. CP at 334. That same year, a female employee complained to her supervisor of Green's sexually inappropriate behavior. CP at 292. The supervisor took no action. *Id.* In 1989, two more female co-workers reported to a supervisor that Green had also sexually harassed them. CP at 335. "The Office of Equal Opportunity within DSHS investigated and found that comments about sex had occurred but that there was insufficient evidence to find sexual harassment under the agency's old sexual harassment policy." *Id.* In retaliation, Green responded by filing suit against the women reporting sexual harassment and their supervisor for discrimination and defamation. *Id.* Green lost his case against the women at arbitration. *Id.* In June 2000, another female employee, Kathleen Lizee, reported that Green had sexually harassed her and then retaliated against her for reporting it. *Id.* DSHS's Office of Equal Opportunity investigated this claim as well. *Id.* The State's investigators found that the evidence supported Lizee's allegations that she was subjected to unwelcome and uninvited sexual overtures, as well as retaliation. *Id.* The Western State CEO at the time concluded that Green had engaged in

inappropriate and unprofessional behavior in the workplace, but not unwanted sexual conduct. *Id.* Instead of discipline, Green was reprimanded and ordered to attend sexual harassment and ethics training. *Id.*

The record shows that over his 15-year career, Green utilized his position at the hospital to sexually harass at least 15 different female employees at Western State. CP at 324 and 1678-79. **The harassing behavior occurred virtually ever year from the time Green began his employment**. CP at 292. The sexual misconduct Green engaged in included: unwanted touching; hugging; kissing; trapping; invading personal space; sexual behavior with co-workers, including dating and having sex and fondling on hospital grounds. CP at 1679. Female employees at WSH also complained of threatening behavior by Green including: comments about appearance; comments about intimate body parts (breasts, vaginal hair); comments about intimate clothing (bra size, lingerie); asking for dates; comments about hair; phone sex; talk about masturbation; talk about his sexual fantasies; talk about his sexual experiences; asking about women's sex lives; comments about being a "sex therapist"; discussions about multiple partner fantasies or acts (wife swapping, liking to watch others or have others watch him and his wife have sex); and talking about urination during sexual activities. *Id.*, see

also CP at 283-87. **At least six of these 15 female employees sexually harassed by Green complained to supervisors at WSH**. CP at 290.

Despite the complaints of sexual harassment to supervisors at WSH, Green continued to be employed, and actually moved swiftly and significantly up the chain of command at WSH. CP at 335, 1701. He started as a temporary Mental Health Technician 1, but by February of 1989 he was appointed to a full-time position. CP at 1701. In 1994, he was promoted to a temporary Forensic Therapist (FT) 2 position, and subsequently achieved permanent status as an FT 2. *Id.* By 1999, Green had been promoted to a permanent FT 3 position at WSH. *Id.*

Not even an impending lawsuit could stop Barrette Green's rise at WSH. Despite Kathleen Lizee's complaint of sexual harassment in 2000, Green was tested for and then promoted to a Habilitation Plan Administrator position in the Organization Performance department in June 2001. CP at 576. That same month, Kathleen Lizee formally filed suit against Green and the State of Washington. CP at 786. Less than a year later, despite the on-going litigation and even more testimonial evidence against Green, Barrette Green was promoted to Acting Clinical Risk Manager in the Organizational Performance department. CP at 576. On March 10, 2003, Kathleen Lizee's trial began against the State for the sexually harassment, retaliation and negligent supervision she suffered at

the hands of DSHS and Barrette Green while at WSH. CP at 786. As trial was beginning, Green was promoted once again; this time to the permanent management position of Clinical Risk Manager. CP at 576.

Contemporaneous with his rise in the ranks of DSHS and Western State Hospital, Green was also climbing high within the Washington Federation of State Employees' Union. *Id.*, *see also* CP at 1382-83. In 1990, Green became a union shop steward. CP at 1382. In 1992, he was appointed to the position of Chief Shop Steward. *Id.* By 1995, Green was serving on the WFSE Executive Board. *Id.* In 1998, he moved to a position on the Local 793 Executive Board. CP at 1383. Later that year, Green was reappointed as the Chief Shop Steward. *Id.* In November 2001, Barrette Green was elected President of Local 793, where he remained even after his termination from the State of Washington. CP at 1071.

As a union leader, Barrette Green was also continuing to sexually harass women at WSH. In 1997, Union shop steward Jose Aguirre wrote a letter to the Executive Board for Local 793, which included members Elijah Sacks, Bob Lenigan, Carol Dotlich and Barrette Green. CP at 1447. Aguirre specifically mentioned to the board that he had received complaints from two female shop stewards-in-training (and WSH employees), Anne Lastrapes and Maria Risse, that Barrette Green had

sexually harassed them. *Id.* Aguirre further indicated that remedial action must be taken against Barrette Green, and he demanded a response to his letter. *Id.* Aguirre never received a response from the Union, from the Executive Board, or from any of the Board members, including Green. *Id.*

B. Background Summary Of The Lizee Case

In June of 2001, Western State Hospital employee, Kathleen Lizee, filed suit in Pierce County Superior Court against the State of Washington, Barrette Green, and others.[2] CP at 786. She brought claims of sexual harassment, retaliation and negligent supervision. *Id.* Ms. Lizee's jury trial began in March of 2003 in front of the Honorable Vicki L. Hogan. *Id.* Plaintiff Lizee presented testimony from 17 different witnesses and at the conclusion of the plaintiff's case, the parties agreed to a settlement. *Id.* The settlement included a cash payment of $795,000 and a two-year paid leave of absence. *Id.* On April 4, 2003, DSHS and Western State Hospital placed Mr. Green on administrative leave. In November of 2003, DSHS finally terminated Mr. Green's employment and he never returned to work at Western State. *Id.*

On the day of settlement, Kathleen Lizee also filed a motion for injunctive relief. *Id.* In the motion, Lizee asked Judge Hogan to require DSHS to hire an independent investigator to investigate allegations that

Barrette Green had sexually harassed and retaliated against others at Western State. CP at 786-87. Based on the abuses she saw, Judge Hogan granted this relief.

C. The Salisbury Investigation Substantiated Sexual Harassment And Retaliation At Western State Hospital

In anticipation of Judge Hogan's ruling, DSHS hired the expert Kathleen Lizee proposed to Judge Hogan, Jan Salisbury of Salisbury Consulting, "to conduct an independent, thorough investigation into the workplace environment at WSH, to review the allegations of sexual harassment, retaliation and workplace violence there, and to propose specific changes in WSH's training of employees and [the] complaint and investigation process involving claims of sexual harassment." CP at 788-90, CP 282-83. The result was one of the most exhaustive sexual harassment investigations in State history. CP 282, 788, 801-02. Investigators conducted 97 witness interviews, reviewed thousands of pages of documents and spent a total of approximately 1200 hours over the course of the investigation. CP at 282, 788.

At the end of the investigation, Salisbury Consulting spoke with 15 different female employees of Western State, including Jane Doe I, who reported various degrees of sexual harassment by Barrette Green. CP at

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[2] *Kathleen P. Lizee v. State of Washington, et al.,* Pierce County Cause No. 012094144.

283. The investigators concluded that, "Based upon the evidence gathered during this investigation, **the allegations of sexual harassment and retaliation are substantiated**." *Id.* (emphasis added).

1. Methodology and Finding of Salisbury Consulting Validated by the State's Reviewing Expert and the Court's Special Master

In a report issued in November of 2004 by the State's hired expert Dr. Charles J. Hobson, the methodology used and findings rendered by Salisbury Consulting in its investigation of sexual harassment at Western State Hospital was professionally peer-reviewed and validated. CP at 802-03. In particular, Dr. Hobson found that:

> "The workplace investigation, completed by Salisbury Consulting, of sexual harassment allegations against B. Green was conducted in a manner consistent with: (1) employer guidelines issued by the Equal Employment Opportunity Commission, (2) applicable professional practice standards in the field of human resource management, and (3) relevant behavioral science research."

Id., see also, CP at 838-41. The expert report continued by listing five (5) "prominent strengths" of the Salisbury Investigation, including the extensive amount of preparation, interviewing hours, and experience Salisbury Consulting dedicated to investigating the workplace environment at Western State Hospital. *Id.* The Salisbury Consulting

investigation, methodology, and findings were also validated by Special Master Michael Reiss on November 22, 2004. CP at 794.

D. The Sexual Harassment Of Jane Doe I Is Repeatedly Admitted And Asserted By Defendant State Of Washington

During the course of the investigation and based upon reports of others, Salisbury investigators asked to interview three women who had never dared to speak previously about the sexual harassment they had endured at the hands of Barrette Green. CP at 1067. One of those individuals was Jane Doe I (a.k.a. Linda Salazar). *Id.*

Based upon the findings of the Salisbury Report, Department of Social and Health Services Director of Mental Health, Karl Brimner, sent Barrette Green a letter of termination from Western State Hospital on November 6, 2003. CP 320-29. The director of DSHS based Green's termination primarily on the harassment of the three newly reporting victims. *Id.* Addressing Barrette Green directly, Director Brimner detailed the sexual harassment of victim Linda Salazar as substantiated by the Salisbury investigation. CP at 321-22. According to Director Brimner, Green was terminated due to "a pattern of engaging in sexually harassing and retaliatory behavior. Your behavior is so egregious and demeaning to the female staff of the hospital that it cannot be tolerated." CP at 323. Director Brimner went further when he made special note of

the duration of sexual harassment by Green. **"I was particularly struck by the fact that these behaviors occurred over your complete career with the agency."** CP at 324 (emphasis added).

Although all defendants have argued against their respective liability due in part to the delay in Jane Doe I reporting sexual harassment until the launch of the Salisbury Investigation, this argument shows a complete misunderstanding of the effects of sexual harassment on an employee. Linda Collinsworth, Ph.D., an expert in sexual harassment and sexual abuse, conducted a 12-hour independent psychological examination of Linda Salazar. CP at 881. In her final expert report, Dr. Linda Collinsworth explains that it is a well-documented response for women, like Linda Salazar, not to report the sexual harassment she endured from Barrette Green. CP at 895-97. In fact, as Dr. Collinsworth goes on to explain, often times fears about the repercussions of reporting sexual harassment are realized. CP at 878. "Contrary to conventional wisdom, a number of studies have documented that assertive responses such as confronting the harasser or filing a complaint are not only frequently ineffective, but often actually make things worse." *Id.*

Faulting Jane Doe I and other similarly situated sexual harassment victims is also contrary to the State's own expert testimony. As Jan Salisbury pointed out in the Salisbury Reports, "[T]here are many reasons

why a woman would not report such behaviors, and the women in this investigation provided a number of plausible reasons why they did not report." CP at 292. Included among those reasons, Salisbury listed: (1) the woman thought she could handle the behavior herself; (2) she did not want a reputation as troublemaker; (3) they perceived Mr. Green as powerful or influential with management; (4) they were afraid of retaliation; (5) they felt they could not prove the [incident] occurred, as there were no witnesses; (6) it was psychologically embarrassing and traumatizing; and (7) fear of physical safety. CP at 292. The report goes on to state, "Given the facts discovered during this investigation, the failure to report does not provide a reason to discount credibility of witnesses. *Id.*

The State's other sexual harassment expert, Dr. Louise Fitzgerald, who testified on behalf of the State against Barrette Green in his Personnel Appeals Board hearing agreed in substance with both Collinsworth and Salisbury and added that, "[T]he more power the individual is perceived to have within the organization (e.g. power acquired through relationships with others in authority, involvement in organizations such as employee groups or union groups, physical power), the less likely the individual will be reported." CP at 1076.

E. Barrette Green's Sexual Harassment Of Jane Doe I

Jane Doe I (Doe) was a Registered Nurse at Western State Hospital in 1998. CP at 1704. She met Barrette Green sometime in 1998 when they both worked in the same building. *Id.* Initially, Salazar and Green were friendly, even sharing personal information, including details of Salazar's marriage and divorce. *Id.*

1. Green's Grooming of Jane Doe I

In 1998, Barrette Green began his sexual harassment of Jane Doe I by grooming her with personal attention, including asking her out, unsuccessfully, on a date. *Id.*, *see also*, CP at 321. After his unsuccessful attempt to get Salazar out on a date, Green would give Salazar "unsolicited hugs." CP at 321. *Id.* During the weeks and months to come, Green would invent reasons to talk with Ms. Salazar and engage her in private closed-door conversations in his office. *Id.* "On one occasion, for no legitimate reason, [Green] even left a group meeting when [he] saw her to talk to her, telling her that she was the only person [he] would do that for." *Id.* During one private conversation, Green talked about his desire to have Salazar promoted to a Registered Nurse 4 position, working more closely with Green. *Id.* And, shortly thereafter, she was approached by Salazar's colleague to consider accepting a position as a Registered Nurse 4 (RN4). CP at 1606. Salazar declined the offer at least three times

before finally acceding to the requests of her colleague and her supervisor late in 1999. *Id.* And, just as Barrette Green had planned it, Ms. Salazar became easily accessible to him. CP at 322. Shortly after she began working in her new position, Barrette Green continued his grooming of Ms. Salazar calling the "best RN4 ever" and commenting that she was "what this unit needs." CP at 321.

These grooming techniques were not solely used on Ms. Salazar. CP at 287. As described in the Salisbury Report and by several women interviewed by Salisbury consulting, Mr. Green's grooming behavior included solicitous behavior, individualized personal interest, flattering compliments, and "counseling" victims through difficult personal problems. *Id.* But, the grooming did not stop there. In fact, "various victims [also] described 'grooming' behaviors such as Mr. Green's pattern of doing favors, pulling strings, then engaging in sexualized behavior, or Mr. Green getting angry, then making up and making sexualized comments." *Id.* Moreover, Mr. Green deliberately targeted women who he perceived to be "very emotionally or situationally vulnerable," such as Linda Salazar. *Id.* The Salisbury Report confirmed that Green's behavior was an established pattern that a number of victims were subjected to and "**when more than one victim experiences the same behavior, the**

pattern corroborates that the behavior actually occurred." *Id.* (emphasis added).

2. Sexually Explicit Verbal Harassment

Green raised the level of sexual harassment beyond grooming while at a union function in Seattle in 1999. CP at 298-99, 321. Green telephoned Salazar late into the evening and asked her to come to his hotel room. CP at 321. When Salazar refused, Green "began to talk about [his] sexual fantasies about Ms. Salazar. *Id.* She told [him] she was uncomfortable with that kind of talk." *Id.* "The following morning [he] again called Ms. Salazar and told her [he was] thinking about her and masturbating. Ms. Salazar told [him] she did not want to hear that kind of talk and quickly got off the phone." *Id.*

3. Assaultive Sexual Harassment

Barrette Green continued his sexual harassment of Linda Salazar, and his behaviors escalated in nature throughout 1999. CP at 297-302, 321. Green asked Salazar to his office at one point in the Fall of 1999 and without warning, "Despite her clear resistance ... [he] pressed Ms. Salazar against the wall, trapping her, and kissed her breast. Ms. Salazar told [him] she did not want to do that and left." *Id.*

4. Green's First "Visit" to Salazar's Home

Green continued the pressure on Salazar despite her refusals to engage. *Id.* In 1999 or 2000 Green told Salazar he wanted to perform oral sex on her. *Id.* "For reasons even Ms. Salazar does not understand, she agreed." *Id.*

"Once you were there you told her you had come to give her oral pleasure. Initially she felt obligated to go through with it, but after you had started the sexual act, she felt she could not go through with it and asked you to stop." *Id.* While at Salazar's home, Green also displayed an envelope with what appeared to be a gun. *Id.*

5. Green's Second "Visit" to Salazar's Home

"You went to Ms. Salazar's house a second time about one month later, ostensibly to talk with her about her divorce and what was going on with that .... Her husband came over while you were there and after he was gone, you took her hand and put it on your erect penis. **She pulled away** and you said, 'You're nasty.'" *Id.* (emphasis added).

Director Brimner characterized the detrimental effect of Green's treatment of Linda Salazar and the other two witnesses who first came forward in the Salisbury investigation. "The behavior described above created a stressful and hostile work environment that significantly affected

the three witnesses against you, as well as others who were subjected to your unwanted advances and affections." *Id. at 4.*

6. Jane Doe I Was Particularly Vulnerable To Barrette Green's Sexual Harassment

According to Dr. Collingsworth, an understanding of "a person's psychological condition" is imperative to understanding the "strengths and weaknesses that an individual brings to the situation in which they find themselves." CP at 896. As it relates to Ms. Salazar, in addition to having experienced several physically and emotional abuse relationship with romantic partners, Ms. Salazar has been taken advantage of before by a person who holds a position of trust and authority, making her vulnerable to Green's predatory techniques. *Id.*

F. Retaliation Against Jane Doe I By The State Of Washington Follows

Following Green's termination from Western State, Linda Salazar instantly became the target for retaliation as a result of her statements to Salisbury Consulting against Barrette Green. CP at 1013-15. First, on November 6, 2003, the State -- after making repeated promises of confidentiality to Ms. Salazar -- nevertheless disclosed her name in a termination letter it wrote to Barrette Green. CP at 321. Immediately, after this disclosure, Ms. Salazar felt alienated at Western State Hospital causing her to feel anxious. CP at 1019-20.

Then, on December 8, 2003, just one month after Green's dismissal, a dead, skinned rabbit appeared on the welcome mat of Salazar's front door. CP at 1014-15. Salazar filed a police report. CP at 1014. She believes that the skinned, dead rabbit was placed on her door mat by Mr. Green or his Western State Hospital supporters. CP at 1014-15. Salazar is not alone in that belief. Former DSHS Secretary Dennis Braddock sent a letter to Pierce County law enforcement departments asking for assistance and commenting that the dead animal, along with similar acts of apparent retaliation against other women complaining about Green, did not appear to be random or coincidental. CP at 944-45. Secretary Braddock also added in his letter that several other female hospital employees had previously reported harassing or threatening phone calls at home after complaining about Barrette Green. *Id.*

A week later, Salazar found a green toy bear in her mailbox. CP at 1013-14. She believes this is also a message sent in retaliation for her speaking out regarding the sexually hostile work environment as Western State Hospital. *Id.*

G. "Supervisors Who Knew And Did Nothing To Stop It"

As referenced earlier, and indicated by the Salisbury Report, DSHS management continued to promote Barrette Green several times

after he was reported for sexual harassment, even following the allegations made against him in the Lizee lawsuit. CP at 292.

Although many of Barrette Green's victims did not immediately report the sexual harassment to a supervisor, most of them eventually complained of his unlawful behavior. CP at 290. "At least six victims eventually told a supervisor at WSH. Several other victims told a trusted friend at the time the behavior was occurring." *Id.* Although some victims could not muster the courage to report the sexual harassment experienced while employed at Western State Hospital, their motivations for non-reporting aptly illustrate has sexually hostile the environment truly was. Specifically, many of those victims felt they could not report because any complaints would be done in vain. CP at 292-93.

H. The "Teflon Man" – The State Of Washington Shielded Barrette Green And Placed Him In A Position Where He Remained Untouchable

Even after the severity and pervasiveness of Barrette Green's sexual misconduct at Western State Hospital was fully exposed by Kathleen Lizee, supervisors and upper-level management at DSHS and WSH continued to protect Barrette Green at the expense of its female employees. CP at 576, 786. As discovered by Salisbury Consulting and relayed in its report to the State:

> One particular problem noted in the investigation was that Mr. Green, following the allegations in the lawsuit, has received several promotions and advancements, to the point where he now holds a position of influence and power in the organization … . No one can adequately explain how he was able to obtain such promotions in light of the serious allegations leveled against him.
>
> . . .
>
> This dismissal of the allegations as though the behavior never occurred has led to Mr. Green rising to a place in the organization where he has the ability to inflict more psychological damage, because of the perception of the victims that he has the power to harm them. Thus, the victims' perception that Mr. Green is a "Teflon Man" protected by management, or untouchable has been reinforced by management's response following the complaint.

CP at 764-64.

I. U.S. District Court Rules Against Barrette Green

Immediately after his termination in November of 2003, Barrette Green filed suit in the U.S. District Court, Western District of Tacoma against the State of Washington and the three women named in the State's termination letter, Linda Salazar, Jackie Delgado and Cheryl Reis, for what he claimed was discrimination, defamation, and a host of other alleged violations. CP at 334-338. This was nothing new for Green. CP at 293. As he had done to other victims of his sexual harassment, Green

used the justice system to retaliate and intimidate all those who would dare speak out against him. *Id., see also,* CP at 947-80.

On June 25, 2005, when U.S. District Court Judge Ronald Leighton dismissed Barrette Green's lawsuit in its entirety, among his finding of facts and conclusions of law, Judge Leighton found that Barrette Green had a "Jekyll and Hyde" existence and engaged in a "shocking pattern of physical and verbal harassment." CP at 334-338.

J. Personnel Appeals Board Rules Also Rules Against Green

On October 31, 2005, Barrette Green's appeal within the State's Personnel Appeals Board system was denied. The Board's decision came after five days of oral presentation and testimony and written closing arguments. CP at 1066. Among its other Findings of Facts and Conclusions of Law, the Personnel Appeals Board found that the weight of the evidence supported Jane Doe I's testimony and that "contrary to his duty [Green] engaged in a pattern of misconduct which undermined the department's ability to ensure that its employees were protected from any form of harassment in the workplace." CP at 1072, 1074, 1080.

II. ARGUMENT

A. The Summary Judgment Standard In Discrimination Cases Is Necessarily High

Our Supreme Court has declared that Washington's Law Against Discrimination "embodies a public-policy of the 'highest priority.'" *Xieng*

v. Peoples Nat'l Bank, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (*quoting Allison v. Housing Auth.*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991)). With that public policy objective in mind, the Ninth Circuit has also set a high standard for the granting of summary judgment in employment discrimination cases. "We require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a "searching inquiry" - one that is most appropriately conducted by the factfinder, upon a full record.'" *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994) (internal citation omitted).

Because employment cases are by their very nature fact intensive, courts have consistently held that "summary judgment in favor of employers is seldom appropriate in employment discrimination cases." *deLisle v.FMCCorp.*, 57 Wn. App, 79, 84, *rev. denied*, 114 Wn.2d 1026 (1990)(citation omitted); *see also Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160 (2000)("Summary judgment should rarely be granted in employment discrimination cases.").

B. Summary Judgment Was Inappropriate Because The Statute Of Limitations Does Not Bar Any Of Jane Doe I's Claims

At the conclusion of oral argument on summary judgment motions filed by the State, the Union and Barrette Green, the trial court ruled as follows:

> All right. Well, this case when it came in front of me some time ago the court did note that there were substantial Statute of Limitations problems. And, unfortunately ongoing discovery has not alleviated those. The acts that she complains of all occurred in 1999. The Statute of Limitations expired on his case before she commenced her lawsuit. If the court is going to say that the Statute of limitations was somehow extended by the rabbit incident or the bear in the mailbox it's going to have to be an appellate court because this court is not going to go wandering down that field. I know people complaint (sic) that we have activist judges on the bench today but I don't feel it's my role to change substantially the law of the State of Washington. That's up to the appellate court.
>
> So, I'm going to grant the motions based upon the Statute of Limitations problems and I'm not going to get to the rest of the reasons why it should be dismissed. I think the Statute of Limitations was a very stiff problem in here and the plaintiff did not overcome it. So, I'm going to grant the motion for summary judgment.

RP at 41-42. Later, the court added:

> Now, I don't know how the rabbit was killed but I do know that cats occasionally – and, I don't know if Ms. Salazar has a cat, but cats occasionally haul home prey as large as rabbits to

> bestow upon their owners as a token of their esteem. But, again, it's all speculation.

RP at 42.

Summary judgment involving statutes of limitation should be granted only when there is no genuine issue of material fact as to when the relevant limitation period commenced. *See Nevils v. Aberle*, 46 Wn. App. 344, 346, 730 P.2d 729 (1986), *rev. denied*, 108 Wn.2d 1008 (1987). Despite the trial court's ruling to the contrary, none of the claims asserted by Jane Doe I against the State, the Union and Barrette Green are barred by the statute of limitations for five main reasons: (1) the applicable statute of limitations on the sexual harassment claims were extended by *Antonius*; (2) inadequate or nonexistent remedial measures prolonged the sexually hostile work environment; (3) the "mere presence" of Barrette Green as an employee at Western State Hospital and Green's continuing role within the Union perpetuated the sexually hostile work environment for Jane Doe I; (4) the discovery rule applies to the claims of outrage; (5) the negligent retention and invasion of privacy claims were filed prior to the expiration of the statute of limitations.

1. Doe's Hostile Work Environment Claim Is A Unitary, Indivisible Sexual Harassment Claim Falling Within The Statute Of Limitations Period Pursuant to *Antonius v. King County*

In *Antonius v. King County*, the Washington State Supreme Court determined, in accord with the U.S. Supreme Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), that a sexually hostile work environment claim may be based on acts occurring more than three years before an action is filed if those acts and the subsequent acts which occurred within the three-year statute of limitations, were part of a unitary, indivisible pattern of conduct. *Antonius v. King County,* 153 Wn.2d 256, 258, 103 P.3d 729 (2004).

A hostile work environment claim "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.... Such claims are based on the cumulative effect of individual acts." *Id.* at 264 (*quoting Morgan*, 536 U.S. at 115). And, because the conduct that often makes up a hostile work environment is all part of one unlawful employment practice, "the employer may be liable for all acts that are part of this single claim" irrespective if some of those acts occurred outside of the statute-of-limitations period. *Morgan*, 536 U.S. at 118.

Additionally, the Supreme Court in *Antonius* rejected the limited nature of the discovery rule in sexual discrimination cases, explaining that the statute of limitations does not begin to run when the victim has even slight notice of harm because such knowledge simply has "no bearing on the timeliness of a hostile work environment claim." *Id.* at 269-70, n.4. It explained that because a claim of hostile work environment encompasses a "single unlawful unemployment practice ... it does not matter that a plaintiff knows or should know at the time discriminatory acts occur outside the statute of limitations period that the acts are actionable." *Antonius*, 153 Wn.2d at 265 (citing *Morgan*, 536 U.S. at 117)(internal citation omitted).

The claims that Jane Doe I brings forth must be considered within a series of acts that collectively constitute one unlawful employment practice, as illustrated in *Antonius*. *Id.* Viewed as such, the sexually hostile work environment present at Western State Hospital via the actions of Barrette Green and the acquiescence of the State and the Union must be considered as a spectrum of events endured by Doe culminating as one act of discrimination that occurred during the limitations period. *Antonius*, 153 Wn.2d at 265-66.

In this case, there were multiple incidents that occurred at various times, beginning in 1999 and continuing through 2003 at a minimum that

cumulatively make up the hostile work environment and retaliatory discrimination suffered by Jane Doe I. *Supra*. The State admits in its letter terminating Barrette Green that: 1) Green first started by grooming Ms. Salazar with closed-door conversations, personal attention and unsolicited hugs; 2) Green then called Salazar at home and spoke to her in a sexually explicit manner while masturbating; 3) Green then trapped Linda Salazar, pulled down her sweater and suckled her nipple; 4) next, Green pressured Salazar into assenting to oral sex, and; 5) then, Green came over to Salazar's home, took her hand, put it on his erect penis. CP at 297-301, 321-22. But the harassment did not stop there. CP at 944-45.

On November 25, 2003 -- the day after his termination became effective -- Barrette Green filed his ultimately failed lawsuit against Salazar individually for what he termed "defamation." CP at 947-80. In order to appropriately defend against these false allegations, it was necessary for Salazar to once again relive the facts underlying the sexual harassment. *Id.* Barrette Green's frivolous lawsuit is another element of the hostile work environment suffered by Salazar. As the Salisbury Report found, Barrette Green had a history of either threatening to file suit or actually filing suit against any woman who complained of his sexual harassment. CP at 293. And although the action was initiated by Green, the sexually hostile work environment that allowed Green to thrive was

built by and sustained through the acts and omissions of the State and Union. CP at 782.

A month after Doe's name was first inappropriately disclosed by the State to Barrette Green, Doe found a dead, partially skinned rabbit on her doorstep, which she believes was a warning from Barrette Green or his WSH supporters. CP at 1014-15. And as recently as last year, the tires on Ms. Salazar's vehicle were punctured on four separate occasions on the Western State Hospital campus. CP at 1017.

Taken individually, these discrete, single acts may or may not amount to unlawful sexual harassment. But, taken as a whole, as in *Antonius*, the "unitary, indivisible hostile work environment claim" becomes much more specifically defined. *Antonius*, 153 Wn.2d at 258. As DSHS Mental Health Director Brimner found, "The behavior described above created a stressful and hostile work environment that significantly affected the three witnesses against you, as well as others who were subjected to your unwanted advances and affections." CP at 328. The evidence of multiple acts constituting a unitary claim, beginning as early as 1999 and continuing through 2003, creates genuine issues of material fact so that summary judgment must be denied.

2. Defendant State's Failures to Take Prompt Remedial Action From the First Report of Green's Sexual Harassment Extends its Liability

Although Washington law has not dealt specifically with an employer's utter failure to remedy a sexually hostile work environment like that at Western State Hospital during Barrette Green's employment, the Ninth Circuit cases of *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), *Fuller v. City of Oakland*, 47 F.3d 1552 (9th Cir. 1995), and *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994) provide considerable guidance. In the absence of adequate state authority, federal authorities are persuasive in interpreting this state's employment discrimination statutes. *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 518 (1993).

An employer is liable for harassment when the employer has knowledge of the harassing behavior and fails to take prompt remedial action reasonably calculated to end the harassment and to prevent its future occurrence. *Ellison*, 924 F.2d at 881-82. The record demonstrates that the State knew of Barrette Green's sexually harassing behavior as early as 1988 or 1989. CP at 292, 335. Yet the State supervisors did nothing. CP at 292. Green's harassing behavior continued all the way through the charges filed by and subsequent trial of Kathleen Lizee. CP 335-38. And the affects of the sexually hostile work environment inflicted

by Green continued past the point of Green's termination in November 2003, as evidence by the skinned rabbit displayed on Jane Doe I's front doorstep. CP at 1014-15.

Part of the employer's duty involves disciplining the harasser and demonstrating to other workers that racial harassment will not be tolerated. *Ellison*, 924 F.2d at 882. The court in *Ellison* determined the standard for the reasonableness of the defendant's remedial action:

> In essence, then, we think that the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers from unlawful conduct.

Ellison, at 1528. Remedies should be "assessed proportionately to the seriousness of the offense." *Id.*, supra at 882.

Once an employer knows or should know of harassment, a remedial obligation kicks in. *Steiner v. Showboat Operating Co.*, 25 F.3d at 1464 (when employee is sexually harassed, the "only question is whether [the employer] is relieved of liability for [the harasser's] actions because it took sufficient disciplinary and remedial action in response to [the employee's] complaints."), *cert. denied*, 115 S.Ct. 733 (1995); *Fuller* at 1529. It is the existence of past harassment, as well as the risk of future harassment, that the remedy must address. *Id.* "Employers have a duty to

'express strong disapproval' of sexual harassment, and to 'develop appropriate sanctions.'" *Ellison*, 924 F.2d at 881 (quoting 29 C.F.R. Section 1604.11(f)).

Here, the State is responsible for not remedying the sexually hostile work environment created by Barrette Green's actions at Western State, because it knew of the problem a full decade before Jane Doe I was sexually harassed by Green but failed to do anything until it was far too late. CP at 321-22. The State is also responsible for the sexually hostile work environment that continued past the point of Green's termination because its chosen remedy was plainly not enough to stop the culture of harassment at Western State Hospital. CP at 1014-1017.

3. The Mere Presence of Barrette Green at Western State Hospital Continued the Sexually Hostile Work Environment for Jane Doe I

The *Ellison* Court also held that in some cases the mere presence of the harasser would create a hostile working environment. Employers have a duty to express strong and immediate disapproval of harassment. *Ellison* , 924 F.2d at 881 (quoting EEOC guidelines); *Intlekofer*, 973 F.2d at 780 n. 9 (a victim of sexual harassment should not have to work in a less desirable location as a result of the employer's remedial plan); *Ellison,* 924 F.2d at 882 (same). The knowledge of the ongoing nature of the defendants' sexually hostile work environment for Jane Doe I through at

very least the point of Barrette Green's termination was attested to by speaking agent of and Director of Human Resources for DSHS, Sherer M. Holter.[3] CP at 1063-64. During her deposition, Ms. Holter, who holds a law degree, conceded that Doe was subjected to a hostile work environment during the entire time that Barrette Green was employed by the State, until November 24, 2003:

> Q: In your assessment, and based on your personal and professional experience, the Salisbury report, and any other information that you had outside of that provided to you by attorneys, do you believe today that Linda Salazar was in a hostile work environment while Barrette Green was at Western State Hospital?
>
> ...
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> A: Based on the information provided by Ms. Salazar, it appeared that she was in a hostile work environment.

CP at 1063.

4. The Discovery Rule Applies And Is An Equitable Exception That Tolled The Statute Of Limitations And Allows Jane Doe I To Recover For the Tort of Outrage

Defendant State also claims that Plaintiff's outrage claim is barred by the three-year statute limitations. Here, many of the acts described above took place prior to the running of the three-year statute of limitations. The discovery rule clearly applies to the multiple 1999 and

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[3] Ms. Holter was formerly known as "Sherer Murtiashaw." She testified during her

2000 harassment incidents, and to the State's enduring and subsequent acquiescence to Barrette Green's sexually harassing behavior and the sexually hostile work environment it created at WSH. The discovery rule acts as an equitable exception to the statute of limitations allowing a plaintiff to recover damages for otherwise time-barred acts. *See Beard v. King County*, 76 Wn. App. 863, 867, 889 P.2d 501 (1995) (*citing Estates of Hibbard*, 118 Wn.2d at 744, 826 P.2d 690; *Allen v. State,* 118 Wn.2d 753, 758, 826 P.2d 200 (1992)). At the time of the initial harassment, Ms. Salazar could not have known that the pattern of harassment and retaliation would continue to be perpetrated by Green and acquiesced to by the State, or the severity with which it would reach. In fact, there are multiple references by Linda Salazar in her deposition transcripts that show that Linda Salazar was unable to comprehend the outrage being perpetrated against her during her employment with Western State Hospital until she met with Jan Salisbury in 2003 and with various treating mental health care professionals since 2003. CP at 1020-22, 1037-38.

5. Doe Filed Her Negligent Retention Claim and Her Invasion of Privacy Claim Well Within The Applicable Statute Of Limitations

Doe's negligent retention claim was also dismissed based on the statute of limitations but without further comment by the trial court.

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deposition that her name changed after her recent marriage.

Appellant respectfully submits that the trial court has committed obvious error in this regard. The State and the Union continued to retain Barrette Green, as a high-level WSH employee and as the Union president respectively, through 2003. Thus, the statute of limitations regarding his negligent retention should not have commenced until after he ceased the by retained. Furthermore, Mr. Green's 15-year tenure at WSH was plagued by organizational acquiescence and toleration of sexual harassment. CP at 292, 324-25, 779-782. The State on multiple occasions admitted, adopted, and promoted the truth of Jane Doe I's experiences when it finally sought to discharge Barrette Green. CP at 320-29, 986, 1068-71. Because Ms. Salazar did not and could not have become aware of the degree in which the State and the Union shielded Barrette Green from his accusers until after he was terminated on November 24, 2003, Ms. Salazar filed her claims for negligent hiring and retention well within the applicable statute of limitations.

The same is true of the State's invasion of Doe's privacy. The tort of invasion of privacy normally involves a two-year statute of limitation under RCW 4.16.100. The unauthorized disclosure of Doe's name occurred on November 6, 2003. CP at 320. Doe's complaint was filed less than two years after that date, on February 8, 2005. CP at 17.

For the aforementioned reasons, Appellant assigns error to the trial court's blanket grant of defendants'/respondents' summary judgment motions, dismissing Jane Doe I's case in its entirety based on the statute of limitations.

C. Jane Doe I's Experiences At Western State Hospital Unquestionably Satisfy Every Element Required By The WLAD & The State Is Collaterally Estopped From Arguing Otherwise

A hostile work environment sexual harassment claim under RCW 49.60.180(3) requires that Ms. Salazar prove that the harassment: 1) Is unwelcome; 2) That it occurred because of sex; and 3) That it affected the terms or conditions of employment that can be imputed to the State of Washington. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000), *rev. denied*, 141 Wn.2d 1017 (2000). An employer is vicariously liable for the harassment that is committed by a non-management employee when the employer authorized, knew, or *should have known of the harassment and failed to take reasonably prompt and adequate corrective action. Id.* The employer's constructive knowledge is proved by evidence of complaints made to the employer through higher managers or supervisors, or by evidence that the sexual harassment was pervasive enough that it gives rise to the interference of the employer's

knowledge, and that the employer's remedial action was not reasonably calculated to end the harassment. *Id.*

Evidence regarding the sexual harassment of other women, "if part of a pervasive or continuing pattern of conduct," is relevant to show a hostile work environment and probative of the employer's notice. *Perry v. Ethan Allen*, 115 F.3d 143, 151 (2nd Cir. 1997); *see also Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309, 1313 (Missouri 1995), *aff'd in part, rev'd in part on other grounds*, 107 F.3d 568 (8th Cir. 1997)("In general, 'evidence of sexual harassment directed at employees other than the plaintiff is relevant to show hostile work environment'")).

If an employer, after learning of an employee's sexually harassing conduct, either fails to take corrective action or takes inadequate action, the employer can be found to have "adopt[ed] the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2000) (*citing Faragher v. City of Boca Raton*, 524 U.S. 775, 789, 118 S.Ct. 2275, 141 L.Ed. 662 (1998)).

1. The State and the Union knew or should have known that Green was a pervasive sexual harasser.

As detailed above, beginning in 1988 and 1989, *supra*, both the State and the Union were on notice of Barrette Green's propensity to

sexually harass female employees at WSH. Because they failed to take any remedial action, both unquestionably perpetuated a culture of organizational tolerance of sexual harassment. CP at 292, 293. Barrette Green exerted all power and control over Western State Hospital's upper-level management, including Ms. Salazar's immediate supervisor, and the Union was but another puppet of Defendant Green – ready, willing and able to perform as he wished. CP at 321, 297-301. Had the State and the Union taken appropriate remedial measures, Salazar and others would have been spared the sexually harassment of Barrette Green.

According to the second report issued to the State by Salisbury Consulting, Western State Hospital fostered an organizational culture of hostile work environment:

> WSH has been described as a deeply imbedded culture that has survived for decades. Employees and supervisors alike describe rampant retaliation, favoritism and abuse of power. Patient and other complaints are used as tools to get rid of employees. People are not held accountable for lying and trusting someone is the exception, not the norm. Complaints about management and the union are often either ignored or punished. The work is highly stressful and chaotic, reflecting a siege mentality.
>
> ...
>
> Most top leadership positions at WSH appear to manage through one of the following leadership styles: laissez-faire, management by exception or in an authoritarian. The first two styles of

> management listed have been linked to higher harassment rates because they represent managers who have delegated too much and as a result are not aware and involved in managing the workplace culture until it is too late. Regular, general communication meetings between employees and managers outside of their immediate chain of command are rare. Supervisors describe themselves as lying to cover up and hide rather than dealing with conflict and complaints. They also express that they feel demoralized as a result of the ineffective system of accountability and the power of the union at the hospital.

CP at 782. In terms of notice, it was clear that DSHS upper-level management was aware of or should have been aware of Barrette Green's sexual harasser tendencies.

2. The Sexual Harassment Of Jane Doe I Is Admitted by State And The Doctrine Of Collateral Estoppel Bars The State or Green From Relitigating The Facts Of Jane Doe I's Sexual Harassment

The State and Barrette Green are collaterally estopped from re-litigating the fact issues that Doe now needs to support her claims and that the State used during other proceedings to its benefit. Moreover, the analysis and rational underlying collateral-estoppel decisions apply with full force to the facts of this case.

"The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between parties, even

though a different claim or cause of action is asserted." *Rains v. State of Washington*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) (quoting *Seattle-first Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978)). The well-known doctrine of collateral estoppel is "a means of preventing the endless re-litigating of issues already actually litigated by the parties and decided by a competent tribunal." *Reninger v. Dept. of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). The four elements required to establish collateral estoppel include the following:

> (1) identical issues; (2) final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Id. (quoting *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987)).

All four elements of collateral estoppel are satisfied here. Application of collateral estoppel would not work an injustice to the State or Green because, as the record demonstrates, both have fully and fairly litigated the merits of the exact same issues presented in this case twice – once as a defendant in a federal lawsuit filed by Barrette Green and once as a respondent defending the termination of Mr. Green in a Personnel

Appeals Board hearing. *See Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 801, 855 P.2d 1223 (1993) (providing that "Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue"); *see also Dunlap v. Wild*, 22 Wn. App. 583, 591, 591 P.2d 834 (1979).

D. WLAD Applies To The Union's Actions At Western State

1. Labor Unions May Not Discriminate Because of Sex

Ms. Salazar's WLAD claims are valid because the Defendant Union, through its actions, omissions, and agency with respect to Barrette Green, violated Ms. Salazar's right to be free from sex discrimination via sexual harassment in the workplace. Under WLAD, it is unlawful to discriminate against another because of sex. RCW 49.60.010, 49.60.030. This right to be free from sex discrimination includes "[t]he right to obtain and hold employment without discrimination." RCW 49.60.030(1)(a). For labor unions, the right to be free from gender discrimination in the workforce means that labor unions may not "discriminate against any ... employee ... because of ... sex." RCW 49.60.190. The legislature has dictated that these protections "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020.

The Defendant owed Ms. Salazar a duty to refrain from gender discrimination in the workplace. Regardless of whether Ms. Salazar was a

member of the union or simply an employee working in and around the union presence, the WLAD specifically states that a union may not discriminate against because of sex. RCW 49.60.190.[4] [5] [6]

E. Individual Accountability Of Defendant Green Under WLAD Is Appropriate And Barrette Green Is Collaterally Estopped From Arguing The Sexual Harassment Did Not Take Place

Plaintiff Doe I's claims against defendant Green in the case are based on RCW 49.60.030, RCW 49.60.180, RCW 49.60.210, RCW 49.60.220.

"We find RCW 49.60.040(3), by its very terms, contemplates individual supervisor liability.... *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d at 358.

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[4] In full, the relevant provision of the RCW 49.60.190 states: It is an unfair practice for any labor union or labor organization:
(3) To discriminate against any member, employer, employee, or other person to whom a duty of representation is owed because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.

[5] In fact RCW 49.60.190(3) was expanded in 1985 to include "other person[s] to whom a duty of representation is owed." RCW 49.60.190(3), Historical and Statutory Notes. Before 1985, the WLAD prevented labor unions from discriminating against members, employers or employees. In 1985, however, the WLAD was amended and the language "or other person to whom a duty of representation is owed" was added. The statute provides no basis to believe this language was added in order **to narrow the protections** of that provision. In fact, that would be contrary to WLAD's express intent. RCW 49.60.020.

[6] Further, the Defendant's interpretation would render the "employer" language of RCW 49.60.190(3) superfluous because it is difficult to imagine an instance when a union would owe an employer a duty of representation. Under the Defendant's strained interpretation, a union could blatantly discriminate against employers and employees unless the union somehow owed the employer/employee a duty of representation.[6] "An interpretation that produces "absurd consequences" must be rejected, since such results would belie legislative intent." *Troxell v. Rainier Pub. Sch. Dist. # 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005).

Brown specifically states that supervisors, when they "affirmatively engage" in discrimination, become personally liable to the plaintiff for their actions. *Brown v. Scott Paper Worldwide Co.*, Footnote 3, 143 Wn.2d 349, 360, 20 P.3d 921 (2001) (citing *Tyson v. CIGNA Corp.*, 918 F.Supp. 836, 841-42 (D.N.J.1996), *aff'd*, 149 F.3d 1165 (3d Cir.1998)). "The plain meaning of RCW 49.60.040(3), by its very terms, encompasses individual supervisors and managers who discriminate in employment. Moreover, enabling employees to sue individual supervisors who have discriminated against them is consistent with the broad public policy to eliminate all discrimination in employment." *Brown*, 143 Wn.2d at 361-62.

Barrette Green's position as a manager and supervisor, together with his role as union president, put him in a position to significantly control the conditions of employment for female employees, including Linda Salazar. CP at 321-22. For example, the independent investigators of Salisbury Consulting found that, contrary to his self-serving declaration accompanying this motion, Barrette Green had tremendous power from his position as union boss and manager. CP at 289-90.

There are factual questions that bar defendant Green from obtaining judgment as a matter of law regarding his personal liability for the sexually hostile work environment he created at WSH for Jane Doe I.

F. Jane Doe I Suffered Multiple Incidents Of Retaliation After Cooperating With The State's Investigation Against Barrette Green That Are Part And Parcel Of The Hostile Work Environment

The acts of retaliation experienced by Ms. Salazar, as described above, were no doubt a by-product of the sexually hostile work environment ratified by the State's omissions and actions, such as the several promotions granted to Barrette Green after his sexually harassing behaviors were exposed. As indicated by the Salisbury Report, it was a well-known fact that Barrette Green established a pattern of retaliation against women who he knew participated in the Lizee lawsuit. CP at 293-96. It was not uncommon for Barrette Green to send in "The Green Machine" to do his dirty work, and Barrette Green often intimidated his victims by threatening to file suit against them and sometimes actually following through with that threat. CP at 294.

This prior knowledge of Green and the Union's retaliatory actions against complaining witnesses, coupled with the retaliation suffered by Jane Doe I described above including the dead, skinned rabbit and the green bear, create a genuine issue of material fact. Thus, summary judgment should not be granted on this issue.

G. Serious Questions Of Fact Exist Regarding Jane Doe I's Outrage Claim

To establish an outrage claim, Ms. Salazar must show: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress, and; (3) actual severe emotional distress. *See Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (*citing Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987)).

The question of whether conduct is sufficiently outrageous is normally for a jury to decide. *See Birklid v. Boeing*, 127 Wn.2d 853, 904 P.2d 278 (1995). In order to get the question to a jury, however, it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Id.*

There can be little argument that Barrette Green's conduct, including his sexually explicit phone calls, forcing his mouth on Ms. Salazar's breast while at work, pressuring Salazar to engage in oral sex, displaying a gun and putting her hand on his penis, rises to the level of extreme and outrageous conduct. CP at 321-22. And as Dr. Linda Collinsworth found in her 12-hour, independent examination of Linda Salazar (Jane Doe I), the psychological impact has been severe. CP at 896-97.

H. Questions Of Material Fact Exist About Whether The State And Union Negligently Hired, Retained And Supervised Barrette Green

1. Employee/employer

An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries. *Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 252, 868 P.2d 882 (1994) (citing *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108 (1992); *Guild v. Saint Martin's College*, 64 Wn. App. 491, 498-99, 827 P.2d 286 (1992)). But the employer's duty is limited to foreseeable victims and then only "to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997).

"Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of

action are based on the theory that "such negligence on the part of the employer is a wrong to the injured party, entirely independent of the liability of the employer under the doctrine of respondeat superior." *Robel*, 148 Wn.2d at 53, n.8 (citing another case).

The Salisbury Report and the adoption of the Salisbury Report's findings by the State, along with the decisions by U.S. District Court Judge Ronald Leighton and the Personnel Appeals Board, confirm that, throughout his career at Western State Hospital, Barrette Green was as prolific a sexual harasser of female employees as can be imagined. *Supra.* Given those indisputable facts, there is certainly a jury question as to whether the Defendant State and Defendant Union knew or should have known that continuing to promote and protect Barrette Green through the ranks of Western State Hospital and the Union was endangering those female co-workers who regularly worked with and encountered Green, like Plaintiff Linda Salazar.

I. The State Of Washington Wrongfully Published And Publicized Jane Doe I's Name Without Privilege And After Expressly Promising Confidentiality And Anonymity

Karl Brimner, Director of Mental Health Division of DSHS, declared, under penalty of perjury, to the Honorable Vicki L. Hogan on April 16, 2003 that the State of Washington promised confidentiality during its investigation of additional allegations made during the Lizee

lawsuit against Barrette Green:

> "All allegations of harassment or discrimination or workplace violence may be reported directly to the Director of Mental Health Division and/or the Director of the Human Resources Division for review and appropriate follow-up. It is my intent and that of the Secretary Braddock's to ensure that employees understand that allegations are confidential and will be appropriately addressed without retaliation and retribution.

CP at 1085, 1086.

Despite the above-declaration promising confidentiality to all employees made by Mr. Brimner, a speaking agent of the State, under penalty of perjury and the additional admissions found *supra*, the State has disclaim responsibility for this invasion of Jane Doe I's privacy.

In *Fisher v. State*, the court clarified the meaning of "publicity" by explaining that publication to a small group or a single person may qualify as publicity, under the current law, if the nature of the material disclosed was a highly offensive communication that outweighed the limited scope of the publicity. *Fisher v. State of Washington*, 125 Wn. App. 869, 879, 106 P.3d 836 (2005). Additionally, "...people enjoy constitutional protections from government invasion of their right to privacy arising from the *First*, *Fourth*, *Fifth*, *Ninth*, and *Fourteenth Amendments* as well as the fundamental concept of liberty." *Fisher v. State of Washington*, 125 Wn. App. at 880, (citations omitted)(emphasis in original). Salazar relied

on a promise of confidentiality by the State, that promise was broken and she suffered the consequences. CP at 1028, 1075.

Even before the Salisbury Investigation was commenced, Mr. Brimner proclaimed and promised to all Western State Hospital employees--on DSHS letterhead--that all information divulged by accusers would remain confidential:

> "It is important to me that all employees feel that they can safely report allegations of harassment, retaliation and workplace violence in a manner that maintains confidentiality. As a result, I intend to review the current reporting process and implement changes as necessary. In the interim, to fully ensure confidentiality, I am asking all employees to report issues and concerns directly to me and/or Sherer Murtiashaw, Director of Human Resources Division. I assure you that your complaints will be delivered directly to my office or Sherer's and we will personally review them and respond in an appropriate and timely manner.
>
> Allegations may be delivered via campus mail or the U.S. Postal Service. Please mark all envelopes "PERSONAL AND CONFIDENTIAL" and send them to one of the following addresses ..."

CP at 1088.

And, again, the very next day, a promise of confidentiality was made to all Western State Hospital employees in a memo by Dennis Braddock, Secretary of DSHS. CP at 1090.

In addition, the State provided its employees promises of confidentiality in weekly bulletins disseminated by the State to Western State Hospital employees, including Ms. Salazar. CP at 1092.

Additionally, Salisbury Consulting, based on instructions provided to it by the State, also provided Ms. Salazar with express promises of confidentiality on which she relied:

> Q: Okay. And what did Jan Salisbury say to you exactly?
>
> A: She said that the information was confidential. And when she said that she would be writing a report to the state in her investigation, that she would include the information. And I asked her then what that meant exactly, and I wanted to be sure that my name wasn't included. She said that she would provide the information but not the names.
>
> And at that point, I said, well, if you include the information and he's privileged to the information, he'll know who it is. And so part of the -- she -- she assured me that -- that the names wouldn't be provided.

CP at 1019.

Based on the above, there is a question of material fact as to whether or not the State's publication of Ms. Salazar's name in its termination letter to Barrette Green was absolutely necessary to ultimately discharge Barrette Green.

III. CONCLUSION

Summary judgment was not appropriate in this case. The toxic, sexually hostile work environment experienced by Jane Doe I and others at WSH continued as long as Barrette Green remained in control. Appellant Jane Doe I respectfully request that this Court reverse the trial court and remand this case for trial.

Dated this 19 day of June, 2006.

Respectfully submitted,

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JANE DOE I, Plaintiff, v. THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES; WESTERN STATE HOSPITAL; BARRETTE GREEN; and WASHINGTON FEDERATION OF STATE EMPLOYEES, LOCAL 793, Defendants.	NO. 34357-6-II PROOF OF SERVICE

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I hereby certify that I am not a party to this action and that I have placed the following documents:

1. Brief of Appellant; and

2. Proof of Service.

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Signed this 20th day of June, 2006 in Tacoma, Washington.

TRICIA D. YUE