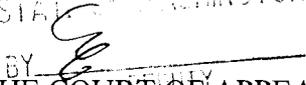


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NO. 34357-6-II

STATE OF WASHINGTON

BY 
C. CHRISTIE

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JANE DOE I,

Appellant,

v.

THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; WESTERN STATE HOSPITAL; BARRETTE
GREEN; and WASHINGTON FEDERATION OF STATE
EMPLOYEES, LOCAL 793,

Respondents.

**BRIEF OF RESPONDENTS STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES, AND
WESTERN STATE HOSPITAL**

Robert L. Christie, WSBA #10895
Attorney for Respondents State of
Washington, Department of Social &
Health Services, and Western State
Hospital

CHRISTIE LAW GROUP, PLLC
2100 Westlake Avenue N., Suite 206
Seattle, WA 98109
(206) 957-9669

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I. COUNTERSTATEMENT OF THE ISSUES AS TO THE RESPONDENT STATE OF WASHINGTON DEFENDANTS¹

1. Did the trial court err in holding that appellant/plaintiff's (Salazar's) claims of sexual harassment, disparate treatment, retaliation, outrage, negligent retention, and invasion of privacy against the State defendants are each barred by the applicable three-year statutes of limitations?

2. If not time-barred, should Salazar's claims against the State defendants for sexual harassment, disparate treatment, retaliation, outrage, negligent supervision and invasion of privacy be dismissed on summary judgment as insufficient as a matter of law, particularly when viewed against the record properly before the court and disregarding those materials that are the subject of defendants' motion to strike?

II. COUNTERSTATEMENT OF THE CASE

A. Statement of Proceedings

On February 8, 2005, Ms. Salazar (Jane Doe I) filed a complaint against Barrette Green (Green), the State defendants, and the Washington Federation of State Employees (WFSE). On March 29, 2005, plaintiff filed a First Amended Complaint functionally identical to the original

¹ Throughout this brief, the defendants State of Washington, Department of Social and Health Services, and Western State Hospital will be referred to collectively as the State or State defendants.

Complaint. (CP 18-34) On June 30, 2003, the State filed its Answer to Plaintiff's First Amended Complaint, asserting as an affirmative defense that all of Ms. Salazar's claims were barred by statutes of limitations. (CP 227-237)

Defendant Green moved for summary judgment of dismissal of Salazar's complaint on statute of limitations grounds on June 16, 2005. Plaintiff opposed that motion on the basis that she needed additional time to conduct discovery. (CP 354-381) Judge Katherine Stolz granted plaintiff's motion and ordered the summary judgment continued until the close of discovery. (CP 432-33)

Following months of discovery by plaintiff's counsel, all defendants brought on similar motions for summary judgment, all scheduled for hearing on January 6, 2006. The State filed its motion on December 9, 2005. (CP 510-31) By agreement, the State took Ms. Salazar's deposition on December 29, 2005 and then re-filed its revised motion for summary judgment, noting it for hearing on January 20, 2006.² (CP 623-46) Judge Stolz granted all defendants' motions. The order granting the State's motion was entered on January 20, 2006. (CP 1921-23) Plaintiff filed a timely Notice of Appeal on January 27, 2006. (CP

² The co-defendants' motions were reset to January 20, 2006 so that all motions could be heard together given their interrelated nature.

1933-43)

B. Counterstatement of Facts

As in her response to the various summary judgment motions, plaintiff's STATEMENT OF THE CASE is replete with immaterial facts and with references to materials that should be disregarded since they do not meet the evidentiary requirements of CR 56 (e).³ For the purposes of summary judgment only, the State submits the following counterstatement of undisputed facts in a light most favorable to the plaintiff.

Plaintiff began her employment at Western State Hospital in 1985 as an RN 2. Salazar's 2004 deposition 11:16-23, attached hereto as Exhibit 1 to Declaration of Jason M. Rosen.⁴ (CP 538) Plaintiff left Western State Hospital in 1987. *Id.* (CP 538) She returned as a temporary RN 2 in 1994. *Id.*, at 15:12-14. (CP 539) Plaintiff progressed to a permanent RN 3 in 1996, and maintained this position until 1998 or 1999, when she was promoted to a temporary RN 4, a position she held for approximately one and a half years. *Id.*, at 16:7-16. (CP 539) Plaintiff

³ The State moved to strike certain enumerated documents from the record on summary judgment. (Supplemental CP 1977-1981)

⁴ For the purpose of the summary judgment motion and this appeal, plaintiff's testimony is taken from her 2004 and 2005 depositions as opposed to a 2002 deposition at which she admits withholding the truth. A copy of the 2004 deposition is attached in its entirety to the Rosen Declaration at (CP 535-573). Plaintiff's December 29, 2005 deposition in its entirety is attached as Exhibit A to the Supplemental Declaration of Jason M. Rosen. (CP 651-680)

then became a community nurse specialist, the position she currently holds. Salazar's 2005 dep. 6:2-5. (CP 652) Both the RN 3 and RN 4 positions were supervisory positions. *Id.*, at 87:25-88:8. (CP 672)

When plaintiff returned to Western State Hospital in 1994, she went through a two-week orientation period that included training with respect to the sexual harassment policy. Salazar's 2004 dep., at 27:17-28:3. (CP 542) Plaintiff reviewed and understood this policy at that time. *Id.*, at 28:5-11. (CP 542) Plaintiff also understood that as a supervisor in her RN 3 and RN 4 positions, she had a responsibility to report sexual harassment she observed or was aware of. *Id.*, at 30:3-11. (CP 543) When plaintiff was promoted to her RN 3 position in 1996, she received additional sexual harassment training, the purpose of which was to make her more aware of the issues of sexual harassment. *Id.*, 31:19-32:14. (CP 543)

In 1994, Barrette Green was promoted to a temporary Forensic Therapist ("FT") 2 position. Declaration of Barrette Green at p. 2, ¶ 2, attached as Exhibit 2 to Rosen Dec. (CP 576) Later in 1994, defendant Green was promoted to a permanent FT 1 position, and shortly thereafter a permanent FT 2 position. *Id.* In October 1999, defendant Green was again promoted to a temporary FT 3 supervisor position in the Center for Forensic Services. *Id.*, at ¶ 3. His duties were to maintain his then current

caseload consisting of up to 16 patients on Ward M-1 and supervise two FT 2's on Ward M-7, one male and one female. *Id.* This was defendant Green's first supervisory position at Western State Hospital, and did not involve any supervision of, or work with, plaintiff. *Id.* In fact, Mr. Green never worked with, supervised nor managed plaintiff in any of his positions while employed at WSH. *Id.*

Mr. Green was placed on home assignment on April 3, 2003 following allegations of misconduct. *Id.*, at ¶ 5. Mr. Green remained on home assignment until November 7, 2003, when he was issued a 15-day suspension with termination to immediately follow, effective November 24, 2003 based on alleged acts of misconduct, including those made by plaintiff. See November 6, 2003 termination letter to Green, attached as Exhibit 3 to Rosen Dec. (CP 589-598)

Plaintiff's first five causes of action are based entirely on four incidents involving Mr. Green, which she now asserts were sexual harassment. Salazar's 2004 Dep., 90:22-24. (CP 558) The first incident occurred on a weekend evening in 1999 when Mr. Green called plaintiff from a hotel room in Seattle and said he wanted plaintiff to come to Seattle to spend the night with him. *Id.*, at 91:5-92:21. (CP 558) The following morning Mr. Green again called plaintiff and spoke to her in a sexual manner. *Id.*, at 94:13-25. (CP 559) Plaintiff never reported either

of these phone calls to anyone at Western State Hospital. *Id.*, at 97:10-15. (CP 559)

The next alleged incident occurred a couple of weeks after the phone calls when plaintiff went to Barrette Green's office. *Id.*, at 100:2-11. (CP 560) On this occasion, Mr. Green allegedly took plaintiff by the arm, moved her to the wall, and pulled down her sweater and bra and kissed her breasts. *Id.*, at 101:5-7. (CP 560) Plaintiff also has testified that there was one occasion between the phone calls and this incident when Mr. Green attempted to kiss plaintiff on the mouth. *Id.*, at 102:8-103:1. (CP 561) Plaintiff did not report any of this conduct to anyone at Western State Hospital prior to the Salisbury investigation in 2003. *Id.*, at 108:16-19. (CP 562)

The next alleged incident of sexual conduct by Mr. Green towards plaintiff occurred when Mr. Green requested permission, which was granted, to go to plaintiff's house and perform oral sex on her. *Id.*, at 111:3-7. (CP 563) Plaintiff has previously testified that this occurred during mid-2000 at the latest. *Id.*, at 111:19-24. (CP 563) (Her most recent testimony indicates that all the personal interaction between herself and Mr. Green occurred during the fall of 1999. Salazar's 2005 dep. 84:24-85:5.) (CP 671-72) Mr. Green had asked plaintiff if he could come to her house and perform oral sex, and she said yes. Salazar's 2004 dep.,

at 115:4-5. (CP 564) Plaintiff gave Mr. Green her address and directions to her home. *Id.*, at 114:24-25. (CP 563) This conversation regarding coming to plaintiff's house for oral sex took place in Mr. Green's office when plaintiff paid a personal visit to Mr. Green after the breast kissing incident. *Id.*, at 115:18-116:5. (CP 564)

The last alleged incident was a subsequent, second visit to her house. *Id.*, at 124:20-23. (CP 566) Mr. Green was at plaintiff's home for 15 to 20 minutes. *Id.*, at 127:7-9. (CP 567) The alleged sexual conduct occurred when Mr. Green put plaintiff's hand on his erect penis, and when plaintiff pulled it away Mr. Green said that she was "nasty." *Id.*, at 129:4-5. (CP 567) Plaintiff did not tell Mr. Green not to do that, or that she found it offensive, or to get out of her home, or that she did not want to be his friend anymore. *Id.*, at 129:8-16. (CP 567) In fact, plaintiff still considered herself to be Mr. Green's friend at that point. *Id.*, at 129:17-18. (CP 567)

This second visit to plaintiff's home in 1999 was the last incident of alleged sexually harassing behavior. *Id.*, at 132:18-21. (CP 568)

Plaintiff did not tell anyone the substance of her involvement with Mr. Green before her interview with Jan Salisbury in 2003. *Id.*, at 132:4-8. (CP 568)

None of the incidents of alleged sexual misconduct by Mr. Green

towards plaintiff had any impact on her ability to work. *Id.*, at 125:20-23. (CP 566) Plaintiff did not believe Mr. Green's conduct warranted any response from an employment perspective, but rather considered it a personal matter. *Id.*, at 109:17-25. (CP 562) Plaintiff did not consider the conduct of Mr. Green to be sexually harassing behavior until after she spoke with Jan Salisbury approximately three years after the behavior ended, (and another woman had received a substantial settlement with the State based on her own allegations against Mr. Green). *Id.*, at 113:11-15. (CP 563) Mr. Green never threatened plaintiff with a gun, or in any other fashion. *Id.*, at 145:6-11. (CP 571)

On December 8, 2003, plaintiff found a dead rabbit on the welcome mat of her front door. *Id.*, at 142:11-23. (CP 571) Plaintiff filed a police report, but has no information regarding who, if anyone, is responsible for the dead rabbit on her porch. *Id.*, at 143:1-8. (CP 571) Plaintiff asserts that the dead rabbit is evidence of harassment and/or retaliation against her by Barrette Green. A police report regarding this incident was filed. Exhibit 4 to Dec of Rosen. (CP 600-01) In addition, the secretary of DSHS, Dennis Braddock, sent a letter to local law enforcement agencies regarding this incident and other similar incidents experienced by other Western State Hospital employees, encouraging an investigation into whether these events were related to Mr. Green's

termination and to help prevent any further similar incidents. Exhibit 5 to Rosen Dec. (CP 603-04) In her 2004 deposition plaintiff testified that she had not experienced any incidents similar to the dead rabbit. *Id.*, at 143:9-12. (CP 571) She now asserts that another instance of retaliation occurred when she found a green bear in her work mailbox one week after the rabbit incident. Salazar's 2005 dep., 17:4-7. (CP 655) On December 15, 2003 plaintiff found the small stuffed bear in her mailbox, thinking a patient had put it there as a Christmas gift. *Id.*, at 18: 1-4. (CP 655) There was no message with the bear and plaintiff has never determined who gave it to her or how it got in her mailbox. *Id.*, at 19:12-23. (CP 655) Plaintiff did not even associate the bear with Mr. Green or think in represented anything specific. *Id.*, at 23:6-13. (CP 656) Rather, her co-workers suggested the correlation between a "green bear" and "Barrett Green." *Id.*, at 23:18-22. (CP 655) But plaintiff herself testified that receiving the bear "boiled down to nothing" and hadn't affected her work at all. *Id.*, at 24:7-11. (CP 655)

Plaintiff was never promised unconditional confidentiality by the State or Salisbury Consulting. Brimner Dep., 24:11-25:1, Ex. 6 to Rosen Dec. (CP 607) There is no way to guarantee an accuser's identity will stay confidential following an investigation of wrongdoing, and for that reason, it is never promised. *Id.* (CP 607) Plaintiff states that Jan

Salisbury told her in her interview that information Salisbury garnered through the investigation would be included in her report but that names would not be included. Salazar's 2005 dep., at 38:14-21. (CP 660) But plaintiff admits that regardless whether her name was revealed, the allegations made by her regarding her interaction with Mr. Green would allow Mr. Green to identify her if presented with those allegations. *Id.*, at 38:22-39:8. (CP 660) Ms. Salisbury did not tell plaintiff that Mr. Green would not have access to the allegations made against him. *Id.*, at 39:9-12. (CP 660)

The State has specific policies and procedures it must follow when disciplining employees. Among these is DSHS Personnel Policy 545, which outlines the procedure for investigating employee misconduct, and includes the right of the accused to be informed of the identities of his accusers. Personnel Policy 545, Section V.(B.), Ex. 7 to Rosen Dec. (CP 610-13) The Collective Bargaining agreement in place at the time also gave employees the right to know the identity of their accusers. Ex. C to Green Dec. (CP 205) The termination of Mr. Green could not have been conducted properly without disclosing plaintiff's name in conjunction with releasing the Salisbury report of Mr. Green's conduct. It was important to plaintiff that Mr. Green be disciplined for the conduct she alleges he directed towards her, and that the process for such discipline be done

properly. Salazar's 2005 dep., at 30:17-31:6. (CP 658) Plaintiff is not aware of any disciplinary proceeding within Western State Hospital, or DSHS, where the identities of the accuser were not provided to the accused. *Id.*, at 31:8-12. (CP 658) Nor does plaintiff articulate any reason to believe that her identity was revealed to Mr. Green for any purpose other than to comply with the disciplinary policies and procedures. *Id.*, at 30:10-16. (CP 658)

III. ARGUMENT

A. *Summary Judgment Standard-Striking Materials That Do Not Comply With CR 56.*

The standard of review for this court is *de novo* review, undertaking the same analysis as did the trial court. Under Rule 56 (c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Plaintiff suggests, incorrectly, that the test for summary judgment is different in employment cases. In *deLise v. FMC Corp.*, 57 Wn.App. 79, 84, *rev. denied* 114 Wn.2d 1026 (1990), cited by plaintiff, the court held "[w]e find absolutely no basis for deviating from established summary judgment rules in employment discrimination cases." That court

cited with approval to *Grimwood v. UPS*, 110 Wn.2d 355 (1988), an oft-cited decision for the definition of the type of evidence necessary to create a genuine issue of material fact:

It is apparent that the emphasis is upon *facts* to which the affiant could testify from personal knowledge and which would be *admissible in evidence*. Thus, there is a dual inquiry as to whether an affidavit sets forth “material facts creating a genuine issue for trial”: does the affidavit state material facts, and, if so, would those facts be admissible in evidence at trial? If the contents of an affidavit do not satisfy both standards, the affidavit fails to raise a genuine issue for trial, and summary judgment is appropriate. A fact is an event, an occurrence, or something that exists in reality. *Webster's Third New Int'l Dictionary* 813 (1976). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. 35 C.J.S. *Fact* 489 (1960). The “facts” required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. *See Hatch v. Bush*, 215 Cal.App.2d 692, 30 Cal.Rptr. 397 (1963). Likewise, conclusory statements of fact will not suffice. *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wash.App. 757, 767, 551 P.2d 1038 (1976).

Rather than pointing to the facts, which clearly support summary judgment, plaintiff takes broad liberties with inadmissible hearsay and conclusory opinions to try and embellish her case. Here, as below, plaintiff repeatedly cites to language contained in the “Salazar Report”

(CP 1139-1153) as if the statements constitute “facts.” The report, whether or not admissible, is certainly not admissible for the purposes of proving the truth of the information contained in it. This same problem befalls virtually all of the exhibits to Mr. Cochran’s declaration (at CP 1134-37) as outlined in the State’s Motion to Strike (at CP 1977-1981; State defendants’ supplemental designation of clerks papers filed contemporaneous with this brief).

Another example is Exhibit C to the Cochran declaration (at CP 1170-79), a pleading filed in a separate lawsuit (*Lizee v. State of Washington, et al*) entitled SPECIAL MASTER’S REPORT ON SETTLEMENT AND INJUNCTIVE RELIEF.” The content of the document is entirely hearsay. The “fact” of the document’s existence is undisputed, but immaterial. Plaintiff relies on its content, just like the Salisbury Report. These materials should be disregarded as part of this court’s *de novo* review.

Pages 11 through 13 of defendant WFSE’s brief address in more detail the flawed submissions attached to the Cochran declaration. The State defendants incorporate those arguments here for the sake of brevity and to avoid unnecessary repetition.

When this chaff is separated from the wheat, there are no genuine issues of material fact and the State defendants are entitled to have this

court affirm summary judgment dismissal of plaintiff's complaint on both statute of limitations and substantive grounds.

B. Plaintiff's WLAD, Outrage and Negligence Claims Are Barred by the Applicable Statute of Limitations.

Plaintiff's claims under the Washington Law Against Discrimination, as well as her claims for outrage and negligence are barred as a matter of law by the three-year statute of limitations in RCW 4.16.080. Courts apply the general three-year statute of limitations to employment discrimination claims under RCW 49.60, reasoning that violations of this chapter amount to an invasion of a person's legal rights. *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 820 (1990). Likewise, the applicable statute of limitations for outrage is three years. RCW 4.16.080(2); *Milligan v. Thompson*, 90 Wn.App. 586, 592 (1998). Plaintiff's claims for negligent hiring/retention are also subject to a three-year statute of limitations. RCW 4.16.080(2).

It is undisputed that no conduct upon which plaintiff bases her claims for discrimination, outrage and negligence occurred after the end of 1999. In fact, the last such allegation occurred on the second visit by Mr. Green to plaintiff's home in the fall of 1999. Therefore, in order to assert a timely cause of action for this conduct, plaintiff would have had to have filed her claims within three years of the date of that second visit to

plaintiff's home – sometime by the end of 2002. However, plaintiff did not file her complaint in this action until February 28, 2005, more than five years after all the conduct upon which her claims are based occurred. As a matter of law, plaintiff's claims for discrimination, outrage and negligence are barred and must be dismissed.

1. Antonius Does Not Apply.

Plaintiff's primary argument against the clear application of the statute of limitations is based upon the principles established in the recent Supreme Court decision *Antonius v. King County*, 153 Wn.2d 256 (2005), which adopted the analysis from *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). However, the facts of this case do not bring plaintiff's claims within the statute of limitations under *Antonius*.

In *Antonius*, the plaintiff filed suit against the County on December 22, 2000, alleging the County violated Chapter 49.60 RCW by fostering and maintaining a sex-based hostile work environment.⁵ In applying the statute of limitations to hostile work environment harassment claims, the Court adopted the analysis in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). *Id.*, at 258-259. *Antonius*, adopting

⁵ *Antonius*, at 260. Plaintiff's claims involved allegations that as a corrections officer she was periodically subjected to pornographic materials of both inmates and coworkers, and was subjected to derogatory comments towards herself and other females. *Id.*, at 259. The alleged conduct occurred from 1985 through 2000 to varying degrees of frequency. *Id.*, at 259-60.

Morgan, holds that a hostile work environment claim involves repeated conduct, occurs over a series of days or perhaps years, and is based on the cumulative effect of individual acts comprising “unlawful employment practice.” *Id.*, at 264. The effect of *Antonius* on the WLAD is such that conduct, which might previously have been denied consideration for liability or damages because it fell outside the statute of limitations, can now be considered under the *Morgan* analysis. *Id.*, at 265-266. However, at least some of the conduct comprising plaintiff’s claim must have occurred within the statute of limitations for such claim to succeed. *Morgan* states that “[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.” *Id.*, at 264 (citing *Morgan*, 536 U.S. at 117).

In *Antonius*, the plaintiff filed her lawsuit within three years of at least some of the offensive conduct. *Id.*, at 260. Here, no conduct attributable to the State occurred between the end of 1999 and February 25, 2002 upon which plaintiff can maintain her claim for hostile work environment, and summary judgment dismissal is appropriate.

Plaintiff argues, as she did below, that Mr. Green’s commencement of a lawsuit against her in November 2003 (after the State terminated his employment) and her discovery of a dead rabbit on her door step, bring

her claims within the statute of limitations under *Antonius*. This analysis is flawed for the reasons articulated in WFSE's brief (pages 16-19). Initially, *Antonius* only applies to the WLAD claim and not to plaintiff's claims of negligence and outrage. Plaintiff ignores this point entirely.

Next, Green's act of initiating a lawsuit after his termination, naming the State as a defendant, cannot conceivably be used by plaintiff against the State as a way of extending the statute of limitations. It does not, as a matter of law, "constitute part of the same hostile work environment claim." *Antonius*, at 271. Finally, the incident involving her discovery of a dead rabbit, even if somehow linked to Mr. Green or one of his ghost-like "supporters", is likewise not the type of interconnected act described in *Morgan* or *Antonius*. Neither occurred in the workplace and neither involved anyone employed with the State.

This court should reject plaintiff's attempt to expand *Antonius* in a way that would achieve the absurd result that a former employee, terminated for misconduct, could bring suit against his former employer and thereby extend the statute of limitations of a claim against the State by another employee. Plaintiff's WLAD, outrage, and negligence claims against the State should be dismissed as a matter of law because they are untimely.

2. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) is Inapplicable to the Statute of Limitations.

Plaintiff's next two arguments ignore the statute of limitations entirely and rely instead on a line of cases from the Ninth Circuit that speak to the test for measuring the reasonableness of an employer's response to a **timely** claim of workplace harassment. In *Ellison* there was no statute of limitations issue. Judge Beezer, writing for the panel, identified the issues on appeal as follows: "This appeal presents two important issues: (1) what test should be applied to determine whether conduct is sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment, and (2) what remedial actions can shield employers from liability for sexual harassment by co-workers." *Id.* at 873. Plaintiff's discussion of *Ellison* therefore misses the point. Nothing about the decision provides a legal basis for extending the statute of limitations.

Further, Green's "mere presence" in the workplace, in and of itself, does not save plaintiff's WLAD claims. There must be proof, something not present in this record, of actionable conduct on the part of the harassing party occurring within the reach of the statute of limitations. In its discussion of this "mere presence", the court *Ellison* recognized that this is a fact driven inquiry: "The district court did not reach the issue of the reasonableness of the government's remedy. Given the scant record on

appeal, we cannot determine whether a reasonable woman could conclude that Gray's mere presence at San Mateo six months after the alleged harassment would create an abusive environment. Although we are aware of the severity of Gray's conduct (which we do not consider to be as serious as some other forms of harassment), we do not know how often Ellison and Gray would have to interact at San Mateo." Plaintiff has presented no evidence of Green allegedly harassing her after 1999. His alleged harassment of other women (assuming the court accepts the hearsay statements in the Salisbury report as proof of their truth) does not support her claim.

Similarly, in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), there was no statute of limitations issue. Plaintiff's snippet quotations from this case are no substitute for thoughtful analysis and do not advance Ms. Salazar's claim. This case stands for the proposition that the adequacy of the employer's response to complaints of discrimination can be an issue for trial, but only where plaintiff has presented evidence creating a genuine issue for trial. That is not so here. Plaintiff's claims under the WLAD and for outrage and negligence should be dismissed as time barred.

3. The “Discovery Rule” Does Not Apply to Preserve Plaintiff’s Outrage Claim.

Plaintiff’s next argument is that the discovery rule preserves her tort of outrage claim. The discovery rule tolls the statute of limitations on a particular plaintiff’s case when facts giving rise to a claim are unknown or are not reasonably discoverable until after the occurrence of the event that gives rise to plaintiff’s cause of action, and it would therefore be inequitable to begin running the statute of limitations when that event occurs. *Peters v. Simmons*, 87 Wn.2d 400, 405-6 (1976). In this case, the events giving rise to plaintiff’s cause of action were the 1999 sexual incidents between plaintiff and Barrette Green. Since a subjective belief by the plaintiff that she was being sexually harassed is a necessary element of her claim, all the elements giving rise to any potential cause of action stemming from those events were within plaintiff’s actual or apparent knowledge at that time such that there is no basis to apply the discovery rule in this case.

In *Gevaart v. Metco*, 111 Wn.2d 499, 501 (1988), the Washington Supreme Court defined application of the discovery rule as follows:

The general rule in a personal injury action is that a cause of action “accrues” at the time the act or omission occurs, however, in certain torts, injured parties do not, or cannot, know they have been injured. In those cases, the cause of action accrues at

the time the plaintiff knew or should have known all of the essential elements of the cause of action, i.e., duty, breach, causation and damages. This rule, which postpones the accrual of the cause of action, is known as the "discovery rule."

In that case, Debbie Gevaart brought a negligence action against defendant Metco Construction, Inc., claiming negligent design and construction of a stairway. *Id.*, at 500. On October 25, 1981, Gevaart ascended the stairs to her residence in the Executive Manor Condominiums. Upon reaching the top step, which sloped downward, she lost her balance and fell backwards. *Id.*

Sometime after November 1981, Gevaart learned, from a discussion with her family and friends, that the slope of the step may have been improperly constructed. *Id.*

The Supreme Court concluded that as of October 25, 1981, the date of Ms. Gevaart's fall, all the essential elements of her cause of action had occurred. *Id.*, 502. The plaintiff argued that she assumed the slope which caused her fall was for drainage and that as of three years prior to the date she filed her lawsuit, she had no knowledge of a possible professional negligence action against the defendants. *Id.* The court went on to state, "however, the discovery rule does not require that knowledge of the existence of a legal cause of action. ... To so require would

effectively do away with the limitations of actions until an injured person saw his/her attorney. ... This is not the law.” The court held that plaintiff could have determined the step did not conform to the building code, and further the true reason why her cause of action existed. Because plaintiff did not exercise due diligence, her cause of action was barred by the three-year statute of limitations. *Id.*

Here, plaintiff was aware of her sexual activities with Mr. Green, and the impact, if any, such relationship had on her. With her extensive sexual harassment training as a supervisor at Western State Hospital, she was able to determine whether Mr. Green’s conduct was appropriate. Since plaintiff did not subjectively perceive the environment to be abusive, the conduct did not actually alter the condition of plaintiff’s employment and therefore would not meet the elements of sexual harassment. See *MacDonald v. Korum Ford*, 80 Wn.App. 877 at 885 (1996), citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Assuming for the sake of argument that plaintiff was sexually harassed, she had knowledge of all the elements giving rise to a cause of action for these events in 1999, making application of the discovery rule to plaintiff’s claims inappropriate.

4. Collateral Estoppel Has No Application.

Plaintiff’s collateral estoppel claim is a red herring built on a house

of cards, the foundation of which is the Salisbury report and the continued reliance on it for the truth of its hearsay contents. The issue of whether plaintiff has a legally actionable cause of sexual harassment timely asserted within the statute of limitations has never been litigated. While the State has prevailed on its claim that Mr. Green was lawfully terminated, there has never been an adjudication directly addressing Mr. Green's conduct involving Ms. Salazar. Noticeably absent from plaintiff's argument is any citation to the Clerk's Papers, to some decision, on the merits, involving, as plaintiff boldly proclaims in her brief, "the exact same issues presented in this case." (Appellant's Opening Brief, P. 39) Beyond correctly citing the elements of collateral estoppel, plaintiff's argument is devoid of sufficient merit to warrant further discussion. The only decision on the issues presented here is Judge Stolz's summary judgment dismissing plaintiff's complaint. This court should affirm her decision.

C. Plaintiff's Allegations Do Not Meet the Elements Necessary for a Successful WLAD Claim.

In addition to being untimely, plaintiff's WLAD claims should be dismissed since the evidence does not establish the requirements for sexual harassment.

1. The Alleged Conduct Does Not Constitute a “Hostile Environment”

To establish a work environment sexual harassment case, the plaintiff must show the following elements: (1) the harassment was unwelcome; (2) the harassment was because of sex; (3) the harassment affected the terms or conditions of employment; and (4) the harassment is imputed to the employer. *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 406-7 (1985). Plaintiff’s claims fall short on the first, third and fourth elements.⁶

a. *The Harassment Was Not Unwelcome.*

In order to constitute harassment, the complained of conduct must be unwelcome in the sense that the plaintiff-employee did not solicit or incite it, and in the further sense that the employee regarded the conduct as undesirable or offensive. *Id.*, at 406. Plaintiff has testified that she entered into a personal friendship with Mr. Green that went beyond any work related contact. This relationship began after Green expressed a romantic interest in plaintiff by asking her on a date. Plaintiff has testified that during this relationship she visited Mr. Green’s office several times for reasons of a personal, not work related, nature. It was during these visits that Mr. Green attempted to kiss the plaintiff and subsequently

⁶ We assume, for lack of any evidence to the contrary, that Barrette Green would not have engaged in similar conduct with male coworkers.

pulled down plaintiff's blouse and kissed her breast.⁷ Plaintiff testified that she welcomed Barrette Green into her house twice, the first time for the express purpose of engaging in oral sex. And despite having significant training on identifying and reporting sexual harassment, plaintiff did not feel that at the time of the events any of Mr. Green's conduct with her constituted sexual harassment. If plaintiff did not have a subjective belief the conduct was unwelcome at the time, neither can a reasonable jury.

b. *The Harassment Did Not Affect the Terms or Conditions of Plaintiff's Employment.*

Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. *Glascow*, at 406. The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. *Id.* Whether the harassment at the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the totality of the circumstances. *Id.*, at 406-407.

⁷ At the PAB hearing, Ms. Salazar's testimony certainly did not indicate that the conduct was undesirable or offensive. See PAB testimony, pages 37-38, attached as Exhibit 8 to Dec of Rosen. (CP 616-17)

Plaintiff has presented no evidence that her work conditions were altered or that she was subject to an abusive working environment. To the contrary, she testified that none of the conduct alleged between her and Barrette Green had an impact on her ability to continue performing her job in a normal manner.

c. *The Harassment Cannot Be Imputed to the Employer in This Case.*

Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof. *Id.*, at 407. It is undisputed that Mr. Green does not fall under any of these classifications during the relevant time frame (before 2000). To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or coworker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment; and (b) failed to take reasonably prompt and adequate corrective action. *Id.* This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it; and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment.

Id.

Plaintiff has unequivocally testified that she informed no one of the alleged conduct until the Salisbury report was initiated. Most, and certainly the most significant, conduct occurred outside of the workplace, during non-working hours, at the invitation of plaintiff herself. Furthermore, any alleged conduct that took place on Western State Hospital property occurred during plaintiff's personal visits to Mr. Green's office.

Mr. Green was not an owner, manager, partner or corporate officer of Western State Hospital. Furthermore, there is no proof that Western State Hospital authorized, knew or should have known of Mr. Green's involvement with the plaintiff. Finally, and perhaps most importantly, once such conduct did come to light following plaintiff's reports to Ms. Salisbury, Mr. Green was fired, in part based upon plaintiff's claims.

Plaintiff relies on Mr. Green's conduct directed towards others as a basis for imputing knowledge to the State about his conduct with Ms. Salazar. This is flawed for two reasons. First, there is no evidence in this record of Mr. Green's alleged sexual harassment of others. Plaintiff again relies on the Salisbury report as evidence of the information contained therein. The entire content of this report is hearsay. Similarly, comments by Karl Brimmer made after the Salisbury report was completed and after

Ms. Salazar and others came forward with complaints about Mr. Green's conduct are legally insufficient to prove that the State should have known of the conduct between these two individuals occurring before 2000. Whatever her motivation, Ms. Salazar kept her relationship with Mr. Green private until the spring of 2003. By her own admissions, no one from the State could have known of her relationship with Mr. Green before that date.

2. No Quid Pro Quo Violations Occurred.

In order to establish *quid pro quo* sexual harassment, an employee/plaintiff must prove that the actor sought "sexual consideration" in exchange for a job benefit or the absence of a job detriment. *Schonauer v. DCR Entertainment, Inc.*, 79 WaApp 808, 823 (1995). Plaintiff has stated that Barrette Green never threatened her in any way. Likewise, there is no evidence that Mr. Green made any promises regarding plaintiff's terms and conditions of employment in exchange for any of the alleged sexual conduct. There is no evidence Mr. Green could, or did, effect plaintiff's terms and conditions of employment. In light of this lack of evidence, plaintiff does not assert, and certainly could not maintain, a cause of action for *quid pro quo* sexual harassment.

For each, and all, of the above reasons, plaintiff's claims of sexual harassment are subject to summary judgment dismissal.

D. Plaintiff's Claims do Not Meet the Extreme Standard to Prove Outrage, and Regardless, the State is Not Vicariously Liable for This Conduct.

To recover for intentional infliction of emotional distress, a plaintiff must plead and prove the elements of the tort of outrage. The basic elements of outrage are: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) severe emotional distress on the part of the plaintiff. *Snyder v. Medical Service Corporation of Eastern Washington*, 145 Wn.2d 233, 242, 35 P.3d 1158 (2001) (quoting *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995) (quoting *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989))); *see also Washington v. Boeing Co.*, 105 Wn.App. 1, 17, 19 P.3d 1041 (2000).

Liability exists when the conduct in question is “*so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.*” *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)(emphasis added); *Restatement of Torts*, § 46 (1965). In the employment context, insults and indignities, which result in embarrassment or humiliation, do not, of themselves, support liability. *Dicomes, supra*, 113 Wn.2d at 630.

In determining whether the conduct was sufficiently extreme, a

court must consider the following factors:

- (a) the position occupied by the defendant;
- (b) whether plaintiff was peculiarly susceptible to emotional distress, and if defendant knew this fact;
- (c) whether the defendant's conduct may have been privileged under the circumstances;
- (d) the degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties; and
- (e) the actor must be aware that there is a high probability that his conduct will cause severe emotional distress and he must proceed in a conscious disregard of it.

Birklid, 127 Wn.2d at 867. Furthermore, the Restatement (Second) of Torts, Section 46, comment d states that “an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort” is insufficient to prove outrageous and extreme conduct. *Birklid*, 127 Wn.2d at 867 (quoting *Restatement (Second) of Torts*, § 46 cmt. d). Furthermore, the definition of outrage does not extend to “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. In this area plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness, and lack of consideration.” *Id.*

In *Snyder*, the plaintiff's supervisor “insulted, threatened, annoyed,

showed unkindness, acted with a careless lack of consideration ... and assault[ed] [the employee],” yet the court held that the evidence was insufficient to support a claim for intentional infliction of emotional distress. 145 Wn.2d at 251.

Ms. Salazar’s allegations in this case simply fail as a matter of law to rise to the level of outrage. She appears to base her outrage claim on the alleged sex discrimination and hostile work environment incidents she claims to have suffered at WSH. However, the conduct complained of cannot be deemed extreme or outrageous as a matter of law, nor can Salazar demonstrate that she suffered extreme or severe emotional distress.

Moreover, under Washington law, plaintiff’s outrage claim is properly dismissed as superfluous when plaintiff can recover emotional distress damages on another claim. *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987). Emotional distress damages are recoverable under RCW 49.60 claims. Thus the tort of outrage based on the same conduct as the RCW 49.60 claims is superfluous, even assuming plaintiff could establish the elements of the tort of outrage.

Furthermore, to the extent the conduct of Mr. Green was found to constitute outrage, clearly such conduct is beyond the scope of his employment such that vicarious liability cannot attach.

Plaintiff asserts that the State is vicariously liable for the conduct of Mr. Green. *See* Plaintiff's First Amended Complaint. However, under Washington law it is clear that there can be no imposition of *respondeat superior* or vicarious liability for an employee's intentional sexual misconduct. *C.J.C. v. Corporation of the Catholic Bishop*, 138 Wn.2d 699, 718-719 (1998). It is an undisputed fact that any sexual contact between plaintiff and Mr. Green in the instant case was beyond the scope of his employment.

The absence of vicarious liability when an employee engages in intentional sexual misconduct is clearly established in Washington case law. *Bratton v. Calkins*, 73 Wn.App. 492, 497 (1994). In *Bratton*, a teacher was found to have had a sexual relationship with one of his students. *Id.*, at 494. The issue before the Court of Appeals, Division III, was "whether, as a matter of law, [defendant] acted within the scope and course of his employment by having a sexual relationship with a student." *Id.*, at 496. The school district argued there is no *respondeat superior* liability because "the sexual relationship between [defendant] and [plaintiff] was not similar or incidental to his teaching duties and only furthered [defendant's] personal interest." *Id.*, at 497.

The *Bratton* court stated:

A master is liable for the acts of a servant committed within the scope or course of his or her employment. . . . If the servant “steps aside from the master’s business in order to effect some purpose of his own, the master is not liable.” The test is

Whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, *or* by specific direction of his employer; *or*, as sometimes stated, *whether he was engaged at the time in the furtherance of the employer’s interest.*

Id., at 498 (citations omitted). The court emphasized the importance of the benefit to the employer and added, “if an employee acts without the knowledge of approval of the employer, or in violation of the employer’s instructions, liability is determined by examining whether the employee was acting within the scope of his implied or apparent authority.” *Id.* (citations omitted).

In *Thompson v. Everett Clinic*, 71 Wn.App. 548 (1993), Division I stated:

A tort committed by an agent, even if committed while engaged in the employment of the principal, is not attributable to the principal if it emanates from a wholly personal motive of the agent

and was done to gratify solely personal objectives or desires of the agent.

Id., at 553. In *Thompson*, the defendant doctor masturbated the plaintiff during an examination. Finding the doctor's conduct emanated from wholly personal motives for sexual gratification, the court concluded "there is no reason the assaultive act can be considered to have been done in furtherance of the clinic's business, or cloaked with some apparent authority." *Thompson*, at 554.

There is no dispute in the instant case that Mr. Green's alleged actions were undertaken wholly to gratify personal objectives or desires. Since the State cannot be liable for any conduct of Mr. Green constituting outrage, and no outrageous conduct is directly alleged against the State, plaintiff's fourth cause of action for outrage was properly dismissed on summary judgment against the State.

E. Plaintiff Does Not Have a Cause of Action for Invasion of Privacy.

Plaintiff asserts in her sixth cause of action invasion of privacy against the State. *See* Plaintiff's First Amended Complaint. Plaintiff contends that the State (and Salisbury) promised her confidentiality. *Id.*⁸

⁸ The State never asserted that plaintiff's violation of privacy cause of action was time barred. Rather, the State moved to dismiss that claim on the merits. For whatever reason, plaintiff never argued below that the statute of limitations did not bar this claim. That portion of her opposition brief addressing this claim (CP 741-746) did nothing to

As plaintiff notes in her brief, Mr. Brimmer provided written assurance to all employees that they could report allegations of harassment confidentially to the Director of Human Resources (Sherer Murtiashaw) or to him directly. Dennis Braddock, then Secretary of DSHS, advised employees that “[t]o the extent possible, your report will be treated confidentially and responded to in a timely and sensitive fashion.” (CP 1090)

Washington recognizes a tort action for invasion of the right of privacy. *Reid v. Pierce County*, 136 Wn.2d 195 (1998). The State has adopted the Restatement (Second) of Torts, § 652D, which sets out the guiding principles for the tortious invasion of that right. *Id.*, at 206. The tort of invasion of privacy requires publicizing the private affairs of another if the matter publicized would be highly offensive to a reasonable person. *Fisher v. State*, 125 Wn.App. 869, 879 (2005) (citing *Reid*, at 205 and *Restatement (Second) of Torts*, § 652D (1977)). “Publicity” for the purposes of § 652D means communication to the public at large so that the matter is substantially certain to become public knowledge, and that communication to a single person or small group does not qualify. *Id.*

clarify that issue for Judge Stolz. Further, plaintiff’s counsel made no oral argument on why this cause of action was timely. Notably absent from plaintiff’s opposition is any discussion of the elements of the right of privacy cause of action. That same flaw plagues plaintiff’s brief on appeal.

§ 652D states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

Comment a states in relevant part that:

“publicity,” as it is used in this section, differs from “publication,” as that term is used in § 577 in connection with liability for defamation. “Publication,” in that sense, is a word of art, which includes any communication by the defendant to a third person. “Publicity,” on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of communication that reaches, or is sure to reach, the public.

Here, neither element of the cause of action can be satisfied. In the first place, the State did not “give publicity” to plaintiff’s name. Mr. Brimner did identify plaintiff by name in his November 6, 2003 letter to Mr. Green terminating his employment. (CP 859) This was not a

communication to the public at large. The form of communication was not one that was “substantially certain to become one of the public knowledge.” *Id.* at Comment a. Plaintiff fails to discuss this key distinction in her appellate brief and, indeed, ignores the elements of the Restatement entirely.

With respect to the second element, plaintiff cannot establish that (a) the limited publication of her name would be “highly offensive to a reasonable person”, an objective standard, and (b) that the disclosure was not of legitimate concern to the public. Both must be proven to establish this claim.

In order to effectively terminate Mr. Green, the State was required to follow its disciplinary policies and procedures. Among these policies and procedures is the right of the accused to be informed of the identities of his accusers. *See* Personnel Policy 545 and Collective Bargaining Agreement. The termination of Mr. Green could not have been effected without disclosing plaintiff’s name to Mr. Green in the limited manner in which it was. Plaintiff does not argue otherwise.

Mr. Braddock gave assurance of confidentiality “to the extent possible.” Whether the limited disclosure of plaintiff’s name, under the circumstances presented here, would be “highly offensive” to a member of the public is a legal question for the court to decide. Here, without the

disclosure to Green of those accusing him of wrongdoing, the State could not have taken the steps that it did to eliminate him from the workforce. The irony of plaintiff's claim is that on the one hand she asserts that the State did not do enough to remove Mr. Green from WSH (his "mere presence" allegedly constituting a hostile work environment) and on the other hand she asserts that the required disclosure of her name to him as part of the termination process was "highly offensive." It was not.

Finally, plaintiff cannot establish the lack of any legitimate public concern for the limited disclosure. The disclosure was required to further the legitimate State interest of eliminating improper conduct by its employees.

While plaintiff's cause of action for invasion of privacy is not time barred, there is no evidence to allow it to survive summary judgment. This court should affirm the dismissal of that claim.

F. Plaintiff's Claim of Retaliation is Baseless As Well.

Plaintiff claims that the State retaliated for her complaints of sexual harassment against Mr. Green by disclosing her identity to him. *See* Plaintiff's First Amended Complaint. To establish a prima facie case of retaliatory conduct, a plaintiff must show that (1) she engaged in statutorily protected activity, (2) the employer took some adverse employment action against her, and (3) retaliation was a substantial factor

behind the adverse employment action. *Washington v. Boeing*, 105 Wn.App. 1, 14 (2001). There are no allegations of adverse employment actions and plaintiff's claim fails as a matter of law.

First, as stated above, the State was obligated to disclose plaintiff's identity to Mr. Green as one of his accusers. Second, the alleged conduct is not an employment action affecting terms and conditions of employment. Furthermore, this action does not rise to the level required to meet the standard for "retaliation." Plaintiff is unable to articulate any allegation, let alone evidence, that such action was motivated in any respect by plaintiff's complaints. This claim should be dismissed.

IV. CONCLUSION

Plaintiff's claims under the WLAD as well as those of outrage and negligent supervision are all time barred, suit having been filed more than five years after the events giving rise to those claims. There is no basis under *Antonius* for extending the statute of limitations. Further, the discovery rule does not apply.

If the court reaches the merits of plaintiff's claims, it should strike those materials attached to Mr. Cochran's declaration that are raised in defendant's motion to strike. The Salisbury report is hearsay and should be treated accordingly.

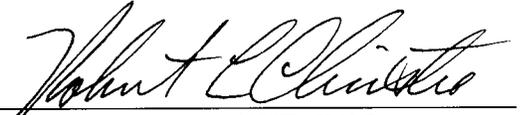
The evidence properly part of this record fails to create a genuine

issue for trial on any of plaintiff's claims against the State defendants.

The trial court's dismissal of plaintiff's complaint should be affirmed.

Respectfully submitted this 18th day of September, 2006.

CHRISTIE LAW GROUP, PLLC

By 
ROBERT L. CHRISTIE, WSBA #10895
JASON M. ROSEN, WSBSA #26550
Attorneys for Respondents State of
Washington, Department of Social &
Health Services, and Western State
Hospital

2100 Westlake Avenue N., Suite 206
Seattle, WA 98109
Telephone: (206) 957-9669
Facsimile: (206) 352-7875

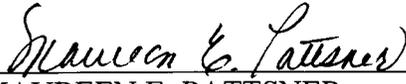
Darrell L. Cochran, WSBA #22851
GORDON THOMAS HONEYWELL MALANCA PETERSON &
DAHEIM, LLP
1201 Pacific Avenue, Suite 2200
P.O. Box 1157
Tacoma, WA 98401-1157
Attorney for Appellant
Via Hand-Delivery

Curman Sebree, WSBA #11959
LAW OFFICES OF CURMAN SEBREE
Eighteenth Floor
1191 Second Avenue
Seattle, WA 98101-2939
Attorney for Respondent Barrette Green
Via Facsimile and Messenger

Edward Younglove, WSBA #5873
PARR YOUNGLOVE LYMAN & COKER
1800 Cooper Point Road S.W., Bldg. 16
Olympia, WA 98507-7846
Attorney for Respondent Washington Federation of State Employees
Via Facsimile and Messenger

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 19th day of September,
2006.



MAUREEN E. PATTSNER