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**I. COUNTERSTATEMENT OF THE ISSUES AS TO  
RESPONDENT BARRETTE GREEN**

1. Did the trial court err in holding that appellant/plaintiff's claims of sexual harassment and outrage against defendant/respondent Barrette Green are each barred by the applicable statute of limitations?

2. If not time barred, should plaintiff/appellant's claims against respondent Barrette Green for sexual harassment and outrage be dismissed as a matter of law based on the insufficiency of the claims?

**II. COUNTERSTATEMENT OF THE CASE**

**A. Statement of Proceedings**

Respondent Barrette Green joins in respondent State defendants' statement of proceedings and by reference incorporates their statement in this brief.

**B. *Counterstatement of Facts***

Respondent Barrette Green joins in respondent State defendants' counterstatement of facts and by reference incorporates their statement in this brief.

### III. ARGUMENT

#### A. *Joinder in Respondents State's and Union's Arguments*

Respondent Green joins in respondents State's and Union's arguments regarding the statute of limitations, the elements necessary for a successful WLAD claim, the tort of outrage, retaliation, collateral estoppel, and striking materials that do not comply with CR 56. Additionally, respondent Green submits the additional arguments regarding individual liability under the WLAD.

#### B. *Green Is Not Individually Liable Under The WLAD.*

##### 1. Green Was Not Plaintiff's Employer, Manager or Supervisor.

As a non-supervisor, defendant Barrette Green cannot be individually liable under Washington's Law against Discrimination. RCW 49.60.180, which defines unfair employment practices, provides that "it is an unfair practice for any **employer**" to engage in certain, specifically designated acts of employment-related discriminatory conduct. *RCW 49.60.180 (emphasis added).*

The statute defines "employer" as "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons. RCW 49.60.040 (3). "Person" includes one or more individuals; it also includes, *inter alia*, any manager, agent or employee. Although the statute

contains a definition for “employee,” that term is not included in any of the provisions that create liability. *See RCW 49.60.040(4)*.

Washington courts have construed “employer” to include individual supervisors, but not persons who do not “employ, manage or supervise” the plaintiff. *Brown v. Scott Paper Worldwide, et.al.*, 143 Wn.2d 349, 20 P.3d 921 (2001); *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn.App. 927, 931, 965 P.2d 1124 (1998), *review denied*, 137 Wn.2d 1029, 980 P.2d 1284 (1999).<sup>1</sup>

The Washington Supreme Court in *Brown* rejected the argument that the term “employer” included “any person acting in the interest of the employer,” instead holding that *individual supervisors of the plaintiff* could be liable for discrimination based on the theory of respondeat superior. *Brown*, 145 Wn.2d at 357-58. However, as the *Brown* court implicitly agreed, RCW 49.60 does not extend liability to persons who are not employers, managers or supervisors. *Malo*, 92 Wn.App. at 931.

In *Brown v. Scott Paper Worldwide*, the Washington Supreme Court decided that individual liability under RCW 49.60 applied to supervisors of the plaintiff, but not to managers who do not supervise the plaintiff. Brown sued Scott Paper alleging sexual harassment and discrimination naming six supervisors and her employer, Scott Paper, as

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<sup>1</sup> Other states with antidiscrimination statutes even broader than RCW 49.60 do not impose liability on nonsupervisory employees. For example, the New Jersey Law against Discrimination (NJLAD) defines “employer” as including “any person.” NSA 10:5-5(a).

defendants. *Id.* at 355. The supervisors moved for summary judgment arguing they were not “employers” under RCW 49.60.040. The trial court agreed and granted the motion. *Id.* Brown appealed arguing the term “employer” applied to “*any person* acting in the interest of an employer who employs eight or more persons.” *Id.* at 357.

The Supreme Court reversed the trial court, but also rejected Brown’s argument that the term “employer” meant “any person” acting in the interest of an employer” meant that a “**supervisor** acting in the interest of an employer who employs eight or more people can be held individually liable for his or her discriminatory acts.” *Brown*, 143 Wn.2d at 358 (emphasis added). The court concluded that

**Individual supervisors along with their employers** may be held liable for their discriminatory acts. The plain meaning of RCW 49.60.040(3), by its very terms, **encompasses individual supervisors and managers** who discriminate in employment.

*Id.* at 361 (emphasis added).

Thus, under *Brown*, individual liability does not extend to managers who do not supervise the plaintiff. *Id.* at 357-58.

In *Malo*, Alaska Trawl Fisheries (“ATF”) employed Malo and Campbell as alternate fishing boat captains. Malo confronted Campbell about complaints that Campbell was sexually harassing female

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However, the NJLAD does not impose liability on non-supervisory employees. *See Tyson v. Cigna Corp.*, 918 F.Supp. 836, 837 (D. N. J. 1996).

crewmembers. Malo also reported the complaints to ATF's president, who subsequently informed Malo his contract would not be renewed. Malo then sued ATF and Campbell alleging they retaliated against him for opposing sexual harassment in violation of RCW 49.60.210. The trial court dismissed Malo's claims on summary judgment and Malo appealed.

The court of appeals affirmed the trial court's dismissal. Applying the basic principles of statutory construction, the court concluded that the use of the general term "or other person" in the statute is restricted by the words "employer," "employment agency," and "labor union." *Id.* at 930. Accordingly, "the section, read as a whole, is directed at entities **functionally similar to employers** who discriminate by engaging in conduct similar to discharging or expelling a person who has opposed practices forbidden by RCW 49.60." *Id.* (emphasis added). According to the court, Campbell was not acting as an "employer" because he did not "employ, manager or supervise Malo," and "was not in a position to expel him from membership in any organization." *Id.* He therefore could not have individual liability for retaliation under RCW 49.60.210.

RCW 49.60.210, which addresses discrimination associated with retaliation against whistleblowing activities, provides as follows:

(1) It is an unfair practice for any **employer, employment agency, labor union, or other person** to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(2) It is an unfair practice for a **government agency or**

**government manager or supervisor** to retaliate against a whistleblower as defined in chapter 42.40 RCW.

RCW 49.60.210(1) and (2) (emphasis added).

The language of the statutory provisions involved in *Malo* and *Brown* compel a finding that non-supervisors cannot be individually liable, regardless of context. *Malo* involved the whistleblower provision of the statute § 210, which includes within its scope “any employer, ... or **other person.**” By contrast, *Brown* involved claims under the general employment discrimination statute, § 180, which includes the more limited class of “any employer” or “other person.”

The *Brown* court limited “employer” to supervisors. Quite clearly, Washington law limits individual liability under RCW 49.60 to supervisors of the plaintiff.

There is no dispute that defendant Green did not employ, manage or supervise Salazar. *CP 576*, ¶ 3. Essentially, Green and Salazar were coworkers. However, at all times material herein, Salazar was a member of management with a duty and responsibility to report and take action to remedy sexually harassing behavior.

Defendant Green cannot have individual liability under RCW 49.60 as a matter of law. He was not an “employer,” nor was he “functionally similar to an employer” with respect to plaintiff. Plaintiff’s

allegations that he was a “manager” and had the power to create a “hostile work environment” do not satisfy the requirement for individual liability that he “employ, manage or supervise” plaintiff. Because he did not, the trial court’s dismissal of plaintiff’s WLAD claims against respondent Green should be affirmed.

#### IV. CONCLUSION

Plaintiff/Appellant’s claims under the WLAD as well as her outrage claims are time-barred. Additionally, plaintiff/appellant fails to create a genuine issue of material fact on her claims of sexual harassment, outrage, and retaliation against respondent Green. Accordingly, the trial court’s dismissal of plaintiff/appellant’s claims should be affirmed.

DATED this 9<sup>th</sup> day of October 2006.

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By   
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CERTIFICATE OF SERVICE

The undersigned hereby declares that on the date indicated below a copy of **Respondent Green's Appellate Brief** was served on the following individuals by the method indicated:

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