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No. 34741-5-II

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

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KRISTI SOLT, Appellant,

v.

ANNIE WRIGHT SCHOOL, and STANLEY CUMMINGS and JANE  
DOE CUMMINGS, and the marital community thereof; PAUL  
MANNING and JANE DOE MANNING, and the marital community  
thereof; et al,  
Respondents.

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BRIEF OF RESPONDENTS ANNIE WRIGHT SCHOOL and the  
CUMMINGS

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ORIGINAL

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

### Assignments of Error

No. 1. The trial court properly granted Annie Wright School and the Cummings' motion for summary judgment dismissing Kristi Solt's ("Solt") claims on the merits.

No. 2. The trial court properly granted the Mannings' motion for summary judgment dismissing Kristi Solt's claims on the merits.

### Issues Pertaining to Assignment of Error

1. The trial court properly ruled that Solt failed to offer proof of facts sufficient to establish a hostile work environment claim under RCW 49.60.

2. The trial court properly ruled that Solt failed to offer proof of facts sufficient to establish a retaliation claim under RCW 49.60. Solt has dropped her claim that her termination was retaliatory.

3. The trial court properly ruled that Solt failed to offer proof of facts sufficient to establish a disparate treatment claim under RCW 49.60.

4. The trial court properly ruled that Solt failed to offer proof of facts sufficient to establish a negligent supervision claim.

## II. COUNTER-STATEMENT OF THE CASE

### A. Introduction.

The statement of facts in this case needs to be started from scratch

because Solt's statement is largely argumentative and conclusory, and without proper citation to the record, in violation of RAP 10.3(a)(4). Where Solt does make references to the record, they are primarily to argumentative statements in prior briefs, and not to evidentiary materials. Additionally, Solt frequently mixes up the chronological order of events.

B. Annie Wright School.

Annie Wright is a nonprofit, private school affiliated with the Episcopal Church. CP 146, 149. Annie Wright is a co-ed day school for grades pre-kindergarten through 8th, and an all-girls day and boarding school for grades 9 – 12. Of the total enrollment of 430, approximately 110 girls are in the “Upper School,” grades 9 – 12. CP 148. During the years relevant to this lawsuit, women held more lead administrative positions than men. CP 372.

About 50 of the Upper School girls are boarding students who live in a dormitory on campus. The girls' dormitory is located on the second and third floors of a wing connected to the main building. Because safety is an obvious concern, security doors are installed on all entrances to the dorm. These doors can only be opened with special key cards, which are issued to school staff and resident students. CP 152. Adult Resident Advisors and their families live in the eight staff apartments located in the dormitory among the girls' rooms. CP 150. Security staff monitor the

grounds throughout the night. CP 951-952.

C. Solt and Selleck and the breakup of their marriage – January 1, 1999 to August 15, 2001.<sup>1</sup>

The relationship between Kristi Solt and Stu Selleck pre-dated their Annie Wright employment. CP 254. They had worked together for the previous three years at the Judson School in Arizona and came to Tacoma within two months of one another. CP 255; CP 161-162. Unmarried to Selleck at the time of her July 1, 1995, hire as Director of Residence and Activities for Annie Wright, Solt was instrumental in getting Annie Wright to hire Selleck as a kitchen helper a few months later. CP 255-256; CP 164, 166. The couple married in March 1996. CP 256. As Director of Residents, Solt occupied one of the staff apartments located in the girls' dormitory, just a few feet from the rooms of the high school boarding students. CP 255. After the wedding, Solt's new husband moved into the dormitory apartment with her. CP 256.

Shortly after his hire, Selleck transferred to Annie Wright's maintenance department, reporting to Paul Manning, Director of Maintenance and Security. CP 940. Manning thought highly of Selleck's work, suggesting Selleck be placed in charge of the eight person crew if Manning were absent. CP 168.

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<sup>1</sup> The school submitted a chronological table as part of its summary judgment materials. CP 648. A copy of that table is appended to this brief.

In August 1999, while attending a conference on the East coast, Solt recognized her homosexual orientation. CP 286-287. Shortly after she told Selleck the news, couple became estranged. CP 287; CP 265. Solt's sexual orientation was one of the causes. CP 265-266.

Solt and Selleck separated in December 1999<sup>2</sup>, but remained married. Selleck moved out of the couple's dormitory apartment and got an apartment off campus. CP 259; CP 321-322; CP 323-325; CP 184. In her deposition, Solt recanted her allegation that she was "harassed continuously" after the separation, instead describing the still-married couple's relationship as "somewhat amicable, friendly." CP 263-267. Solt characterized their relationship as "okay" even though Selleck telephoned her when he was drunk. CP 267-268. Despite the telephone calls, Solt was not afraid of her husband. CP 313. Their arguments had never gotten physical during their marriage. CP 257-258.

In June 2000, six months after Solt and Selleck separated, Solt ran into Manning in Annie Wright's mailroom. She expressed concern about Selleck's alcohol consumption, and her suspicions that Selleck had been in her apartment. She asked if there was a way to change the locks to her apartment or to keep Selleck away from her apartment without Selleck

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<sup>2</sup> Although they separated in December 1999, Solt did not file for divorce until October 2001. CP 188.

knowing. CP 271-272; CP 326. Manning responded that the locks could be changed, but the discussion should include Bob Klarsh ("Klarsh"), the then Head of School. CP 272-273. Manning followed up the mailroom discussion in writing later that afternoon. CP 190. His response acknowledged her reluctance to report Selleck ("I can fully understand that you would be reluctant to come forward as the source of this information about Stu"), and begged her not to downplay her concerns:

I encourage you not to downplay your fears with the intent of avoiding unpleasantness. If you have concerns for your privacy, safety, and security in this building then some level of action is warranted. I am committed to taking the level of action necessary to insure your well being and allay your fears. But I will need your help and we will possibly need help from others to determine the appropriate level of action to take.

CP 190. Solt's written response to Manning asked him to disregard the conversation, stating:

I will not put you in a situation asking you to compromise your friendship or working relationship with Stu. Nor am I willing to jeopardize Stu's position or my "relationship" with him (or his children). No new locks are necessary and I will handle anything that needs to be dealt with from this point forward. Thank you for your discretion and concern.

CP 192.

Solt testified she was reluctant to involve Klarsh because she did not want her husband to lose his job. CP 275-275. She also felt that a conversation with Klarsh would result in a discussion of her sexuality and

she believed Klarsh to be homophobic.<sup>3</sup> CP 277-278; CP 576. Despite Solt's alleged fear of Klarsh and his alleged homophobia<sup>4</sup>, sometime during the course of the summer following her separation from her husband, Solt's female lover from New York spent two weeks with Solt in her dormitory apartment, and stayed on another occasion for a shorter period of time. CP 261-262, 702. Less than a month after Solt decided that telling Klarsh about Selleck might get Selleck fired and might result in a discussion of Solt's sexuality with people she considered her husband's friends (CP 277-278), Klarsh promoted Solt to a newly created position – Dean of Students. Klarsh simultaneously promoted Susan Bauska (“Bauska”) to replace the retiring Director of the Upper School. With the promotion, Solt began reporting to Bauska. CP 350-351. They became friends. CP 352.

In August 2000, shortly after Solt's promotion, Selleck's daughter Jenny, his offspring from an earlier marriage, left her mother's home in

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<sup>3</sup> In her deposition, Solt described Klarsh as being part of a "good old boy network." CP 272. Asked to explain what she meant, Solt stated that some of the men at the school, including Selleck, Manning, the cook, and Klarsh, golfed, went drinking, and played fantasy football together. CP 276-277. Solt denied any belief that women received unfair treatment in some way because of this. CP 278.

<sup>4</sup> At her deposition, Solt identified several other homosexual employees, including a male who was “open” with his sexual orientation. She testified that she was unaware of any negative consequences he may have suffered as a result, despite the fact that Klarsh was allegedly homophobic. CP 274.

Arizona to move in with Solt in order to attend her freshman year of high school at Annie Wright. CP 184. Her father's employment at Annie Wright allowed Jenny to attend school tuition-free. CP 292. And because she lived with her father's wife, she had free housing. During the 2000/2001 school year that Jenny lived with Solt, Selleck did not harass<sup>5</sup> Solt much. CP 263. In fact, Solt and her husband attended Jenny's parent conferences together, and Selleck's other children and his ex-wife visited them both while Jenny lived with Solt. CP 267.

By April or May 2001, toward the end of the school year that Jenny lived with Solt, Selleck's telephone calls increased in frequency. CP 269. Some of the telephone calls reflected Selleck's suspicions that Solt was having sex with another woman or women in the dormitory apartment she shared with Jenny. CP 915-917; CP 270. Notwithstanding the increase in phone calls from Selleck, Solt did not complain to Manning or ask for help from anyone at Annie Wright. CP 279. In fact, both Selleck and Solt wanted to keep their domestic dispute out of the public eye. CP 314.

Jenny returned home to Arizona after school ended in early June 2001. CP 284. Solt left on an eighteen-day school sponsored trip to China shortly thereafter. CP 282-283. In the meantime, on July 1, 2001, a new Head of School, Dr. Stan Cummings, undertook his duties as the

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<sup>5</sup> Selleck's harassment consisted of telephone calls. CP 184.

replacement for the retiring Klarsh. CP 653.

When Solt returned from China, she began having her new lover, a local woman named Angie Morrison, spend the night at the dorm. CP 262. Selleck verbally confronted Morrison sometime that July, but Solt told Morrison not to report it because she did not want to embarrass the school, herself, or anyone. CP 310. Eventually, Solt decided to take action. CP 293. On July 13, 2001, she petitioned for and was granted a Temporary Order of Protection that would restrain her husband from calling her or entering her apartment, but which allowed him to be on the Annie Wright campus during his work hours. CP 205-207.

It was also in mid-July that she first told her supervisor, Bauska, about Selleck's harassing telephone calls. CP 293. Solt neither asked nor expected Bauska to do anything about Selleck's behavior. CP 293-294. Nonetheless, Bauska told Cummings, the new Head of School. CP 495. Manning became aware of Selleck's behavior at about the same time, when he received a letter dated July 22, 2001, from another staff member who observed Selleck yelling and making obscene gestures at Solt as she got into her lover's car. CP 198; CP 418.

Solt was granted a permanent Order of Protection on July 27, 2001, and let Manning hear, for the very first time, a few of Selleck's telephone

messages.<sup>6</sup> CP 271. Once again, at Solt's request, the order included an exception that allowed Selleck to be on the Annie Wright campus during his scheduled work hours. CP 209-212. On July 30, 2001, Solt advised Manning and the new Head of School, Cummings, that she had been granted a Permanent Order of Protection and explained that by its terms, "Stuart is restrained from being at my workplace or residence *unless* he is scheduled to work." She asked for "their support in this matter." CP 214. Even after the restraining order was in place, Solt sought only minimal assistance from Manning and Annie Wright:

Q. ...would it be fair to say that what you wanted in terms of his support was that he would tell Mr. Selleck that he had to follow the restraining order, but that you didn't want him fired?

A. Correct.

CP 284-285. All Solt wanted was to have Manning talk to Selleck and ask him not to make the phone calls. CP 280-281, 285. In accordance with her request, Manning and Cummings both met with Selleck and told him to leave Solt alone. CP 341; CP 345.

Two or three days after Solt notified Manning and Cummings of the restraining order, she left town for ten days. CP 288. On August 12, 2001, the day of her return, Selleck spotted her with her lover and verbally

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<sup>6</sup> This was the first time Solt complained to Manning about any aspect of Selleck's behavior since their laundry room conversation in June 2000. CP 279.

harassed her. Solt notified Manning and Cummings the next day, making no attempt to disguise her sexual orientation as she described the incident in a way that made it clear that her husband was referencing a suspicion that Solt was engaged in a lesbian relationship. CP 216. In addition, she went to Cummings' office, and let Cummings listen to several of Selleck's explicit telephone messages. CP 290. The messages made it clear that Selleck believed his wife was engaged in a lesbian relationship: "You're a whore. I bet you like licking pussy. I hope you're not licking pussy during, you know, the day. You're a slut. I hope you like using your vibrators." CP 270. It was at this time that Cummings learned Solt was a lesbian. CP 653-54.

Even as she shared these graphic telephone messages with Cummings, Solt asked Cummings not to fire Selleck, but to make the harassment stop. CP 291-292. In fact, Solt testified that she always wanted Selleck to keep his job and never wanted the school to fire him. CP 291-92. Solt was not physically afraid of her husband, but did not want to be subjected to verbal harassment. CP 257-258, 313; CP 353. Cummings told her it was out of her hands. CP 292. Solt left for vacation in Nebraska two days later. CP 289. Cummings called her on the first day of her vacation and told her he had fired Selleck effective August 15, roughly one month after Solt first reported the harassment to anyone with authority at Annie

Wright. Solt was out of town for almost half of that one month period. CP 288.

Although it was Cummings who fired Selleck (CP 320), Manning was involved with and concurred with the decision. CP 340-341. Selleck's last day at Annie Wright was August 15, 2001. CP 327-328. Although Solt claims Selleck made more telephone calls and sent harassing emails to her and her friends after his termination, it stopped when Selleck moved to Texas on or around October 2001. CP 420-421; CP 295. It wasn't until that same October that Solt finally filed for divorce. CP 188.

D. Solt and Manning and the dispute over Solt's lover staying in the girls' dorm – August 15, 2001 to June 6, 2002.

Manning concurred with Dr. Cummings' decision to terminate Selleck, however, he harbored concerns regarding the process. CP 319. On the one hand, Selleck, a valued employee, was abruptly terminated for his behavior in the domestic dispute. On the other hand, Kristi Solt's actions and their contribution to Selleck's behavior (such as entertaining extra-marital lovers in the dormitory apartment that used to be the marital home) were ignored. Manning correctly observed that the domestic dispute involved bad behavior and accusations by both parties. For instance, according to Selleck, Solt was having sex with a female partner in her dormitory apartment and was allowing his daughter Jenny to have

knowledge of it. Selleck also claimed that Solt threatened him with losing his job. CP 355-356. Such behavior, if true, was not behavior expected of a Resident Advisor, much less the Dean of Students.

Bauska heard about, but did not believe, Selleck's side of the marital dispute. CP 357. Because of this, she did not discuss Selleck's accusations with either Manning or Cummings. She believed Solt would not conduct an extra-marital sexual affair in the dormitory. CP 356-357. According to Bauska, if Selleck's accusations were true, Solt's behavior violated an unwritten policy at Annie Wright that was directed at all adult sexual relationships outside of marriage, regardless of orientation or gender. CP 363-364. Bauska however, believed Solt when Solt told her that she and Morrison were only platonic friends and that Morrison was not spending the night in the dorm. CP 369; CP 866. In fact, it wasn't until her deposition that Solt finally admitted that Morrison spent the night in the dorm twenty or thirty times beginning in the summer of 2001. CP 262. It was not until she read Solt's deposition that Bauska discovered Solt lied to her about the nature of the Solt/Morrison relationship and about Morrison spending the night in the dorm. CP 116 (deposition pp. 130-31), 119 (deposition pp. 60-61), 120 (deposition p. 70).

Manning's concerns over Solt's behavior continued after Selleck's termination. Specifically, he was concerned with Solt's failure to advise

security about Morrison's frequent overnight stays. Morrison's visits were noticed because she parked her truck near the dormitory, on a street forbidden to overnight parking by Annie Wright residents, approximately thirty times between late September and early January. CP 225; CP 335-339; CP 296-297; CP 360. As the head of security for Annie Wright, Manning's concern was well within his job description. CP 330-331; CP 346-347; CP 364.

Manning expressed his concerns to Dr. Cummings, as the Head of School and to Susan Bauska, as Solt's immediate supervisor. CP 335-339; CP 342. Manning believed Solt's apparent ability to disregard the rules reflected an unacceptable class distinction between blue and white-collar workers. CP 329, 332-333. Manning limited the discussion of his concerns to meetings with Cummings and Bauska. Cummings testified that Manning never discussed the terms of Solt's divorce, her finances, or her sexuality, in those meetings. CP 375-378; CP 104 (deposition p. 76). Solt admitted in her deposition that her belief that Manning discussed these matters arose solely from conversations she had with Bauska. CP 305, 315, but Bauska denies that Manning ever discussed Solt's divorce, finances or sexuality with her. CP 116-17 (deposition pp. 131-35).

On or about December 7, 2001, Bauska asked Solt about her unreported overnight guest, and told her that Manning had raised the issue.

CP 361; CP 297; CP 912. This infuriated Solt, who denied that the owner of the truck, Angie Morrison, ever spent the night. CP 361-362. Bauska believed her. Solt told Bauska she didn't like Manning reporting the presence of the truck and attributing that presence to Solt having guests. "She felt her life was being too closely examined." CP 365-366.

Apparently realizing that she and Angie could not continue conducting their relationship in the dormitory, Solt had already begun a campaign to get permission to move in with her lover off campus. Her efforts had started in August 2001. CP 298. These efforts culminated in a January 8, 2002, memo to Bauska asking for a new job description, enhanced responsibilities, more pay, and permission to move off campus, never once even hinting at a "hostile environment" as her reason. CP 218; CP 299-300; CP 367-368. Then, in February 2002, Solt prepared a heated written response to Manning's concerns and gave it to Dr. Cummings. CP 220-222.

By late January or early February 2002, Dr. Cummings had heard and received written complaints from both Solt and Manning. Manning's letter to Dr. Cummings expressed both his concerns over Solt's unreported guest and his fervent belief that Selleck's bad behavior resulted in immediate punishment because he was a maintenance worker, while Solt's behavior had escaped any type of scrutiny because she was an

administrator. The apparent class distinction troubled him. CP 224-225. Solt's letter acknowledged Manning's legitimate concern over the "safety reasons" behind monitoring unreported overnight guests, but also expressed her opinion that Manning's reporting of her frequent overnight guest was motivated by "Mr. Manning's unresolved issues regarding my recent legal action against Stuart Selleck." CP 220-222. Dr. Cummings' responded by meeting with each of them, and sending them a memo acknowledging their complaints, and asking that they move forward for the good of the school. CP 227. Cummings' memo specifically addressed Solt's comments regarding safety issues by devoting a full paragraph to describing the school's legitimate security concerns. CP 227. Cummings memo also addressed the school's informal policy regarding overnight guests, stating "to that end we will work toward formalizing what is now an informal procedure for guests signing in and out of the building after hours." CP 227.<sup>7</sup>

Following the meetings, Manning sent a copy of his letter to Solt and to Selleck, who was by then living in Texas. CP 334. Shortly

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<sup>7</sup> The undisputed, written, February 2002 references to the security issue destroy Solt's factually unsupported attempt to characterize this as a pretext that was not created until after the start of litigation in 2004. Appellant's Brief, p. 25. The school's understandable concerns with frequent overnight guests in the girls dormitory thus remains a valid non-discriminatory reason for Manning reporting the visitor to Cummings.

thereafter, on March 11 & 12, Selleck sent emails to Solt and to multiple other staff at Annie Wright, restating his belief that Solt had conducted her lesbian affairs in front of both of his children. CP 194-196. Cummings immediately apologized to the recipients, had an attorney send a cease and desist letter to Selleck, reprimanded Manning for contacting Selleck, and apologized to Solt. CP 229-237.

Shortly thereafter, even though it was a deviation from its requirement that Resident Advisors live on campus, Annie Wright granted Solt's request to move off campus, raised her pay, and gave her the increased job responsibilities she requested. CP 370; CP 301-302. Solt moved out of the dorm on June 10, 2002. CP 303. All harassment, real or imagined, ceased from then on. CP 85. Solt remained employed at Annie Wright while living off-campus for the next two years.

E. The new Head of School and the elimination of Solt's position – July 2002 to June 2004. No appeal by Solt.

In the late summer of 2002, Annie Wright appointed Dr. Jayasri Ghosh, a female, as the new Head of School, filling the position vacated by Dr. Cummings' departure a month earlier. CP 381. Nearly two years later, in 2004, due to an enrollment drop in the Upper School, Dr. Ghosh was forced to eliminate and consolidate several positions, which included elimination of Solt's position as Dean of Students in the Upper School.

The school's legitimate, non-discriminatory reasons for eliminating Solt's position were described in detail in several declarations, depositions and pleadings. CP 14-16, 23-26, 239-40, 424-44, 374, 382-93, 644-45, 837-38, 886.

Despite several challenges by the defense in the briefing and during oral argument, Solt never offered any evidence or made any argument that the school's budget-crunch motive for eliminating her position was pretextual. CP 739-40, 780-81. Consequently, Solt does not appeal the summary judgment on her claim that the elimination of her position was retaliatory, nor could she, since arguments not raised until an appeal will not be considered. RAP 2.5(a).

F. Violence is completely absent from the facts of this case.

Despite Solt's overblown rhetoric, using the term "violence" 26 times in the first 12 pages of her brief, Solt's own testimony indisputably established that violence was never part of this case. Solt testified that she was never subjected to any violence in her marriage with Selleck. She likewise testified that she felt "safe and secure" at the school and never had any fear of violence with Selleck while he was employed at the school. CP 257-58, 313. Susan Bauska, Solt's boss, confirmed that Solt "was not physically afraid of Stu." CP 353. Solt testified that even arguments that were merely verbal in nature were rare in her relationship

with Selleck. CP 264-65. None of Solt's conclusory statements, references to highly publicized cases, or quotations from materials outside of the record contradict these undisputed facts.

### III. ARGUMENT

#### A. Standard of review.

An appellate court reviews a trial court's grant of summary judgment de novo, and if reasonable minds can draw but one conclusion from the facts, then summary judgment is appropriate. Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982); Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court and only considers the evidence and issues raised below. Wash. Federation of State Employees v. Office of Financial Mgt., 121 Wn.2d 152, 157 (1993).

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988). In discrimination cases, Washington courts apply the protocol the Supreme Court developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to determine the parties' respective evidentiary

burdens. Hill v. BCTI Income Fund-1, 144 Wn.2d 172, 180, 23 P.3d 440 (2001). Under this protocol, the plaintiff bears the initial burden of establishing a prima facie case of discrimination or retaliation. Hill, 144 Wn.2d at 181. "In order for a plaintiff alleging discrimination in the workplace to overcome a motion for summary judgment, the worker must do more than express an opinion or make conclusory statements." Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). To defeat summary judgment, the employee must establish specific and material facts to support each element of her prima facie case. Id.; Kahn v. Salerno, 90 Wn.App. 110, 117, 951 P.2d 321, review denied, 136 Wn.2d 1016, 966 P.2d 1277 (1998). If the plaintiff fails to establish a prima facie case, the defendant is entitled to judgment as a matter of law. Hill, 144 Wn.2d at 181.

Even if a discrimination plaintiff establishes a prima facie case, escaping summary judgment on that basis, the employer may rebut the case by presenting evidence of a legitimate non-discriminatory reason for its action. The burden then shifts back to the plaintiff, who must then attempt to prove that the employer's reason is pretextual. Hill, 144 Wn.2d at 180-82. If the plaintiff fails to offer proof of pretext, the employer is entitled to summary judgment. Id.

B. Solt cannot establish her claims arising under RCW 49.60.

On appeal, Solt's RCW 49.60 claims consist of (1) a claim that Defendants failed to correct an allegedly gender-hostile working environment that existed while Annie Wright employed her husband; (2) a claim that Defendants Annie Wright and Cummings failed to correct an allegedly gender-hostile working environment created by Manning's conduct after the school fired Solt's husband; (3) a claim that Manning's behavior was retaliatory; and (4) a claim that Manning's behavior constituted disparate treatment on the basis of sex. Solt Brief, p. 21.<sup>8</sup>

1. As a religious institution, Annie Wright is not subject to RCW 49.60.

Washington's Law Against Discrimination defines "employer" as "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit." RCW 49.60.040(3). Thus, as a nonprofit, religious organization, Annie Wright and the defendants acting in its interest, are exempt from RCW 49.60.

2. The statute of limitations bars claims arising during the time Annie Wright employed Solt's husband.

Selleck's last act of harassment while an employee of Annie

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<sup>8</sup> Solt has dropped her claim that Annie Wright's decision years later not to renew Solt's contract was retaliatory or gender based, so this portion of the trial court's summary judgment order is not at issue.

Wright was on August 12, 2001. Annie Wright fired Selleck on August 15, 2001. Plaintiff filed her First Amended Complaint on August 24, 2004.<sup>9</sup> CP 812. The applicable statute of limitations for cases arising under RCW 49.60 is three years. RCW 4.16.080; Antonius v. King County, 153 Wn.2d 256, 261, 103 P.3d 729 (2005). Therefore, none of the Solt's claims under RCW 49.60 can be supported by the events occurring during the course of her husband's employment at Annie Wright.

3. Selleck's conduct was not sexual harassment. Rather, the motivation for Selleck's conduct was his anger about his wife's extra-marital affairs.

Sex discrimination, by definition, does not include conduct motivated simply by personal animosity. Anger that develops from the disintegration of a personal relationship is a prime example of a non-discriminatory motive for bad behavior.

In a case factually similar to the dispute between Solt and Selleck, but involving Title VII<sup>10</sup>, a co-worker verbally and physically harassed his former lover in the workplace in front of colleagues and students. The

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<sup>9</sup> Plaintiff's original complaint was filed earlier, but was never served on any of the defendants. The Amended Complaint added completely new facts and was the only complaint ever served on the defendants. Plaintiff is thus not entitled to have the Amended Complaint relate back to the filing date of her original complaint. CR 15(c).

<sup>10</sup> "[D]ecisions interpreting [Title VII] are persuasive authority for the construction of [WLAD]." Xieng v. People's Nat'l Bank, 120 Wn.2d 512, 518, 844 P.2d 389 (1993).

court dismissed the claim, finding that defendant's anger following the failed relationship was the underlying reason for the harassment, rather than the plaintiff's sex. Succar v. Dade County Board, 229 F.3d 1343, 1344-45 (11<sup>th</sup> Cir. 2000). The court explained that, "Title VII prohibits discrimination; it is not a shield against harsh treatment at the work place. Personal animosity is not the equivalent of sex discrimination ... The plaintiff cannot turn a personal feud into a sex discrimination case." Id.

The Succar decision is in accord with an earlier decision by the Supreme Court. In a case involving same-sex sexual harassment, the Court held that the pertinent question is whether the harassment occurred because of an individual's sex as male or female. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80, 118 S.Ct. 998, 998, 140 L.Ed.2d 201 (1998). The Court stated that "[w]e have never held that workplace harassment, even harassment between men and women is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id.

This analysis does not undermine the liberal construction of WLAD, which prohibits sexual harassment that "unfairly handicaps an employee against whom it is directed in his or her work performance and

as such is a barrier to sexual equality in the workplace.” Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 405, 693 P.2d 708 (1985). Selleck harassed Solt because of the personal animosity arising out of their soured marriage, not because she was a woman. His telephone calls and occasional public insults were strictly limited to the one person with whom he had bonded in marriage, and did not create a barrier to sexual equality in the workplace. Solt's own testimony identifies some of the specific sources of Selleck's anger. Solt admitted at her deposition, for instance, that she initiated the couple's separation after the conference during which she identified her sexual orientation and disclosed it to her husband. CP 265-266; CP 267.<sup>11</sup> She also testified that the post-separation relationship deteriorated because "Mr. Selleck was not allowed to come to my apartment. He was not allowed to visit his daughter at my apartment." CP 267. Solt felt that her restriction on Selleck's visitation was appropriate. "In my mind, I thought it was the appropriate way a relationship should kind of go." CP 267. She knew that he did not: "So I think on some levels, in his mind, that began the deteriorating of the relationship." CP 267. Selleck's inability to visit his daughter created difficulties in the relationship. CP

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<sup>11</sup> Solt's Brief misstates her own testimony by erroneously claiming that it was "during her separation from her husband" rather than during the time they lived together that she disclosed to him that she had issues with her sexual orientation. Solt Brief, p. 11.

416. Solt also knew that Selleck was unhappy with the restriction because of "his inability to visit me and be in my home and be around my personal belongings." CP 573. She testified that, "it was my belief that as [Jenny] was preparing to leave for the summer, that was starting to cause him some anxiety that perhaps I wouldn't be there in that caretaker role and I would have a little more freedom to do what I want to do." CP 574. Selleck's telephone calls were specific about his fears. Solt testified that at that time Selleck stated, "I bet you can't wait until Jenny's gone. You can do whatever you want." CP 574.

Solt's relationship with Morrison, which began in April and May of 2001, coincided with an increase in Selleck's telephone calls. CP 410, 416. It wasn't until June and July of 2001, after Jenny left for the summer, and Solt began entertaining Morrison in what used to be the Solt/Selleck marital home, that Selleck's conduct apparently became intolerable. CP 575. Selleck focused his conduct on times when he saw his wife with persons he believed to be her lovers, and on persons he believed to be her lovers, and about persons he believed to be her lovers. CP 459-460; CP 652.

Based on these facts, Solt is not entitled to any inference that Selleck's behavior was motivated by female animus. Selleck's anger was quite clearly generated by Solt's rejecting him and then compounding the

rejection by bringing her new lovers into the former marital home while Solt and Selleck were still married. While it may have been particularly insulting to Selleck that Solt's new lovers were women, there is no evidence Selleck would have been less upset if Solt's extramarital affairs had been with men, or for that matter, if Solt and Selleck had been a male homosexual couple experiencing a bitter split.

The point here is that the unpleasant events arose from personal animosity and not from gender discrimination. It would be absurd to hold that the WLAD makes it illegal for a married person to be distressed over an affair by the other spouse. Solt's claims based on Selleck's behavior thus fail as a matter of law.

4. Solt incited Selleck's conduct and cannot now allege that such conduct constituted sexual harassment.

The gravamen of any sexual harassment claim is that the alleged sexual harassment was unwelcome in the sense that the plaintiff-employee did not solicit or incite it. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 68, 106 S.Ct. 2399, 2406, 91 L.Ed.2d 49 (1956); Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406, 693 P.2d 708 (1985). Evidence related to the work environment has a bearing on this determination. A plaintiff's provoking behavior in the workplace is obviously relevant to the issue. Meritor, 477 U.S. at 69, 106 S.Ct. at 2406 (citing 29 CFR sec. 1604).

In attempting to prove the first element required to establish a case of sexual harassment, Solt makes only the conclusory allegation that "... there is no doubt that the offensive conduct was unwelcome." Solt Brief, p. 30. However, it is undisputed that Solt's female lovers frequently spent the night with her in the dormitory apartment she once shared with her husband, and, despite the fact that her husband was still employed at Annie Wright, Solt made no attempt to hide the visits. According to Solt's own testimony, the timing of Selleck's harassment coincided with these visits. In addition, the contents of Selleck's harassing statements establish that the motivation for his harassment was clearly associated with the fact that it was very difficult for him to see his wife conduct her extra-marital affair and welcome her lovers into their marital home in front of him and his co-workers.

When a plaintiff's provoking behavior incites a reaction, she is not entitled to claim sexual harassment. Solt was obviously aware of the impact her lover's visits had on her husband. Under the law, Solt cannot claim the right to conduct an extramarital affair, homosexual or otherwise, in front of her husband and simultaneously claim that his predictable response constitutes sexual harassment. Allowing her to do so would turn the shield of anti-discrimination law into a sword used in marital disputes.

5. Solt failed to exercise reasonable care in avoiding, preventing, or promptly correcting any harassing behavior.

In a sexual harassment case, an employer is not liable for a co-worker's harassment if the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. Kohler v. Inter-Tel Technologies, 244 F.3d 1167 (9<sup>th</sup> Cir. 2001).

Solt's delay in reporting Selleck's behavior during the alleged initial stages of harassment shows that she did not perceive of her work environment as hostile or abusive. Mosher v. Dollar Trees Stores, Inc., 240 F.3d 662, 668 (7<sup>th</sup> Cir. 2001) (plaintiff employee's failure to report her alleged harasser's behavior at the time it occurred suggested that she did not subjectively perceive of her work environment as hostile or abusive). However, even if she did, she purposefully kept matters quiet until July 2001, more than a year and a half after Solt initiated the couple's separation.<sup>12</sup>

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<sup>12</sup> Solt's argument that reporting Selleck's conduct to Bob Klarsh, the then Head of School, would negatively affect her job status by disclosing her sexuality is argument and not fact. CP 414-415. Solt herself testified at her deposition that during Klarsh's tenure there was a gay man on the faculty who "was very open with his sexuality." Notwithstanding Solt's belief that being gay meant you would be fired, she admitted she knew of no negative consequences that befell that man. CP 274. Nor has she offered any evidence of any homosexual employee suffering discrimination on that (or any other) basis.

6. Annie Wright is not liable for any harassment by Selleck, because it took appropriate steps to remedy the alleged harassment once it had notice.

If a harasser is a co-worker with no supervisory authority over the plaintiff, as is the case here, there can be no vicarious liability against the employer for the co-worker's actionable harassment. Under this scenario, the only way an employer can be held liable for co-worker harassment is if it knew or should have known that the harassment was taking place, but did not take adequate steps to address it. Brooks v. City of San Mateo, 229 F.3d 917, 925 n. 6 (9<sup>th</sup> Cir. 2000).

Furthermore, Solt is estopped from arguing that the School responded inadequately to Selleck's actions. Estoppel occurs when (1) one party makes a statement or act inconsistent with its later claim, (2) that another second party relies on, and (3) the second party will suffer injury if the first party is allowed to repudiate the statement or act. Heg v. Alldredge, 157 Wn.2d 154, 166 (2006). The School relied on the information that Solt gave it about the issues between her and her husband as the dispute developed. In particular, the School relied, for a time, on her expressed desire that Selleck not lose his job. Given that the School went above and beyond Solt's requests when it protected her by firing Selleck and banning him from the campus, the law of estoppel prevents Solt from now claiming that the School should have done more.

Even apart from the estoppel argument, once it had notice, Annie Wright and Cummings took timely and reasonable steps to stop Selleck's conduct and, when that failed, to protect Solt from Selleck's conduct. It is undisputed that after Jenny Selleck moved out of Solt's apartment in June 2001, Solt left for an 18-day trip to China, a trip she did not return from until July 4, 2001. Solt left town again from August 1 to August 12, 2001. It was almost midway through this four-week period in July 2001<sup>13</sup> that Solt first told her supervisor, Susan Bauska, about the extent of Selleck's behavior. Solt did not tell Manning until July 27, 2001, at which time she asked him to talk to Selleck and ask him to stop bothering her. Cummings and Manning met with Selleck and gave him a verbal warning that his behavior had to change because his job was on the line. Notwithstanding the warning, Selleck confronted Solt when she came back on August 12. Solt then advised Cummings on August 13, and Cummings fired Selleck on August 15 and banned him from campus, the maximum punishment it could impose, and more than what Solt had requested.

With these dates in mind, it is clear that Solt was actually on campus in a position to be harassed for only five days from the time she

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<sup>13</sup> Since Selleck's public confrontation with Solt and her lover on July 11, 2001, was the trigger for Solt's restraining order. Solt's report to Bauska happened that day or shortly thereafter.

first told Manning, and only two days from the time she first told Cummings. In response, the school, Cummings, and Manning took two concrete steps during the short period of time available. First, they told Selleck his behavior had to stop or he would be fired, and second, they fired him and banned him from the campus.

Annie Wright's response was adequate as a matter of law. The Washington Court of Appeals made that determination in a case with far more egregious facts. In Estevez v. Faculty Club, 129 Wn.App. 774, 120 P.3d 579 (2005), the plaintiff brought a Title VII and RCW 49.60 case of sexual harassment against her employer, alleging that it failed to take reasonably prompt and adequate corrective action against a co-worker's harassment. Plaintiff complained of the harassment on two consecutive days. Within days of the initial complaint, the employer put the harasser on a leave of absence until a mental health assessment could clear him to return to work. The harasser continued to contact the plaintiff, at work and at home. She reported the contact to her employer, who escorted the harasser off of the premises once, and to the police, who recommended that she get a restraining order. Plaintiff asserted that the corrective action was not adequate because her employer did not issue a Notice of Trespass to the harasser, did not provide for her safety in coming to and from work, discouraged her from getting a restraining order against him, and did not

specifically discuss the incidents involving her when they put the harasser on leave. The court ruled in the employer's favor, finding that the employer's actions were both reasonably prompt and adequate, and that "[t]here is no requirement that employers take *all* possible measures of corrective action." Estevez, 129 Wn.App. at 796.

Nor can Selleck's post-termination acts connect to his earlier acts in a way creates liability for the school. Nothing in law or logic makes an employer liable for the alleged discriminatory acts of ex-employees. Annie Wright's ability to intervene when a third party violates a protective order to harass an employee is extremely limited and perhaps non-existent. Whatever options Annie Wright might have had for addressing Selleck's behavior after it had fired him, were completely separate from its duty as an employer to correct a gender-hostile working environment. Selleck was Solt's husband for some time after Annie Wright terminated him. In fact, she did not file for divorce until October 2001. The dispute between a non-employee husband and an employee wife, however distasteful, does not make the employer liable for sex discrimination, and cannot logically become a part of any hostile work environment claim under RCW 49.60. Indeed, Solt testified that, when she notified the school of Selleck's post-termination communications, there was nothing that she wanted or expected the school to do. CP 304-305.

Annie Wright clearly acted both promptly and adequately during the time it exercised any control over Selleck's actions. After learning of the problem, the school quickly counseled Selleck to obey the protective order, and when he refused, it fired him and banned him from the campus. Thereafter, when Selleck sent emails to persons at Annie Wright, Cummings contacted an attorney and sent a cease and desist letter to Selleck, apologized to Solt and the Annie Wright staff who received them, and put a written reprimand in Manning's personnel file, chastising him. Because the police were already aware of the dispute between Solt and Selleck, and were actively enforcing the restraining order, there was no need or ability for Annie Wright or Cummings to do more in order to meet any duty they had to protect Solt from her husband.

7. Solt cannot establish the elements of a hostile work environment claim based on Manning's Acts.

In order to establish the existence of a gender-hostile working environment, the employee must prove the existence of the following elements: (1) offensive and unwelcome conduct, (2) that occurred because of sex, (3) that affected the terms or conditions of employment, and (4) were imputable to the employer. Glasgow v. Georgia-Pacific, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). The undisputed facts do not establish any of these elements.

- a. Manning's actions do not constitute actionable harassment, much less sexual harassment.

Manning's actions were completely different from Selleck's. Despite Solt's wild accusations that he was "monitoring her apartment around the clock" and making a "constant barrage of reports of supposedly improper behavior,"<sup>14</sup> Manning's acts consisted of nothing more than his occasional reporting, to the school head, the presence of a vehicle frequently parked near the dormitory on a street restricted from parking by Annie Wright personnel living on campus. These reports were gender neutral and did not resemble Selleck's phone messages in the slightest. In fact, Solt specifically testified that, throughout this matter, Manning never made any communications at all to Solt herself, and that their business relationship did not suffer in the slightest. CP 80-81, 315.

And yet, Solt wildly accuses Manning of engaging in "an extraordinary campaign of overly intense scrutiny and pervasive harassment ... that lasted for years after Mr. Selleck's termination." CP 436. According to Solt's testimony, the intense scrutiny and pervasive harassment consisted of "watching me closely" and making "a series of false accusations about me, most of which had to do with my divorce, my sexual orientation, and what he deemed inappropriate behavior." CP 421.

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<sup>14</sup> Solt Brief, p. 18.

The record supports none of that. The alleged “campaign” of harassment consists entirely of a few conversations that Manning had with his boss about topics within his scope of duties as the chief of campus security. Thus Solt’s claims arising out of Manning’s actions are hollow at their core since Manning never took any actions, discriminatory or otherwise, directed at Solt.

On only one occasion, when Manning sent a copy of the letter he wrote to Cummings and Bauska to both Solt and Selleck, did his concerns go beyond the administration. Even then, it simply went to the individuals who were directly mentioned in the discussions.

While Solt no doubt did not appreciate Manning noticing and reporting her violations of school policy, the hostile reaction on her part does not satisfy the first element of Plaintiff’s burden of proof. Simple hostility between coworkers of the opposite sex is not harassment, especially when the alleged expression of hostility consists of nothing more than an employee making legitimate reports to his boss in the performance of his duties. Manning’s reporting of unregistered guests in a girl’s dormitory simply cannot be classified as harassment.<sup>15</sup> Further,

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<sup>15</sup> Manning himself cannot be liable under any of Plaintiff’s RCW 49.60 causes of action because he was a co-worker with no management authority over Plaintiff. Jenkins v. Palmer, 116 Wn.App. 671, 676, 66 P.3d 1119 (2003).

"[c]onduct that is hostile and intimidating, without more, is not actionable as sexual harassment." Herried v. Pierce County, 90 Wn.App. 468, 473, 957 P.2d 767 (1998).

Nor is there anything in the record that supports Solt's allegation that Manning's report of Morrison's truck is evidence of disparate treatment because of gender. She presents no evidence that any of the other Resident Staff members were having frequent unreported guests or that evidence of their having such guests was observed, but not reported, or that the security staff limited their patrols to 10<sup>th</sup> Street. By itself, the fact that Manning reported the truck cannot support even the slightest inference in support of Solt's claim of disparate treatment.

Solt attempts to establish disparate treatment by arguing that Selleck spent the night at her dormitory apartment before they were married, and it was deemed acceptable, but when Solt had a woman lover spend the night, it was not. Solt Brief, p.28. However, there are at least four things wrong with this argument. First, when Selleck spent the night, he was already an Annie Wright employee in the security department and raised no security implications. Second, if the security department had completely ignored the frequent and obvious overnight presence of a non-employee, it would not have done its job. The dormitory was full of high school girls as well as the families of other Resident Assistants who were

entitled to school-provided security. Suspecting the visitor was Angie Morrison did not diminish the responsibility of the security department to report that the frequency of her overnight stays exceeded any norm. Third, there is a complete absence of any evidence that anyone else, male or female, entertained unreported overnight guests to the extent Solt did. Fourth, Solt does not present a single piece of direct evidence to show a bias against women or homosexuals, and no evidence whatsoever that she was subjected to any adverse action as a result.

Manning's differences with Solt were not over issues of gender, but instead concerned security clearances for visitors (a topic completely within Manning's scope of duties) and consistent standards of conduct for blue-collar workers in Manning's department (another topic within Manning's job-related duties). Disputes over genuine workplace issues do not constitute gender discrimination. Otherwise, every workplace argument about accounts receivable or production schedules would turn into a civil rights case if the disputing parties happened to be members of the opposite sex.

- b. Solt specifically testified as to the absence of gender bias.

When questioned about Manning's motives towards her, Solt stated only that Manning was upset about losing a valued employee in

Selleck, and that he was perhaps biased against homosexuals. CP 306-307. Obviously, neither of these motives constitutes prohibited gender bias under RCW 49.60.

Solt's newly-minded theory that Manning's reports to Cummings were an attempt to "out her" and get her fired, fails for at least five reasons. First, months before Manning's actions, Solt had already raised the issue of her sexual orientation with Cummings, the new head of School, so "outing" was a moot concept. CP 653-54.

Second, if Solt is correct - that any homosexual, regardless of gender, is at risk for being fired at Annie Wright because of their sexual preference -- then there is no sex discrimination. Both genders are subject to the same treatment. As Solt points out in her brief, rare cases of "gender stereotyping" are possible under Title VII where, for instance, a homosexual man might suffer harassment because he is not "masculine" enough. This line of cases does not apply here because there is no evidence that Manning or anyone else cared about whether Solt walked, talked or dressed "feminine enough" -- Solt herself says she was discreet about her sexual identity. See Rene v. MGM Grand Hotel, 305 F.3d 1061 (9<sup>th</sup> Cir. 2002). The Manning/Solt issue concerned only the security issue of overnight, non-employee guests in the girls' dormitory.

Third, there is no evidence Manning or anyone else cared about

Solt's lesbianism. Solt herself knew that security was the issue. In her February 2002 letter to Dr. Cummings, she stated, "I assume that Mr. Manning will claim that, for safety reasons, he and his staff need to be accountable for all persons living in the building. And of course, I agree." CP 220-222. Mr. Cummings confirmed Solt's supposition. He testified at deposition, "I wanted to know in terms of visitation, how do we know who's in the building ... And at night time that was even more, how did we know who was in the building ... We were using this as an opportunity ... how do we behave in this situation? How do we react?" CP 346. "Who was in the dorms and why they were there." CP 347. Cummings advised Manning to tighten his procedures and create written logs of what was going on. CP 347; CP 335. However, this was not directed toward Solt, and there was never a written record made of the presence of Morrison's truck or any record made on who came to visit Solt. CP 342.

Fourth, even if all of the above arguments are discarded, true statements simply do not constitute gender discrimination. If A truthfully tells B that C is a homosexual, A has not violated Washington law. Solt does not and cannot cite any case that turns the RCW 49.60 into an instrument of censorship.

Fifth, even if Manning's actions did constitute sex-based harassment, Cummings addressed Solt's concerns by listening to both

parties and acquiescing in Solt's request for an increase in her pay and a move off campus, thus creating an accord and satisfaction. Jones v. Allstate Ins Co., 146 Wn.2d 291, 313 (2002). (elements of accord and satisfaction) (see Section III. D., herein).

- c. The conditions of Solt's employment were not affected and thus cannot constitute a hostile work environment or harassment as retaliation.

In order to show that the terms or conditions of employment have been affected, the allegedly offensive conduct must be "sufficiently pervasive as to alter the conditions of employment and create an abusive working environment[,] ... to be determined with regard to the totality of the circumstances." Glasgow, 103 Wn.2d at 406-07. Solt cannot argue that the environment around her became hostile. In fact, she testified to just the opposite. To the extent anyone at work knew about her issues with her husband and later with Manning, Solt testified that, far from being hostile, the environment consisted of everyone rallying around her. CP 308-309, 312. And again, Solt never had any contact with Manning over these issues so she did not experience any unpleasantness with him.

On this point, the evidence is overwhelming that nothing ever happened to Solt or her frequent houseguest as a result of Manning's reports. The school didn't limit Solt's guests, restrict the frequency of Morrison's visits, require Morrison to log in and out, or make any

alteration to Solt's living arrangements. In short, other than some conversations about her visitor, nothing happened to Solt.

d. No misconduct is imputable to Annie Wright.

An employer's failure to correct a gender-hostile working environment can constitute illegal sex discrimination and a violation of RCW 49.60. Glasgow, 103 Wn.2d at 407. However, a condition precedent to establishing this cause of action is the existence of a gender-hostile working environment. Glasgow, 103 Wn.2d at 405-6. Solt cannot establish its existence, much less the next necessary element – proof that her employer failed to take reasonably prompt and adequate corrective action. Glasgow, 103 Wn.2d at 407. Cummings met with and considered the complaints of both Solt and Manning. Ultimately, Manning, the male in this dispute between co-workers, was by far unhappier with Cummings' handling of the dispute. Manning received a written reprimand from Cummings, while Solt received none. In addition, Cummings and Solt's supervisor, Bauska, responded generously to Solt's complaints about Manning by accepting Solt's proposal that she be allowed to move off campus, be given a raise, and the additional responsibilities she requested.

e. No evidence of retaliation.

In order for Solt's claim of retaliation to survive, she has to establish that there was a hostile environment that satisfies the adverse

employment action element in a retaliation claim. Delahunty v. Cahoon, 66 Wn.App. 829, 839, 832 P.2d 1378 (1992) (retaliation under WLAD requires (1) engagement in a statutorily protected activity; (2) and adverse employment action that followed; and (a causal link between the activity and the adverse action). As argued earlier, the undisputed evidence is that Manning's sole acts were the discreet reports of Morrison's truck, and the letter to Cummings that he mailed to both Solt and Selleck. Those isolated acts, which occurred between August 2001 and June 2002, do not meet the standard of harassment as a matter of law.

"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." Glasgow v. Georgia-Pacific Corporation, 103 Wn.2d 401, 406, 693 P.2d 708 (1985). Instead, the harassment must be so pervasive, severe, and persistent that it seriously affects the emotional or psychological well being of an employee. Id.

It is not sufficient that the conduct is merely offensive. Washington v. Boeing Co., 105 Wn.App. 1, 10, 19 P.3d 1041 (2000). To determine whether the conduct was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment, courts look at the totality of the circumstances. In addition to its frequency and severity, courts look at whether the conduct involved words alone or also included

physical intimidation or humiliation, and whether the conduct interfered with the employee's work performance. Glasgow, 103 Wn.2d at 406-07; MacDonald v. Korum Ford, 80 Wn.App. 877, 885, 912 P.2d 1052 (1996).

But a civil rights code is not a “ ‘general civility code.’ ” Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1988) The conduct must be so extreme as to amount to a change in the terms and conditions of employment. Id. The conduct must be both objectively abusive (reasonable person test) and subjectively perceived as abusive by the victim. Harris v. Gorklift Systems, Inc., 510 U.S. 17, 21-22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

By an objective standard, no reasonable person could find that Manning's reports of Morrison's visits were abusive or came anywhere close to creating a hostile working environment. Solt's alleged subjective reaction to them doesn't change the undisputed fact that the only things that occurred were a few conversations involving Cummings, Manning and Bauska, and nothing was ever done to Solt or Morrison. As a matter of law this fails to meet the objective standard.

- f. The School's safety and security concerns were not pretextual.

Solt cannot come close to making a prima facie case of sexual harassment, however, even if she could, she can not raise any inference of pretext sufficient to overcome summary judgment.

Cummings, Manning, and even Solt herself admit that Manning's responsibilities include keeping the campus safe. Given that, it is simply the reporting of what his staff observed that Solt must focus on to prove pretext. However, she cannot and does not deny the truck was there, and cannot provide any factual support for her imaginative idea that there were undoubtedly other cases of frequent, unreported, overnight visitors among the Resident Assistants living in the other seven apartments. The undisputed facts also disprove her contention that the safety and security issue did not arise until the start of this litigation. See footnote 7, p. 15, herein. Solt thus fails in her attempt to show pretext.

C. Solt's negligent supervision claim fails.

Solt alleges that Annie Wright breached its duty to maintain a safe workplace by failing to supervise Selleck and Manning, both whom she claims upset her. To prevail on a claim like Solt's, where one employee allegedly harms another, Solt must show that (1) Manning and/or Selleck acted outside the scope of their employment; (2) Manning and/or Selleck presented a risk of harm to Solt; (3) Annie Wright knew, or in the exercise of reasonable care should have known, that Manning and/or Selleck posed

such a risk; and (4) Annie Wright's failure to supervise Manning and/or Selleck was the proximate cause of Solt's injury. Niece, 131 Wn.2d at 48, 51.

With regard to Selleck, the duty Solt describes is only a limited duty in exception to the general rule that there is no legal duty to protect another from the criminal acts of third party. Hutchins v. 1001 Fourth Ave. Assoc., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). An employer is not liable for negligent supervision of an employee unless the employer knew, or in the exercise of reasonable care, should have known, that there was a risk of the employee committing harmful acts which were outside the scope of his employment. Niece v. Elmview Group Home, 131 Wn.2d 39, 48-49, 929 P.2d 420 (1997).

Solt's negligent supervision claim regarding Selleck fails because Annie Wright acted reasonably once it had reason to believe Selleck had acted badly. As argued earlier in this brief, Annie Wright first became aware of Selleck's possible misconduct shortly before it terminated him. Solt was absent from the Annie Wright campus for more than half of this time. Additionally, to the extent Solt now labels Selleck's earlier behavior "domestic violence," it is a concept formed after her deposition, solely to help her litigate this case. Solt's own testimony establishes that there was never any violence between Selleck and her, that she did not fear Selleck

while he worked at Annie Wright, and did not want him fired. In 2000, more than one year prior to Selleck's termination, Solt told Manning to do nothing when he offered assistance. Selleck's later behavior, which motivated Solt to file for and receive a protective order, still had her asking Manning simply to talk to Selleck (which he did) and asking Cummings not to fire Selleck (which he did anyway). As argued earlier, Solt is estopped from arguing that Annie Wright should have done more than she requested. Even apart from the estoppel argument, as a matter of law, Annie Wright acted promptly to protect Solt, and is therefore entitled to summary judgment on this issue.

Solt's negligent supervision claim regarding Manning reporting her overnight guest fails because Manning committed no act, criminal or otherwise, outside of the scope of his employment as Director of Security. The deposition testimony of Manning, Cummings, and Bauska establish without question that Manning's duties as Director of Campus Security included keeping track of vehicles parked in the area and overnight visitors to the dorm. CP 330-331; CP 346-347; CP 364. Manning's concerns arose out of his management responsibilities and his security responsibilities. Manning limited the expression of his concerns to his relevant fellow administrators and the parties involved in the marital dispute. He exhibited no openly hostile behavior toward Solt, nor does she claim that he did. Nor

did Solt report that she saw him lurking around her living quarters. She simply labels as harassment Manning's truthful recounting of Solt's unreported overnight visitor. A recounting she was first aware of only because Bauska followed up on what Manning reported as a school policy violation. Solt is thus completely unable to identify any tortious or negligent act by Manning or Annie Wright.

D. Solt's promotion in the Spring of 2002 constitutes accord and satisfaction and bars her claims.

Accord and satisfaction occurs when a defendant proves that it tendered a benefit as full satisfaction of a disputed claim and the plaintiff accepted that benefit. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 313, 45 P.3<sup>rd</sup> 1068 (2002).

Solt began lobbying for permission to move off campus shortly after her husband was fired. CP 298. Susan Bauska testified that she supported Solt in this effort. CP 367-368. Solt also testified that she complained to Cummings that Manning's actions caused her to lose some of the value of her residence because she was no longer comfortable in the girls' dormitory due to the awareness of her lover's visits. CP 298-300. Solt prepared a written request for increased compensation. CP 218. In response to Solt's complaints, the school allowed her to move off campus and increased her compensation from \$42,100 to \$56,000, with a

corresponding increase in benefits, while Solt maintained her ability to dine on campus.

Based on these facts, where Solt complained about Manning's actions, requested increased compensation, and persuaded the school to accept her proposal, an accord and satisfaction was created barring Solt's subsequent claims.

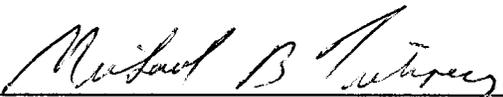
#### IV. CONCLUSION

This Court should reject Solt's attempt to open a new era in judicial regulation of the workplace. Nothing in WLAD or public policy supports the notion that society would be well served if the courts begin using the Washington Law Against Discrimination as a tool to protect individuals from hurt feelings that arise out of marital disputes.

Judge Armijo's decision on summary judgment was correct because Solt has not offered proof of facts sufficient to support her claims. The decision should be affirmed in its entirety.

DATED this 5<sup>th</sup> day of October, 2006.

MICHAEL B. TIERNEY, P.C.

By: 

Michael B. Tierney, WSBA No. 13662

Diana V. Blakney, WSBA No. 17629

Attorneys for Respondents Annie Wright School and the Cummings

APPENDIX

Kristi Solt vs. Annie Wright School, et al.

Timeline

1996	March	Kristi Solt marries Stu Selleck.
1997		
1998		
1999	January	
	February	
	March	Selleck pulls phone out of wall during argument with Plaintiff.
	April	
	May	
	June	
	July	
	August	Solt questions her sexuality at a conference on the East Coast.
	September	
	October	
	November	
	December	Selleck moves out of Solt's apartment at Annie Wright School.
	2000	January
February		
March		
April		
May		
June		Solt requests that Manning change the lock on her apartment and then rescinds request.
July		
August		Selleck's daughter, Jennifer, begins living with Kristi Solt for the 2000/2001 school year.
September		
October		
November		
December		
2001	January	
	February	
	March	
	April	
	May	
	June	Jennifer moves out of Kristi Solt's apartment at end of school year expecting to return in the fall.
	July	7/27/01 Court issues no contact order. Cummings and Manning counsel Selleck.

2001	August	8/13/01 Selleck violates protective order. 8/15/01 Selleck terminated and barred from campus.
	September	
	October	Stuart Selleck moves to Texas. 10/5/01 Kristi Solt files for divorce.
	November	
	December	
2002	January	Manning reports to Bauska truck parked on Tenth Street. 1/18 Plaintiff's divorce is final.
	February	2/7 Solt meets with Cummings re Manning's report on truck. 2/14 Cummings counsels Manning.
	March	3/12 Selleck sends derogatory emails regarding Solt to Annie Wright Staff.
	April	
	May	
	June	Solt moves off campus.
	July	Jaysari Ghosh becomes new head of school.
	August	
	September	
	October	
	November	
	December	
2003	January	
	February	
	March	
	April	
	May	
	June	
	July	
	August	
	September	
	October	
	November	
	December	
2004	January	1/22 Solt's position eliminated due to budget shortfall.
	February	

FILED  
COURT OF APPEALS

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No. 34741-5-II  
STATE OF WASHINGTON

BY \_\_\_\_\_  
TIERNEY

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

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KRISTI SOLT, Appellant,

v.

ANNIE WRIGHT SCHOOL, and STANLEY CUMMINGS and JANE  
DOE CUMMINGS, and the marital community thereof; PAUL  
MANNING and JANE DOE MANNING, and the marital community  
thereof; et al,  
Respondents.

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PROOF OF SERVICE

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ORIGINAL

I, Heather Hegeman, hereby certify under penalty of perjury that on October 5, 2006, I caused to be filed with the Court of Appeals Division II via ABC Legal Messengers, the original of the following documents:

1. Brief of Respondents Annie Wright School and the Cummings; and
2. Proof of Service.

I also caused to be served via ABC Legal Messengers, copies of said documents upon:

Richard D. Reed  
The Law Offices of Judith A. Lonnquist, P.S.  
1218 Third Avenue, Suite 1500  
Seattle, WA 98101-3021

And Via US Mail:

Bret S. Simmons  
Roy & Simmons, P.S.  
1223 Commercial Street  
Bellingham, WA 98225

Dated this 5th day of October, 2006.

  
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Heather Hegeman