

**ORIGINAL**

No. 35130-7

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JANE DOE III,

Appellant,

vs.

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

Respondents.

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

### Assignment of Error

1. The trial court erred in granting the motions for summary judgment of defendants/respondents State of Washington (State) and the Washington Federation of State Employees (Union) based on the statute of limitations.

### Issues Pertaining to Assignment of Error

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

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

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

b) Whether there was sufficient evidence of notice on the part of Respondents to preclude summary judgment;

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

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

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

f) Whether the State violated Jane Doe III's right to privacy by disclosing her name together with information of a highly offensive nature to both Jane Doe III and to a reasonable person, in violation of express assurances of confidentiality; and

g) Whether the State and the Union negligently retained and/or supervised Green when it knew or should have known that he was unfit and otherwise dangerous to female employees including Jane Doe III.

## **II. STATEMENT OF THE CASE**

The sexual harassment that forms the bases of this lawsuit began back in 1988. Over the years, Barrette Green increased the intensity and frequency of harassment and victimized at least fifteen state employees.

The full extent of Mr. Green's conduct only became public after a 2003 Pierce County trial where an extensive investigation was ordered by

the court. Although Mr. Green was finally terminated after this trial in 2003, the damage that he had done by that point was substantial.

This case represents the tragic experience of just one of Mr. Green's victims. The State of Washington has already conclusively determined that Petitioner was sexually harassed by Mr. Green and presented this fact to two federal courts that have relied on these factual representations. The sections below briefly outline Jacqueline Delgado, Jane Doe III's experience and the environment at Western State Hospital.

**A. Background Summary Of The *Lizee* Case.**

In June 2000, Western State Hospital employee, Kathleen Lizee, filed suit in Pierce County Superior Court against the State of Washington, Barrette Green, and others.<sup>1</sup> CP 512. She brought claims of sexual harassment, retaliation and negligent supervision. *Id.* Ms. Lizee's jury trial began in March 2003 in front of the Honorable Vicki L. Hogan. CP 557. Ms. Lizee presented testimony from 17 different witnesses and at the conclusion of the plaintiff's case, the parties agreed to a settlement. *Id.* The settlement included a cash payment of \$795,000 and a two-year paid leave of absence. *Id.* On April 4, 2003, DSHS and Western State Hospital placed Mr. Green on administrative leave. In November 2003, DSHS finally terminated Mr. Green's employment. *Id.*

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<sup>1</sup> *Kathleen P. Lizee v. State of Washington, et al.*, Pierce County Cause No. 012094144.

On the day of settlement, Kathleen Lizee also filed a motion for injunctive relief. *Id.* In the motion, Lizee asked Judge Hogan to require DSHS to hire an independent investigator to investigate allegations that Barrette Green had sexually harassed and retaliated against others at Western State. CP 558. Based on the abuses she saw, Judge Hogan granted this relief.

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

In anticipation of Judge Hogan's ruling, DSHS hired the expert Kathleen Lizee proposed to Judge Hogan, Jan Salisbury of Salisbury Consulting, "to conduct an independent, thorough investigation into the workplace environment at WSH, to review the allegations of sexual harassment, retaliation and workplace violence there, and to propose specific changes in WSH's training of employees and [the] complaint and investigation process involving claims of sexual harassment." CP 559. The result was one of the most exhaustive sexual harassment investigations in State history. Investigators conducted 97 witness interviews, reviewed thousands of pages of documents and spent a total of approximately 1200 hours over the course of the investigation. CP 490.

At the end of the investigation, Salisbury Consulting spoke with 15 different female employees of Western State, including Jane Doe III, who reported various degrees of sexual harassment by Barrette Green. CP 491.

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

**C. Methodology And Finding of Salisbury Consulting Validated by the State’s Reviewing Expert And The Court’s Special Master.**

Dr. Charles J. Hobson, the State’s hired expert, issued a report in November of 2004. He determined the methodology used and findings rendered by Salisbury Consulting in its investigation of sexual harassment at Western State Hospital was professionally peer-reviewed and validated. CP 628-29. In particular, Dr. Hobson found that:

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

*Id.* The Salisbury Consulting investigation, methodology, and findings were also validated by Special Master Michael Reiss on November 22, 2004. CP 561.

**D. Barrette Green’s Sexual Harassment Of Jane Doe III.**

During the course of the investigation and based upon reports of others, Salisbury investigators asked to interview three women who had never dared to speak previously about the sexual harassment they had

endured at the hands of Barrette Green. One of those individuals was Jackie Delgado.

Jackie Delgado started at Western State Hospital in 1988. CP 440-45. Jackie initially took the job because of the security it provided with a steady income and health benefits for her and her family. *Id.* The Mental Health Technician (MHT) position also allowed Jackie the chance to help others in need. *Id.* Ms. Delgado first met Barrette Green on the graveyard shift while working on the East Campus at Western State. *Id.* Like so many of Barrette Green's other victims, Ms. Delgado was carefully groomed by Green. She found him to be helpful, concerned and likeable at first. *Id.* But just months later, Barrette Green changed his demeanor with Jackie Delgado. *Id.* In November or December 1989, Plaintiff Jackie Delgado was taking out trash during the night shift. *Id.* The trash bin was located in the lower part of the building, and it was dark and isolated. *Id.* Barrette Green followed Jackie out to the trash bin. *Id.* Without warning, Barrette Green attacked Jackie Delgado and kissed her fully on the lips. *Id.* Jackie pushed Green away and ran back to her floor. *Id.* After she had a chance to recover from the shock and disgust of the incident, Delgado told Green definitively that his actions were unwanted and unwelcome. *Id.*

Unfortunately, Green's sexual harassment did not stop there. About a month later, Green attacked Jackie Delgado again. *Id.* Green's

conduct escalated from there. From 1990 through 2002, Green sexually assaulted Jackie Delgado in the following ways: “1) he forced me to have sex with his wife and I complied; 2) he forced me to lay on my back so he could defecate on me; 3) when he was a risk manager in 2002, Mr. Green lured me into his management offices in the safety building at Western State and commanded me to show (him) my breasts while he masturbated; 4) he mouthed my breasts; 5) he forced me to perform oral sex; 6) Green performed oral sex on me; and 7) he even instructed me to urinate in a cup at which point Green drank the urine in front of me.” CP 442. During much of that time, Barrette Green often forced Ms. Delgado to perform sexual acts while at work at Western State Hospital. *Id.* Green would routinely summon Ms. Delgado by telephoning her and her supervisors and demanding that she leave the ward and come to his office. *Id.* Once she was at Green’s office, he would sexually abuse her. *Id.*

As a measure of ensuring his control over Jackie Delgado, Barrette Green threatened her with bodily harm. In late 1992 or early 1993, Green signaled for Jackie to pull her car over. *Id.* As she rolled her window down, Barrette Green reached into Jackie Delgado’s car, pointed a handgun to her head and repeatedly pulled the trigger. *Id.* Mr. Green then said to Ms. Delgado, “See how easy a person can die? Do you really want to die?” *Id.*

Delgado was so desperate to put an end to the sexual assaults and sexual harassment that she went to extreme measures to deter Barrette Green. CP 443. Jackie cut her hair, gained a great deal of weight, avoided entire areas of the hospital and purposefully dressed poorly in order to repel Barrette Green. *Id.* Although her efforts deterred Green some, the sexual harassment did not stop. *Id.* And by 2002, when her weight was back down and Barrette Green had moved into management, Green was sexually abusing Delgado again with impunity. *Id.*

All the way until she actually reported to Salisbury Consulting, Ms. Delgado felt powerless to stop or even complain about Green's unwanted and unwelcome sexual harassment and assaultive behavior because of his prominence as an employee at Western State and because of his power within the Union. CP 442-43. Ms. Delgado describes Barrette Green's power within WSFE and Local 793 to be "unlimited and all encompassing over members of the union like myself." CP 443. Jan Salisbury, in her independent investigation, concurred:

Q In your investigation, could you -- was the union a necessary component in your evaluation of Barrette Green's sexual harassment at Western State Hospital?

A Yes.

Q And you felt that that was a part or a causative factor in his ability to sexually harass individuals at Western State the way that he did?

MR. CHRISTIE: Object to the form.

A The fact that he was in a powerful position in the union and able to interact with management in a very powerful way did appear to be part of his pattern of sexual harassment and retaliation.

Q (By Mr. Cochran) Interact with management as a union representative --

A Yes.

CP 761-62.

**E. DSHS Pushes Delgado To Report To Salisbury.**

Around May 2003, Jackie Delgado received a call from Mental Health Division Director Karl Brimner encouraging her to cooperate with the Salisbury Investigation. CP 443. Ms. Delgado was frightened to become involved, and told Brimner that she did not wish to participate. *Id.* Mr. Brimner's office called again the following week to request a meeting. *Id.* She agreed only to meet. *Id.* Brimner met the following week with Ms. Delgado where he expressed how "sorry" he was. CP 443-44. Brimner again asked for Ms. Delgado's cooperation with the Salisbury Investigation. CP 444. Ms. Delgado cried and told the Director, "I can't, I can't. He'll kill me." *Id.* Brimner told Ms. Delgado that management knew of Green's past retaliations. *Id.*

Karl Brimner assured Ms. Delgado that he was going to "clean house" and that the interview and the information she shared with Jan Salisbury would be kept strictly confidential. *Id.* With that assurance,

**and only with that assurance**, Jackie Delgado agreed to be interviewed by Salisbury Consulting. *Id.*

**F. “Supervisors Who Knew And Did Nothing To Stop It.”**

As indicated by the Salisbury Report, DSHS management continued to promote Barrette Green several times even following the allegations made against him in the *Lizee* lawsuit. CP 500. It is baffling how Mr. Green received these promotions and advancements to positions of increased influence and power in the organization even after these serious allegations had been made against him. *Id.* Although many of Barrette Green’s victims did not immediately report the sexual harassment to a supervisor, most of them eventually complained of his unlawful behavior. CP 498. “At least six victims eventually told a supervisor at WSH. Several other victims told a trusted friend at the time the behavior was occurring.” *Id.*

As early as 1988, a victim reported Mr. Green’s sexually harassing behavior to her supervisor who took no action. CP 500. Another victim indicated that she reported Mr. Green’s sexually harassing behavior to the Labor Relations Manager at the time it occurred, but no follow up questions were posed. *Id.* Although some victims could not muster the courage to report the sexual harassment experienced while employed at Western State Hospital, many of those victims felt they could not report

because any complaints would be done in vain and subject them to retaliation by Green. *Id.* at 501.

**G. The “Teflon Man” – The State Of Washington Shielded Barrette Green And Placed Him In A Position Where He Remained Untouchable.**

Even after the severity and pervasiveness of Barrette Green’s sexual misconduct at Western State Hospital was fully exposed by Kathleen Lizee in June of 2000, supervisors and upper-level management at DSHS and WSH continued to protect Barrette Green at the expense of its female employees. As discovered by Salisbury Consulting and relayed in its report to the State:

One particular problem noted in the investigation was that **Mr. Green, following the allegations in the lawsuit, has received several promotions and advancements, to the point where he now holds a position of influence and power in the organization . . . .** No one can adequately explain how he was able to obtain such promotions in light of the serious allegations leveled against him. **Leadership at WSH seemed to feel that once Mr. Green returned from eight months of home assignment, and received a letter of reprimand, the allegations could be ignored as though the behaviors never occurred. The Director of Organization Performance clearly stated that she did not believe the allegations that thus would not consider the behavior in any decisions made.** This dismissal of the allegations as though the behavior never occurred has led to Mr. Green rising to a place in the organization where he has the ability to inflict more psychological damage, because of the perception of the victims that he has the power to harm them. **Thus, the victims’ perception that Mr. Green is a “Teflon Man” protected by management, or**

**untouchable has been reinforced by management's response following the complaint.**

CP 500 (emphasis added). In her deposition, Jan Salisbury affirmed her findings regarding Barrette Green's untouchable status within Western State and the Union.

Q . . . the State of Washington is actually at trial over allegations of sexual harassment for Barrette Green, and he's being promoted. Isn't that true?

A That's correct.

Q And is this a part of what you've identified not only in the July 1, 2003 report, but the July 8, 2003? Isn't this a part of the culture at Western State Hospital that allowed Barrette Green to be such a pervasive sexual harasser?

MR. CHRISTIE: Object to the form.

A Yes.

CP 760.

#### **H. The State Terminates Barrette Green.**

Based upon the findings of the Salisbury Report, DSHS Director Brimner sent Barrette Green a letter of termination from Western State Hospital on November 6, 2003. CP 769. The director of DSHS based Green's termination primarily on the harassment of the three newly reporting victims. *Id.* According to Director Brimner, **Green was terminated due to "a pattern of engaging in sexually harassing and retaliatory behavior. Your behavior is so egregious and demeaning to the female staff of the hospital that it cannot be tolerated."** CP 772

(emphasis added). Director Brimner went further when he made special note of the duration of sexual harassment by Green. “I was particularly struck by the fact that these **behaviors occurred over your complete career with the agency.**” CP 773 (emphasis added).

Addressing Barrette Green directly, Director Brimner detailed the sexual harassment of victim Jackie Delgado as substantiated by the Salisbury investigation. CP 771-72.

**I. Retaliation Against Jane Doe III By The State Of Washington And Barrette Green Follows.**

Following Green’s termination from Western State, Jackie Delgado instantly became the target for retaliation as a result of her statements to Salisbury Consulting against Barrette Green. On November 6, 2003, the State – after making repeated promises of confidentiality to Ms. Delgado (and to Jane Doe I and II as well) – nevertheless disclosed her name in a termination letter it wrote to Barrette Green. CP 772. Ms. Delgado was so fearful of retaliation by Green that she filed for and obtained an order of protection against Green. CP 444.

After his termination in November 2003, Barrette Green filed suit in the U.S. District Court, Western District of Tacoma against the State of Washington, Jackie Delgado, Linda Salazar and Cheryl Reis for what he claimed was discrimination, defamation, and a host of other alleged violations. CP 567. Filing suit against his victims, as the Salisbury

investigators noted, was nothing new for Green when he was reported for sexual harassment. As he had done to other victims, Green used the justice system to retaliate and intimidate all those who would dare speak out against him. CP 501.

The State was aware of Green's retaliatory tactics against those who have complained of sexual harassment. *Id.* Among the victims who met with Salisbury investigators, retaliation by Green was a common theme including the following behaviors:

- Victim was criticized by Mr. Green for confronting him with his action;
- Threatening note sent to victim after she complained, which said: "stay away from me, this is about the lawyer, screw you."
- [T]hreatened to sue for telling lies;
- Mr. Green threatened to file suit after a victim complained';
- Mr. Green did sue two victims in 1989 after they complained;
- Mr. Green posted a letter after trial which implied that the victims were lying.

CP 501-15.<sup>2</sup> The Salisbury Report goes on to state, “It is undisputed that Mr. Green sued the victims in the 1989 allegations, wrote the threatening note, and posted the letter following the trial.” CP 501.

**J. Procedural History.**

On February 16, 2005, Jane Doe III filed suit in Pierce County Superior Court against Washington State, Washington Federation of State Employees and Green for violations of Washington’s Law Against Discrimination (“WLAD”), negligence and outrage. CP 1. All three Defendants eventually moved for summary judgment. CP 64, 258, 276.

On June 2, 2006, the trial court held oral argument on the pending motions for summary judgment. The Court began its ruling from the bench by explaining the difficulty he had in reaching a decision in this matter:

This is a really interesting situation, and I know for the parties that my legal interest in it is probably small potatoes because they’ve had to live the situation.

VRP (June 2, 2006) at 58. The Court went on to determine that all actions that occurred over three years before the lawsuit was filed were not admissible to establish a hostile work environment. *Id.* at 59. Then the Court determined that because Jane Doe III had not made specific complaints to the State or Union, her WLAD claims were dismissed. *Id.*

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<sup>2</sup> In addition to the retaliation attributed directly to Barrette Green, the Salisbury Report also details retaliation victims of Green suffered at the hands of co-workers and union members supportive of Barrette Green.

at 60. On similar grounds of lack of notice, the Court also dismissed the retaliation and negligent supervision claims. *Id.* at 62.

Regarding Jane Doe III's claim of invasion of privacy, the Court dismissed this claim reasoning that the State was legally obligated to publish her name to Green. *Id.* Although the Court retained the outrage claim against Green, it dismissed the outrage claim against the State and Union. *Id.* at 61.

Appellant filed a motion for reconsideration, which was denied on July 7, 2006. CP 940, 1000. This appeal follows. CP 1008.

### III. ARGUMENT

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

“A summary judgment motion can be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must consider the facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 123, 839 P.2d 314 (1992); *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996).

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

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

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

**B. The Statute Of Limitations Does Not Bar Any Of Jane Doe III's Claims Against The State Or Union.**

Summary judgment involving statutes of limitation should be granted only when there is no genuine issue of material fact as to when the relevant limitation period commenced. *See Nevils v. Aberle*, 46 Wn. App.

344, 346, 730 P.2d 729 (1986), *rev. denied*, 108 Wn.2d 1008 (1987). None of the claims asserted by Ms. Delgado against the Respondents are barred by the statute of limitations for two main reasons: (1) the applicable statute of limitations on the sexual harassment and retaliation claims was extended by *Antonius*; and (2) the discovery rule applies to the claims of outrage and negligence.

**1. Ms. Delgado's hostile work environment and retaliation claims are a unitary, indivisible sexual harassment claim, satisfying the extended statute of limitations period pursuant to *Antonius*.**

Summary judgment involving statutes of limitation should be granted only when there is no genuine issue of material fact as to when the relevant limitation period commenced. *See Nevils*, 46 Wn. App. at 346. In a sexual harassment, workplace discrimination claim, the injury relates back so as to provide an entire picture of the "unitary, indivisible hostile work environment claim." *Antonius*, 153 Wn.2d at 258.

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

irrespective if some of those acts occurred outside of the statute-of-limitations period. *Morgan*, 536 U.S. at 118.

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

The situation endured by Ms. Delgado constitutes one unlawful employment practice, which is wholly approved by the *Antonius* court. As such, Ms. Delgado only needs to present at most one act of discrimination under RCW 49.60.190 that occurred during the limitations period. *Antonius*, 153 Wn.2d at 265-66. Attempts to argue a “gap” are completely distinguished and refuted by the court in *Antonius*. *Id.* at 272-73.

In this case, there were multiple incidents that occurred at various times, beginning in 1988-89 and continuing through 2002, with retaliation that continued into 2003, that cumulatively make up the hostile work environment and retaliatory discrimination suffered by Jackie Delgado.

As Mental Health Division Director Brimner found, “The behavior described above created a stressful and hostile work environment that significantly affected the three witnesses against you, as well as others who were subjected to your unwanted advances and affections.” CP 772. The evidence of multiple acts constituting a unitary claim, beginning as early as 1989 and continuing through 2003, creates genuine issues of material fact. The trial court, therefore, erred in granting summary judgment.

**2. The discovery rule applies and is an equitable exception that tolled the statute of limitations and allows Jane Doe III to recover for otherwise time-barred acts.**

Respondents also claimed that Appellant’s outrage claim is barred by the three-year statute limitations. Here, many of the acts described above took place prior to the running of the three-year statute of limitations. The discovery rule applies to the early incidents of sexual harassment, and to the State and Union’s continual support of and acquiescence to Barrette Green’s sexually harassing behavior and the sexually hostile work environment it created at WSH. The discovery rule acts as an equitable exception to the statute of limitations allowing a plaintiff to recover damages for otherwise time-barred acts. *See Beard v. King County*, 76 Wn. App. 863, 867, 889 P.2d 501 (1995) (citing *Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992); *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992)). At the time of the initial

harassment, Ms. Delgado could not have known that the pattern of harassment and retaliation would continue to be perpetrated by Green and acquiesced to by Defendant WFSE, or the severity with which it would reach.

**C. Jane Doe III's Experiences At Western State Hospital Unquestionably Satisfy Every Element Required By The WLAD.**

**1. The State and Barrette Green are collaterally estopped and judicially estopped from rearguing the sexually hostile work environment for Jane Doe III at Western State Hospital.**

The State of Washington is collaterally and judicially estopped from relitigating the fact issues that support Ms. Delgado's claims. Because the State has represented to other courts that Green did sexually harass Jane Doe III, it cannot now take the opposite factual position.

**a) The sexual harassment of Jane Doe III is repeatedly admitted and the Doctrine of Collateral Estoppel bars the State from relitigating the facts of Jane Doe III's sexual harassment.**

"The doctrine of collateral estoppel differs from *res judicata* in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between parties, even though a different claim or cause of action is asserted." *Rains v. State of Washington*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) (quoting *Seattle-first Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725

(1978)). The well-known doctrine of collateral estoppel is “a means of preventing the endless re-litigating of issues already actually litigated by the parties and decided by a competent tribunal.” *Reninger v. Dept. of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). The four elements required to establish collateral estoppel include the following:

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

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

All four elements of collateral estoppel are satisfied here. Application of collateral estoppel would not work an injustice to the State because, as the record demonstrates, it fully and fairly litigated the merits of the exact same issues and facts presented in this case twice – once as a defendant in a federal lawsuit filed by Barrette Green and once as a respondent defending the termination of Barrette Green in a Personnel Appeals Board hearing. *See Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 801, 855 P.2d 1223 (1993) (providing that “Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue”); *see also Dunlap v. Wild*, 22 Wn. App. 583, 591, 591 P.2d 834 (1979).

Washington courts have also applied collateral estoppel to preclude re-litigation of discrimination claims raised in civil service disputes decided by administrative tribunals. In *Shoemaker*, a deputy chief of police was demoted to the rank of captain. *Shoemaker*, 109 Wn.2d at 504. In that case, an employee appealed his demotion to the civil service commission, alleging that he was demoted in bad faith and without cause. The commission issued findings of fact and conclusions of law upholding Shoemaker's demotion and concluding it was not retaliatory. Shoemaker then filed a civil rights action in federal district court, alleging that his demotion was retaliatory. The federal district court granted summary judgment in favor of the city, on the ground that the commission's determination was binding on the federal court under the doctrine of collateral estoppel. This issue was later certified by the Ninth Circuit to the state Supreme Court, which held that Washington law gives preclusive effect to the factual finding of an administrative agency like the civil service commission. *Id.* at 513.

And, in *Reninger*, Washington's Supreme Court held that two Department of Corrections' employees who claimed they were wrongfully demoted and "constructively discharged" from employment were precluded from re-litigating their claims in superior court because those claims were previously litigated before the PAB. The court reasoned that:

Reninger and Cohen were entitled to one bite of the apple, and they took that bite. That should have been the end of it. The normal rules of collateral estoppel apply here to prevent successive and vexatious litigation. “Any other result would render the administrative forum a place for meaningless dry runs of wrongful termination claims[.]” (citation omitted). Reninger and Cohen are collaterally estopped to relitigate the misconduct issues.

*Id.* at 454.

Both the *Shoemaker* and *Reninger* cases are parallel to this case. Similar to the employees in those cases, the State is now seeking to re-litigate the fact issues already determined in the PAB administrative hearing held to determine whether Green sexually harassed Ms. Delgado and, thus, lawfully discharged him. Without a doubt, the facts used by the State during the PAB hearing against Barrette Green are the same facts that Ms. Delgado is asserting as the basis for her claims under WLAD.

Facts that by the State’s own admission have been validated twice:

**Respondent [State of Washington] contends that the facts before this Board are essentially the same as those before United States District Court (*see infra*).** Respondent asserts that **any facts in dispute have already been presented to and determined by the federal court.** Respondent argues that Appellant [Barrette Green’s] Second Amended Complaint, Appellants’ attorney deposed several individuals and the Court had before it the deposition testimony of the appointing authority, Cheryl Reis, Jackie Delgado, and Linda Salazar, the three women referred to in the disciplinary letter, as well as the deposition testimony of Mr. Green. Respondent argues that although Appellant claimed there were conflicting stories, when asked by the judge, the court noted that Appellant never made an outright denial of the charges during the pre-

disciplinary process. **Respondent argues that Washington law recognizes res judicata, which bars parties from re-litigating claims and collateral estoppel, which bars parties from re-litigating issues. Respondent argues that both doctrines apply to Appellant's case, and therefore, he is not entitled to a second opportunity to present his case in this forum.**

*Id.*

Just as the State argued against Barrette Green in the PAB hearing, Ms. Delgado asserts the same rationale and logic now, but against the State of Washington. The State cannot be allowed another bite at the apple by virtue of re-litigating the facts and the issues that it conceded were properly adjudicated in federal court and validated during the PAB hearing. *Id.*

In fact, the State has once again admitted in another court precisely the same facts pled by plaintiff. Before the United States Court of Appeals for the Ninth Circuit, in its "Motion to Supplement Record and Apply Preclusive Effects of Personnel Appeals Board's Finding and Conclusions and Order," the State asks the Ninth Circuit to apply collateral estoppel to the Personnel Appeals Board findings and conclusions that found that Barrette Green had committed misconduct including the sexual harassment of Jackie Delgado, Cheryl Reis and Linda Salazar. CP 797-829. It would be unconscionable to allow the State to defend itself against Barrette Green by rallying behind Jackie Delgado (as well as Linda Salazar and Cheryl Reis) as the victim of Barrette Green's

sexual harassment, but then turn around here and disavow any knowledge of what Green did. At the very least, the admissions and the estoppel effect create genuine issues of material fact precluding summary judgment.

**b) The State is prohibited from contesting the issue of discrimination based on the Doctrine of Judicial Estoppel.**

Under the doctrine of judicial estoppel, the State is prohibited from denying that Jane Doe III was the victim of sexual harassment. “Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Cunningham v. Reliable Concrete*, 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005). As explained by the Ninth Circuit in *Hamilton v. State Farm*, 270 F.3d 778, 782 (9th Cir. 2001), courts invoke “judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of ‘general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,’ and to ‘protect against a litigant playing fast and loose with the courts.’” (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

Here, the doctrine of judicial estoppel prevents the State from contending that Green’s conduct was non-discriminatory. By *now*

claiming that Jane Doe III was not a victim of sexual harassment, the State is “playing fast and loose with the courts.” The State successfully argued that Green created a hostile working environment when it was defending itself in federal court. It cannot now take an inconsistent position.

**2. Barrette Green’s conduct was unwelcome and based on Jane Doe III’s sex.**

A hostile work environment sexual harassment claim under RCW 49.60.180(3) requires that Ms. Delgado prove that the harassment is unwelcome, that it occurred because of sex, and that it affected the terms or conditions of employment that can be imputed to the State of Washington. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000), *rev. denied*, 141 Wn.2d 1017 (2000).

The State and the Union do not seriously dispute that Green sexually harassed Jackie Delgado. In his November 10, 2005 deposition Director Brimmer admitted to the unwanted and unwelcome harassment based on Jackie Delgado’s sex:

Q (By Mr. Cochran) Do you believe that the misconduct of Barrette Green, which you've previously identified in the termination letter of November 6, 2003, with regard to Jackie Delgado, was sexual in nature?

MR. ROSEN: Same objections.

THE WITNESS: It was described in the report by Salisbury that it was sexual in nature at times.

Q (By Mr. Cochran) And you have found that report to be credible, correct?

A Yes, I have.

Q Do you believe that it was unwanted -- or do you believe the conduct for which Barrette Green was terminated with regard to Jackie Delgado was unwanted or unwelcome in nature?

MR. ROSEN: Same objection, calls for speculation and a legal conclusion.

THE WITNESS: Based on the information that I've received, it indicates that she did not want it to happen.

CP 705.

In addition, both the Salisbury investigation and the Director of Mental Health with DSHS agreed that Jackie Delgado was sexually harassed by Barrette Green. CP 771.

Fletcher Taylor, M.D. has been Ms. Delgado's treating psychiatrist for over three years. He relays his impressions of Green's sexual harassment on Jackie Delgado as follows:

In terms of the nature of the sexual harassment by Mr. Barrette Green and the effects thereof, (Ms. Delgado) provided several examples. She described a step-by-step process that can best be termed as "grooming." He first befriended her, won her confidence, did favors for her, curried indebtedness, used coercion, ranging essentially from blackmail to death threats. For example, during a session on March 17<sup>th</sup> of 2004 she described an incident in which Barrette Green compromised her sexually and said that if she told her husband that her husband would die. On April 6<sup>th</sup> of 2004 she said that the reason she was under Mr. Green's thumb all these years was that he had threatened her life with a gun. He had made her sign a paper relinquishing her daughter to him if she should die. On June 16<sup>th</sup> of 2003 she had described specifically a death threat. He had held a gun to her head and said how easy it

would be to kill her. He actually pulled the trigger “click” while holding the gun to her head. Later she realized he had emptied the chambers of the gun. Over the years at Western State Hospital she has not felt safe knowing that he continued to be employed there. She is afraid of the repercussions of saying anything or doing anything about it or resisting for fear of the life of herself, her husband, and the safety of her family.

CP 446-450.

**3. The State and the Union knew or should have known that Green was a pervasive sexual harasser who used his power to influence employees’ terms and conditions of employment.**

For purposes of a claim of hostile work environment sexual harassment, an employer is not vicariously liable for the harassment that is committed by a non-management employee unless the employer authorized, knew, or should have known of the harassment and failed to take reasonably prompt and adequate corrective action. *Francom*, 98 Wn. App. at 845.

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

plaintiff is relevant to show hostile work environment.”’)).<sup>3</sup> Similarly, the employer’s constructive knowledge can also be proven by evidence of complaints made to the employer through higher managers or supervisors, or by evidence that the sexual harassment was so pervasive that it gives rise to the inference of the employer’s knowledge, and that the employer’s remedial action was not reasonably calculated to end the harassment. *Francom*, 98 Wn. App. at 845.

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

In an attempt to escape the obligations they lawfully owe to Ms. Delgado, the State and the Union argued below that they had no knowledge of abuse specific to Jackie Delgado, and therefore, despite years of prior reporting, including the active lawsuit of Kathleen Lizee,

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<sup>3</sup> While federal courts’ interpretation of Title VII, § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) are not binding upon Washington courts, they are deemed to be instructive with respect to state discrimination laws. *Francom*, *supra*, at 1187 (citing *Glasgow*, 103 Wn.2d at 406 n.2, 693 P.2d 708; *see also Fahn v. Cowlitz County*, 93 Wn.2d 368, 376, 610 P.2d 861 (1980)) (because federal law, Title VII of the Civil Rights Act of 1964, is to be construed broadly, and the legislature has directed that RCW 49.60 be liberally construed, relevant federal case may be looked to for guidance.)

neither the State or Union should be held accountable for the toxic environment they helped created that was Barrette Green's Western State Hospital.

But according to the Salisbury Report, Jan Salisbury's deposition and Mental Health Director Karl Brimmer, the State and the Union unquestionably perpetuated a culture of organizational tolerance of sexual harassment. According to the second report issued to the State by Salisbury Consulting, Western State Hospital fostered an organizational culture of hostile work environment:

WSH has been described as a deeply imbedded culture that has survived for decades. **Employees and supervisors alike describe rampant retaliation, favoritism and abuse of power.** Patient and other complaints are used as tools to get rid of employees. **People are not held accountable for lying and trusting someone is the exception, not the norm. Complaints about management and the union are often either ignored or punished.** The work is highly stressful and chaotic, reflecting a siege mentality.

...

Most top leadership positions at WSH appear to manage through one of the following leadership styles: laissez-faire, management by exception or in an authoritarian. The first two styles of management listed have been linked to higher harassment rates because they represent managers who have delegated too much and as a result are not aware and involved in managing the workplace culture until it is too late. Regular, general communication meetings between employees and managers outside of their immediate chain of command are rare. **Supervisors describe themselves as lying to cover up and hide rather than dealing with conflict and complaints.** They also express that **they feel demoralized as a result of the ineffective system of**

**accountability and the power of the union at the hospital.**

CP 509 (emphasis added).

In terms of notice, it was clear that DSHS upper-level management was aware of or should have been aware of Barrette Green's sexual harasser tendencies. As described in the Statement of Facts, many unheeded allegations of sexual harassment were previously made against Barrette Green. Additionally, even after the *Lizee* lawsuit was filed, the State continued to promote Barrette Green to higher managerial positions without any concern for female employees at Western State Hospital, including Plaintiff Delgado. CP 500.

Similarly, the State has admitted during depositions and administrative hearings that Ms. Delgado and other women were subjected to Barrette Green's misconduct during the *entire time* that he was employed at Western State Hospital. For example, in his most recent deposition, Secretary Dennis J. Braddock testified that he had knowledge of Mr. Green's misconduct up to a year and a half prior to the initiation of the Salisbury Investigation:

Q (By Mr. Cochran): Was there independent confirmation, then, that you were --

A Well, **there was a history of activity prior to the Salisbury report that we received;** information, yes.

Q **So you had knowledge of a history of misconduct by Barrette Green prior to the Salisbury report?**

A here was --

MR. CHRISTIE: Object to the form of the question. You can answer.

A **There was a history of allegations in some public information regarding his activities.** So there was a history prior to -- public history, a personnel history, prior to the Salisbury report.

Q (By Mr. Cochran): There was a public history of what, Mr. Braddock?

A Public history of -- I would say what came to my attention probably the most was the history of using -- or the allegations of use of the union position to intimidate workers at Western State.

Q What was your understanding of how Barrette Green used his union position to intimidate workers at Western State?

A Well, I probably can't give justice to the description, but there rules and shifts and -- how do you -- the working arrangements at Western State Hospital. But there were employees that believed that Barrette Green had sufficient control over assignments, that they were concerned about retaliation on his part if he was not pleased with their position.

Q What kind of retaliation, to the best of your knowledge?

A Well, there again, I wouldn't -- couldn't do justice to it, but retaliation in whether you work on Christmas or whether you work on holidays, whether you have a day shift or a night shift. You know, those kinds of activities.

Q Were you aware of any other kinds of retaliation that went beyond just adverse shifts or changes in workplace?

A I suspect there were some, but those are the ones prior to Salisbury that I was most familiar with, most concerned about.

Q **Do you recall when you were first made aware of reports of misconduct by Mr. Green, prior to the Salisbury report or investigation?**

A I don't, but **it could have been up to a year**. There was some report that came across my desk, concern regarding this. And it **may have been a year or a half a year**, or maybe –

Q What actions, if any, did you do when you received those prior reports of possible misconduct by Mr. Green?

A The reports that I had looked at were ones that had taken -- activity had taken place prior to my being secretary. And they were -- and there was no -- the action had been taken, whatever action had been taken relative to Mr. Green.

CP 835-36 (emphasis added).

Finally, none of the Respondents can credibly argue that Ms. Delgado's terms and conditions of employment were not affected. Ms. Delgado has frequently testified that after her initial contact with Barrette Green she lived in daily fear of losing her job and her safety. According to Dr. Taylor, "It is clear that the sexual harassment affected the terms and conditions of her employment. The toxic discriminatory environment occurring during those years, including the fact that she was vulnerable and female, has adversely affected her long-term prognosis." CP 450. Dr. Taylor has diagnosed Post Traumatic Stress Disorder and symptoms of a Major Depressive Disorder as a result of Barrette Green's actions. CP 447-49.

Sexual harassment expert Linda Collinsworth, Ph.D., agrees with

Dr. Taylor's assessment:

It is the examiner's opinion that Ms. Delgado's current psychological condition is attributable to her experiences with Mr. Barrette Green and their aftermath; Mr. Green's chronic abuse, combined with the revelation of her identity in the Hospital's investigative report and its sequelae are more than sufficient to produce the symptoms she is currently experiencing.

CP 452.

**D. WLAD Applies Equally To The Union's Actions At Western State, Just As It Does To The State.**

Q In your investigation, could you -- was the union a necessary component in your evaluation of Barrette Green's sexual harassment at Western State Hospital?

A Yes.

Q And you felt that that was a part or a causative factor in his ability to sexually harass individuals at Western State the way that he did?

MR. CHRISTIE: Object to the form.

A The fact that he was in a powerful position in the union and able to interact with management in a very powerful way did appear to be part of his pattern of sexual harassment and retaliation.

(By Mr. Cochran) Interact with management as a union representative --

A Yes.

CP 761-62.

**1. Labor unions may not discriminate because of sex.**

Ms. Delgado's claims against the Union are supported by the WLAD because the Union, through its actions, omissions, and agency with respect to Barrette Green, violated Ms. Delgado's right to be free from sex discrimination via sexual harassment in the workplace. Under WLAD, the right to be free from gender discrimination in the workforce means that labor unions may not "discriminate against any member . . . because of . . . sex." RCW 49.60.190.<sup>4</sup> The legislature has dictated that these protections "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020.

Respondent Union does not and cannot dispute that it owed Ms. Delgado a duty to refrain from gender discrimination in the workplace. She was a dues paying member of Local 793, and at various times throughout her tenure with the Union, she was led and directed by Barrette Green. In fact, at the time of the last two sexual attacks, Green was the president of WFSE Local 703. CP 261-62.

The facts of this case illustrate not only how the Union breached its duty to Ms. Delgado, but they also illustrate why the WLAD dictates that the Union owed Ms. Delgado a duty to refrain from gender discrimination.

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

The Union breached that duty by promoting a known sexual predator to its highest positions of authority and allowing him to represent the Union and further its interests even after his employer had terminated him from his employment.

a) **The Union knew Barrette Green had a history of sexual harassment.**

The Washington Federation of State Employees had a long history of representing Barrette Green regarding sexual harassment complaints. Beginning first in 1988, and continuing all the way through and beyond his termination, Barrette Green pervasively harassed female employees of Western State Hospital. Despite Green's position as a high ranking agent of the Union, the WFSE claims that it had no notice until Kathleen Lizee reported Barrette Green's harassment in June 2000, that Barrette Green was sexually discriminating against female employees and other union members at Western State.

However, at least two individuals who came forward in Kathleen Lizee's case strongly refute the Union's assertions of ignorance regarding Barrette Green's harassing behavior. By a December 2001 declaration and by his deposition testimony in June 2002, former shop steward Jose Aguirre asserts that he "wrote a letter to the Executive Board (of the Union) in 1997, which at the time consisted of Elijah Sacks, Bob Lenigan, Barrette Green, and Carol Dotlich, who was a supervisor for

WSH . . . . In the letter, I specifically mentioned that Barrette Green sexually harassed Ms. (Anne) Lastrapes and Ms. (Maria) Risse. I indicated that some remedial action must be taken against Barrette Green and demanded a response to my letter. I never received a response.” CP 844-46. In her 2002 deposition, former Local 793 President, Executive Board member, and now, Vice President Carol Dotlich confirms that she received a letter from Mr. Aguirre, but does not recall the reference to Barrette Green. CP 850-56. In short, at least five years prior to Barrette Green’s last sexual harassment of Jackie Delgado, the WSFE had actual notice of his sexual harassment of two female employees at Western State Hospital.

The Union had notice of Mr. Green’s conduct because Mr. Green was the President of Local 793 during the 2002 sexual attacks on Jackie Delgado. The Ninth Circuit has held that “[a]n employer may be liable for the acts of a supervisor when it knew or should have known he was engaging in harassment.” *Woods v. Graphic Communications*, 925 F.2d 1195, 1202 (9th Cir. 1991). Furthermore, “[I]ack of notice does not insulate the employer from liability, especially when . . . the harassing employee was also the official through whom a complaint would otherwise have been lodged. If no complaint has been lodged, constructive knowledge may be imputed to the employer when harassment is pervasive.” *Id.*; *see also Francom*, 98 Wn. App. at 855-56 (noting that

an agent may be an employer's alter ego if the agent occupies a high rank within the company). An employer ratifies an employee's conduct if it fails to take "prompt and adequate corrective action." *Id.*

Here, the Union also had actual notice of Mr. Green's conduct because, as it admits, Mr. Green was the President of Local 793 during the time relevant to Ms. Delgado's sexual harassment. As in *Woods*, the Union cannot complain that it lacked notice because Mr. Green is the Union official to whom Ms. Delgado would have complained. Similarly, Mr. Green should be considered the alter ego of the organization because he occupied the highest local position within that organization.

**b) Volunteers and the master/servant relationship.**

In addition to denying knowledge of Barrette Green's history of sexual harassment and assault against female employees, Respondent WFSE has claimed that it has no liability for Barrette Green's action because he was never anything more than a volunteer. However, the law supports the opposite conclusion and assigns responsibility for Green's actions based on its constant support for Green's rise among the Union's ranks.

A master is liable for the torts of their servant if the tort was committed while acting in the scope of employment. Restatement (Second) of Agency § 219; *see Stocker v. Shell Oil Co.*, 105 Wn.2d 546,

548, 716 P.2d 306 (1986) (citing this section of the Restatement). Further, a master is liable for the torts of a servant committed outside the scope of employment if the master was negligent or reckless or if the servant was “aided in accomplishing the tort by the existence of the agency relation.” *Id.* at § 219(2)(b) and (d); *see also Thompson v. Berta Enters.*, 72 Wn. App. 531, 538-39, 864 P.2d 983 (1994) (adopting § 219(2)(d) in a quid pro quo sexual harassment claim).

Mr. Green is a servant of the Union regardless of whether Mr. Green volunteered his services. A master-servant relationship exists “where one volunteers or agrees to assist another, to do something for the other’s benefit, or to submit himself to the control of the other, even without an agreement for or expectation of reward, if the one for whom the service is rendered consents to its being performed under his direction and control.” *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 896-97, 521 P.2d 946 (1974); *see also Carabba v. Anacortes Sch. Dist.*, 72 Wn.2d 939, 942 n.1, 958, 435 P.2d 936 (1967) (holding that a school district could be vicariously liable for the conduct of a voluntary referee); *see generally* Restatement (Second) of Agency § 225.

**E. The State And The Union Negligently Retained And Failed To Supervise Barrette Green.**

An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary

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

Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that "such negligence on the part of the employer is a wrong to the injured party, entirely independent of the liability of the employer under the doctrine of respondeat superior." *Robel*, 148 Wn.2d 35, 53, n.8, 59 P.3d 611 (2002) (citing another case).

The Salisbury Report and the adoption of the Salisbury Report's findings by the State, along with the decisions by U.S. District Court

Judge Ronald Leighton and the Personnel Appeals Board, confirm that, throughout his career at Western State Hospital, Barrette Green was as prolific a sexual harasser of female employees as can be imagined. Given those indisputable facts, there is certainly a jury question as to whether the State and Union knew or should have known that continuing to promote and protect Barrette Green through the ranks of Western State Hospital was endangering those female co-workers who regularly worked with and encountered Green, like Plaintiff Jackie Delgado.

**F. Jane Doe III Suffered Multiple Incidents Of Retaliation After Cooperating With The State's Investigation Against Barrette Green.**

A . . . . If someone speaks up against -- this isn't all the time, but there was a pattern that, when somebody challenged management or somebody challenged the union, that rather than there being a Respectful conversation about it, there was a pattern for some people of them being punished for speaking up and being critical.

Q And was that a part of the culture at Western State Hospital that you found?

A Yes. It was reported to be part of the culture.

CP 764.

These acts of retaliation experienced by Ms. Delgado were no doubt a by-product of the sexually hostile work environment ratified by the State's omissions and actions, such as the several promotions granted to Barrette Green after his sexually harassing behaviors were exposed. As

indicated by the Salisbury Report, it was a well-known fact that Barrette Green established a pattern of retaliation against women who he knew participated in the *Lizee* lawsuit. Barrette Green often intimidated his victims by threatening to file suit against that and sometimes actually following through with that threat.

In addition, while the State vehemently denies it, the publishing of Ms. Delgado's name, despite express assurances of confidentiality, is retaliatory. She was a whistleblower who was used in every sense of the word by the State for its own purposes. She was coerced into helping, and then ousted by the State after promise after promise of anonymity.

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

Before the trial court, Respondents attempted to frame Barrette Green's conduct in relation to Appellant's outrage claim by referring to two instances of sexual harassment and intimidation and ignoring the other acts which occurred to create the intentional infliction of emotional distress that Jackie Delgado suffered at Barrette Green's Western State Hospital and within Barrette Green's Union.

To establish an outrage claim, plaintiff must show: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress, and; (3) actual severe emotional distress. *See Dicombe v. State*,

113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (citing *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987)).

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

For example, in *Birklid* the court held that Boeing's intentional exposure of plaintiffs to toxic conditions, and the refusal to transfer them to other positions even after medical restrictions had been placed upon them met the elements of outrage. *Id.* at 873. In addition, in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 78, 821 P.2d 18 (1991), the court found that terminating an employee for filing a worker's compensation claims may give rise to the tort of outrage.

Among the factors a jury or a court should consider is whether the position occupied by the defendant is significant. *See Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (citing Restatement (Second) of Torts, § 46 (1965) and comments thereto). The relationship between the parties is a significant factor in determining whether liability should be imposed. *See Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977).

Respondents would have this Court believe that Ms. Delgado's outrage claim involves minor incidents of sexual impropriety. The characterization offensively minimizes the emotional distress endured by Jackie Delgado. The toxic work environment at Western State Hospital, the retaliation of the subsequent lawsuit, living in daily fear of losing her job, the ostracizing by members of her Union, and the ever-present fear for her own safety and that of her family have caused "actual severe emotional distress" and raise a question of fact for the jury to decide the outrage claim. *Dicomes v. State*, 113 Wn.2d at 630. As Dr. Collinsworth found in her examination (again, concurring with treatment provider Dr. Fletcher Taylor), Jackie Delgado suffers from "Posttraumatic Stress Disorder, Chronic Major Depressive Disorder, Single Episode, With Melancholic Features, Severe." CP 451-54.

The Respondents cannot plausibly argue that the working environment experienced by Ms. Delgado was not extreme or outrageous. The actions taken by the Union and State by promoting Green, despite numerous complaints, and fostering this working environment is actionable under the tort of outrage.

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

Although the State conceded below that it made a promise of confidentiality in its motion for summary judgment, it cited the

RESTATEMENT (SECOND) OF TORTS § 652D and *Fisher v. State*, 125 Wn. App. 869, 879 (2005), and argued that there was no publication of Ms. Delgado’s private-life facts. *Id.* Contrary to the State’s argument, in *Fisher*, the court clarified the meaning of “publicity” by explaining that publication to a small group or a single person may qualify as publicity, under the current law, if the nature of the material disclosed is a highly offensive communication that outweighed the limited scope of the publicity. *Id.* at 879.

The State also argued that it had no choice, and that the disclosure was necessary based upon the Union’s collective bargaining agreement. This, however, was not what was communicated to Appellant. Instead, the State knew that the only way it could encourage other female Western State Hospital employees to come forward would be to provide a promise of confidentiality; a promise that the State expressly provided to Western State Hospital employees, including Jackie Delgado. CP 858. The State cannot now argue that it had no choice but to disclose the names. If the State knew the consequences of disclosure, it was obligated to explain this to Jane Doe III.

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

It is important to me that all employees feel that they can **safely report allegations of harassment, retaliation and workplace violence in a manner that maintains confidentiality**. As a result, I intend to review the current reporting process and implement changes as necessary. In the interim, **to fully ensure confidentiality**, I am asking all employees to report issues and concerns directly to me and/or Sherer Murtiashaw, Director of Human Resources Division. I assure you that your complaints will be delivered directly to my office or Sherer's and we will personally review them and respond in an appropriate and timely manner.

Allegations may be delivered via campus mail or the U.S. Postal Service. **Please mark all envelopes "PERSONAL AND CONFIDENTIAL"** and send them to one of the following addresses ..."

CP 858 (emphasis added).

And, again, the very next day, a promise of confidentiality was made to all Western State Hospital employees by Dennis Braddock, Secretary of DSHS:

Due to the allegations regarding sexual harassment that arose during the recent court case, Salisbury Consulting has been retained to conduct an investigation into these allegations and any related violations of DSHS policies at Western State Hospital. **In order to ensure that Ms. Salisbury and her associates are able to conduct a thorough investigation, it is important that all employees who have knowledge of any of these issues come forward with that information.**

If you feel that you are being retaliated against for having participated in this investigation, report your concerns to the Director, HRSA Mental Health Division (902-0790) or the Director, Human Resources Division (664-5861). To the extent possible, **your report will be treated confidentially** and responded to in a timely and sensitive manner.

CP 860 (emphasis added).

At the time that the State tricked Ms. Delgado to give it information regarding Barrette Green, it was fully aware of restrictions placed upon it by certain personnel policies and the collective bargaining agreement. But, instead of disclosing any possibilities or scenarios in which the names of accusers could be disclosed to Barrette Green, the State affirmatively assured Ms. Delgado that her name would under no circumstances be revealed – it promised her confidentiality. CP 444.

Based on the above, there is a question of material fact as to whether or not the State's publication of Ms. Delgado's name in its termination letter to Barrette Green was absolutely necessary to ultimately discharge Barrette Green. Accordingly, the trial court erred in granting summary judgment, and this matter should be remanded for trial.

#### **IV. CONCLUSION**

Summary judgment was not appropriate in this case. The toxic, sexually hostile work environment experienced by Jane Doe III and others at WSH continued as long as Barrette Green remained in control.

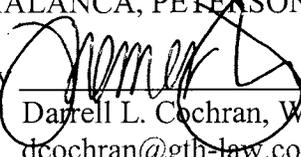
Appellant Jane Doe III respectfully request that this Court reverse the trial court and remand this case for trial.

Dated this \_\_\_\_\_ day of January, 2007.

Respectfully submitted,

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STATE OF WASHINGTON

BY \_\_\_\_\_

DEPUTY

**CERTIFICATE OF SERVICE**

I, Becky J. Niesen, certify under penalty of perjury under the laws

of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, 1201 Pacific Avenue, Suite 2100, Tacoma, Washington 98401, attorneys for plaintiff/appellant.

C. On January 10, 2007, I caused a copy of the *Brief of*

*Appellant* to be served upon the following:

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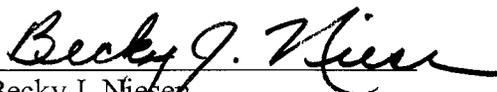
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Dated this 10<sup>th</sup> day of January, 2007.

  
Becky J. Niesen