

NO. 35130-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON  
AT TACOMA

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DIVISION II  
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STATE OF WASHINGTON  
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JANE DOE III, Appellant,

v.

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 RESPONDENT WASHINGTON FEDERATION  
OF STATE EMPLOYEES

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## TABLE OF CONTENTS

|      |  |    |
|------|--|----|
| I.   | COUNTERSTATEMENT OF THE ISSUES<br>AS TO THE RESPONDENT WASHINGTON<br>FEDERATION OF STATE EMPLOYEES (WFSE)      | 1  |
| II.  | COUNTERSTATEMENT OF THE CASE   | 1  |
|      | A. <i>Statement of Proceedings</i>   | 1  |
|      | B. <i>Counterstatement of Facts</i>  | 2  |
| III. | ARGUMENT   | 8  |
|      | A. <i>Summary judgment on review.</i>  | 8  |
|      | B. <i>The court should not consider<br/>          much of Delgado's submissions.</i>                           | 10 |
|      | C. <i>Delgado's claims are time barred.</i>  | 12 |
|      | D. <i>Green's conduct cannot be imputed<br/>          to the WFSE.</i>   | 16 |
|      | E. <i>Delgado's discrimination claims<br/>          were properly dismissed.</i>                               | 18 |
|      | F. <i>Delgado's claim of outrage was<br/>          properly dismissed.</i>                                     | 25 |
|      | G. <i>Delgado's negligent hiring and<br/>          retention claims were properly<br/>          dismissed.</i> | 27 |
| IV.  | CONCLUSION   | 29 |

## TABLE OF AUTHORITIES

### Table of Cases

|   |       |
|---|-------|
| <u>Antonius v. King County</u> , 153 Wn.2d 256,<br>103 P.3d 729 (2005)                                    | 14,15 |
| <u>Bratton v. Calkins</u> , 73 Wn.App. 492,<br>870 P.2d 981 (1994)  | 16    |
| <u>C.J.C. v. Corporation of the Catholic<br/>Bishop of Yakima</u> , 138 Wn.2d 699,<br>985 P.2d 262 (1999) | 16    |
| <u>Carey v. Reeve</u> , 56 Wn.App. 18,<br>781 P.2d 904 (1989)   | 10    |
| <u>Francom v. Costco Wholesale Corp.</u> ,<br>98 Wn.App. 845, 991 P.2d 1182 (2000)                        | 10,20 |
| <u>Glasgow v. Georgia-Pacific Corp.</u> ,<br>103 Wn.2d 401, 693 P.2d 708 (1985)                           | 19    |
| <u>Haubry v. Snow</u> , 106 Wn.App. 666,<br>31 P.3d 1186 (2001)   | 25,27 |
| <u>In re Estate of Black</u> , 153 Wn.2d 152,<br>102 P.3d 796 (2004)                                      | 9     |
| <u>Little v. Countrywood Homes, Inc.</u> ,<br>132 Wn.App. 777, 133 P.3d 944 (2006)                        | 9     |
| <u>Lucas v. Chicago Transit Authority</u> ,<br>367 F.3d 714 (7th Cir., 2004)                              | 15    |
| <u>Marshall v. Bally's Pacwest, Inc.</u> ,<br>94 Wn.App. 372, 972 P.2d 475 (1999)                         | 13    |
| <u>Mayer v. Huesner</u> , 126 Wn.App. 114,<br>107 P.3d 152 (2005)   | 13    |
| <u>Milligan v. Thompson</u> , 90 Wn.App. 586,<br>953 P.2d 112 (1998)                                      | 13    |
| <u>Morgan, Crowley v. L.L. Bean, Inc.</u> ,<br>303 F.3d 387 (1st Cir. 2002)                               | 14    |

|  |          |
|--|----------|
| <u>Perry v. Costco Wholesale, Inc.</u> ,<br>123 Wn.App. 783, 98 P.3d 1264 (2004) | 20       |
| <u>Robel v. Roundup Corp.</u> , 148 Wn.2d 35,<br>59 P.3d 611 (2002)              | 18       |
| <u>Thompson v. Everett Clinic</u> , 71 Wn.App. 548,<br>860 P.2d 1054 (1993)      | 16       |
| <u>Titus v. Tacoma Smeltermen's Union</u> ,<br>62 Wn.2d 461, 383 P.2d 504 (1963) | 16       |
| <u>Washington v. Boeing Co.</u> , 105 Wn.App. 1,<br>19 P.3d 1041 (2000)          | 12       |
| <u>Woods v. Graphic Communications</u> ,<br>925 F.2d 1195 (9th Cir., 1991)       | 20,21,22 |

#### **Statutes**

|               |             |
|---------------|-------------|
| RCW Ch. 49.60 | 12,18,24,25 |
| RCW 49.60.190 | 18,20,21,22 |

#### **Regulations and Rules**

|          |    |
|----------|----|
| CR 56(e) | 10 |
| ER 602   | 12 |
| ER 701   | 12 |
| ER 802   | 12 |

**I. COUNTERSTATEMENT OF THE ISSUES AS TO THE RESPONDENT WASHINGTON FEDERATION OF STATE EMPLOYEES (WFSE)**

Were plaintiff's claims of discrimination (sexual harassment and retaliation), outrage and negligent supervision against the WFSE, properly dismissed on summary judgment?

**II. COUNTERSTATEMENT OF THE CASE**

**A. *Statement of Proceedings***

On February 16, 2005, Jackie Delgado, using the pseudonym Jane Doe III, filed a complaint against the State of Washington (State), the WFSE, and Barrette Green (Green).<sup>1</sup> On April 26, 2006, the WFSE filed a Motion for Summary Judgment of Dismissal of Delgado's claims.<sup>2</sup> On June 2, 2006, the trial court (the Honorable Thomas J. Felnagle) granted the WFSE's motion.<sup>3</sup>

At the same time, the court also granted a similar motion of the State.<sup>4</sup> A motion for summary judgment by Green was also granted, except as to the claim of outrage.<sup>5</sup> The plaintiff subsequently took a nonsuit as to Green.<sup>6</sup>

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<sup>1</sup> Clerk's Papers (CP) 1-14.

<sup>2</sup> CP 64-65.

<sup>3</sup> CP 935-36.

<sup>4</sup> CP 933-34.

<sup>5</sup> CP 937-39.

<sup>6</sup> CP 1005-07.

Delgado appeals the orders as to the State and the WFSE.<sup>7</sup>

**B. Counterstatement of Facts**

Delgado has been an employee of the Department of Social and Health Services (DSHS) at Western State Hospital (WSH) since approximately June of 1988. She has been employed as a Mental Health Technician 1 (MHT1).<sup>8</sup>

The WFSE is the certified exclusive bargaining representative (union) for a bargaining unit at WSH including the MHT employees. Delgado was an active member of the WFSE.<sup>9</sup> Delgado has held several positions in the organization. She has been a shop steward, a lead shop steward, a union committee person, a trustee, a member of the local union executive board, a member of the union statewide policy committee, and a delegate to both state and international (American Federation of

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<sup>7</sup> CP 1008-18. This is the second of three appeals pending in this Court involving claims against the State and the WFSE based on Green's alleged harassment of a female WSH employee. All were dismissed on summary judgment by the three different trial judges. See *Jane Doe I (Salazar) v. State et al.*, No. 34357-6-II; and *Jane Doe II (Reis) v. State et al.*, No. 35507-8-II.

<sup>8</sup> CP 81-244 at p. 85; Certified Statement of Edward Earl Younglove III, Attachment A, Delgado Personnel Appeals Board (PAB) Transcript (Tr.) 5/3/05, p. 137, lines 10-25.

<sup>9</sup> CP 81-244 at p. 85; Cert. Stmt. of Younglove, Attachment A, PAB Tr. 5/3/05, p. 138, lines 5-9.

State, County and Municipal Employees) union conventions.<sup>10</sup>

In 1989 Delgado met Barrette Green. Green was also employed at WSH as an MHT 1.<sup>11</sup> Delgado contends that for a period of time from shortly after she first met Green, until approximately 1993, she was subjected to unwanted sexual contact with Green. She referred to these contacts as "rapes." She characterized these as occurring, on average, more than once a week during this period.<sup>12</sup>

Starting in 1994, after Delgado claims she gained a great deal of weight, she had only infrequent and nonspecific contacts with Green.<sup>13</sup>

Delgado contends that after a period of approximately eight years of inactivity, Green "raped" her for the last time in a hotel in Olympia in June or July 2002,<sup>14</sup> and in December

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<sup>10</sup> CP 81-244 at pp. 85 and 99; Cert. Stmt. of Younglove, Attachment A, PAB Tr. 5/3/05, p. 138, line 10 through p. 139, line 4; and PAB Tr. 5/4/05, p. 28, lines 9-25.

<sup>11</sup> CP 81-244 at p. 85; Cert. Stmt. of Younglove, Attachment A, PAB Tr., 5/3/05, p. 139, lines 5-8.

<sup>12</sup> CP 81-244 at p. 99; Cert. Stmt. of Younglove, Attachment A, PAB Tr., 5/4/05, p. 25, line 8 through p. 27, line 6.

<sup>13</sup> CP 81-244 at p. 99; Cert. Stmt. of Younglove, Attachment A, PAB Tr., 5/4/05, p. 25, line 17 through p. 26, line 2.

<sup>14</sup> CP 81-244 at pp. 212-17; Cert. Stmt. of Younglove, Attachment B, Delgado Dep., 6/17/04, p. 107, line 1 through p. 114, line 13.

2002, he inappropriately touched her while in his WSH office.

Delgado testified that she submitted to Green's sexual contacts only because she was afraid that he would hurt her or her family. While Delgado's counsel argues that Green used his power and position at WSH and in the WFSE to subject Delgado to his harassing behavior, Delgado's own testimony is that she submitted because of Green's threats of violence and physical intimidation.

**A [by Delgado]:** I was afraid I'd lose my job. I was afraid that -- that he would hurt me. I was afraid that he would hurt my mother. I knew if my husband had found out about it, that -- that my husband would want to protect me, and that I was afraid that Bear [Green] would kill him, and then my kids wouldn't have a dad.<sup>15</sup>

During all but the last two incidents, Green was an MHT like Delgado, a line-level employee, and had little or no position with the union. He certainly had no power over her due to any union position, since he had none.

Although Delgado claims she was subjected to Green's unwanted sexual advances (rapes) for many

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<sup>15</sup> CP 81-244 at p. 87; Cert. Stmt. of Younglove, Attachment A, PAB Tr., 5/3/05, p. 148, lines 12-17.

years, she never told anyone (including her sister whom she lived with) until she told her psychiatrist, her lawyer and Dr. Brimmer (a DSHS official). This was in 2003 after DSHS began an investigation into Green's alleged behavior (the Salisbury investigation).<sup>16</sup>

Delgado does not claim to have ever told anyone associated with the WFSE or Local 793 of any of Green's alleged misconduct. This, despite the fact she had regular contact with many female union representatives on both a state and national level, including Carol Dotlich, the female President of the statewide union. Dotlich is also an employee of WSH.<sup>17</sup>

The pretermination proceedings conducted by DSHS against Green after the Salisbury investigation was the first time the WFSE had any information Delgado claimed she was sexually harassed by Green. This was after her last contact with Green. The only previous information concerning any allegations of sexual improprieties

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<sup>16</sup> CP 81-244 at p. 107; Cert. Stmt. of Younglove, Attachment A, PAB Tr., 5/4/05, p. 58, line 12 through p. 59, line 24.

<sup>17</sup> CP 245-57 at p. 246, lines 20-22; Certified Statement of Liz Larsen.

by Green that the WFSE was aware of was a 2001 complaint by Kathleen Lizee.<sup>18</sup> The WFSE was unable to investigate Lizee's claim because Lizee refused to cooperate, choosing instead to pursue her Equal Employment Opportunity Commission complaint and a lawsuit against DSHS. This lawsuit ultimately led to a large monetary settlement for Lizee, the Salisbury investigation, and Delgado's claims that she too had been harassed by Green.<sup>19</sup>

Delgado had resigned from her position on the WFSE local executive board in March 2001 due to "personal demands."<sup>20</sup> This was toward the end of her eight-year hiatus from Green's alleged harassment.

In May 2003 Delgado was "removed" as a shop steward by the union executive board.<sup>21</sup> Delgado herself admitted that her removal followed her

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<sup>18</sup> Delgado suggests that the WFSE had earlier knowledge, based on a steward, Jose Aguire, having submitted information to the WFSE that Green had acted inappropriately with regard to two women shop stewards in training. A review of Aguire's letter reflects that it contains no allegations concerning any harassment by Green.

<sup>19</sup> CP 245-57 at p. 248, lines 8-19; Cert. Stmt. of Larsen.

<sup>20</sup> CP 81-244 at p. 111; Cert. Stmt. of Younglove, Attachment A, PAB Tr. 5/4/05, p. 74, line 12 through p. 75, line 8; and PAB Exhibit A-8.

<sup>21</sup> CP 81-244 at p. 133; Cert. Stmt. of Younglove, Attachment A, PAB Tr. 5/5/05, p. 127, line 25 through p. 128, line 4.

graphically voicing her opinion about the union (that they had "fucked" the employees) at a union meeting.<sup>22</sup> Delgado had previously been removed as a shop steward on several occasions, generally, she felt, after she had not agreed with other members of the executive board.<sup>23</sup> Although Delgado suggests that Green may have had something to do with her removal as a shop steward, she admits she had no idea if that is true. She also admits that several employees have sworn under oath that Green had nothing to do with Delgado's removal; and that Green in fact suggested Delgado be given a second chance.<sup>24</sup>

It was not until the very end of his career that Barrette Green became the President of the WFSE local at WSH. For most of the time Delgado contends she was harassed by Green, the two were both working as MHTs, and both were merely members of the WFSE, or they were both working as shop

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<sup>22</sup> CP 81-244 at p. 110; Cert. Stmt. of Younglove, Attachment A, PAB Tr. 5/4/05, p. 70, line 21 through p. 72, line 5.

<sup>23</sup> CP 81-244 at p. 110; Cert. Stmt. of Younglove, Attachment A, PAB Tr. 5/4/05, p. 72, lines 6-21.

<sup>24</sup> CP 81-244 at p. 125; Cert. Stmt. of Younglove, Attachment A, Dawn Gomez, PAB Tr., 5/5/05, p. 93, line 12 through p. 94, line 2; Deborah Meyers, PAB Tr., 5/5/05, p. 115, line 13 through p. 118, line 3; and Jon Wagner, PAB Tr., 5/5/05, p. 202, line 5 through p. 204, line 25.

stewards. For some of the time while Green was the chief shop steward, Delgado was a member of the executive board to which Green reported. The executive board is the highest governing body of the WFSE local at WSH.

Delgado, despite her position in the union, did not have any information as to the alleged improprieties involving Barrette Green and other WSH employees. She is not aware of any information that other WFSE members or officials had any knowledge of her (or others') interactions with Green.

### III. ARGUMENT

#### A. *Summary judgment on review.*

On summary judgment, we "engage[ ] in the same inquiry as the trial court." *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wash.2d 488, 493, 886 P.2d 147 (1994). We will not resolve factual issues, but rather must determine if a genuine issue as to any material fact exists. *Balise v. Underwood*, 62 Wash.2d 195, 199, 381 P.2d 966 (1963). "A material fact is one upon which the outcome of the litigation depends." *Id.* The moving party has the burden of proving there is no genuine issue of material fact and all inferences are construed in the light most favorable to the nonmoving party. *Id.*; see also Civil Rules (CR) 56(c). [Footnote omitted.] If the moving party meets its burden, the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." *LaPlante v.*

*State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975); *Snohomish County v. Rugg*, 115 Wash.App. 218, 224, 61 P.3d 1184 (2002) (stating that a nonmoving party must set forth evidentiary facts, not suppositions, opinions, or conclusions); see also CR 56(e) . . . .

In re Estate of Black, 153 Wn.2d 152, 160-61, 102 P.3d 796 (2004).

[I]f the plaintiff fails to make a showing sufficient to establish an essential element of his case, the trial court should grant the summary judgment motion because there can be no genuine issue of material fact in that situation; a complete failure of proof concerning an essential element of the plaintiff's case renders all other facts immaterial. *Id.* The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 377, 972 P.2d 475 (1999).

Little v. Countrywood Homes, Inc., 132 Wn.App. 777, 779-80, 133 P.3d 944 (2006).

"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 Wash.2d 97, 105, 922 P.2d 43 (1996) (citing *Grimwood v. University of Puget Sound, Inc.*, 110 Wash.2d 355, 359-60, 753 P.2d 517 (1988)). To defeat summary judgment, the employee must establish specific and material facts to support each element of his or her prima facie case. *Id.* (citing *Hiatt [v. Walker Chevrolet Co.]*, 120 Wash.2d [57] at 66-67, 837 P.2d 618 [1992]).

Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 846-47, 991 P.2d 1182 (2000).

[A] trial court's disposition [on summary judgment] may be affirmed [on appeal] on any theory within the pleadings and the proof. *Timms v. James*, 28 Wash.App. 76, 81, 621 P.2d 798 (1980). Thus the decision may be upheld where there is an alternate ground on which the summary judgment could have been granted.

Carey v. Reeve, 56 Wn.App. 18, 23, 781 P.2d 904 (1989).

In this case, the trial court properly granted the WFSE's summary judgment motion and dismissed each of Delgado's claims as to the WFSE.

**B. The court should not consider much of Delgado's submissions.**

Delgado relied on numerous inadmissible documents in opposing the WFSE's Motion for Summary Judgment.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

CR 56(e).

The Declaration of Loren A. Cochran attached the following inadmissible (at least for the purpose of establishing facts or opinions asserted therein against the WFSE) documents:

Exhibit A, Salisbury Report dated July 1, 2003.

Exhibit B, Salisbury Summary dated July 8, 2003.

Exhibit C, Complaint in Lizee v. State (Pierce County No. 01 2 09414 4).

Exhibit D, Reis Special Master Report in Lizee v. State, dated November 22, 2004.

Exhibit E, Barrette Green Complaint in Green v. State, CV03-5653.

Exhibit F, Order Granting Summary Judgment in Green v. State, CV03-5653.

Exhibit G, Hobson Report in Green v. State, CV03-5653.

Exhibits H and I, Brimner depositions.

Exhibit J, Salisbury deposition.

Exhibit K, Green termination letter.

Exhibit L, Personnel Appeals Board Decision on Green appeal.

Exhibit M, State Motion to Supplement Record in Green v. State appeal.

Exhibit N, Deposition of Dennis Braddock.

Exhibit Q, Brimner Memo dated April 14, 2003.

Exhibit R, Braddock Memo dated April 15, 2003.

Each of the foregoing documents contains allegations about which the individual making the assertion is not competent because they lack personal knowledge (ER 602), are repeating hearsay (ER 802), and/or are expressing inadmissible opinions (ER 701). The WFSE was not a party to any of the litigation or administrative proceedings, and none of the individuals whose reports, depositions or affidavits are cited are agents of the WFSE. The court should not consider the contents of those documents upon which Delgado relies to decide issues involving the WFSE.

***C. Delgado's claims are time barred.***

Each of Delgado's claims against the WFSE is subject to a three-year statute of limitations.

"The three-year statute of limitations applies to actions under this act [RCW Ch. 49.60, Washington's Law Against Discrimination]." Washington v. Boeing Co., 105 Wn.App. 1, 7, 19 P.3d 1041 (2000).

The statute of limitations on Delgado's claim of outrage (intentional or negligent infliction of

emotional distress) is also three years. Milligan v. Thompson, 90 Wn.App. 586, 592, 953 P.2d 112 (1998).

Delgado also claims negligent supervision. "The statute of limitations for negligent failure to supervise . . . is three years." Mayer v. Huesner, 126 Wn.App. 114, 123, 107 P.3d 152 (2005).

Each of Delgado's claims is substantially barred by these applicable three-year statutes of limitation. Each and every encounter Delgado claims to have had with Green occurred before February 16, 2002 (three years prior to this lawsuit being commenced), except the last two. She conveniently claims that, after a several-year hiatus, Green summoned her to a hotel in Olympia during June or July 2002, and had sex with her for the last time, and later in December accosted her in his office.<sup>25</sup>

Delgado argues that based on these last two incidents, she can claim recovery for the previous

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<sup>25</sup> Delgado's nonspecific and vague claims in rebuttal documents that Green may have generally "harassed her" between 1994 and 2002 are not a basis to deny summary judgment. See Marshall v. Bally's Pacwest, Inc., 94 Wn.App. 372, 379, 972 P.2d 475 (1999).

years of harassment under Antonius v. King County, 153 Wn.2d 256, 103 P.3d 729 (2005).

In Antonius, the Court adopted the analysis set forth in Morgan, Crowley v. L.L. Bean, Inc., 303 F.3d 387 (1st Cir. 2002). The Court stated:

Under Morgan, a "court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period." Morgan, 536 U.S. at 120, 122 S.Ct. 2061. **The acts must have some relationship to each other to constitute part of the same hostile work environment claim, and if there is no relation, or if "for some other reason, such as certain intervening action by the employer" the act is "no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts" as part of one hostile work environment claim.** Morgan, 536 U.S. at 118, 122 S.Ct. 2061.

(Emphasis supplied.) Antonius, *supra*, at 271.

In adopting the single employment practice analysis, Antonius did say that a gap between a series of harassing events is not in and of itself fatal, but can be a consideration. In Antonius, the female corrections employee enjoyed a brief one-year hiatus from a sexually hostile work environment during an approximate 15-year period. Here, Delgado claims to have been harassed

regularly once or twice a week, on average, from 1989 to 1994, and then hardly, if at all, until June or July 2002, a period of eight years.

The Antonius Court noted that in Lucas v. Chicago Transit Authority, 367 F.3d 714 (7th Cir., 2004), the Court had found a three-year gap warranted a finding that the discriminatory acts were not part of the same hostile environment. Here, an eight-year gap certainly requires such a finding.

The facts in Antonius do not support its application in this case. The several-year gap in time between the pattern of alleged behavior before 1994 creating the hostile environment and the final incidents in 2002 is at least one reason for the Court to find Antonius inapplicable.

Further, even if it were to apply, Antonius only has applicability to Delgado's sexual harassment claims. The analysis does nothing to salvage her other stale claims.

All of Delgado's claims based on her allegations before the final alleged incidents in 2002 are untimely.

**D. Green's conduct cannot be imputed to the WFSE.**

Even if Green's behavior constitutes some civil wrong against Delgado, his conduct cannot be imputed to the union. A union may be liable for the conduct of its members "providing it is done in the furtherance of the union's business and within the scope of the employment. . . ." Titus v. Tacoma Smeltermen's Union, 62 Wn.2d 461, 469, 383 P.2d 504 (1963). See also Bratton v. Calkins, 73 Wn.App. 492, 870 P.2d 981 (1994); and Thompson v. Everett Clinic, 71 Wn.App. 548, 860 P.2d 1054 (1993). There is no evidence that any of Green's alleged conduct was in furtherance of the union's business or within the scope of his employment or position with the union. Any conduct alleged by Delgado was for Green's personal gratification. This intentional misconduct is not imputable to the union. See C.J.C. v. Corporation of the Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999).

An employee's conduct will be outside the scope of employment if it "is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." RESTATEMENT (SECOND) OF AGENCY §

228(2) (1958); see also RESTATEMENT, supra, § 228(1). . . . The proper inquiry is whether the employee was fulfilling his or her job functions at the time he or she engaged in the injurious conduct. . . . [T]his court has also determined that, where an employee's acts are directed toward personal sexual gratification, the employee's conduct falls outside the scope of his or her employment. For example, in *Thompson v. Everett Clinic*, 71 Wash.App. 548, 860 P.2d 1054 (1993), the court held that the actions of a doctor who, for his own personal sexual gratification, had manually obtained sperm samples from his male patients during examination were not within the scope of the doctor's employment. [FN9]

[FN9] Indeed, prior to *Snyder [v. Med. Servs. Corp. of E. Wash.]*, 145 Wash.2d 233, 35 P.3d 1158 (2001)], Washington case law regarding intentional torts and vicarious liability was mostly confined to sexual misconduct; naturally, the courts have held that the sexual acts of employees are not within the scope of employment. See *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wash.2d 699, 985 P.2d 262 (1999) (holding that diocese could not be held vicariously liable for sexual abuse by priests); *Niece [v. Elmview Group Home]*, 131 Wash.2d 39, 929 P.2d 420 [1997] (holding that group home was not vicariously liable for the rape of a disabled resident by an employee); *Blenheim v. Dawson & Hall, Ltd.*, 35 Wash.App. 435, 667 P.2d 125 (1983) (holding that employer could not be held vicariously liable where employees acted for their own purposes by assaulting and raping a dancer at a company Christmas party).

See Robel v. Roundup Corp., 148 Wn.2d 35, 53-54, 59 P.3d 611 (2002).

This issue, as it relates to some of Delgado's specific claims, is also addressed infra.

***E. Delgado's discrimination claims were properly dismissed.***

Plaintiff's principal complaint is one of sexual harassment (hostile work environment), a form of sex discrimination prohibited by RCW Ch. 49.60. Specifically, with regard to labor unions, RCW 49.60.190 provides that:

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 . . . sex . . . .

Insofar as plaintiff's first three causes of action against the WFSE (discrimination in the form of a hostile workplace in violation of RCW Ch. 49.60; discrimination in the form of disparate treatment in violation of RCW Ch. 49.60; and retaliation in violation of RCW Ch. 49.60) are

concerned, Delgado's claims against the WFSE all fall under this one provision.

Clearly, Delgado comes within the purview of the statute as an individual whom the WFSE may not discriminate against, harass or retaliate against because of her gender. Just as clearly, Delgado failed to produce any evidence of discrimination by the WFSE or for which it is responsible.

The required elements of a sexual harassment claim are: (1) the harassment was unwelcome; (2) the harassment was because of sex; (3) the harassment affected terms and conditions of employment; and (4) the harassment is imputed to the employer [union]. See Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 693 P.2d 708 (1985).

Not only is Delgado's claim untimely, there is no basis to impute the harassment to the WFSE, on the basis that the WFSE knew or should have known of Green's harassment of Delgado, and that despite such knowledge the WFSE failed to take adequate corrective measures. Id.

There is no evidence that anyone connected with the WFSE, much less anyone in authority, even knew of Green's conduct, much less authorized it.

Delgado never complained to the union giving it knowledge, and two incidents after an eight-year hiatus is not so pervasive that any reasonable person could charge the union with constructive notice. See Perry v. Costco Wholesale, Inc., 123 Wn.App. 783, 791-92, 98 P.3d 1264 (2004); and Francom v. Costco Wholesale Corp., *supra*. Even as to the early years of more pervasive harassment, Delgado admits she purposefully hid her interactions with Green from her family and closest friends. As far as Green's alleged interactions with other female WSH staff, Delgado was as active as anyone in the WFSE at WSH, and she claims to have had absolutely no knowledge at all of any of those situations. Her own lack of knowledge belies her argument that the WFSE must have known of Green's conduct.

No Washington case has been decided with regard to a union's liability under RCW 49.60.190. In Woods v. Graphic Communications, 925 F.2d 1195 (9th Cir., 1991), the Ninth Circuit upheld a finding that a union had violated both federal and state provisions regarding discrimination, and specifically the provisions of RCW 49.60.190.

Woods, an African-American union member, alleged pervasive racial discrimination on the part of his union. He alleged that his union shop steward and union shop committeeman had both engaged in explicit racially derogatory conduct and hostility, and that the union knowingly failed to take steps on his behalf to grieve what the Court described as "the plant's racial atmosphere." Finding the pervasive racial hostility in the workplace and participation in that hostility by the two union representatives, with the full knowledge of the union, the Court found a violation of RCW 49.60.190, as well as a breach of the union's duty of fair representation, based on the union's failure to attempt to rectify the employment situation.

The Woods Court found:

Woods [the black employee] complained more than once of exactly this phenomenon [pervasive racial hostility in the workplace] yet the Union chose not to file a grievance. This brings the case squarely within the rule of *Goodman* [*Goodman v. Lucan Steel Company*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987)]. We affirm the district court's holding that the union violated Wash. Rev. Code § 49.60.190.

Woods at 1200.

This case is remarkably distinguishable from Woods in several respects. Delgado has never contended that she complained to anyone, much less complained to anyone associated with the union, regarding Green's behavior until well after her last sexual encounter with Green. In fact, whether out of fear of Green or otherwise, she purposefully concealed her interactions with Green. She kept secret Green's behavior from family and the closest of friends, even when living with them.

Delgado offers absolutely no evidence that anyone associated with the union had any knowledge, either actual or constructive, of what she alleged was Green's behavior. And, in fact, the record in this case reflects that the union did not know.

Delgado argues that she surrendered to Green's sexual rapes starting in 1989 only because of Green's powerful positions in the union and at WSH. This self-serving claim flies in the face of the uncontroverted facts. At that time Green was only an entry-level employee and a union member (as were all the employees in that job

classification). Green held no office or position with the union whatsoever until 1992, when he first became a shop steward.<sup>26</sup> This was several years after Delgado (or more precisely her attorney) now contends Green used his "powerful union position" to harass (rape) her.

For most of the years she knew Green, Delgado was also a union shop steward. For a period of time covering some of her later allegations, as a member of the executive board she even held a position of authority over Green, who was at the time the chief shop steward reporting to the board.

Delgado admits she actively kept the union from learning of Green's behavior, which she had ample opportunities to disclose (at executive board meetings or state or national conventions, for example). She had frequent interactions with the female President of the state WFSE council. Delgado now wants to blame the union for not doing something about that which it had no actual knowledge or anyway of knowing.

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<sup>26</sup> PAB Tr., 6/20/05, p. 76, line 14 through p. 77, line 8.

To the extent that Delgado has pled retaliation under RCW Ch. 49.60 for filing a complaint, she has failed to prove the *sine qua non* of such a claim, that anyone associated with the union was even aware of any complaint she was making with regard to Green's behavior. This is because, as she admits, she never made one. How can she be retaliated against for making a complaint when she admits none was made?

While Delgado suggests that her removal as a shop steward by the executive board was retaliatory, she admits she has no information that her removal was motivated by anything other than her fellow employees being upset with her accusing them of selling out their co-workers on a leave issue. She offers no evidence to support her claim that her removal was retaliatory.

The uncontroverted evidence is that Green had nothing to do with Delgado's removal as a shop steward. Her removal was instigated by board members totally independently of Green. They voted to remove her because of Delgado's outrageous behavior when she was upset with members of the union executive board and swore at

them with regard to certain action related to the treatment of an employee leave issue.

Delgado's claims of discrimination and retaliation in violation of RCW Ch. 49.60 were properly dismissed.

**F. Delgado's claim of outrage was properly dismissed.**

Delgado alleges that the WFSE is liable on her claim of outrage, otherwise known as intentional infliction of emotional distress.

The elements of the tort of intentional infliction of emotional distress are:

"(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." [Citations omitted.] The conduct in question must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." [Citation omitted.] The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. [Citation omitted.]

Haubry v. Snow, 106 Wn.App. 666, 680, 31 P.3d 1186 (2001).

Green's behavior, at least as contended by Delgado, may very well be outrageous; however, it was not within the scope of his union duties, supra. There is therefore no basis to impute that behavior to the union.

If the issue is whether the union engaged in any behavior which was so outrageous that it meets this standard, the evidence falls far short of anything which any reasonable person could find constituted the tort of outrage.

First, there is no evidence that any union official was even aware, either actually or constructively, of any of Green's alleged behavior.

Second, even if any union official could be charged with some knowledge that Green may have been acting sexually inappropriately toward Delgado, there is certainly no evidence to suggest that any individual was aware of the extreme nature of Green's behavior. Without such knowledge, the failure of the union to remove Green could not reasonably be described as outrageous or as intentionally or recklessly inflicting emotional distress on Delgado.

Finally, Delgado has failed to show any evidence of "severe emotional distress."

The plaintiff's complaint for outrage as to the defendant WFSE was properly dismissed.

**G. Delgado's negligent hiring and retention claims were properly dismissed.**

Delgado claims the WFSE negligently hired and retained Green as a union official.

"The torts of negligent hiring, supervision and retention have generally been described as follows:

[A] An **employer** may be liable to a third person for the employer's negligence in hiring or retaining a servant who is incompetent or unfit. Such negligence usually consists of hiring or retaining the employee with knowledge of his unfitness, or of failing to use reasonable care to discover it before hiring or retaining him. The theory of these decisions is that such negligence on the part of the employer is a wrong to such third person, entirely independent of the liability of the employer under the doctrine of respondeat superior. It is, of course, necessary to establish such negligence as the proximate cause of the damage to the third person, and this requires that the third person must have been injured by some negligent or other wrongful act of the employee so hired. [Footnote omitted.]

(Emphasis added.) Haubry at 679.

Green was not an employee of Local 793 or the WFSE. He was an employee of WSH who volunteered as a union agent. More significantly, Delgado has

made no showing that any union official had any knowledge, actual or constructive, of Green's unfitness because of some proclivity for sexual harassment, as Delgado alleges.

The only previous complaint of a sexual nature against Green had been made by Lizee in 2001. This was many years after all but two of Delgado's allegations involving Green. Further, the WFSE attempted to investigate Lizee's claims but was stymied by her refusal to cooperate. DSHS did investigate the complaint and found Lizee's claim to be without merit. It was not until the further investigation (by Salisbury) in 2002, following Lizee's lawsuit in which Delgado's complaint and others were detailed, that the WFSE first learned of the allegations. By that time, Green was on administrative leave and was subsequently terminated.

Delgado's complaint for negligent hiring and retention should be dismissed.

**IV. CONCLUSION**

Delgado's claims were properly dismissed on summary judgment.

DATED this 5<sup>th</sup> day of February, 2007.

Respectfully submitted,

~~YOUNGLOVE LYMAN & COKER, P.L.L.C.~~



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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

|                          |       |              |
|--------------------------|-------|--------------|
| JANE DOE III,            | )     |              |
|                          | )     |              |
| Appellant,               | )     |              |
| v.                       | )     |              |
|                          | )     |              |
| THE STATE OF WASHINGTON, | )     | AFFIDAVIT OF |
| DEPARTMENT OF SOCIAL AND | )     | DELIVERY     |
| HEALTH SERVICES; et al., | )     |              |
|                          | )     |              |
| Respondents.             | )     |              |
| STATE OF WASHINGTON      | )     |              |
|                          | ) ss. |              |
| COUNTY OF THURSTON       | )     |              |

I, Carla C. Flynn, being first duly sworn upon oath, deposes and says: That I am the assistant to the attorney for the respondent, Washington Federation Of State Employees, herein and that on the 5<sup>th</sup> day of February, 2007, I did deliver by ABC Legal Services a copy of the following documents:

- BRIEF OF RESPONDENT WASHINGTON FEDERATION OF STATE EMPLOYEES
- AFFIDAVIT OF DELIVERY

to all parties by delivering the same to:

Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

COURT OF APPEALS  
DIVISION II  
07 FEB -6 PM 1:51  
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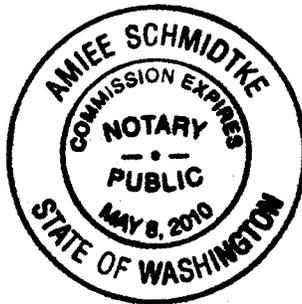
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[Signature]  
Carla C. Flynn, Legal Assistant

SUBSCRIBED AND SWORN to before me this 5th day of February, 2007.



[Signature]  
Amiee Schmidtke (PRINT NAME)  
NOTARY PUBLIC in and for the State  
of Washington, residing at Olympia  
Commission expires: May 8 2010