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## I. INTRODUCTION

Appellant, Jane Doe II – Cheryl Reis, files this brief in response to the brief filed by Washington Federation of State Employees (“WFSE”). Through its response, WFSE minimizes both Barrette Green’s and its own role regarding the sexually hostile work environment at Western State Hospital. At the summary judgment stage, “[f]acts and the reasonable inferences therefrom are considered in favor of the nonmoving party[.]” *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). WFSE’s brief does not recite the facts of this case in this manner. As explained in Appellant’s opening brief, the court below erred in dismissing Appellant’s claims for hostile working environment and negligence.

## II. ARGUMENT AND AUTHORITY

Barrette Green held great power in his various capacities with the Union. CP 865. Only through Barrette Green’s role in WFSE was he able to gain the power to intimidate and harass the individuals at Western State Hospital. CP 865. DSHS’ top official, Dennis Braddock explained that Mr. Green would use his influence with the union to intimidate workers at Western State Hospital. Mr. Braddock testified as follows:

I would say what came to my attention probably the most was [Barrette Green’s] history of using – or the allegations of use of the union position to intimidate workers at Western State.

CP. 899-900. There is little doubt that Mr. Green used his position with the Union to create the hostile working environment.

WSFE's response relies heavily on a portion of Cheryl Reis' deposition testimony from Barrette Green's lawsuit against her in 2004. Br. at 12. This is done in an attempt to minimize the seriousness of Green's conduct. However, WSFE fails to explain the context of this deposition. During Ms. Reis' deposition, Mr. Green was present and used his presence as an intimidation tactic. CP 917. Following the deposition, Mr. Reis completed a change and signature sheet where she declared that Mr. Green's presence at the deposition frightened and confused her, which prohibited her from testifying completely. *Id.* When asked during the deposition a series of questions regarding incidents in which Mr. Green inappropriately touched Ms. Reis, conscious of his presence in the room, Ms. Reis preferred to preserve herself against further aggravation by Mr. Green, by providing only partial details or stating that she did not recall the incidents:

Mr. Barrett's presence made it very difficult to remember and I was afraid to give details.

*Id.* Understandably, Ms. Reis could not testify as openly as she would have wanted because Mr. Green was sitting in the room hovering over her.

**A. WFSE Is Subject To WLAD.**

Ms. Reis's claims are supported by the Washington Law Against Discrimination ("WLAD"). Under WLAD, it is unlawful to discriminate against another because of sex. RCW 49.60.010, 49.60.030. This right to be free from sex discrimination includes "[t]he right to obtain and hold employment without discrimination." RCW 49.60.030(1)(a). For labor unions, the right to be free from gender discrimination in the workforce means that labor unions may not "discriminate against any ... employee ... because of ... sex." RCW 49.60.190 (emphasis added). The legislature has dictated that these protections "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020.

Contrary to the argument made by WFSE, the union owed Ms. Reis a duty to refrain from gender discrimination in the workplace. Regardless of whether Ms. Reis was a member of the union or simply an employee working in and around the union presence, the WLAD specifically states that a union may not discriminate against because of sex. RCW 49.60.190.

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.

In its brief, WFSE relies on the language "or other person to whom a duty of representation is owed" to suggest that a union is only prevented from discriminating against individuals to whom a union owes a duty of representation. Br. at 16-17. This narrow interpretation is misplaced. The coverage of RCW 49.60.190(3) was *expanded* in 1985 to include "other person[s] to whom a duty of representation is owed." Laws of 1985, ch. 185 § 17. Prior to 1985, the WLAD prevented labor unions from discriminating against members, employers or employees. In 1985, however, the legislature amended WLAD to add language "or other person to whom a duty of representation is owed." The statute provides no basis to believe this language was added in order to narrow the protections of the WLAD. In fact, that would be contrary to WLAD's express intent. RCW 49.60.020. WFSE's interpretation would render the "employer" language of RCW 49.60.190(3) meaningless because it is difficult to imagine an instance when a union would owe an employer a duty of representation. Under WFSE's interpretation, a union could blatantly discriminate against employers and employees unless the union

somehow owed the employer/employee a duty of representation.<sup>1</sup> “An interpretation that produces ‘absurd consequences’ must be rejected, since such results would belie legislative intent.” *Troxell v. Rainier Pub. Sch. Dist. # 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). Contrary to the assertions made by WFSE, WALD is applicable to the union under the circumstances of this case.

**B. WFSE Had Notice Of Barrette Green’s Actions.**

Beginning first in 1988, and continuing all the way through and beyond his termination, Barrette Green pervasively harassed female employees of Western State Hospital and WFSE was on notice. Despite Mr. Green’s position as a high ranking agent of the union, the WFSE claims that it had no notice that Barrette Green was sexually discriminating against female employees. WFSE’s assertion in this regard is in conflict with the record on appeal.

Former shop steward Jose Aguirre testified as follows:

I 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. Lastrapes and Ms. 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.

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<sup>1</sup> For example, a labor union could threaten an employer that if employer hired any African American employees, the union would strike in retaliation.

CP 1071. Thus, the evidence, viewed in the light most favorable to Appellant, shows that WFSE had notice of Mr. Green's actions as of 1997.

**C. The Union Is Liable For Its Own Negligence.**

Washington recognizes the tort of negligent hiring, supervision, and retention. *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 43, 747 P.2d 1124 (2001). To establish such a claim, a plaintiff must present evidence that the master: (1) knew or should have known of the servant's unfitness; and (2) negligently hired or retained the servant. *Lester v. Town of Winthrop*, 87 Wn. App. 17, 26, 939 P.2d 1237 (1997).

Here, as discussed above, WFSE had actual knowledge of Green's conduct as of 1997. CP 1071. A question of fact remains as to whether WFSE acted in a reasonable manner by retaining Mr. Green in his position of power for years after the first complaints were received.

**D. Statute Of Limitations Does Not Bar Appellant's Claims.**

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. *Nevils v. Aberle*, 46 Wn. App. 344, 346, 730 P.2d 729 (1986). Initially, it is important to note that the trial court did not dismiss these claims on the affirmative defense of statute of limitations. VRP (April 28, 2006) at 44:12-13. There, the trial court stated "[t]he statute of limitations, I don't think we really need to

reach that.” *Id.* Nevertheless, the claims currently asserted by Ms. Reis against the union are not barred by the statute of limitations.

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 v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). 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.

The claims Ms. Reis is asserting should be considered as a series of acts that collectively constitute one unlawful employment practice. DSHS Director of Human Resources, Sherer M. Holter, testified that Ms. Reis was subjected to a hostile work environment during the entire time that Barrette Green was employed by the State, which was until November 24, 2003:

Q . . . . Do you believe that while Barrette Green was employed at Western State Hospital, that she was subject to a hostile work environment?

THE WITNESS... Based on the information that she provided, it appeared that she was in a hostile work environment.

CP 1085-86.

By continuing to allow Green to use the power derived from his position in the union, the hostile work environment continued up to his termination. In her declaration, Appellant explains that she feared the control Green had in the work place and felt that he had the ability to end her career. CP at 850-51. As the Ninth Circuit explained in *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991), “in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment.” This is such a case. The question as to whether Mr. Green’s mere continued presence at Western State Hospital was sufficient to create a hostile working environment should be left to a jury.<sup>2</sup>

**E. The Union Is Not Entitled To Sanctions.**

Pursuant to RAP 18.9(a), this Court will only assess sanctions when an appeal “presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal.” *Gall Landau Young Constr. Co. v. Hurlen Constr. Co.*, 39 Wn. App. 420, 432, 693 P.2d 207 (1985). Importantly, “[a] party has a right to appeal, and an appeal is not frivolous simply because the party's arguments are rejected.” *Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200 (1997).

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<sup>2</sup> Prior to the filing of this brief, this Court rendered its opinion in *Jane Doe I v. Washington*, No. 34357-6-II, holding that the negligence and discrimination claims of

Here, there is an open question of statutory interpretation as to whether RCW 49.60.190 applies. This was the basis for dismissing Appellant's claims against WFSE. Appellant believes that the trial court erred in determining that RCW 49.60.190 does not apply to employees. Appellant had a right to appeal this decision. There is a good faith basis for this appeal, and therefore, WFSE's request should be denied.<sup>3</sup>

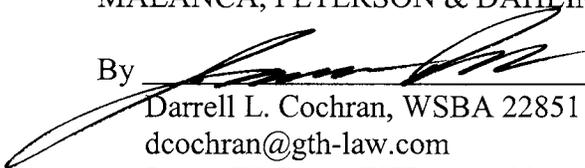
### III. CONCLUSION

Summary judgment was not appropriate in this case. Appellant Jane Doe II respectfully requests that this Court reverse the trial court and remand this case for trial.

Dated this 29<sup>th</sup> day of May, 2007.

Respectfully submitted,

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*Jane Doe I* were barred by the statute of limitations. Because the *Jane Doe I* opinion was unpublished, it is not considered in the review the instant case.

<sup>3</sup> WFSE failed to cross-appeal the trial court's refusal to award sanctions pursuant to CR 11. Therefore, this issue is not before the Court on appeal. RAP 5.1(d)

