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NO. 35507-8-II  
BY 

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

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JANE DOE II, Appellant,

v.

THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL  
AND HEALTH SERVICES; WESTERN STATE HOSPITAL;  
BARRETT 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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**I. COUNTERSTATEMENT OF THE ISSUES AS TO THE RESPONDENT WASHINGTON FEDERATION OF STATE EMPLOYEES (WFSE)**

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

**II. COUNTERSTATEMENT OF THE CASE**

**A. *Statement of Proceedings***

On March 29, 2005, using the pseudonym "Jane Doe II," Cheryl Reis (Reis) filed a complaint against the State of Washington (State), Barrette Green (Green), and the WFSE.<sup>1</sup> The WFSE moved for Summary Judgment of Dismissal.<sup>2</sup> On April 28, 2006, the trial court (the Honorable Ronald Culpepper) granted the WFSE's motion.<sup>3</sup>

At the same time, the court also granted a similar motion by the State.<sup>4</sup> Reis stipulated to the dismissal of her claims as to Green.

Reis appeals the orders of dismissal as to the State and the WFSE.<sup>5</sup>

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<sup>1</sup> Clerk's Papers (CP) 1-2.

<sup>2</sup> CP 509-10 and 1444-45.

<sup>3</sup> CP 2199-2201.

<sup>4</sup> CP 2202-04.

<sup>5</sup> This is the last 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 III (Delgado) v. State et al., No. 35130-7-II.

**B. Counterstatement of Facts**

1. Reis was a manager and held a position equal to Green's position.

Reis was an employee of the Department of Social and Health Services, State of Washington (DSHS), until her retirement August 1, 2005. At the times pertinent to her complaint, she was employed as the Quality Management Director at Western State Hospital (WSH), a WSH management position. Ms. Reis and Barrette Green were both supervised by Dolly Hanson (Hanson), to whom they each directly reported. Hanson, in turn, reported directly to the WSH CEO.<sup>6</sup> Contrary to the allegations in plaintiff's complaint,<sup>7</sup> the defendant Green was never Reis's supervisor.<sup>8</sup> Reis attributed problems she had at work to Hanson, but also generally felt that Green had influence with Hanson.<sup>9</sup>

2. Reis's employment had no connection to the WFSE.

At no time pertinent to her complaint was Reis a member of WFSE Local 793, or a member of a bargaining unit represented by the

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<sup>6</sup> CP 1492-93, Edward Earl Younglove III Certified Statement, Attachment A, Reis PAB Transcript, p. 106, line 3 through p. 109, line 1.

<sup>7</sup> CP 2, ¶ I, p. 2, lines 10-12.

<sup>8</sup> CP 1492-93, Younglove Cert. Stmt., Attachment A, Reis PAB Tr., p. 108, line 19 through p. 109, line 1.

<sup>9</sup> CP 1496, Younglove Cert. Stmt., Attachment A, Reis PAB Tr., p. 123, line 8 through p. 124, line 23.

WFSE.<sup>10</sup> She never complained to the WFSE concerning Green.<sup>11</sup> None of her complaints about Green involved his actions as a union representative.

3. Green's alleged contacts with Reis were minimal.

According to Reis, the first day she worked with Green was during June 2001. They apparently had a disagreement during a work meeting that day. Green was not participating in the meeting as a union official. Afterward, Green came and spoke with her in her office. She claimed her recollection was "extremely fuzzy," but that he apparently told her, "we have a problem."<sup>12</sup> Reis found Green's demeanor intimidating, but when he left, according to Reis, they were on very good terms.<sup>13</sup> Reis admits that thereafter she gave the outward appearance to everyone else of having a good relationship with Green.<sup>14</sup>

On another occasion, Reis claimed that Green rubbed her shoulders. She described his conduct as unnecessary,<sup>15</sup> but she felt he was

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<sup>10</sup> CP 1514, Reis had been a member prior to becoming a manager. She was not a member at the time of her first contact with Green or at any time thereafter. Younglove Cert. Stmt., Attachment C, Reis Deposition (1/11/06), Tr. p. 23, lines 4-10.

<sup>11</sup> CP 1480, Certified Statement of Liz Larsen, p. 4, lines 6-8.

<sup>12</sup> CP 1493, Younglove Cert. Stmt., Attachment A, PAB Tr., p. 111, lines 9-16.

<sup>13</sup> CP 1493-94, Younglove Cert. Stmt., Attachment A, PAB Tr., p. 111, line 5 through p. 114, line 13; Tr. p. 74, lines 12-15; Exhibit R-2, p. 2; Exhibit R-1, p. 4; and Attachment B, Reis Dep. (1/6/06) p. 24, lines 11-13.

<sup>14</sup> CP 1518, Younglove Cert. Stmt., Attachment C, Reis Dep. (1/11/06), Tr. p. 45, lines 1-18.

<sup>15</sup> CP 1495, Younglove Cert. Stmt., Attachment A, PAB Tr., p. 117, line 17 through p. 118, line 11.

being supportive and kind.<sup>16</sup> She has described the incident as lasting only a second or two.<sup>17</sup> During her deposition in this case, Reis could not recall when this event supposedly occurred.<sup>18</sup> Reis did not even mention this last incident in an earlier deposition she gave.<sup>19</sup> Green's termination letter alleged it occurred in February 2002.<sup>20</sup> The Tort Claim Reis filed with the State (sworn to by Reis on oath) also claimed this incident was in February 2002.<sup>21</sup> Reis's Trial Brief in Opposition to the WFSE's Motion for Summary Judgment also stated that the incident occurred in February 2002.<sup>22</sup>

Reis had no contact of any kind whatsoever with Green after July 2002.<sup>23</sup>

Reis has complained about Hanson, her supervisor, who she felt was destroying her career, but never complained to anyone about Green. She admitted under oath that she understood what sexual harassment is,

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<sup>16</sup> CP 1495, Younglove Cert. Stmt., Attachment A, Reis PAB Tr., p. 117, lines 17-20.

<sup>17</sup> CP 1519, Younglove Cert. Stmt., Attachment C, Reis Dep. (1/11/06), Tr. p. 49, lines 18-19.

<sup>18</sup> CP 1498, Younglove Cert. Stmt., Attachment A, PAB Tr., p. 129, line 11 through p. 130, line 4.

<sup>19</sup> CP 1498, *Id.* at p. 129, line 11 through p. 130, line 4.

<sup>20</sup> CP 1491, Younglove Cert. Stmt., Attachment A, PAB Tr., Exhibit R-1.

<sup>21</sup> CP 1526.

<sup>22</sup> CP 812, lines 17-19.

<sup>23</sup> CP 1515, Younglove Cert. Stmt., Attachment C, Reis Dep. 1/11/06, p. 34, lines 14-18.

and that she never felt sexually harassed at WSH, and specifically never by Green.<sup>24</sup>

4. The WFSE had no prior knowledge of Green's alleged behavior.

Green was an employee at WSH from the late 1980s until his dismissal on November 24, 2003. During the time relevant to Reis's complaint (2002), Green was the President of Local 793, an affiliate of the WFSE. In that capacity, Green was not an employee of either Local 793 or the WFSE. This is a volunteer position.<sup>25</sup>

In 2000 Kathleen Lizee (Lizee) complained to the WFSE that Green had harassed her. Prior to that, no official of either Local 793 or the WFSE had any knowledge of any claim of any sexual impropriety by Green. The WFSE attempted to investigate Ms. Lizee's complaint; however, she refused to cooperate.<sup>26</sup> Lizee subsequently sued Green and the State. Green was dismissed from Lizee's lawsuit.<sup>27</sup> He has consistently denied her claims.

The first time the WFSE became aware of Reis's complaint concerning Green was during Green's predisciplinary proceedings in 2003.

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<sup>24</sup> CP 1497, *Id.* at p. 125, lines 17-24; CP 1496, p. 122, line 25 through p. 123, line 7; and CP 1504-05, Attachment B (Reis Dep. 6/18/04), Tr. p. 15, line 10 through p. 16, line 7.

<sup>25</sup> CP 1478, Larsen Cert. Stmt., p. 2, lines 2-14.

<sup>26</sup> CP 1478-79, Larsen Cert. Stmt., p. 2, line 15 through p. 3, line 19.

<sup>27</sup> Pierce County Cause No. 01-2-09414-4.

By then, Green was on home assignment where he remained until his dismissal in November 2003.<sup>28</sup>

### III. ARGUMENT

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

On summary judgment, we "engage[ ] in the same inquiry as the trial court." *Faylor'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).

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<sup>28</sup> CP 1480, Larsen Cert. Stmt., p. 4, lines 2-5.

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).

As is shown herein, the trial court properly granted the WFSE's summary judgment motion dismissing each of Reis's claims.

***B. The court should not consider many of Reis's submissions opposing WFSE's motion.***

Reis relies on numerous inadmissible documents in opposing the WFSE's Motion for Summary Judgment.

Supporting and opposing affidavits [opposing a summary judgment motion] 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<sup>29</sup> 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.

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<sup>29</sup> CP 853-1102.

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 many 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 Reis relies to decide issues involving the WFSE.

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

In her complaint, Reis asserted claims of discrimination (sexual harassment and retaliation), outrage and negligent supervision/retention.<sup>30</sup> On appeal, Reis raises only the issues of whether the WFSE is liable for a

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<sup>30</sup> CP 1-12.

sexually hostile work environment,<sup>31</sup> and whether the union negligently retained and/or supervised Green.<sup>32</sup>

Each of plaintiff's claims is subject to a three-year statute of limitations. See Washington v. Boeing Co., 105 Wn.App. 1, 7, 19 P.3d 1041 (2000) (claims under RCW Ch. 49.60 for discrimination, including sexual harassment and retaliation); and Mayer v. Huesner, 126 Wn.App. 114, 123, 107 P.3d 152 (2005) (negligent supervision and/or retention).

Reis identified two specific incidents upon which she bases her claims.<sup>33</sup> She claims that in June 2001 (the first day Reis worked with Green), Green spoke with her in her office immediately following a work meeting, during which time she felt intimidated by his sitting across the desk from her and telling her that "we have a problem."

In February 2002, she claims that Green rubbed her shoulders.<sup>34</sup> Reis had not even mentioned this incident during earlier testimony.<sup>35</sup>

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<sup>31</sup> Brief of Appellant, p. 1, Issues Pertaining to Assignment of Error, ¶ 1).

<sup>32</sup> Id., ¶ 4).

<sup>33</sup> Although not mentioned in the Salisbury Report, Green's discipline, Reis's Personnel Appeals Board (PAB) testimony, earlier affidavits by Reis and an earlier deposition, in her final deposition Reis claimed that she believed Green had also hugged her, although she could not recall any specific incident. CP 1514, Reis 2006 Dep., p. 34, line 25 through p. 36, line 15. Such an indefinite, nonspecific claim made at such a late date cannot support a claim of harassment. See Francon, supra.

<sup>34</sup> CP 909.

<sup>35</sup> CP 1498, Younglove Cert. Stmt., Attachment A, Reis PAB Tr., at p. 129, line 11 through p. 130, line 4.

Clearly, these incidents occurred more than three years prior to the filing of Reis's complaint on March 29, 2005.<sup>36</sup> Each of Reis's claims is properly dismissed as beyond the applicable statute of limitations.

***D. Reis failed to establish the elements of a sexual harassment claim.***

A claim of sexual harassment requires proof of each of the following: (1) the harassment was unwelcome; (2) the harassment was because of sex; (3) the harassment affected the terms or conditions of employment; and (4) the harassment is imputed to the employer. Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985).

Reis fails to establish any of these elements.

1. Reis does not establish unwelcome harassment.

On at least two occasions, Reis herself denied that she had been subjected to any sexually harassing behavior.

**Q:** [by Ms. Sebree] Okay. Does Western State Hospital have a policy regarding sexual harassment?

**A:** [by Ms. Reis] Yes.

**Q:** Have you seen that policy?

**A:** Yes.

**Q:** Did -- did you understand that policy?

**A:** Yes.

**Q:** Did you understand your role and responsibilities, if any, with respect to that policy?

**A:** Yes, I did.

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<sup>36</sup> CP 1-12.

**Q:** So to the extent that I'm using the term sexual harassment, I'm using it in the same sense that you understand that policy. Do you -- do you understand that?

**A:** (Witness nods affirmatively.)

**Q:** Okay. So my question had to do with during the time that you worked in -- and I hope this is the same question -- during the time you worked in the organizational performance unit, do you believe that you were subjected to sexual harassment?

**A:** No.

**Q:** Has there been any occasion, Ms. Reis, when you believe that you have been subjected to sexual harassment by Mr. Green?

**A:** No.<sup>37</sup>

\* \* \*

**Q:** [by Mr. Younglove] Isn't it true that you never felt that you were subjected to any form of sexual harassment during the time that you were employed in organizational performance?

**A:** [by Ms. Reis} Yes.

**Q:** And specifically, you never felt you were subjected to any form of sexual harassment by Mr. Green. Isn't that true?

**A:** Yeah, that's true.<sup>38</sup>

In her brief, Reis provides the Court with absolutely no information whatsoever regarding the specific nature of her interactions with Green upon which she bases her complaint. Instead, she focuses on Green's alleged behavior toward others. This itself is almost a tacit admission by Reis that the conduct she alleges Green engaged in directed at her does not constitute sexual harassment.

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<sup>37</sup> CP 1504-05, Younglove Cert. Stmt., Attachment B, Reis Dep. (6/18/04), p. 15, line 10 through p. 16, line 7.

<sup>38</sup> CP 1497, Younglove Cert. Stmt., Attachment A, PAB Tr., p. 125, lines 1-24.

2. Green's "harassment" was not because of Reis's gender.

To defeat a summary judgment motion, Reis was required to produce competent evidence that supported a reasonable inference that her gender was the motivating factor for Green's behavior. Sangster v. Albertson's, Inc., 99 Wn.App. 156, 991 P.2d 674 (2000); and Doe v. Dept. of Transportation, 85 Wn.App. 143, 149, 931 P.2d 196 (1997).

Nothing in Green's behavior, when he allegedly told Reis that they "had a problem," had anything to do with her gender. Similarly, while certain touching could be offensive because of gender, as to Green's rubbing of her shoulders, Reis did not describe the touching as offensive, but only as "unnecessary."<sup>39</sup> In fact, she felt it was supportive and kind.<sup>40</sup> The same is true with regard to any hugging Green may have done since Reis could not recall a particular incident, and only generally that Green hugged lots of people.<sup>41</sup> Such claims do not support a finding that Green's interactions with Reis, that she now contends were harassment, were directed at her because of her gender.

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<sup>39</sup> CP 1495, Younglove Cert. Stmt., Attachment A, PAB Tr., p. 117, line 17 through p. 118, line 11.

<sup>40</sup> CP 1495, Younglove Cert. Stmt., Attachment A, Reis PAB Tr., p. 117, lines 17-20.

<sup>41</sup> CP 637, Rosen Declaration, Exhibit 1, Reis 2006 Dep., p. 94, lines 23-25.

3. Green's behavior did not affect Reis's terms or conditions of employment.

To support a sexual harassment claim, the harassment must be sufficiently pervasive to create an abusive work environment, based on the totality of the circumstances. Glasgow v. Georgia-Pacific, supra, at 406-07.

"Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." Glasgow, 103 Wash.2d at 406, 693 P.2d 708.

Whether the harassment is such that it creates an abusive working environment may be determined by examining the totality of the circumstances. Payne, 77 Wash.App. at 515, 892 P.2d 1102 (citing Glasgow, 103 Wash.2d at 406-07, 693 P.2d 708). We consider the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). "Casual, isolated or trivial" incidents are not actionable. Glasgow, 103 Wash.2d at 406, 693 P.2d 708; see also Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998) ("isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'").

Sangster, 99 Wn.App. at 162-63.

The few trivial, isolated and unrelated incidents described by Reis are hardly sufficient to create a persuasive atmosphere interfering with Reis's

work. Further, she fails to detail any effect on her work performance whatsoever.

Not only did Green's alleged behavior fail to rise to the level of conduct which could be construed to be sexual harassment, Reis actually attributed her problems at work to her supervisor, Dolly Hanson, not Green.<sup>42</sup>

4. Green's alleged harassment cannot be imputed to the WFSE.

Reis argues that the WFSE knew or should have known that Green was a pervasive harasser of female WSH employees. She claims "the Washington Federation of State Employees had a long history of representing Barrette Green regarding sexual harassment complaints."<sup>43</sup> Reis does not cite to anything in the record to support this contention.<sup>44</sup>

What the record does reflect is that the first knowledge that the WFSE had of any complaint regarding any alleged harassment by Green was

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<sup>42</sup> CP 1496, Younglove Cert. Stmt., Attachment A, Reis PAB Tr., p. 123, line 8 through p. 124, line 23.

<sup>43</sup> Brief of Appellant, p. 15.

<sup>44</sup> In her trial court pleadings, Reis contended that the WFSE local executive board may have acquired information concerning Green sexually harassing two union shop steward trainees (not Reis); however, an examination of the actual complaints reveals no allegations of any type of sexual harassment. see CP 1528-34, Supplemental Certified Statement of Edward Earl Younglove III, Attachments 2-6.

a complaint in late 2000 from Kathleen Lizee. When the WFSE attempted to investigate Ms. Lizee's complaint, she refused to cooperate or to provide any information to the WFSE. The WFSE understood that DSHS investigated Lizee's complaints at that time and essentially cleared Green. Not until after the Lizee lawsuit and the subsequent Salisbury Investigation conducted in 2003 (after Reis's claimed interactions with Green) did the WFSE acquire any additional information regarding alleged improprieties by Green. That was also the first time that it had any information regarding any alleged misconduct by Green involving Reis.<sup>45</sup>

5. Reis is not a person protected from alleged discrimination by a union.

A union's liability for sexual harassment in the State of Washington is based on RCW 49.60.190, which provides:

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 . . . .

In addition to the fact that Reis fails to establish any of the four elements of a sexual harassment claim, supra, insofar as any claim against

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<sup>45</sup> CP 1478, Larsen Cert. Stmt., p. 2, line 15 through p. 4, line 5.

the WFSE is concerned, she is not an individual protected by the provisions of RCW 49.60.190. Reis was never a member of the WFSE, or even a member of a bargaining unit represented by the WFSE, to whom it owed a duty of representation. She was not an employee of the WFSE. There is no basis in the statute for any liability of the WFSE.

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 court upheld a finding that the union had violated the discrimination provisions of RCW 49.60.190. In that case, a black union member alleged pervasive racial discrimination on the part of his union. He alleged that his shop steward and shop committeeman had both engaged in explicit racially derogatory conduct and hostility, and 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, the court found a violation of RCW 49.60.190, as well as a breach of the union's duty of fair representation. The 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. First and foremost, at no time during the period relevant to her complaint was Reis a member of the union or of any bargaining unit represented by the union. The union owed her no duty of representation whatsoever. Secondly, Reis has never contended that she complained to anyone, much less complained to anyone associated with the union, regarding Green's behavior. She has produced absolutely no evidence that anyone associated with the union had any knowledge, either actual or constructive, of what she alleged was Green's behavior toward her or anyone else. And, in fact, the union did not have any such knowledge.<sup>46</sup>

For all of the foregoing reasons, the trial court properly granted summary judgment of dismissal of Reis's claims of sexual harassment against the WFSE.

**E. Reis's claim that the WFSE negligently supervised Green was properly dismissed.**

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

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<sup>46</sup> CP 1478-80, Larsen Cert. Stmt., p. 2, line 15 through p. 4, line 12.

[A]n **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 v. Snow, 106 Wn.App. 666, 679, 31 P.3d 1186 (2001).

As previously argued, Reis produced no evidence that the WFSE knew or should have known of Green's alleged conduct. The only previous complaint of a sexual nature against Green had been made by Lizee. The WFSE attempted to investigate that claim, but was unable to do so because of Lizee's lack of cooperation. Lizee instead chose to file a complaint against Green and her employer, DSHS. It was her lawsuit, and the State's investigation as a result thereof, that eventually lead to the revelation of the other claims against Green, including those of Reis.

Nevertheless, Reis argues that the WFSE must have known of Green's conduct toward her because, subsequently, the PAB and others have concluded that Green probably engaged in such conduct. However, not only was the WFSE not a party to any of those proceedings, none of them

concluded that the WFSE was either actually aware of Green's behavior or had any reason to know of Green's behavior. None of the employees who alleged that they were harassed by Green reported that behavior until after Lizee's complaint. In fact, they all kept their interactions with Green a secret. Reis herself testified:

**Q:** [by Ms. Sebree] So you tried to hide [from other people] any concerns you had about him [Green]?

**A:** [by Ms. Reis] Absolutely.<sup>47</sup>

In addition to having failed to produce any evidence of the union's knowledge or basis for imputed knowledge of Green's behavior, Reis's complaint of negligent supervision and retention fails on other grounds.

The claim is barred by the three-year statute of limitations, as previously argued.

None of Green's alleged activities were done for or on behalf of the WFSE. The 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).

There is no evidence of any kind that Green's conduct in entering Reis's office or rubbing her shoulders was in furtherance of the union's business, or within the scope of his position with the union. There is no

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<sup>47</sup> CP 1518, Cert. Stmt. of Younglove, Attachment C, Reis Dep., p. 45, line 23 through p. 46, line 1.

connection between Green's union position and any of his alleged interactions with Reis. Green was not acting in any union position during any of his interactions with Reis. In fact, Reis had no interactions with the union. Accordingly, Green's behavior cannot be imputed to the union either under an agency theory, or because the union continued Green in his position with knowledge of his treatment of female WSH employees.

Even if it is assumed the WFSE had knowledge of Green's harassment of WSH female employees, if the WFSE had removed Green from his union position, he would have remained a WSH employee. It was his employment, not his position in the union, which arguably permitted his interactions with Reis. Green's continued position with the union had no causal connection whatsoever to his interactions with Reis.

Reis's claim of negligent retention or supervision was properly dismissed by the trial court on summary judgment.

**F. The WFSE is entitled to its costs and attorney's fees under both CR 11 and RAP 18.1 and 18.9.**

In its Motion for Summary Judgment, the WFSE requested that the trial court award reasonable costs and attorney's fees under CR 11, which provides as follows:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to

the best of the party's or attorney's knowledge, information and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a).

The WFSE renews its request for CR 11 sanctions on the basis that Reis's claims and appeal are frivolous.

WFSE also requests its fees on appeal under RAP 18.1 and RAP 18.9.

RAP 18.9(a) provides:

**(a) Sanctions.** The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including

payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

Reis's complaint against the WFSE and her appeal from the Summary Judgment of Dismissal are both frivolous. The claims she makes are outside the applicable limitation periods, supra. Her allegations clearly fail to establish the elements of her discrimination and negligent supervision claims, supra. Reis's appeal does not even raise issues of "debatable" merit. In such a case, RAP 18.9 is violated. See Briggs v. Vail, 119 Wn.2d 129, 138, 830 P.2d 350 (1992). It seems evident from the record that Reis is attempting to recover for Green's alleged conduct directed toward others (Lizee and the other female WSH employees who came forward in the Salisbury Investigation). As a result of Reis's frivolous claims, the WFSE has been put to considerable expense, which counsel will detail pursuant to RAP 18.1(d) if WFSE's request is granted.

#### **IV. CONCLUSION**

Reis's complaints against the WFSE for discrimination and negligent supervision were properly dismissed on summary judgment and should be affirmed, and Reis's appeal should be dismissed with an award of costs and fees to the WFSE.

DATED this 26<sup>th</sup> day of April, 2007.

Respectfully submitted,

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



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Attorney for Respondent Washington Federation  
of State Employees

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION II

JANE DOE, II )  
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 ) WESTERN STATE HOSPITAL; DEPARTMENT )  
 ) OF SOCIAL AND HEALTH SERVICES; THE )  
 ) STATE OF WASHINGTON; WASHINGTON )  
 ) FEDERATION OF STATE EMPLOYEES, )  
 ) COUNCIL 28, LOCAL 273; BARRETT GREEN; )  
 )  
 ) RESPONDENTS. )

NO. 35507-8-II  
CERTIFICATE OF DELIVERY

I, Lindy DeGidio, certify that I served a copy of the BRIEF OF RESPONDENT  
WASHINGTON FEDERATION OF STATE EMPLOYEES on all parties or their counsel of record on  
April 26, 2007, as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand Delivered

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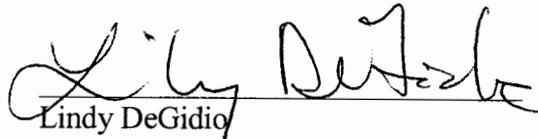
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12 I certify under penalty of perjury under the laws of the State of Washington that the foregoing is  
13 true and correct.

14 Dated this 26<sup>TH</sup> day of April, 2007 at Olympia, Washington.

15   
16 Lindy DeGidio