

Court of Appeals No.
35967-7-II

**BEFORE THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

GINA STRONG, *Plaintiff/Appellant*

v.

JIM TERRELL, *Defendant/Respondent*

FILED
COURT OF APPEALS
DIVISION II
07 MAY 21 PM 9:19
STATE OF WASHINGTON
BY *[Signature]*

APPELLANT'S OPENING BRIEF

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COMES NOW the Plaintiff/Appellant, GINA STRONG
[hereinafter cited as Plaintiff], by and through her attorney, Eric T.
Nordlof, Attorney at Law, hereby submits her opening brief to the Court.

I. INTRODUCTION

The core issue in this case involves an analysis of the torts of infliction of emotional distress in the workplace (intentional and negligent), where a worker is mistreated by her supervisor on a regular and reoccurring basis until she becomes physically ill. The question which must be answered is “how much is too much?” A second issue is whether a public employee is deprived of her vested property interest in her job when she is bullied by her supervisor until she becomes physically ill.

II. PROCEEDINGS BELOW

The Trial Court [Clark County] dismissed Plaintiff’s claims for intentional and negligent infliction of emotional distress, and for violation of Title 42 USC § 1983 on summary judgment. The Trial Court rejected several procedural defenses advanced by Defendant in conjunction with the summary judgment ruling. [CP 527-73 (Letter Ruling); 574-77 (Order Granting Defendants’ Motion for Summary Judgment)].

III. ASSIGNMENTS OF ERROR

1. The Trial Court erred in dismissing this case on summary judgment.

IV. ISSUES RELATING TO ASSIGNMENTS OF ERROR

- A. In a workplace setting, can pervasive verbal abuse and degrading treatment by a supervisor of his subordinate amount to the tort of intentional infliction of emotional distress, where stress induced by the supervisor's actions causes his subordinate to experience physical illness?
- B. In a workplace setting, can pervasive verbal abuse and degrading treatment by a supervisor of his subordinate amount to the tort of *negligent* infliction of emotional distress, where stress induced by the supervisor's actions causes his subordinate to experience physical illness?
- C. What amount and/or degree of mistreatment is sufficient to allow a jury to decide the question set forth in Issue "A" or Issue "B", above?
- D. Is a public employee deprived of her vested property interest in her public employment where a supervisor, acting under color of state law, inflicts upon the employee pervasive verbal abuse and degrading treatment to the point where the associated stress induces physical illness?

V. STATEMENT OF THE CASE

Plaintiff Gina Strong was employed by the Evergreen School District as a copy and bindery operator in its print shop. Her supervisor was Defendant/Respondent Jim Terrell [hereinafter cited as Defendant]. Over a period which lasted longer than a year, Mr. Terrell engaged in a severe and pervasive campaign of emotional abuse of Mrs. Strong until he

made her physically ill. *See*, specific citations to the record in Section VI, *supra*. No individual act stands out as actionable conduct on its own, but taken as a whole, Mr. Terrell's verbal and emotional abuse; constant derogatory comments and infliction of petty insults and indignities would lead a reasonable jury to conclude that he intended to inflict emotional distress upon Mrs. Strong quite outside and apart from his assigned duties of supervising her work.

After the commencement of a similar action to this case by two other employees of the print shop, the Evergreen School District finally investigated Mr. Terrell's behavior, in part because of information which was revealed during depositions in that case [*Wright v. Terrell*, 135 Wn. App. 722, 145 P.3d 1230 (2006)] and subsequently discharged him from employment on the basis of its investigatory findings and because he lied about his behavior to his supervisor, Marcia Fromhold, who was a defendant in this case.¹

VI. ARGUMENT

1. There are sufficient facts in the record to justify allowing a jury to decide the merits of this case.

A. Applicable Law

¹ Defendants Nikki Koch and Marcia Fromhold were dismissed from this action by stipulation, and are not parties to this appeal. [CP 480-81].

The appeal now before the Court contrasts two competing views of the tort of the intentional infliction of emotional distress. Defendant Terrell has argued below, and is expected to continue to argue that each individual incident of bullying or harassment that occurred with respect to Mrs. Strong should be measured against the standard for conduct which has applied by the Washington Supreme Court in analyzing the elements of an action for outrage, and Defendant has asserted that while his conduct may be seen as “rude or boorish behavior” [*Defendant Terrell’s Motion for Summary Judgment*, CP 96], it still fails to reach the level of abuse that a reasonable person should be expected to endure. Mrs. Strong, on the other hand, contends that the *totality* of constant abuse, insults and petty indignities, taking place virtually every work day over a period of years, reached the point where a reasonable jury should be allowed to decide whether a reasonable person should be expected to endure such treatment in order to hold a job.

Defendant Terrell relied below upon the Court of Appeals analysis of the tort of intentional infliction of emotional distress set forth in *Snyder v. Medical Service Corp. of Eastern Washington*, 98 Wn.App. 315, 988 P.2d 1023 (1999), *affirmed*, 145 Wn.2d 233, 35 P.3d 1158(2001). [CP 94-96]. Defendant’s reliance, however, is seriously undercut by the Supreme Court’s discussion of this aspect of *Snyder’s* claims. Despite the

fact that the Supreme Court did affirm a dismissal in *Snyder*, the Court stated:

Snyder's claim for outrage may have been able to survive a summary judgment challenge had she brought suit against Ms. Hall [the supervisor] personally, as the determination of whether conduct is sufficiently outrageous to warrant recovery is generally a question of fact for the jury [*citations omitted*]. However Snyder's claim was against MSC [the employer], not Ms. Hall, and consequently it must fail. *Snyder v. Medical Service Corp., supra*, 145 Wn.2d at 242.

Defendant Terrell was Mrs. Strong's supervisor. She has not brought a derivative liability claim against the Evergreen School District. As discussed *infra*, the totality of facts she alleges are sufficient to allow a jury to decide whether she is entitled to recover against Defendant Terrell.

After *Snyder*, the Washington Supreme Court again addressed the tort of the intentional infliction of emotional distress in *Robel v. Roundup Corporation, d/b/a Fred Meyer, Inc.*, 148 Wn.2d 35, 59 P.3d 611 (2002). In *Robel*, an employee of Fred Meyer brought suit against her employer based upon events that took place in August and September, 1996. The plaintiff had filed a workers' compensation claim after suffering a workplace injury, and had been placed on light duty by her employer. During a six-week period, other workers mocked her injury and called her very inappropriate names. The plaintiff alleged that an assistant manager made fun of her, laughed, pointed and gave her dirty looks. Plaintiff's

union representative arranged for a meeting with the store manager. The manager admonished other workers not to harass plaintiff Robel. The workers continued to mock plaintiff, and plaintiff overheard the assistant manager make a rude remark about her to another worker. Plaintiff went on administrative leave in mid-September, 1996, and never returned to work. One employee was terminated at the end of September for participating in the harassment. *Robel*, 148 Wn.2d at 40-41.

Ms. Robel sued Fred Meyer for five various reasons. The trial court found in her favor on each of the five causes of action. The Court of Appeals reversed the trial court on all counts. *Robel v. Roundup Corp.*, 103 Wn.App. 75, 10 P.3d 1104 (2000). Two of the Ms. Robel's causes of action were the intentional infliction of emotional distress and the negligent infliction of emotional distress. The Court of Appeals had ruled that the evidence was not sufficient on these points to have been submitted to the trier of fact. The Supreme Court reversed, and the Court's ruling was based, in part, upon the participation of a supervisor in the offending conduct.

While the standard for an outrage claim is admittedly very high (by which we mean that the conduct supporting the claim must be appallingly low), we disagree with the Court of Appeals on the threshold legal question and conclude that reasonable persons could deem the employer's conduct, as set forth in the unchallenged findings, sufficiently outrageous to trigger liability. In some contexts, perhaps the language directed at Robel could be

dismissed as merely ‘rough’ and ‘insulting’, as the Court of Appeals characterized it, *Robel*, 103 Wn.App. at 90, but we believe that reasonable minds (such as the one exercised by the trial judge) could conclude that, in light of the severity and context of the conduct, it was ‘*beyond all possible bounds of decency, ...atrocious, and utterly intolerable in a civilized community.*’ [citing *Dicomes v. State*, 113 Wash.2d 612, 630 (1989)], quoting *Grimsby v. Samson*, 85 Wash.2d 52, 59 (1975) (emphasis in original). *This Court has recognized that in an outrage claim ‘[t]he relationship between the parties is a significant factor in determining whether liability should be imposed.’* *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977) [emphasis added]. The *Contreras* court emphasized that ‘added impetus is given to an outrage claim ‘[w]hen one in a position of authority, actual or apparent, over another has allegedly made racial slurs and jokes and comments.’ *Id.*; see also *White v. Monsanto Co.*, 585 So.2d 1205, 1210 (La. 1991) (stating that ‘plaintiff’s status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger’). *Robel v. Roundup Corp.*, *supra*, 148 Wash.2d at 51-52.

Mrs. Strong submits that the evidence in the record in this case, considering the context in which it occurred, is certainly comparable in degree to the facts before the Supreme Court in *Robel v. Roundup*, *supra*, and therefore it should be found sufficient to enable reasonable persons to conclude that Defendant Terrell committed the tort of intentional infliction of emotional distress, This is especially so in light of his position of authority over Mrs. Strong, as her supervisor.

B. The Record

School District Conducts an Investigation of Defendant Terrell.

In March, 2004, the Evergreen School District conducted an investigation into the conduct of Defendant Terrell. The investigation led to his discharge from employment. Plaintiff Strong's union recovered a copy of the investigation report from the school district in connection with another matter. A copy of the investigation report is contained in the record in this matter. [CP 350-79]. The report was redacted in several places by the school district before it was released. The report contains information supporting Mrs. Strong's claims for negligent and intentional infliction of emotional distress.

Interview # 1: **Q**: *"Have you observed other employees that have been yelled at publicly, humiliated, or treated with less than dignity and respect?"*

A: "Yes, **Gina Strong** and Sandy Oliver. . . . Gina came to me upset saying she had requested time off to go to her daughter's school performance and that Jim had belittled her and denied her the time off." [CP 351].

Q: *"How would you describe the working climate in the print shop? Is it open with personnel treated with dignity and respect? Is it emotionally and physically safe?"*

A: "There is a lot of fear over here." [CP 351]

Interview # 5: Q: *“Have you ever observed Jim yelling at, intimidating or belittling other employees?”*

A: “...I’ve also overheard him jump **Gina** at her work station and could hear the commotion and see the anger on his face from where I was working.” [CP 359]

Q: *“How would you describe the working climate in the print shop?”*

A: “I think it is a very intimidating climate, people are always afraid. They are particularly afraid to say what they think because they are afraid they will lose their job. Everyone walks on egg shells, everybody fears reprisals. I am very careful about what I say as are most employees.” [CP 359]

Q: *“Do you feel emotionally safe at the print shop?”*

A: “No.” [CP 359]

Interview # 7: Q: *“Have you ever observed Jim raising his voice, yelling or becoming angry at other employees?”*

A: “On several occasions I have observed him yelling at **Gina Strong.**” [CP 361]

Interview # 8: Q: *“Have you ever observed Jim yell, humiliate or belittle another employee in public?”*

A: "Yes. Kerrie, Dave and **Gina**. The worst was Kerrie...."
[CP 362].

Interview # 10: Q: "*Have you ever observed Jim yell at, intimidate or humiliate another employee in the print shop in your view?*"

A: "Oh yes. David, Sherry, Kathy and many of the subs. Another time he came out ranting at **Gina** thinking she had called the union. Are [sic] normal procedure is to pick our jobs off the shelf and copy them and send them for shrink wrap. He told Gina not to take her jobs off the shelf, he would give her her jobs and she was to sit in a chair and stay there until he got time to give her her jobs. I asked him, do you want to give me my jobs as well. He said no, you pick up your own jobs.
[CP 367].

Q: "*Do you feel emotionally safe at work?*"

A: "I feel constant fear and intimidation." [CP 367].

Q: "*Is there any other information you would want to share with me as part of my investigation that I haven't asked about?*"

A: "Yes....Another incident is that we have always had three workers at night, when Sherry left he hired Sandy. Sandy [sic] he came and told us that the reason she was put on the third shift was to spy on **Gina**. [CP 367]

Q: "*Did you confront or clarify this with Jim?*"

A: "No, we were afraid to." [CP 367].

The foregoing excerpts of interviews are those of print shop employees which specifically mention Mrs. Strong. She was also interviewed.

Interview # 2 (Gina Strong Interview)

"[Mrs. Strong] was very reluctant to talk to me saying she didn't know who to trust and that she thought she should have a union representative present. I told her if she didn't feel comfortable talking to me, someone joining us from the union was fine. She agreed to the interview." [CP 352].

Q: *"Describe any situations where you were yelled at, talked down to, belittled or humiliated in your job as a copy/bindery operator?"*

A: "Jim Terrell told me not to cooperate with or get involved with the union soon after I came to work. He told me this several times at my work station, in the break room and in the hallway. He claimed that I was being caught up in the union politics of the department. I felt very uncomfortable by him repeatedly telling me not to cooperate with the union."

"On several occasions upon my return from taking sick leave Jim, with raised voice, angry facial expression, and red in the face, [sic] you shouldn't take sick leave unless you are really sick."

“On another occasion I wore a pair of knickers to work. Jim came to me with raised voice and said those are only to be worn in the summer. another day I wore leggings and he called me into his office and directed me to turn around in front of him. He claimed other employees had complained about my leggings. I felt humiliated that he made me turn around in front of him because of some perversion.”

“If you make a mistake Jim brings it up in front of people. A year ago, a teacher brought back a job that had a faded area. Jim brought the teacher back to my area and publicly humiliated me saying this job was unacceptable and needed to be redone. At that point the teacher also probably embarrassed, said no it was fine she would take it and use it. I said no, I wanted to redo it and began to cry. Jim backed off at that point and left.”

“Jim told me on one occasion that I am a horrible mother. I had taken my son to an appointment and it appeared we would be late so I called Jim to explain that I might be late, he asked what kind of appointment it was and I said it was of a psychological nature. As it turned out, I made it back to work on time but when I returned, Jim further questioned me about the appointment and told me I was horrible mom. Again, I felt really humiliated.” [CP 352]

Q: “How would you describe the working climate in the print shop? Is it open with personnel treated with dignity and respect? Is it emotionally and physically safe?”

A: “We are always walking on egg shells over here and not wanting to get on Jim’s bad side.” [CP 353].

Q: “Is there anything else you want to tell me in this interview?”

A: “I really need this job, please make sure none of this information gets back to Jim.” [CP 353].

The school district’s investigator provided a summary of his findings as well. The summary is contained in the record in this matter.

Questions to be investigated.

1. *Is there a climate of fear and intimidation present in the print shop between employees and the manager?*

All interviews with print shop employees describe the work climate and filled with tension and fear. Employees used the following words to describe the climate, tense, we’re always walking on egg shells to avoid getting on the wrong side of Jim Terrell. All employees interviewed reported experiencing the anger of their supervisor ranging from raised voice and yelling to ‘rage.’ Most interviewed say they feel intimidated by Mr. Terrell’s supervision of them [sic] often experience humiliation and feeling as if they are being treated as small children. Many said if you get on the bad side of Jim Terrell he is on you to the point it is nearly impossible to do your job. It is apparent from the personnel that I interviewed that Jim has a history of intimidation and humiliation and perhaps bullying of employees, vendors and teachers. [CP 350].

Marcia Fromhold Recommends Termination of Defendant Terrell

As a result of the school district investigator's findings, and in conjunction with information which came to light during discovery in the companion case *Wright v. Terrell, supra*, Mr. Terrell's supervisor, Assistant Superintendent Marcia Fromhold, finally acknowledged Defendant Terrell's misconduct, and recommended his termination from school district employment in a memorandum to the school district's superintendent dated March 31, 2004. The memorandum is included in the record in this matter, [CP 381-83]. It states, in part, as follows:

Either through omission or commission, Jim has been dishonest with me as his supervisor. I believe this area of concern justifies Jim's termination by itself...I believe there is sufficient evidence through the depositions and interviews, that Jim has intimidated and harassed his own employees, at least one teacher, and at least one vendor. [CP 381-82].

In summary, there is evidence that Jim has lied to me and others, has *harassed (perhaps sexually) and intimidated employees* and vendors, has not lived up to the District's contract with employees, and has generally not demonstrated behaviors appropriate for a District manager. [emphasis added]. [CP 382].

Gina Strong's Answer to Interrogatory Regarding Her Treatment by Defendant Terrell

INTERROGATORY NO. 8: *With respect to the allegations against Jim Terrell contained in your complaint, provide in narrative chronological form all of the details describing when, where, why and how each incident in question occurred.* [CP 343].

ANSWER:

When I received the job at Evergreen School District, it was a dream come true for me as a single mother with two children. The benefits offered in combination with the hours of the position were ideal and I enjoyed the type of work. I took as [sic] lot of pride in working for the school district.

Several months had passed within the first year when Jim Terrell started making inappropriate comments to me of a sexual nature. I soon began to feel very uncomfortable when he was near or when he approached me. He became extremely controlling over my personal time and during my time off as well. I was told that I had to report to him if I was to go out of town during the summer months and I was to be on call and ready to come in if needed. I found out later that this was very untrue and not a part of my job duties.

The abuse became much worse in 2002 when I had filed an employee incident report for my Carpal Tunnel. Jim would ask me detailed questions of what kind of things made my Carpal Tunnel worse and what would cause pain. He would then have me do tasks in the print shop that he was very aware would cause me great pain. I was told to lift heavy boxes of paper and unload pallets of paper by myself when previously it was done with several people. His harassment and behavior toward me began to make me physically sick every morning before work and nervous during the day. I began to have anxiety attacks, and heart palpitations and great depression. I was not aware that emotional distress could cause such harm to a body. I had never experienced this before. I was vomiting every morning, I had difficulty sleeping, I had horrible nightmares, and I would wake up in cold sweats. The emotional distress also affected my vision. I began to have migraine effects. My doctor at Family Physicians Group put me on anti-anxiety medication and anti-depressant medication. I went through several different anti-depression medications and none of them were working so I stopped taking them due to unwanted side effects. [CP 343-44].

Jim had also turned certain co-workers against me. Some wouldn't even speak to me in fear of Jim. I was told by Jim to "stay away"

from any Union activity or contact. So after I contacted the Union about the harassment, his abuse became worse. This is also why some of my co-workers shunned me in fear of Jim and their job.

My sickness and depression was affecting my home life as well. I feel I have missed out on several years of being 100% for my children and my new husband. I was so depressed; I had uncontrollable crying and loss of appetite. I was losing my self-confidence on a daily basis. No matter how well I did or how well I performed at work, Jim would consistently put me down and try to humiliate me in front of others at work. At one point I was only allowed a certain amount of work to do, and then Jim had me sit in a chair until further notice by him. There was plenty of work to do and the work load was getting behind. When I contacted my union about this, I was informed that Jim was telling Nicky Cook that I was refusing to do certain jobs and would grab a chair and sit when work was to be done. This was a complete lie. At this point I felt that I was being "set up" to lose my job which caused my physical and emotional health to further deteriorate. My anxiety got worse one night and my heart was pounding uncontrollably and with an irregular beat. My husband called 911 and I was rushed to the emergency room.

Since I have left Evergreen School District, I still feel the effects of the torment received by Jim Terrell. I still have nightmares and paranoia about Jim, and anxiety. I have a hard time trusting people and I feel my self-confidence will never be the same again.
[CP 344].

Gina Strong's Deposition Testimony

Gina Strong was deposed by the Defendants in this case on November 17, 2006. Her deposition testimony paints a clear picture of an out-of-control supervisor who was nothing more than a common school-yard bully, and enjoyed picking on his subordinates, and in particular Gina

Strong, for the simple reason that he had been placed in a position of authority over some one who could not afford to fight back.

Mrs. Strong's claims against Defendant Terrell are based as much upon the constancy of his bullying as on the degree. Eventually, even a single, steady drop of water on a sensitive area of the body can become unbearable. Defendant Terrell engaged in this water torture of the soul for better than two years with respect to Mrs. Strong.

Under questioning by Defendant Terrell's attorney, Mrs. Strong testified as follows:

- Defendant Terrell ordered Mrs. Strong to unload heavy boxes of paper by herself when he knew that doing so caused her pain in her hands. [TR 20, 24, 79 – CP 319-20].
- Mrs. Strong concluded that unloading the heavy boxes was punishment as a result of Defendant Terrell's tone, actions and body language. [TR 26 – CP 321].
- Defendant Terrell transferred Mrs. Strong to the print shop's swing shift because he concluded (incorrectly) that she had complained about him to the union. As a mother with children to care for, this change of shifts caused an obvious disruption in her family life. Another employee wanted to work on the swing shift and would

have switched with Mrs. Strong, but Defendant Terrell would not allow that to take place. [TR 27-28 – CP 321].

- Mrs. Strong and another employee (Linda) had been friends outside of work. Defendant Terrell disrupted the friendship, telling Mrs. Strong that he didn't approve of the friendship and scaring Linda to the point where she told Mrs. Strong that she was afraid to talk to her. [TR 39-40 – CP 322].
- Defendant Terrell engaged in various actions that were clearly precursors to establishing an inappropriate social or sexual relationship with Mrs. Strong. He called her into his office and commented on her looks, with the door closed. He asked her how she stayed in shape. He asked what she did outside of work, and was "flirty" toward her. [TR 43-44 – CP 323]. This conduct is significant in light of some of Defendant Terrell's related behavior, described *infra*, such as unnatural interest in Mrs. Strong's social life and boy friends, hostility toward her new husband, and his insistence that, even though she was only a 10-month per year employee, she keep him apprised during the summertime of her activities.
- At least twice a week during the initial period of her employment (before she re-married), Defendant Terrell made comments of a

sexual nature to Mrs. Strong that she considered to be inappropriate. [TR 61 – CP 324].

- Defendant Terrell “put [Mrs. Strong] down in front of other employees” and limited the amount of production work she was allowed to do at a time when the shop was behind schedule. Mrs. Strong concluded that he was doing that in order to punish or demean her. Other employees also concluded that Defendant Terrell was punishing Mrs. Strong by disrupting her production schedule. [TR 61, 64, 66 – CP 324-25].
- Defendant Terrell assigned Mrs. Strong to undesirable work in the print shop’s bindery when there was ample copying work to do (she was hired to do copying). [TR 75 – CP 326].
- Defendant Terrell unjustly criticized Mrs. Strong for improperly completing an assignment, then altered the written instructions to support his criticism. [TR 96 – CP 327].
- Defendant Terrell confronted Mrs. Strong regarding the union’s bulletin board. He was in a rage, screaming and spitting in her face. He positioned himself inches from her during this assault and backed her up against a wall in the print shop while he made a huge scene over the bulletin board. She was afraid he was about to strike her during the tirade. [TR 99, 101, 104 – CP 328-29].

- Mrs. Strong took sick leave (which was a negotiated contractual benefit), and when she returned, Defendant Terrell demanded some sort of written doctor verification of her illness that she didn't have (not required by the contract). He was so abusive during this confrontation that Mrs. Strong began crying, and Defendant Terrell escorted her out of the building. Mrs. Strong went to the school district's personnel office and showed them what she did have from her doctor, and was told it was fine. [TR 108 – CP 330].
- Mrs. Strong took her son to mental health counseling before work, and called Defendant Terrell to alert him to the fact that she might be a few minutes late because the appointment was running longer than expected. He forced her to reveal the nature of her delay, then told several of her co-workers the details. It turned out that Mrs. Strong wasn't late to work after all, but when she arrived at work, her co-workers wanted to know more about her son's condition. This invasion of her family's privacy was very distressing to Mrs. Strong. [TR 113, 117 – CP 331-32].
- During the interchange with Defendant Terrell about her son's counseling appointment, he said "Well, I guess your son's just finding out what a bum mother you are." This statement caused

Mrs. Strong to begin to cry, and Defendant Terrell said nothing, but just smiled. [TR 137 – CP 333].

- Defendant Terrell made the statement about Mrs. Strong being a “bum mother” in the presence of the print shop’s secretary and possibly other employees (“I mean everybody was in the front as far as the work in the front.”). [TR 137-38 – CP 333].
- The print shop acquired a new copier, and Defendant Terrell gave all of the copy operators training on this machine, except Mrs. Strong. Mrs. Strong felt as if she was singled out for dispirit treatment. Eventually another employee, who felt bad that Mrs. Strong had been the only one left out, trained her on the new machine at night. [TR 121-24 – CP 334].
- On multiple occasions, Defendant Terrell gave Mrs. Strong conflicting instructions regarding her work, then criticized her for doing what she had been told to do. [TR 128, 130, 132 CP 335-36].
- Defendant Terrell criticized Mrs. Strong’s work in a sarcastic manner for two years. He was unprofessional in his criticism, and acted unlike any manager Mrs. Strong had previously experienced. [TR 133-34 CP 337].

- Defendant Terrell leveled his criticisms in an angry, sarcastic tone, then would turn and smile, and walk away as if he had enjoyed the encounter. Mrs. Strong observed this behavior when Defendant Terrell criticized other workers, and assumed (since she couldn't see his face with his back to her) that his reaction was similar with respect to her. [TR 134-35 – CP 337].
- Defendant Terrell was abusive to Mrs. Strong about both her work and her home life and private life. He would stand at the time clock when she arrived at work to begin criticizing her. [TR 135 – CP 337].
- Defendant Terrell criticized Mrs. Strong most of the time, and it caused her a lot of emotional distress. [TR 134-35 – CP 337].
- Defendant Terrell interrogated Mrs. Strong about a man she was dating before she re-married while they were in the presence of other employees. He was openly critical of this individual (whom he did not know), then insisted that Mrs. Strong tell him the details of a planned trip to Alaska with the man. Defendant Terrell instructed Mrs. Strong to call him at home when she returned to town regardless of the hour. [TR 139-40 – CP 333].
- Defendant Terrell criticized Mrs. Strong for utilizing contractual sick leave, and criticized her personal physician. Defendant

Terrell told Mrs. Strong that he was “sick and tired of her calling in sick every time she had a sniveling cold,” despite the fact that Mrs. Strong never exhausted all of her contractual sick leave benefits. [TR 144 – CP 338].

- Defendant Terrell demeaned the home that Mrs. Strong’s new husband bought for their family while they were in the presence of other employees. Mrs. Strong felt that his remarks were made solely to humiliate her in the presence of her co-workers. [TR 145 – CP 339].
- Defendant Terrell mocked Mrs. Strong’s physical appearance, that is, her hair color, by making derogatory comments about blonds to the point that she actually dyed her hair brunette, “hoping to God that he would stop, and then he would make other comments.” [TR 146 – CP 339].
- When Defendant Terrell’s comments about her physical appearance made Mrs. Strong cry, Defendant Terrell typically responded by smiling. “Usually I would just start crying and walk away, and he just smiled.” [TR 147 – CP 339].
- When pressed as to the frequency of Defendant Terrell’s comments about her physical appearance, Mrs. Strong testified that it happened at least once a day. [TR 148 – CP 339].

- Defendant Terrell criticized Mrs. Strong's new husband, and was sarcastic about her husband's employment, although he had never met Mr. Strong. [TR 148-49 – CP 339-40].
- After transferring Mrs. Strong to the evening shift at the print shop, Defendant Terrell disabled telephone service to the print shop in the evenings, so that her family could not contact her. He also forbade employees from using cellular telephones in the print shop. When Mrs. Strong inquired about how she could be contacted in the event of a family emergency, he responded "Too bad. Have them call 911. Have them send a cop to the door and knock on the front door." (The women working at night couldn't have heard someone knocking on the front door, as they worked in the back of the shop, and were running copiers and bindery equipment.) [TR 152-53 – CP 340-41].
- Mrs. Strong received a personal call at the print shop while she was on her lunch hour. Defendant Terrell interrogated the caller about the nature of the call, and refused to put the call through to Mrs. Strong. The caller was attempting to communicate on a business matter not having to do with the Evergreen School District, and was distressed by Defendant Terrell's interrogation

and subsequent refusal to allow Mrs. Strong to receive the call.

[TR 155 – CP 341].

- Mrs. Strong summarized her view of this lawsuit for Defendant Terrell’s lawyer during the deposition: “He was so critical of everything every day and harassed me so bad and made me so extremely sick and ill, that’s what all this is about. That’s what I feel.” [TR 150 – CP 340].

C. What does it all mean?

On summary judgment the facts in the record, and all reasonable inferences to be drawn from them must be considered in the light most favorable to the non-moving party, that is, in the light most favorable to Mrs. Strong. *Christensen v. Grant County Hospital*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). Those facts and inferences in this case establish 1) that Defendant Terrell engaged in a pervasive campaign of demeaning Mrs. Strong over a period of at least two years. 2) That Defendant Terrell knew that his actions were causing Mrs. Strong to experience emotional distress. Why? Common experience would tell anyone that when you insult, humiliate or demean a person, especially in the presence of their co-workers, and that person starts crying in response, it is a pretty good sign that you have caused them to experience emotional distress. It is certainly reasonable to infer that when the person who does the insulting smiles,

fails to apologize, and walks away, it is a pretty good sign that he intended the result. When Defendant Terrell argues that his actions toward Mrs. Strong were nothing more than ordinary supervision, and that he had no idea that he was causing her distress, he is pushing the envelope of credibility beyond the breaking point.

Facts in the record establish that Defendant Terrell's persistent abuse made Mrs. Strong sick. She states in her answers to interrogatories:

His harassment and behavior toward me began to make me physically sick every morning before work and nervous during the day. I began to have anxiety attacks, and heart palpitations and great depression. I was not aware that emotional distress could cause such harm to a body. I had never experienced this before. I was vomiting every morning, I had difficulty sleeping, I had horrible nightmares, and I would wake up in cold sweats. The emotional distress also affected my vision. I began to have migraine effects. My doctor at Family Physicians Group put me on anti-anxiety medication and anti-depressant medication. I went through several different anti-depression medications and none of them were working so I stopped taking them due to unwanted side effects. [CP 344].

Defendant Terrell's conduct was exacerbated, not mitigated, by the fact that he was a supervisor. His conduct was exacerbated, not mitigated, by the fact that his misconduct extended over a period of more than two years. In *Robel v. Roundup Corporation, supra*, the Court suggests that the "severity and context" of the mistreatment should be considered in evaluating the evidence. 148 Wn.2d at 52. The Court also states that if the mistreatment is at the hands of someone in a position of authority, such

as a supervisor, “added impetus is given to an outrage claim.” 148 Wn.2d at 52.

In *Robel v. Roundup Corp.*, *supra*, the misconduct toward the victim extended only over a period of six weeks. In this case, it extended over a period of two years, because Mrs. Strong could not afford to leave her employment with the school district. [CP 353 (“I really need this job, please make sure none of this information gets back to Jim.”)]. And, the extended duration of Defendant Terrell’s campaign of bullying Mrs. Strong really lies at the core of her claims against him. Viewed in a vacuum, some of Defendant Terrell’s misconduct may not seem to rise above the status of a petty insult or trivial indignity. But consider the effect on an otherwise perfectly satisfactory employee such as Mrs. Strong when the petty insults and trivial indignities are delivered day after day after day after day, over a period of two years or more. And consider the effect upon an individual who is forced by circumstances to simply absorb blow after blow after blow after blow. Defendant Terrell seems to suggest that Mrs. Strong could simply quit if she didn’t like being bullied by him, but she needed her job. Having a good union job at the school district was “a dream come true,” for Mrs. Strong. [CP 343]. Unfortunately, Defendant Terrell turned it into a nightmare quickly enough.

Viewed in their totality, the facts and inferences in the record of this case are easily as severe as the facts which were considered sufficient to establish a cause of action for the intentional infliction of emotional distress in *Robel v. Roundup Corp.*, *supra*.

2. Defendant Terrell's "workplace dispute" defense simply doesn't wash.

Defendant Terrell argued below, and is expected to argue on this appeal that Mrs. Strong's negligent infliction of emotional distress claims fail because they are based upon a "workplace dispute." [CP 109-110]. This argument is without merit, as it does not take into account the fundamental nature of this lawsuit. Mrs. Strong is not suing her employer for disciplining her or because she was distressed by a mere personality dispute in the workplace. She is suing her supervisor for bullying her to an extent that no reasonable worker should be expected to put up with such mistreatment.

Defendant Terrell relies upon *Snyder v. Medical Service Corp. of Eastern Washington*, *supra*. There, the Court stated:

In *Hunsley* [*Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976)], we observed, 'Our experience tells us that mental distress is a fact of life.' [citation omitted] Further, we held actions predicated on mental distress, like actions predicated on products liability or medical malpractice, must be subject to limitations imposed by the courts. *Id.*

To set such limitations, we stated ‘the defendant’s obligation to refrain from particular conduct is owed only to those who are *foreseeably* endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.’ [citations omitted].

‘Conduct is unreasonably dangerous when its risks outweigh its utility.’ [Citations omitted].
Snyder, supra, 148 Wash.2d at 245.

In the present case, the campaign of bullying described by Mrs. Strong is entirely without utility. If Defendant Terrell wanted to discipline Mrs. Strong in the ordinary manner, there are established procedures for doing so. Despite the fact that he frequently criticized her work product, can Defendant Terrell really claim in good faith that the conduct described by Mrs. Strong amounts to legitimate workplace discipline? That is the question that Mrs. Strong would like to put before a jury, and it is the reason that Defendant Terrell’s motion for summary judgment should be denied. There is ample evidence in the record upon which a jury could find that Defendant Terrell’s pervasive bullying campaign was unreasonably dangerous, was not a disciplinary act, and was not undertaken in response to a personality dispute. After all, Defendant Terrell was fired for harassing his employees and lying about it when his supervisor finally awoke to the situation in the print shop. On summary judgment, Mrs. Strong is entitled to a favorable inference from this fact; that is, she is entitled to an inference that Defendant Terrell wasn’t acting

within the scope of his authority when he bullied and harassed his subordinates; otherwise, he would not have been fired for his behavior.

It should also be noted that the tort of negligent infliction of emotional distress continues to be recognized by Washington courts in the context of an employment situation. In *Snyder, supra*, the Court discussed and distinguished *Chea v. Men's Wearhouse, Inc.*, 85 Wn.App. 405, 932 P.2d 1261 (1997).

In *Chea* Division One upheld a negligent infliction verdict where a supervisor inflicted emotional damage on an employee. *Chea* is however limited by its facts.

The *Chea* court specifically recognized, and concurred with, precedent that an employer's disciplinary decisions in response to a workplace personality dispute will not give rise to a negligent infliction claim. [citation omitted]. Notwithstanding, the *Chea* court permitted the employee to recover because the employer did not argue at trial the incident at issue was a disciplinary act or in response to a personality dispute. [citation omitted]. *Snyder, supra*, 145 Wn.2d at 245-46.

In *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 991 P.2d 1182 (2000), an employee sued a manager and her employer for sexual harassment, negligent infliction of emotional distress, and other matters. The Court dismissed the emotional distress claim because it was subsumed in the sex discrimination claim. In doing so, though, the Court did state "However, when a plaintiff alleges that nondiscriminatory conduct caused separate emotional injuries, he or she may maintain a separate claim for

negligent infliction of emotional distress.” *Francom, supra*, 98 Wn.App. at 865, *citing Chea v. Men’s Wearhouse, supra*.

In this case, Mrs. Strong has not alleged a sex discrimination, or any discrimination, claim. Some conduct in which Defendant Terrell engaged with respect to her might also be characterized as sexual harassment; however, that conduct is described in the record because it was a component of Defendant Terrell’s bullying campaign – an effort to control Mrs. Strong, and not as a separate sexual harassment allegation.

There is ample evidence in the record from which a jury could conclude that Defendant Terrell’s conduct was without utility and that it was not undertaken as legitimate employee discipline or in response to a workplace personality dispute. For example, making demeaning comments and jokes about Mrs. Strong’s hair color until she dyed her hair brunette? Mocking her home and husband’s employment? Calling her a “bum mother?” Screaming and spitting in her face and backing her against a wall because he was upset about a union bulletin board?

Mrs. Strong is entitled to have a jury decide what, if any, utility might be gleaned from such conduct. The result could be very interesting.

3. Defendant Terrell was acting outside of the scope of his employment when he engaged in misconduct while supposedly supervising Mrs. Strong.

A related argument raised by Defendant Terrell before the trial court is that he was acting within the scope of his employment when he bullied Mrs. Strong until she became ill. That argument is misplaced, as Defendant Terrell's conduct falls outside of the scope of employment standard articulated by the Washington Supreme Court in *Robel v. Roundup Corp., supra*, 148 Wn.2d at 53. "An employee's conduct will be outside of 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'" [citation omitted].

The question presented is whether a school district supervisor properly engages in a prolonged and pervasive bullying campaign toward his subordinates? Is that conduct *of the kind which is authorized by the employer*? The record is clear in this case that Defendant Terrell's conduct toward his employees, and Mrs. Strong in particular, was *not* of the kind authorized. Defendant Terrell was fired, in part because of information brought to light in discovery [*Wright v. Terrell, supra*]. His supervisor, Assistant Superintendent Fromhold, recommended his termination based upon findings that Appellant Terrell had "intimidated and harassed" his subordinates, and lied to her about doing so. Her conclusions bear repeating here:

I believe there is sufficient evidence, through the depositions [in this case] and interviews, that Jim has intimidated and harassed his own employees, at least one teacher; and at least one vendor.

....

In summary, there is evidence that Jim has lied to me and others, has harassed (perhaps sexually) and intimidated employees and vendors, has not lived up to the District's contract with employees, and has generally not demonstrated behaviors appropriate for a District manager. *Memorandum from Marcia Fromhold to Rick Melching (school district Superintendent)*. [CP 381].

Assistant Superintendent Fromhold's conclusion that Defendant Terrell "has generally not demonstrated behaviors appropriate for a District manager" answers the question. *For the purposes of summary judgment, Mrs. Strong is entitled to an inference that Defendant Terrell's conduct was not of the kind authorized, whether he was engaged in so-called supervision or not.* Applying that inference to the facts of this case leads to the inescapable conclusion that Defendant Terrell was not acting within the scope of his employment when he bullied Mrs. Strong. And this conclusion, accordingly, has an important bearing upon whether the facts in this case would support a jury finding that Defendant Terrell committed the tort of negligent infliction of emotional distress.

Another factor to be considered in evaluating whether Defendant Terrell's conduct was of the kind authorized was his status as a *school district* supervisor.

The Washington State Legislature has recently addressed the issue of bullying conduct:

The legislature declares that a safe and civil environment in school is necessary for students to learn and achieve high academic standards. The legislature finds that harassment, intimidation, or bullying, like other disruptive or violent behavior, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment.

Furthermore, the legislature finds that students learn by example. The legislature commends school administrators, faculty, staff, and volunteers for demonstrating appropriate behavior, *treating others with civility and respect*, and refusing to tolerate harassment, intimidation, or bullying. 2002 Washington Laws ch. 207, § 1. [emphasis added].

Bullying has also been defined for us by the legislature, and Defendant Terrell's conduct, as alleged by Mrs. Strong in this matter, clearly falls within the scope of that definition.

(2) "Harassment, intimidation, or bullying" means any intentional written, verbal, or physical act, including but not limited to one shown to be motivated by any characteristic in RCW 9A.36.080 (3), or other distinguishing characteristics, when the intentional written, verbal, or physical act:

(a) Physically harms a student or damages the student's property; or

(b) Has the effect of substantially interfering with a student's education; or

(c) Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or

(d) Has the effect of substantially disrupting the orderly operation of the school. RCW 28A.300.285(2).

While the statute is directed toward students-upon-student conduct (probably because no reasonable legislator would suspect that *adult* staff

of a school district would behave in the manner that Defendant Terrell did), there can be no mistake regarding the legislature's intent that *everyone* connected with school districts must refrain from bullying and other abusive behavior. The unavoidable conclusion to be drawn here is that Defendant Terrell's conduct was different in kind from the conduct in which he was authorized to engage; that is, ordinary supervision of the operations of the school district's printing facility.

4. Defendant Terrell deprived Mrs. Strong of a federally-protected right while acting under color of state law.

The essential point that Defendant Terrell and the Trial Court overlooked in this case is that his bullying and abuse of Mrs. Strong deprived her of the full enjoyment of an important property right that has been recognized by Washington courts. The Washington Supreme Court has recognized that a due process property interest may arise from express or implied contracts for continued employment, objective representations of tenure or even collective bargaining agreements providing for continued employment. *Washington Educ. Ass'n v. State*, 97 Wn.2d 899, 908, 652 P.2d 134 (1982); *Ritter v. Board of Comm'rs*, 96 Wn.2d 503, 509, 637 P.2d 940 (1981). Here, there is a statute (and a collective bargaining agreement) which create such a "contract"

for continued employment, creating a constitutionally protected property interest in Mrs. Strong's public employment. *See* RCW 28A.400.300(1) (school districts may discharge classified employees only for sufficient cause). Necessarily implicit in the protected property interest in public employment is the right to enjoy this property interest in a reasonably safe and secure workplace. The implied constitutional right to a reasonably safe and secure workplace is a substantive due process right pursuant to the UNITED STATES CONSTITUTION, Amendments V, XIV; a right of which Defendant Terrell has deprived Mrs. Strong while acting under color of state law as her supervisor. As such, a cognizable claim pursuant to Title 42 USC § 1983 should be found.

This case involves more than isolated instances of verbal abuse or harassment. Defendant Terrell's conduct was severe and pervasive, as discussed *supra*. The courts have explicitly recognized that to support a 1983 claim, the damage claimed need not be limited to physical pain or injury. For example, in *Northington v. Jackson*, the court determined that psychological injury may constitute pain, (under the Eighth Amendment "excessive force" standard) especially when the behavior which causes the harm is not *de minimus*. *Northington v. Jackson*, 973

F.2d 1518 (10th Cir. 1992). And, when the conduct in question is purposefully engineered to be harassing, (such as the repeated searching of an inmate's cell), again, the courts have determined that such behavior would give rise to a constitutional claim pursuant to § 1983. *Scher v. Engelke*, 943 F.2d 921 (8th Cir. 1991). It is important to note that, previously the court had never found that inmate searches would give rise to a constitutional violation. However, in *Scher*, the court found dispositive that the searches had "evidenced a pattern of calculated harassment". *Scher, supra*, 943 F.2d at 924.

Here, Defendant Terrell's actions demonstrate a consistent pattern of harassing abuse; abuse which cannot be construed as *de minimus* as it continued for months or years.

The U.S. Supreme Court has stated that the action in question need not have been previously held unlawful, but in the light of pre-existing law, the unlawfulness must be apparent. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed. 2d. 523 (1987). The unlawfulness of Defendant Terrell's actions should be apparent. Respondent engaged in a long-term, consistent pattern of extreme verbal abuse and bullying toward Mrs. Strong. The results of this abuse were profound

psychological pain and misery which manifested itself in numerous physical symptoms such as anxiety attacks, heart palpitations, sleeplessness, nightmares, night sweats, depression and regular vomiting before going to work.

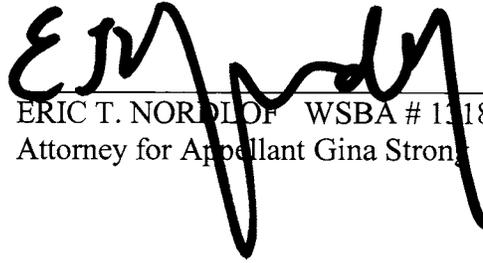
Defendant Terrell interfered with the protected property interest that Mrs. Strong held in her job with the Evergreen School District, not by firing her, but by making the job of considerable less value to her than it should have been. He did it in a manner that even the school district has acknowledged was outside of the scope of his authority as a supervisor; and he did it while acting in a position of authority into which he had been placed by state law. Defendant Terrell deprived Mrs. Strong of the benefits of her employment without providing prior her notice and a hearing. Thus, he violated her procedural due process rights, as well as her substantive due process right to a safe and secure workplace. The record in this case establishes an actionable claim under Title 42, USC § 1983, and Defendant Terrell's motion for summary judgment on that claim should have been denied.

CONCLUSION

The Trial Court's dismissal of Mrs. Strong's claims for intentional infliction of emotional distress, negligent infliction of

emotional distress, and a violation of Title 42 § 1983 should be reversed, and this matter remanded to the Trial Court for trial on the merits before a jury.

Dated this **18** day of May, 2007



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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and accurate copy of the foregoing opening brief to:

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