

No. 35967-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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COURT OF APPEALS
DIVISION II
SEATTLE, WA

GINA STRONG,
Plaintiff/Appellant,

v.

JIM TERRELL,
Defendant/Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Respondent James Terrell (“Terrell”) respectfully requests that the Court of Appeals affirm the trial courts’ order dismissing Appellant Gina Strong’s (“Strong”) claims of intentional infliction of emotional distress (outrage), negligent infliction of emotional distress, and Strong’s claim, pursuant to 42 U.S.C. § 1983, alleging that Terrell, her workplace supervisor, violated her alleged constitutional right to a reasonably safe and secure workplace.

Strong’s claims are identical to the claims of Charlotte Wright (“Wright”) and David Larson (“Larson”), two other Evergreen School District print shop employees who also alleged that Terrell was verbally abusive towards them and “engaged in a campaign of bullying and harassment.” The Court of Appeals recently affirmed the trial court’s order dismissing those claims in Wright v. Terrell, 135 Wn.App. 722, 145 P.3d 1230 (2006). The Court did not reach the merits of Wright and Larson’s tort claims instead affirming the trial court’s order dismissing Wright and Larson’s claims for failure to comply with the notice of claim statute. However, in holding that the notice of claim statute was applicable, the Court analyzed the merits of Wright and Larson’s claims and held that Terrell “acted within the scope of his duties and employment.” Wright, at 738. Furthermore, in examining Wright and

Larson's claims the Court specifically held that, "[a]t worst, the allegations fall within the category of " 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " Wright, at 738, (internal quotations omitted). Thus, as Strong's allegations are nearly identical to those of Wright and Larson, Terrell requests that the Court again affirm the trial court's order and this time dismiss Strong's claims.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly granted Terrell's motion for summary judgment dismissing Appellant Strong's claim of intentional infliction of emotional distress.
2. The trial court properly granted Terrell's motion for summary judgment dismissing Appellant Strong's claim of negligent infliction of emotional distress.
3. The trial court properly dismissed Appellant Strong's claim under 42 U.S.C. § 1983, alleging that Terrell violated her constitutional right to a reasonably safe and secure workplace.
4. The trial court erred in failing to dismiss Strong's claims for failure to comply with the notice of claim requirements set forth in RCW 4.96.
5. The trial court erred in failing to dismiss Strong's claims because the claims involved a workplace dispute with her supervisor, Terrell, and

therefore the exclusive remedy was to proceed under the grievance and arbitration procedures set forth in the Collective Bargaining Agreement.

III. COUNTER-STATEMENT OF THE CASE

A. Statement Of Facts Relating To Gina Strong.

In 1998, Evergreen School District ("District") hired Terrell to be the print shop manager for the District. Terrell's direct supervisor was Marcia Fromhold ("Fromhold"), Superintendent for Business and Support Services for the Evergreen School District ("District").

Strong first worked as a copy operator at the District print shop while she was employed by a temporary employment agency in 1999. CP 3. Strong was then hired by the District as a regular employee approximately nine months later to work as a copy operator. CP 3.

Strong's job responsibilities included operating the copy machines in the District's print shop and then preparing projects for finishing in the bindery area or shrink-wrapping completed projects. CP 147-148. In addition, all print shop employees were required on occasion to help with the unloading of paper boxes from pallets. CP 150. Strong claims she was unfairly assigned to unload pallets on a more frequent basis than other employees. CP 149. Eventually, the job title of all copy operators, including Strong, was changed to that of Copy Operator/Bindery Operator. CP 145-46. As a result of this change, the copy operators'

responsibilities were expanded to include the responsibilities of working in the bindery as well as running the District's copy machines. The copy operators' responsibilities were expanded to allow them to work in the bindery during time periods when the bindery was very busy and the copy operators were sitting idle. This change in job titles and responsibilities was accomplished through an agreement between the District and the Public School Employees' Union ("PSE").

Strong states that she "initially enjoyed a positive relationship with Terrell, but eventually it deteriorated." CP 4. As their relationship deteriorated, Strong claims Terrell engaged in conduct directed towards her that amounted to verbal and emotional abuse. CP 5.

Strong sets forth a series of general allegations in her complaint. These allegations include the claim that Terrell "engage[ed] her in inappropriate conversation regarding her personal life." CP 11. During these "inappropriate conversations," Terrell allegedly expressed a desire to have a social relationship outside the workplace and made comments about Strong's appearance, allegedly including jokes regarding the fact that Strong was blonde.

According to Strong the alleged conversation regarding the desire to have a social relationship occurred approximately two days after she

had begun her employment, apparently in 1999 or early 2000.¹ CP 173. Strong later documented this claim in an email to Mike Boyle, the Evergreen PSE Chapter President, on April 13, 2002. Strong states in that email that Terrell called her into his office two days after she had been hired and mentioned that she was attractive and indicated that she must take good care of herself. In addition, Strong stated in the email that Terrell inquired as to how she kept in such good shape. Strong responded that she hiked regularly. Strong also states that during the conversation, Terrell discussed his pending divorce and stated that Strong could come to him if she needed anything and that he didn't hire her just for her looks. Strong replied, "I hope not because I try to do a very good job." Strong states that Terrell then told her as she left, "Oh, by the way Gina, let your hair grow out." Strong later states in the email to Mike Boyle that Terrell later made a point of telling her when and where he was going hiking.

Strong also claims that Terrell made comments that were critical of her personal life. These comments included the following allegations:

¹ Strong's lawsuit was filed in 2004 and this alleged conduct, which occurred from 1999-2000, clearly falls outside the applicable three-year statute of limitations for the tort claims of outrage, negligent infliction of emotional distress and Strong's claims pursuant to 42 U.S.C. § 1983. RCW 4.16.080. Thus, the Court should not consider this specific allegation, or any other alleged conduct that occurred prior to July 23, 2001.

1) Terrell allegedly made comments critical of Strong's previous boyfriend, who was a pilot, and the fact that she had to fly standby when going to visit him in Alaska (CP 164-165);

2) Terrell allegedly made critical comments about the size of the house that Strong and her husband purchased (CP 165);

3) Terrell allegedly made comments Strong believes were sarcastic in nature regarding her husband's place of work, although she doesn't recall what Terrell said (CP 163-64);

4) Strong also claims that Terrell required that she divulge the fact that her son was attending a counseling appointment. This allegedly occurred when Strong called Terrell to inform him that she would be late for work because her son's appointment was running late. Strong states that Terrell then informed two other employees of the reason why she was running late and those employees then inquired as to how her son was doing when she arrived at work (CP 11).

Strong's other claims involve disputes relating to the manner in which Terrell supervised and managed the print shop. These claims include allegations that Terrell expressed "displeasure with her job performance in a loud, hostile and angry tone of voice, to the point where he was actually screaming..." CP 11. Strong also alleges that Terrell used profanity during these times. In addition, Strong claims that Terrell gave

her “conflicting instructions regarding her job and then criticiz[ed] her for following those instructions.” CP 11. Strong also alleges that Terrell criticized “minor or imaginary performance errors in a manner, and to an extent, which was not applied to other print shop employees.” CP 11.

Strong’s additional work related claims, include the allegation that Terrell unfairly controlled Strong’s work load and at times had her sit idle while other employees continued working on projects. CP 175. According to Strong’s formal harassment complaint, these incidents occurred from approximately May 21, 2002 through May 28, 2002. CP 175. However, Strong states in her harassment complaint that these incidents also occurred only after Strong complained that she should not have to work in the bindery while copy work was available. Strong states in her harassment complaint that she exercised her seniority rights to send another employee to the bindery in her place on May 7, 2002. CP 181. Afterwards, it appears that Terrell and Strong had conflicts regarding the available work projects that Strong could complete based upon her previous refusal to help in the bindery. After that date, Strong also claims that she frequently sat idle or was required to shrink wrap her completed projects or unload pallets of paper. CP 175-76. Strong also speculates that Terrell’s actions were in retaliation for her complaints to the union and because he was aware she had a previous carpal tunnel injury. CP 151.

On July 31, 2003, Strong was given notice that she was being moved from the day to the evening shift. CP 185. Strong claims that Terrell “assign[ed] her to an evening shift after she turned to her union, PSE, for protection from his abuse.” CP 11. However, Strong fails to offer any evidence in support of this allegation, but instead simply asserts that Terrell was seeking to punish her based upon a statement she claims he made indicating that someone had complained, possibly because of seniority, to the union so he was shifting employees. CP 152. In addition, Strong’s own testimony establishes that the person who she changed shifts with had more seniority than Strong.

A. I can’t remember the exact date he switched my shift.

Q. Okay. And Cathy came – was on night shift prior to that; is that correct?

A. Yes, and she enjoyed the night shift.

Q. Okay. Was there any question about seniority at that time as far as you having more or less seniority than Cathy?

A. I had less seniority than Cathy. Cathy – that’s when I learned that I had less than her – enjoyed the night shift, I enjoyed the day shift. She had asked the question to Jim when this meeting was going on and he called everybody up front, she asked him, “Well, what if I don’t want to work the day shift?”

He said, “Because you have seniority you don’t have a choice. You automatically get the day shift.”

CP 153; Strong Deposition, p. 29, lines 1-19.

Strong also claims that Terrell “exclud[ed] Strong from training opportunities that were made available to other employees.” CP 11.

However, in her deposition testimony, Strong recalled only one instance of being excluded from training. CP 156. This exclusion from training allegedly occurred when a new copier was purchased and Terrell had an outside technician train the other copy operators while not having Strong trained. Strong testified that she did not request training and also stated that another print shop employee eventually instructed her on how to operate the new copier. More importantly, Strong testified during her deposition that she was regularly assigned to use the copier by Terrell during her employment, as he appeared to have no problem with the fact that she was trained to operate the new copier. CP 157-58.

Strong makes two other claims regarding Terrell's management of the print shop. First, Strong claims that Terrell assigned "another employee to inform on Plaintiff Strong." CP 5. Second, Strong claims that Terrell jeopardized her personal safety "by causing the print shop telephone line to be disconnected during her evening shift, while at the same time refusing to allow her to bring a cellular phone to work." CP 5. In regards to this second allegation, Strong acknowledged during her deposition testimony that the phone line was not disconnected but went automatically to an answering machine and that she rarely, if ever, used the phone line and was unaware of whether or not the phone would even dial out, as she couldn't even recall checking to see if it worked. CP 166-

69. In addition, Strong recalled only missing one call from her husband as a result of the print shop phone line being “disconnected.” CP 166-67.

B. The District's Investigation And Response To Strong's Allegations.

In the summer of 2002, Strong filed a formal harassment complaint with the District's Complaint Resolution Team (“CRT”). CP 175-83, 187-93. Strong’s claims were investigated and the CRT determined “there has been no harassment in violation of the policy.” CP 195-96.²

C. Procedural History.

On July 23, 2004, Strong filed a complaint in Clark County Superior Court under Cause No. 04-2-03777-1. CP 212. Strong's complaint sought monetary damages and named Terrell and Fromhold.

On July 26, 2004, the Evergreen School District received a letter and attached notice of claim on Strong’s behalf from her attorney, Eric Nordlof. CP 204-10. Mr. Nordlof signed the letter and attached notice of claim. However, Strong did not sign the notice of claim, thus failing to provide the required verification of her claims.

On or about August 2004, Strong left her job with the District to accept another position with Standard Insurance Company. CP 170-71.

² Strong later requested a hearing to appeal the CRT’s decision, which was set for January 23, 2003. CP 195-96. The CRT maintained its original position, as Strong failed to appear at the hearing and did not present any additional evidence or argument in support of her claims. CP 195-96.

This new position was also in the printing industry as a Copy/Bindery operator, but was a better paying, salaried position. Strong testified that she left the District several months after Terrell left his position at the District on April 13, 2004.

On September 3, 2004, Strong filed an Amended Notice of Claim raising the identical claims that she had included in the previous notice of claim. CP 221-26. The only difference between the two claims was the inclusion of Strong's signature and additional claims by Wright and Larson that were barred by res judicata.

On November 22, 2004, Strong filed a second complaint in Clark County Superior Court under Cause No. 04-2-06115-0. CP 127-42. The second complaint included the identical claims and causes of action, as raised by Strong in the previous complaint. However, Wright and Larson, who had previously filed a separate lawsuit under Cause No. 03-2-03086-8, were added as plaintiffs and Nikki Koch was added as a defendant.

On October 21, 2005, the trial court granted the Defendants' motion dismissing Charlotte Wright and David Larson's claims on the basis of res judicata in Cause No. 04-2-06115-0. CP 228-29. The Court then consolidated Strong's remaining causes of action under Cause No. 04-2-03777-1 and Cause No. 04-2-06115-0, as the claims in both lawsuits, relating to Strong, were identical. The trial court's consolidation

of the remaining claims was done over the objection of Terrell, as the second lawsuit should have been dismissed as a duplicative lawsuit.

On December 20, 2006, Strong voluntarily dismissed her claims against Marcia Fromhold and Nikki Koch. CP 480.

On February 1, 2007, the trial court entered an order granting Terrell's summary judgment motion dismissing Strong's claims. CP 574.

IV. ARGUMENT

A. Standard Of Review Of Motion For Summary Judgment.

An appellate court reviews a trial court's grant of summary judgment de novo, viewing the facts and the reasonable inferences in the light most favorable to the non-moving party. Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982). However, if reasonable minds can draw but one conclusion from the facts, then summary judgment is appropriate. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court and only considers the evidence and issues raised below. Douglas v. Jepson, 88 Wn.App. 342, 945 P.2d 244 (1997), rev. denied, 134 Wn.2d 1026, 958 P.2d 313 (1998).

B. Strong Failed To Allege Facts Sufficient To Establish Outrage.

1. Elements Of Intentional Infliction Of Emotional Distress.

The basic elements of the tort of outrage, also referred to as intentional infliction of emotional distress, are:

- 1) extreme and outrageous conduct;
- 2) intentional or reckless infliction of emotional distress; and
- 3) actual result to the plaintiff of severe emotional distress.

Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); Restatement (Second) of Torts, § 46 (1965). “The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.” Dicomes v. State, 113 Wn.2d 612, 782 P.2d 1002 (1989), (citing, Phillips v. Hardwick, 29 Wn.App. 382, 387, 628 P.2d 506 (1981)).

The Washington Supreme Court has set the bar high for a plaintiff to establish a claim of outrage, holding that the tort “...does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities.” Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975), see also, Wright, at 738.

[I]t is not enough that defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.

Grimsby at 59, (quoting, Restatement Second of Torts, § 46.). Despite Strong’s claim to the contrary, the courts were not intended to referee and

provide oversight over the allegations of every employee who feels their boss is mean, hostile or insensitive. “This is because all of us must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” Snyder v. Medical Service Corporation of Eastern Washington, 98 Wn.App. 315, 988 P.2d 1023 (1999), aff’d, 145 Wn.2d 233, 35 P.3d 1158 (2001), (quoting, Grimsby at 59).

Washington Courts have consistently held that the workplace is not a stress free environment and an employer or supervisor's focus on workplace issues, even if such conduct or actions could be described as "mean-spirited," in and of itself does not necessarily constitute a cause of action. Bishop v. State, 77 Wn.App at 228, 234-35, 889 P.2d 959 (1995); Snyder 98 Wn.App. at 324. Thus, Strong's claims, regarding the conduct of her supervisor, fail because there is no duty to provide a stress free workplace where an employee is always able to get along with her supervisor.

2. Strong's Claims Fail To Satisfy The High Legal Standard Of Extreme And Outrageous Conduct.

Strong's claims regarding Terrell's conduct, even if taken at face value, fail to meet the legal standard of extreme and outrageous conduct. This legal standard has been well established by Washington courts, which have determined that the conduct must be:

...so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community

Dicomes, at 630, (quoting, Grimsby at 59). Strong's claims fail when this high legal standard of extreme and outrageous conduct is applied. Instead, the evidence establishes that, even when taken at face value, these claims amount to what, at best, can be described as instances of rude, childish or unprofessional behavior and Strong's dislike of Terrell's management style and supervision of the print shop.³

In attempting to establish a claim of outrage, Strong relies extensively upon conclusory allegations, hyperbole, and rhetoric.⁴ This includes statements such as: "Terrell engaged in a severe and pervasive campaign of emotional abuse" (Appellant's Brief, p. 2) and "Terrell engaged in this water torture of the soul" (Appellant's Brief, p. 17).⁵

³ In fact, Strong concedes this point, stating that "[n]o individual act stands out as actionable conduct on its own." Appellant's Brief, p. 3. Instead, Strong contends that the Court must look to the totality of the circumstances and claims that the cumulative effect is somehow sufficient to meet the legal standard of outrage. However, Strong offers no legal authority in support of this argument. Appellant's Brief, p. 4. More importantly, even in the event the Court considers the totality of Strong's claims, they are insufficient to establish the tort of outrage.

⁴ Strong's claim that the conduct rises to the level of outrage because she suffered "day after day after day after day" is rebutted by Strong's own recorded recollection of the events in question. CP 175-83. This evidence establishes that Strong recalls only a limited set of events set forth widely over nearly four years of employment. Strong's allegation of an ongoing campaign of harassment is also undercut by Terrell's ongoing performance evaluations of her, which while critical in places, appear to be objective and serve only to contradict Strong's allegations of ill intent on Terrell's part. CP 534-40.

⁵ Strong's reliance upon the investigation notes of Mike Bjur and Marcia Fromhold should also be rejected as the investigation was unrelated to Strong's claims, not relevant

Another example of Strong's willingness to exaggerate or distort the facts is her allegation that Terrell had an "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." Appellant's Brief, p. 18. Not surprisingly Strong fails to cite to any part of the record in support of these allegations, as there is no support for these claims. Instead, Strong is apparently exaggerating the claims that Terrell gave her a hard time about where her husband worked, teased her about having to fly standby when her boyfriend was a pilot, and asked her about exercise and hiking. The fact that Strong seeks to convert these claims into a cause of action in tort by distorting the facts and relying upon hyperbole serves only to reveal the weakness of her claims.⁶

to this lawsuit, and consisted primarily of generalizations such as "everyone walks on eggshells" as opposed to providing evidence of actual events. See CP 398-99, 400-02 for a more detailed analysis of this issue. On this basis, the trial court in Wright v. Terrell, rejected the use of these documents and the Court of Appeals upheld that ruling in regards to the denial of Wright and Larson's motion to compel the production of these same documents. Wright, at 741-42.

⁶ Strong's willingness to distort the facts and make claims unsupported by the record is also evidenced by the repeated references to her claim that "Terrell was fired for harassing his employees and lying about it..." Appellant's Brief, p. 29. Not once does Strong cite to the record when making this claim, no doubt because Strong is fully aware it is unsupported by the record. In fact, Terrell resigned his position at the conclusion of an investigation unrelated to Strong's claims. This information is included nowhere in the record of this case and Terrell objects to the consideration of facts not included in the record relating to his resignation. Not surprisingly, Strong seems unconcerned about such details. See CP 398-99 , 400-02 for a more detailed analysis.

However, a careful examination of the actual evidence, relating to each of Strong's claims, establishes that her allegations constitute nothing more than a workplace dispute stemming from Strong's dislike for her supervisor's manner and method of supervision.⁷

a. Strong's Claim That Terrell Engaged In Inappropriate Conversations Regarding Her Personal Life and Appearance Fails To Rise To The Level Of Extreme And Outrageous Conduct.

Strong's claims that Terrell allegedly made comments that were critical of her personal life, her appearance and implying a desire to have a personal relationship fail to rise to the level necessary to establish or enhance her claim of intentional infliction of emotional distress.⁸ While these allegations in total, if taken at face value, may consist of boorish or rude behavior, the alleged conduct still fails to reach the level of what is extreme and outrageous behavior beyond what a reasonable person could be expected to endure. This conduct is no different than the conduct described in Snyder. In fact, Strong's allegations are similar to the plaintiff in Snyder, who claimed intentional infliction of emotional distress based on her supervisor's "continuing harassment, rude,

⁷ Furthermore, the District provided Strong the opportunity to prepare a complete report of her concerns and allegations regarding Terrell for investigation and review. CP 175-83. In response, Strong prepared a detailed written complaint that fails to set forth anything remotely similar to the "day after day" account that Strong now summarily states was the case.

⁸ As stated previously, this alleged conduct falls well outside the statute of limitations and should therefore not be considered as a basis for this lawsuit.

discourteous, disruptive, threatening, intimidating and coercing” conduct. Snyder, 98 Wn.App. at 320. The court in Snyder found that the supervisor in that case had “insulted, threatened, annoyed, showed unkindness, and acted with a callous lack of consideration,” and also described the behavior as “rude, obnoxious and overbearing.” Snyder, 98 Wn.App. at 322 and 325. However, the Snyder court concluded that this conduct did not rise to the level of incivility required to support a claim of outrage and that it was “not enough” under the standards set forth in the Grimsby decision. Snyder, 98 Wn.App. at 322.

Furthermore, the undisputed evidence establishes that Terrell’s alleged conduct was limited in scope and constituted seemingly innocuous comments. While these comments may have been insensitive or unprofessional they hardly amount to the sort of extreme and outrageous behavior required to establish a claim of outrage.

In fact, Strong's own testimony and description of the allegations establishes that these comments simply fail to rise to the level necessary to establish the tort of outrage. For example, on April 13, 2002, over two years after the alleged incident occurred, Strong sent an email to Mike Boyle, the Evergreen PSE Chapter President, recounting Terrell's alleged comments about a desire to have a personal relationship. CP 173. According to Strong, Terrell called her into his office two days after she

had been hired and mentioned that she was attractive and indicated that she must take good care of herself. In addition, Strong stated in the email that Terrell inquired as to how she kept in such good shape. Strong responded that she hiked regularly. In response to this, Strong later claims that on many occasions Terrell would make a point of telling her when and where he was going hiking. Strong also states that during the conversation, Terrell discussed his pending divorce and stated that Strong could come to him if she needed anything and that he didn't hire her just for her looks. Strong replied, "I hope not because I try to do a very good job." Strong states that Terrell then told her as she left, "Oh, by the way Gina, let your hair grow out."

While these comments may be unprofessional or even considered inappropriate in the workplace, they hardly amount to such extreme and outrageous conduct as is necessary to establish a legal tort claim. Furthermore, much of the conversation appears to be an innocuous discussion about hiking and Terrell's ongoing divorce and highly dependent upon Strong's implications to rise to the level of what would be considered inappropriate. The evidence provided by Strong, even when viewed in a light most favorable to Strong, fails to establish conduct amounting to anything more than perhaps overly friendly conversation on the part of Terrell with an employee. Essentially, a supervisor asking

about what an employee does in her free time and then discussing what he does in his free time does not constitute the tort of outrage.

Strong's deposition testimony regarding Terrell's criticism of her personal life is even more innocuous and serves to further establish the weakness of Strong's claims. For example, when Strong was asked during her deposition to describe in detail her claims that Terrell had been critical of her personal life she described the following incidents:

1) Criticism Of Strong's Previous Boyfriend Who Was A Pilot.

Q. You're the one that's told me he was critical and these are the reasons that you believe he was abusive. I need to know what he said that was abusive.

A. Okay. All right. Well, I was -- I was dating a pilot guy, was in Alaska at the time, wanted me to come up for a couple of weeks and changed my flight time. I had already planned with Jim the time off. He wanted to know why, where I was going, what I was going to do, who I was seeing, which actually none of it was any of his business, and when I had gone the day earlier I told him I was getting a flight earlier.

He said well -- what did he say? Oh, I was on standby and he was making fun of the fact that he was a pilot but yet couldn't get me a flight at a certain time. He also wanted me to let him know when I got back into town. No matter what time, call him at home.

Q. Did you?

A. No. I thought that was kind of weird --

Q. Did he say why? To tell him you were coming back to work or what was the reason for that? Did he say?

A. He knew when I was going to be back to work.

Q. What was the reason? Do you know?

A. I don't know why he wanted to know.

CP 159-60; Strong Deposition, p. 139, lines 20-25, p. 140, lines 1-20 (emphasis added).

2) Criticism Of The House Strong Purchased.

A. He was critical of when my husband and I bought our first house and he did that in front of people in the front office.

Q. Okay. What did he say?

A. He wanted to know what size it was and then he wanted to know -- he goes well, what is it, six feet or six stories high, straight up and down, and stuff like that just to humiliate me in front of other people.

CP 161; Strong Deposition, p. 145, lines 1-10 (emphasis added).

3) Criticism Of Strong Getting Married After A Long Time And Criticism About Where Her Husband Worked.

Q. Anything else as far as criticism of work? It sounds like we've already gone through most of that; is that correct?

A. He also criticized the fact when I got married, my husband, who he had never met.

Q. What did he say?

A. Because I had dated him for such a long period of time and I had not married him before, couldn't believe that I would just get married.

Q. How did that come up?

A. And he also criticized -- what did he criticize? A place that he worked. And I can't even remember the company that he worked for but he put that down.

Q. He made some critical remark about where he worked?

A. Yes.

Q. Where was that? You don't recall?

A. I don't recall.

Q. What was the remark? I don't like that place where your husband works?

A. I can't remember.

Q. Well --

A. But I remember him being sarcastic about where he was employed.

Q. But you don't remember anything about what he said?

A. Well, Jim had been in printing for years as far as selling presses, so no. I don't recall, but I do recall him being sarcastic.

Q. He was sarcas -- so the allegation is that at some point Jim was sarcastic about where your husband worked?

A. Yeah, he was sarcastic about where my husband worked.

CP 162-63; Strong Deposition, p. 148, lines 12-25, p. 149, lines 1-21

(emphasis added).

4) Summary Of Terrell's Criticism's Regarding Strong's Personal Life.

Q. And I'm asking for the specific instances of what you say are his criticisms. You've gone through with me what they were from work.

A. Uhm-hum.

Q. You've provided already the issue about your son (Regarding the allegation that Terrell had required her to divulge information regarding her son's counseling appointment).

A. Yes.

Q. You've provided the issue about -- what was the other -- about the pilot and him not being able to get a flight for you.

A. Right.

Q. You've described the criticism about buying a house and him not thinking it was a -- being critical of the house size or something, I guess; is that correct?

A. Yeah.

Q. And questions about whether you were really sick.

A. Which was every time?

Q. And taking sick leave. And then criticism about the color of your hair and then criticism about being sarcastic about your husband's work.

A. Uhm-hum.

Q. And that's what I'm saying. Tell me what these are. Tell me what the basis is for these claims you are setting forth and that's what you provided so far. I'm asking is there --

A. To the best of my knowledge at this time, yes.

Q. Those are the criticisms that you can recall?

A. At this time, yes.

CP 164-65; Strong Deposition, p. 150, lines 16-25, p. 151, lines 1-25 (emphasis added).

Strong's claim that Terrell made comments about her personal appearance, including making blonde jokes, also fails to satisfy the high legal standard of conduct so extreme and outrageous that it is beyond what a reasonable person could bear. The comments, even if taken at face value, may constitute rude, boorish and unprofessional behavior. However, such comments do not extend beyond "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." Grimsby, at 59; Wright, at 738. Such comments, even from a supervisor, simply do not rise to the high legal standard required to establish the tort of outrage.

In addition, a careful examination of these allegations establishes that they were isolated to comments such as "it must be a blond thing" or "Oh, by the way Gina, let your hair grow out." CP 173, 179. Such

comments, while rude and immature are not so egregious as to constitute extreme and outrageous conduct or rise to the level of the tort of outrage.

Furthermore, Strong's own actions establish that these alleged events do not rise to the level necessary to constitute extreme or outrageous behavior. This is established by the fact that Strong failed to even mention these allegations in her harassment complaint, filed with the District. CP 175-83. The harassment complaint was filed in the summer of 2003 well after these alleged incidents had occurred. In the harassment complaint, Strong provided an extremely detailed accounting of other various incidents, but failed to make any mention of these allegations relating to Terrell's criticism of her personal life or any desire to have a personal relationship. Strong also failed to mention these allegations during the course of a detailed investigation, conducted by the CRT and Nikki Koch. Indeed, Strong only raised these allegations for the first time in her complaint initiating this lawsuit in 2004. CP 11. These allegations, even when considered in the light most favorable to Strong, must be considered in this context.

b. Strong's Claim That Terrell Required That She Divulge Information About Her Son's Healthcare Appointment Fails To Establish Outrage.

Strong also bases her claim of outrage upon an allegation that Terrell demanded that she divulge the fact her son attended a counseling

appointment and then shared that information with other employees she worked with. However, it is clear from Strong's own testimony that this conduct fails to rise to the level of extreme and outrageous conduct.

A. Okay. Well, there was a time where I had an appointment for my son --

Q. Okay.

A. -- and I had made it like three hours before I was to start work so I thought I'd have plenty of time to take him back to school and then go to work. Well, it was running quite a bit longer than I expected so I called him saying I think I might be late. Well, he wanted to know why and I told him I had an appointment. What kind of appointment? And I told him it was for my son. What kind of appointment for your son? And it was a -- that was a -- he had a counseling appointment.

Q. Okay.

A. And he wanted to know what for and I told him I would be a few minutes later. I ended up being on time --

Q. Okay.

A. -- as it all turned out but after I got to work other people knew about this appointment, asking me questions if my son was okay.

CP 154-55; Strong Deposition, p. 110, lines 19-25, p. 111, lines 1-15.

While Strong may have disliked the way Terrell handled the situation, and while it may have been rude or insensitive behavior, it is not extreme and outrageous for a supervisor to inquire as to why an employee is possibly going to miss work or inform other employees of the reason. Such conduct fails to rise above the level of "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." Grimsby, at 59.

- c. Strong's Claim That Terrell Was Verbally Abusive While Criticizing Her Work Performance And Gave Her Conflicting Instructions Fails To Establish A Cause Of Action.

Strong's allegation that Terrell became angry and even yelled or screamed while criticizing her work performance also fails to rise to the level of extreme and outrageous conduct. CP 11. In fact, such conduct, while rude and boorish, is exactly the sort of workplace conduct that Washington courts have consistently left to employers to monitor and resolve. Determining that a cause of action existed because an employee feels that her or his supervisor is too gruff or unprofessional or yells and screams would merely serve to inundate the courts with lawsuits filed by disgruntled employees who don't like the way their boss behaves. While such conduct may be unprofessional and rude, it fails to rise to the level of the tort of outrage. Instead such behavior again amounts to what can at best be described as "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." Grimsby, at 59.

Furthermore, the notion that employees are entitled to a cause of action in tort because their supervisor provides conflicting instructions, or requests something different from his or her original request, is absurd. While Strong may very well have felt that Terrell's instructions and work requests were conflicting or unclear that does not equate to a tort. CP 11.

d. Strong's Claim That Terrell Assigned Her To The Evening Shift Is Without Merit And Fails To Rise To The Level Of Extreme And Outrageous Conduct.

Another work related claim that Strong references in an attempt to establish the tort of outrage is the allegation that Terrell reassigned her to the night shift in retaliation for a complaint she made to the union. CP 11. However, Strong fails to offer any actual evidence in support of this claim, instead relying upon mere conjecture. CP 152. Furthermore, even taken at face value, a reassignment to the evening shift, in which her job duties were identical, fails to rise to the level of conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Dicomes, at 630, (quoting, Grimsby at 59). Strong’s own testimony also establishes that the shift changes were based upon the employees’ seniority and that Strong had less seniority than the other employee who was moved. CP 153.

e. Strong’s Allegation That Terrell Requested Another Employee Inform Him Of Strong’s Misbehavior Fails To Establish A Cause Of Action.

Strong claims that Terrell directed another employee to observe or “spy” upon Strong and inform on him of any misconduct by Strong. CP 11. Even if the Court accepts this allegation at face value, the behavior

fails to meet the requirement of extreme and outrageous behavior. If an employer's insulting, threatening verbal abuse is insufficient to meet this requirement, then it is illogical to conclude that making a request to report co-workers' misbehavior would somehow meet the requirement of extreme and outrageous behavior. In fact, other than a possible complaint regarding the style in which the matter was handled, there is nothing unlawful in requesting that employees inform their supervisor when co-workers misbehave or fail to comply with work rules.

f. Strong's Claims Regarding The Alleged Disconnection Of The Print Shop Phone Line Fails To Establish The Tort Of Outrage.

Strong also claims Terrell disconnected the phone line and refused to allow employees to bring cell phones to work. CP 11. While such an alleged request may have been inconvenient or an annoyance to employees of the print shop it hardly amounts to extreme and outrageous conduct sufficient to establish the tort of outrage. Simply put – restricting employee use of phones and asking them not to talk on the phone during work hours does not establish a legal cause of action in tort.

Strong's claim that Terrell's request jeopardized her personal safety is also without merit. Strong's testimony establishes just how ridiculous this claim is, as she could recall missing only one phone call from her husband due to these draconian restrictions. CP 166-67.

Furthermore, Strong testified that she rarely if ever used the phone line and couldn't even recall whether the line worked or whether she could have in fact called out on the line. CP 166-69. This is hardly the sort of egregious behavior necessary to establish the tort of outrage.

3. No Evidence Exists That Terrell's Conduct Constituted An Intentional Infliction Of Emotional Distress.

A person intentionally or recklessly causes emotional distress if the person:

- 1) acts with the intent to cause emotional distress; or
- 2) knows that emotional distress is certain or substantially certain to result from his or her conduct; or
- 3) is aware that there is a high degree of probability that his or her conduct will cause emotional distress and proceeds in deliberate disregard of it.

Restatement (Second) of Torts, § 46, comment i.

Strong argues that Terrell should have known that his conduct was certain or substantially certain to cause emotional distress, due to Strong's occasional emotional reaction. However, this argument ignores reality, in that a reasonable person can expect that some supervisors will employ management styles that seem gruff and even involve raising one's voice, especially in a loud, machinery filled environment like a print shop. The fact that Strong claims to have cried during one or two of her encounters with her supervisor is hardly indicative of the fact that Terrell should have

known that emotional distress, sufficient to constitute an emotional injury or severe emotional distress, was certain or substantially certain to occur. A supervisor's failure to recognize that an employee is uncomfortable with his gruff or demanding style of supervision simply does not rise to the level necessary to establish the tort of outrage.

4. Strong's Claim Fails To Satisfy The Legal Standard Of Severe Emotional Distress.

Strong has also failed to allege facts sufficient to prove "actual" severe emotional distress occurred as a result of the alleged extreme or outrageous conduct. Rice, at 61. Severe emotional distress is defined as "...more than 'transient and trivial emotional distress' which is 'a part of the price of living among people.'" Kloepfel v. Bokor, 149 Wn.2d 192, 198, 66 P.3d 630 (2003) (citing, Restatement (Second) of Torts, § 46 cmt.) Severe emotional distress must also be such "that no reasonable man [or woman] could be expected to endure it." Kloepfel at 203.

Any actual emotional distress experienced by Strong does not meet the definition of "severe." While Strong may have had an emotional reaction to Terrell's management style and behavior, that reaction does not change the fact that this behavior did not rise to the level such that no reasonable person could have endured it. While an employee may dislike a supervisor who is gruff or yells when expressing criticism, having a

disagreeable boss simply does not meet the high legal standard required to establish the tort of outrage. Furthermore, while Strong claims to have experienced “anxiety attacks, and heart palpitations and great depression,” she fails to offer any actual evidence supporting her assertion that these symptoms were connected to Terrell’s conduct.

C. Strong’s Claim Fails To Meet The Legal Requirements Necessary To Establish A Claim Of Negligent Infliction Of Emotional Distress.

1. Elements Of Negligent Infliction Of Emotional Distress.

To establish a claim of negligent infliction of emotional distress, a plaintiff must prove the following elements:

- 1) the employer’s negligent act injured him/her;
- 2) the acts were not a workplace dispute or employee discipline;
- 3) the injury is not covered by the Industrial Insurance Act;
- 4) the dominant feature of the claim was the emotional injury.

Snyder, 98 Wn.App. at 323, (citing, Chea v. Men’s Wearhouse, Inc., 85 Wn.App. 405, 412-13, 932 P.2d 1261 (1997), review denied, 134 Wn.2d 1002, 953 P.2d 96 (1998)). Furthermore, a plaintiff must prove he or she has “suffered emotional distress by ‘objective symptomatology,’ and the ‘emotional distress must be susceptible to medical diagnosis and proved through medical evidence.’” Kloepfel, at 196 (quoting, Hegel v. McMahan, 136 Wn.2d 122, 135, 960 P.2d 424 (1998)).

2. Strong's Claim Fails As It Resulted From Workplace Disputes.

Strong's claim fails as it plainly consists of a workplace dispute. The courts have consistently recognized that tensions in the workplace are an everyday occurrence and it is a "fact of life" that emotional distress exists in the workplace. Snyder, 98 Wn.App. at 323. As a result, the court in Bishop determined that certain limitations must be adhered to where the claim arises from an employment setting, stating:

The utility of permitting employers to handle workplace disputes outweighs the risk of harm to employees who may exhibit symptoms of emotional distress as a result. The employers, not the courts, are in the best position to determine whether such disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all. While such actions undoubtedly are stressful to impacted employees, the courts cannot guarantee a stress-free workplace. Therefore, we hold that absent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes.

Bishop, at 234-35 (emphasis added).

Despite Strong's claim to the contrary, Washington courts have consistently held that workplace disputes or personality differences will not give rise to claims of negligent infliction of emotional distress. Chea, at 413. Strong's argument that the tort of negligent infliction of emotional distress continues to be recognized in employment situations entirely

misses the point that such a tort claim has consistently been denied when involving a workplace personality dispute. The Washington State Supreme Court in Snyder specifically recognized this distinction, affirming the trial court's dismissal of the plaintiff's negligent infliction of emotional distress claim on the basis that it "encompassed a workplace dispute or personality difference." Snyder v. Medical Service Corp., 145 Wn.2d 233, 246, 35 P.3d 1158 (2001).

In addition, the Supreme Court in Snyder specifically recognized that the only reason such a claim was allowed in the Chea case, cited by Strong, was "because the employer did not argue at trial the incident at issue was a disciplinary act or in response to a personality dispute." Snyder, 145 Wn.2d at 246, (citing, Chea, at 413). In determining the requisite duty, the Supreme Court in Snyder stated that, "employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes." Snyder, 145 Wn.2d at 324, (quoting, Bishop, at 234-35).

Strong's contention that this is not a workplace dispute is without merit. Strong's only argument in support of her claim is that Terrell's conduct was not workplace related due to the extent of the alleged

harassment and/or because it constituted “bullying” and lacked utility.⁹ However, Strong’s mere suggestion unsupported by any evidence that this dispute was not workplace related, constituted “bullying” or lacked utility does not make it so. Furthermore, the fact that Strong thought Terrell’s work related conduct was inappropriate or rude does not suddenly make it unrelated to work. Instead, the evidence plainly establishes that Terrell’s alleged conduct was work related in nearly every instance as evidenced by the following allegations:

- Terrell was critical of Strong’s work production and quality at times even yelling and screaming at her. (CP 11).
- Terrell was critical of Strong arriving late to work. (CP 337).
- Terrell provided conflicting work instructions. (CP 11).
- Terrell questioned the reasoning for Strong’s possible late arrival to work in order to take her son to an appointment. (CP 154-55).
- Terrell contested Strong’s sick leave requests. (CP 165).
- Terrell unfairly assigned Strong manual labor, despite the fact that it was within her assigned duties. (CP 149).
- Terrell controlled Strong’s workload and had her sit idle because she exercised her seniority rights to avoid working in the bindery. (CP 175, 181).

⁹ Strong’s attempted application of a school bullying statute, intended for students, to “everyone connected with school districts” serves only to establish the weakness of Strong’s claims and her willingness to offer any argument to perpetuate this lawsuit. Appellant’s Brief, p. 33-35. This statute, RCW 28A.300.285(2) is clearly inapplicable to an employment setting and in conflict with Washington case law in regards to the establishment of a cause of action in tort.

- Terrell's yelling at Strong for use of the wrong bulletin board as a union bulletin board CP 183
- Terrell's assignment of Strong to the night shift. (CP 11, 153).
- Terrell's restriction of telephone usage at work. (CP 11).
- Strong's exclusion from training on a new copy machine. (CP 11).
- Terrell 's alleged instruction of another employee to inform on other employees' misconduct and work production. (CP 5).

These allegations plainly involve work related conduct and Strong's tort claim for negligent infliction of emotional distress was therefore appropriately dismissed.¹⁰

Strong also makes additional claims that Terrell engaged in inappropriate discussions at work, including comments about the fact she was blond and criticisms of her personal life. While these allegations, if true, could arguably fall outside work related activities, Strong concedes she is not alleging a sex discrimination claim and instead states that these claims are merely a component of Terrell's workplace bullying campaign and not a separate sexual harassment allegation. Furthermore, much of these allegations constitute workplace banter and discussions that, while

¹⁰ In the case at hand, the District's CRT reviewed these same claims and determined that there was no evidence of harassment and that this was simply a workplace dispute involving differing styles and personalities. CP 195-96. The CRT recommended that Terrell work to improve his management style, but found no merit in Strong's claims.

perhaps disagreeable to Strong or unprofessional, simply do not rise to the level sufficient to establish a cause of action in tort.¹¹

3. Strong Fails To Offer Evidence Of Objective Symptomatology.

In addition, Strong fails to offer any evidence she has “suffered emotional distress by ‘objective symptomatology,’ and the ‘emotional distress must be susceptible to medical diagnosis and proved through medical evidence.’” Kloepfel, at 196 (quoting, Hegel, at 135). Strong is unable to establish this necessary connection and her claim of negligent infliction of emotional distress should be dismissed.

D. Strong’s Claim Fails To Meet The Legal Standards Required To Establish A Claim Pursuant To 42 U.S.C. § 1983.

1. Legal Requirements Of 42 U.S.C. § 1983.

To support a claim under 42 U.S.C. § 1983, a plaintiff must establish, first, that the rights, privileges and immunities granted to them by the Constitution or laws of the United States were violated; and second, that the violation was committed by a person acting under color of state law. Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912 68 L.Ed.2d 420 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

¹¹ In addition, the specific allegations related to Terrell’s allegedly overly friendly conversation about hiking and Strong’s personal life are barred by the statute of limitations.

2. Strong Fails To Identify A Violation Of A Const. Right.

As this Court has previously held in Wright v. Terrell, Strong “fail[s] to identify a violation of an existing constitutional right, much less even identify an existing constitutional right. Wright, at 739, fn. 15. Instead, Strong alleges that Terrell deprived her of her due process rights, conferred by Amendments V and XIV of the Constitution of United States, to physical security in the workplace. Appellant’s Brief pp. 35-36.

In order to establish a substantive due process violation, a plaintiff must demonstrate a violation of an identified liberty or property interest protected by the Due Process Clause. Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). Strong contends that this property interest created contractually by the PECBA and statutorily by RCW 28A.400.300(1) is her “constitutionally protected property interest in Mrs. Strong’s public employment.” Appellant’s Brief, p. 36. While Strong may well have a protected property interest in her continued employment, requiring that school districts may discharge classified employees only for sufficient cause, there is no evidence that such a right was violated.

Instead, Strong’s allegation is based upon an implied, or actually fictitious, constitutional right “to enjoy this property interest in a reasonably safe and secure workplace.” Appellant’s Brief, p. 36. Strong

fails to cite any authority in support of this claim. Furthermore, Strong ignores direct authority to the contrary holding that no constitutional injury can arise under Section 1983 solely from an employer's failure to provide a safe workplace. Collins v. City of Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

The plaintiff's claims in Collins were based upon an alleged constitutional right to a safe and secure workplace. The plaintiff, who was the widow of a sanitation worker asphyxiated while working in a sewer, based her claims upon an alleged constitutional right to be protected from the municipal policy of deliberate indifference toward employees regarding the dangers of working in manholes and sewers and the city's failure to provide a safe workplace. The United States Supreme Court rejected plaintiffs' claims, stating:

Neither the text nor the history of the due process clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the due process clause. [... W]e conclude that the due process clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of security in the workplace. In the city's alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense.

Collins, at 126 (emphasis added).

3. No Evidence Exists That Terrell Jeopardized Strong's Safety, Even If There Was A Constitutional Right To A Safe And Secure Workplace.

Even if the Court was to determine that Strong had alleged the violation of an actual constitutional right to a safe and secure workplace, there is no evidence that Terrell violated such a right. Not once does Strong allege conduct on Terrell's part that could be described as actually endangering her safety. In fact, Strong concedes this fact, stating that Terrell “engaged in a long-term, consistent pattern of extreme verbal abuse and bullying of the plaintiffs.” Appellant’s Brief, p. 37. While Strong does use the vague term “bullying” there exists no evidence of any physical contact or physical endangerment to Strong. The record is quite clear that Terrell’s alleged conduct was completely verbal in nature.

4. Allegations of Verbal Harassment Alone Are Insufficient to Establish a Claim Under Section 1983.

Again, Strong ignores the relevant case law stating that “[i]t is well-established that verbal harassment or threats... will not, without some reinforcing act accompanying them, state a constitutional claim.” Maclean v. T.J. Secor, 876 F.Supp. 695 (E.D.Pa. 1995); see also, Murray v. Woodburn, 809 F.Supp. 383, 384 (E.D.Pa 1993) (“Mean harassment... is insufficient to state a constitutional deprivation.”); Prisoners’ Legal Ass’n v. Roberson, 822 F.Supp. 185, 189 (D.N.J. 1993) (“[V]erbal harassment does not give rise to a constitutional violation enforceable under § 1983.”); Collins v. Cundy, 603 F.2d 825, 826 (10th Cir. 1979)

(allegations that sheriff laughed at prisoner and threatened to hang him did not state claim for constitutional violation); Oltarzewski v. Riggiero, 830 F.2d 136, 139 (9th Cir. 1987) (allegations of vulgarity did not state constitutional claim).

5. Strong's Claims Of Physical And Psychological Symptoms Do Not Create A Constitutional Violation.

Strong attempts to bolster her claim regarding an alleged violation of a constitutional right by alleging that she suffered “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.” Appellant’s Brief, p. 38. However, it is noteworthy that Strong fails to cite to any portion of the record in support of her claim that Terrell's alleged conduct caused these symptoms, but instead relies upon baseless assertions and conclusory allegations.

In addition, Strong ignores the relevant legal authority and the fact that the focus of the constitutional protections provided by substantive due process is concentrated on the actions of the defendant rather than the effect on the plaintiff. For example, at least one federal district court has held that an inmate's particular vulnerability to verbal harassment could not be considered a sufficient basis for overlooking the established

doctrine rejecting constitutional claims based solely on verbal harassment. Murray v. Woodburn, 809 F.Supp. at 384.

6. The Legal Authority Cited By Strong Is Inapplicable.

Strong's reliance upon two federal cases, Northington v. Jackson, 973 F.2d 1518 (10th Cir. 1992) and Scher v. Engelke, 943 F.2d 921 (8th Cir. 1991), in support of the argument that "the damage claimed need not be limited to physical pain or injury" fails. Appellants' Brief, pp. 36-37.

First, both of these cases involve interpretation of the clearly identified Eighth Amendment right protecting individuals in custody from "cruel and unusual punishments." U.S. Constitution, Amendment VIII.

In addition, the facts described in both of these cases are far more egregious than Strong's allegations to the point where they are simply not comparable. The facts in Northington v. Jackson involved a guard putting a revolver to an inmate's head and threatening to shoot. Northington, at 1520. The facts in Scher v. Engelke involved similarly egregious conduct in which a guard repeatedly searched a prisoner's cell in retaliation for reporting instances of prison corruption. Scher, at 922. These cases are inapplicable as they involve conduct, that the federal courts correctly held, goes well beyond verbal threats or harassment. Strong's attempt to create a new constitutional right to security in the workplace by comparing these federal cases to Strong's allegations that her boss was verbally abusive

towards her is completely unsupported by any legal authority and flies in the face of Federal case law.

E. Strong's Claims Are Barred Due To Her Failure To Properly File A Notice Of Claim Pursuant To RCW 4.96.

Even in the event the Court were to reverse the trial court's dismissal of Strong's claims on the merits, this Court should dismiss Strong's claims for failure to properly comply with RCW 4.96.

1. Procedural Requirements Of RCW 4.96.

Because Terrell was acting as the print shop manager for Evergreen School District, a local governmental entity, and because Strong's causes of action sound in tort and seek monetary damages, Strong was required to comply with statutory claim filing procedures as a condition precedent to filing a lawsuit on these causes of action. The relevant portions of the statute read as follows:

Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages.

RCW 4.96.010(1)

No action shall be commenced against any local governmental entity for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof.

RCW 4.96.020(4).

In short, RCW 4.96.020 requires that before a plaintiff may file a lawsuit against a local governmental entity or its employees, the plaintiff must file a claim.

Strong failed to comply with the notice of claim requirements because she filed her lawsuit without first filing a notice of claim and then waiting the requisite sixty days. RCW 4.96. Rather than dismiss and refile her lawsuit, Strong instead filed a notice of claim while continuing to prosecute the first lawsuit. Strong then amended her notice of claim in an attempt to remedy the defects of the first notice of claim. Strong then, while still prosecuting the first lawsuit, filed a second lawsuit, which included the identical claims against Terrell as those claims included in the first lawsuit. As a result, the procedural history of this case fails to comply with RCW 4.96 as it consists of the following chronology:

- 1) July 23, 2004 – Strong files first lawsuit (CP 212);
- 2) July 26, 2004 – Strong’s first notice of claim (CP 204);
- 3) Sept. 3, 2004 – Amended notice of claim (CP 221);
- 4) Nov. 22, 2004 – Strong’s 2nd duplicative lawsuit (CP 3);
- 5) Oct. 21, 2005 – Two lawsuits are consolidated (CP 228).

A claimant may substantially comply with the claim content requirements. Medina v. Pub. Util. Dist. No. 1, 147 Wn.2d 303, 316, 53 P.3d 993 (2002). However, despite Strong’s claim that this is a “procedural diversion,” a claimant must strictly comply with the claim filing procedures. Medina, at 316. Furthermore, a failure to strictly

comply with the claim filing requirements requires dismissal of the action. Sievers v. City of Mountlake Terrace, 97 Wn.App. 181, 183, 983 P.2d 1127(1999); Reyes v. City of Renton, 121 Wn.App. 498, 504, 86 P.3d 155 (2004); Schoonover v. State, 116 Wn.App. 171, 178, 64 P.3d 677 (2003). Thus, Strong's failure to strictly comply with this claim filing process should result in dismissal of her claims.

2. Strong's Reliance Upon The Filing Of A Second Duplicative Lawsuit Is Contradicted By Long-Standing Principles Of Washington Law.

Recognizing the flaw in Strong's attempt to litigate two identical lawsuits, Terrell brought a motion to dismiss the second duplicative lawsuit based upon long-standing principles of Washington law prohibiting duplicative lawsuits.

Filing two separate lawsuits based on the same event – claim splitting – is precluded in Washington.

Landry v. Luscher, 95 Wn.App. 779, 780-81, 976 P.2d 1274 (1999); Sprague v. Adams, 139 Wash. 510, 515, 247 P. 960 (1926).

On October 21, 2005, the trial court held that Strong's claims against Terrell were identical in the first and second lawsuits and consolidated those identical causes of action under the second Clark County Cause No. 04-2-06115-0. CP 228-29.¹² However, Washington

¹² The trial court then dismissed the extraneous causes of action included in the second lawsuit relating to the additional Plaintiffs, Wright and Larson, as those claims were

case law is clear that the appropriate remedy for duplicate lawsuits is dismissal of the second case rather than dismissal of the first case. Orwick v. Fox, 65 Wn.App. 71, 82-83, 828 P.2d 12 (1992). The Court of Appeals in Orwick held that while the existence of a prior case can bar claims in the second case, the existence of the second case should not be used to bar the proceedings in the first case. Id. Obviously, this principle is intended to avoid situations such as the one Strong presents in attempting to avoid the notice of claim requirements by filing a second duplicative lawsuit.

In addition, an application of RCW 4.96 consistent with Strong's position would render the statute meaningless and be at complete odds with the Legislature's clear intent. Washington courts have consistently held that the "readily discernible" intent of the sixty-day period "is to allow the governmental entity time to investigate and settle the claim against that entity." Troxell v. Rainier Public School District # 307, 119 Wn.App. 361, 364, 80 P.3d 623 (2003) (citing, Medina at 310).¹³

F. Strong's Claims Are Barred Because Arbitration Is The Sole Remedy Under The Collective Bargaining Agreement.

barred by res judicata. CP 228-29. The only additional claims were those involving Nikki Koch who Strong voluntarily dismissed from the lawsuit.

¹³ This notice requirement is also in place, at least in part, because the District is required to defend, indemnify, and hold harmless its employees when sued for acts within the scope of employment. RCW 28A.400.360 (Insurance protection for employees of the District); See also, RCW 4.96.041 (statute requiring local governments to pay for defense of suits against employees). The District maintains liability insurance to provide coverage of its employees' acts or omissions. Therefore, public funds are exposed to liability and the claim filing requirements are applicable.

Even in the event the Court were to reverse the trial court's dismissal of Strong's claims on the merits, this Court should dismiss Strong's claims for failure to exhaust her remedies under the Collective Bargaining Agreement. The Collective Bargaining Agreement, between the District and PSE, is the exclusive remedy covering Strong's claims, as all of Strong's claims arise from a dispute regarding the contractual relationship that exists between Strong, as a member of the collective bargaining unit, and the District. The basis of all of Strong's claims is a dispute regarding the nature of her supervision by Terrell and her allegations that the District failed to properly monitor and resolve those allegations. These are contractual issues that are covered under the CBA.

1. Strong's Claims Relating To The District And Terrell's Breach Of Their Contractual Duties Under The CBA Are Analyzed Under Federal Law.

Principles of federal law are controlling in lawsuits arising under collective bargaining agreements. Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 126, 839 P.2d 314 (1992). Washington Courts have long recognized the authority of federal law concerning the arbitrability of labor disputes. Peninsula School Dist. No. 401 v. Public School Employees of Peninsula School District, 130 Wn.2d 401, 413, 924

P.2d 13 (1996).¹⁴ Furthermore, under federal labor law, the grievance and arbitration procedures set forth in the collective bargaining agreement are the employee's exclusive remedy.¹⁵

2. The CBA Is Strong's Exclusive Remedy.

Under federal labor law, where a collective bargaining agreement establishes grievance and arbitration procedures for the redress of employee grievances, an employee's remedies are limited to those procedures, unless the union, acting in bad faith, prevents the employee from utilizing arbitration. Clayton v. ITT Gilfillan, 623 F.2d 563, 567-68 (9th Cir. 1980). Washington courts have consistently applied this principle. Lew v. Seattle School District, 47 Wn.App. 575, 577, 736 P.2d 690 (1987).

3. Relevant Sections Of The CBA.

Strong's exclusive remedy is a detailed grievance procedure set forth in the CBA. The agreement requires that:

Grievances or complaints arising between the District and its employees within the bargaining unit defined in Article I herein, with respect to matters dealing with the interpretation or application of the terms and conditions of

¹⁴ See also, the "Steelworkers Trilogy": United Steelworkers v. American Mfg., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

¹⁵ Clayton v. ITT Gilfillan, 623 F.2d 563, 567-68 (9th Cir. 1980). Washington courts have consistently applied this principle. Lew, at 577; Commodore, at 126.

this Agreement, shall be resolved in strict compliance with the Article.

CP 262. This language is unequivocal in its requirement that the parties “shall” resolve their grievances or complaints in compliance with Article XV of the CBA. The parties are given no choice but to comply with the grievance procedure that is contractually binding. The CBA also speaks to the subject matter of those complaints stating that they should relate to those “matters dealing with the interpretation or application of the terms and conditions of this Agreement.” CP 262.¹⁶

4. The CBA Applies To All Of Strong’s Claims.

Because Strong fails to state a valid cause of action under Section 1983 or state tort law, as argued above, we are left to assume that Strong’s claims involve the failure of Terrell and the District to fulfill their contractual duties under the CBA. The heart of all of Strong’s claims is a dispute arising out of concerns with her supervision under Terrell and her

¹⁶ The CBA also sets forth the grievance steps, which the parties must comply with to resolve grievances and complaints. First, the employee must discuss the grievance or complaint with his/her immediate supervisor within 20 days of the occurrence of the grievance. CP 262. Second, if that meeting does not resolve the grievance, the employee is next required to submit the grievance in the form of an informal written statement within 10 business days after Step 1. CP 262. Third, PSE must submit a formal written statement of grievance within fifteen days, if the grievance was not resolved during the five day period set forth in step two. CP 262. Fourth, if no settlement is reached during the fifteen days referred to in step three, then “the employee may demand arbitration of the grievance.” CP 263. Strong failed to comply with the grievance procedure steps one through four.

allegation that Terrell's supervisor Marcia Fromhold, failed to properly respond to her complaints.

The language of the CBA specifically addresses Strong's grievances regarding her working conditions and her contention that Terrell and Fromhold failed to comply with their contractual duties under the CBA. Article V of the CBA, entitled Appropriate Matters for Consultation and Negotiation, specifically states:

The parties agree that it has been and will continue to be in their mutual interest and purpose to promote systematic and effective employee-management cooperation; to confer and negotiate in good faith with respect to grievance procedures and collective negotiation on personnel matters including wages, hours and working conditions;

CP 242 (emphasis added). Strong's allegations are clearly related to the "working conditions" of the District print shop and covered by the CBA.¹⁷

V. CONCLUSION

This Court should reject the attempt by Strong and her union to open a new era in judicial regulation of the workplace. Many people, if not most, have worked for a difficult boss at some point in their lives, and the consequent existence of workplace stress is widespread. Nothing in law, logic or sound public policy supports the notion that society would be well served if the courts, using the tool of emotional distress tort law, were to

¹⁷ Article III of the CBA also specifically addresses Strong's allegations that Terrell made inappropriate comments to her regarding a personal relationship, or made sexual innuendos. CP 237.

begin regulating the management style of employers. Historically, the determination of whether a particular workplace functions better under a warm and caring empath or under a hard-driving shouter has been left to the marketplaces and enterprises involved. This wisdom is especially appropriate where, as in the instant case, unions, upper management, and internal grievance procedures exist to address the issues.

Likewise, this Court should reject Appellant's proposal to create a new constitutional right to be free from hurt feelings and stress in the workplace. Nothing in the history of our nation, much less the history of our Constitution, suggests that our Constitution, our government, or our Courts were created to guarantee such a Nirvana.

DATED this 20th day of July 2007.

MICHAEL B. TIERNEY, P.C.

By: _____

Michael B. Tierney, WSBA No. 13662

John M. Stellwagen, WSBA No. 27623

Attorneys for Respondent James Terrell

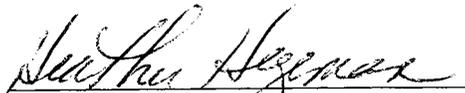
I, Heather Hegeman, certify under penalty of perjury under the laws of the State of Washington that on July 20, 2007, I caused the following documents:

1. Respondent's; and
2. Declaration of Service.

to be sent via Messenger to:

Eric T. Nordlof
Public School Employees of Washington
PO Box 798
Auburn, WA 98071

DATED at Mercer Island, Washington this 20th day of July,
2007.


Heather Hegeman