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DIVISION II

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STATE OF WASHINGTON
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No. 37862-1-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
ET AL

Respondent

v.

MARY E. MIVILLE

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY

REPLY BRIEF OF APPELLANT

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P.M. 1-22-09

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I. Restatement of the Case:

In its submission to the Court, the State has attempted to recast the circumstances and events faced by the Appellant, Ms. Miville, in a light most favorable to the State. The State has sought to dissemble the argument and the facts supporting that argument established by Ms. Miville in her submissions to the trial court. However, the “reorganization” of the events and circumstances offered by the State does not effectively rebut the factual contentions nor legal argument proffered by Ms. Miville.

II. Loss of Job Assignments and Opportunities as Forensic Therapist 2:

The basis for the claim that Ms. Miville was treated in an unequal manner, are the facts that establish that the tasks and duties assigned to her classification as a Forensic Therapist 2 (FT2), were winnowed away by the decisions made by Dr. Mehlman. An examination of the Job Specifications¹ established for an FT2 demonstrate this conclusion.

The first listed “Typical Work” identified in the Job Specification was – “Conducts individual and group training sessions and demonstrations for Group Psychotherapy personnel;”² This responsibility was removed by Dr. Mehlman when he caused Ms. Miville to be

¹ [CP 379-81], Exhibit D, attached to Declaration of Lynne Glad.

² Ms. Miville had performed these type of duties for years,[CP 152.]

transferred to the Therapies and Recovery Center (TRC) in June 2004.³

She stopped engaging in training for individuals altogether and her group responsibilities shifted to “education” of the group she was assigned.

The third listed “Typical Work” identified in the Job Specifications was – “Observes, interviews, gathers data about, evaluates and directs the treatment of each offender assigned to one or more treatment groups;”⁴ This responsibility was removed by Dr. Mehlman when he caused Ms. Miville to be transferred to the TRC in June 2004. She no longer “interviewed” or “gathered data about” or “evaluated or directed the treatment” of any of the individuals assigned to her groups.

The fourth listed “Typical Work” identified in the Job Specifications was – “Guides and directs one or more groups of individual and group psychotherapy; supervises in-patient, work-release, outpatient, and marital treatment groups; conducts group therapy sessions for offenders or offenders and their spouses;”⁵ ended when Dr. Mehlman assigned Ms. Miville to the TRC. She provided no therapy, only “education” involving the court process.⁶

The fifth listed “Typical Work” identified in the Job Specifications was – “Communicates and works with judges, prosecuting attorneys,

³ [CP 40], Exhibit B, attached to Declaration of Rick Mehlman, Ph.D.

⁴ Ms. Miville performed each of these duties, [CP 147.]

⁵ Ibid.

⁶ [CP 152.]

probation officers⁷, physicians, agencies and institutions regard the admission, evaluation, treatment⁸, and discharge of offenders”⁹. This activity ended when Ms. Miville was transferred to Ward S-5 after she was sent to Medical Records from Ward S-8.

The sixth listed “Typical Work” identified in the Job Specifications was – “Participates in program-wide clinical and administrative meetings; presents cases before review committees; prepares and maintains progress reports and records...” This duty ended when she was transferred to the TRC in June 2004.

Thus, five of the six listed duties she had held for over a decade and a half were removed from her through the machinations engaged in by Dr. Mehlman. The State has no explanation for this conduct except to assert that Dr. Mehlman had decided that social workers needed to perform these types of duties. As a shop steward¹⁰ for over a decade, Ms. Miville was aware of the problem with removal of the typical duties from a classified position in civil service.¹¹

⁷ Ironically, Ms. Miville was tasked to assist newly assigned social workers to engage with prosecutors, attorneys and the courts, although those duties had been removed from her. [CP 271.]

⁸ Ms. Miville was tasked with getting the treatment plans (normally done by social workers) up to par in advance of a survey by an outside accrediting agency just before she was reassigned to the TRC. [CP 270.]

⁹ Ibid.

¹⁰ [CP 137-8.]

¹¹ Paragraph s, Page 13, Declaration of Mary Miville, [CP 151.]

On the surface the assertion that a different type of professional was needed to conduct the listed duties has a seductive appeal. The appeal, however, is short-lived when it is made known that another FT2 in the TRC, Mr. John Higgins, continued to perform the psychosocial reports and individual and group therapy. Dr. Mehlman acknowledges that FT2 Higgins was permitted to perform such duties and Ms. Miville was not.¹² The ostensible reason why Mr. Higgins was permitted to engage in the same duties that Ms. Miville and Mr. Olson had performed for years was because Mr. Higgins was “credentialed.”

This “credentialing” qualification appears to be a superficial appellation because it follows being appointed to perform “psychiatric social work”. In her declaration, Ms. Laurel Kelso, Director of Social Work, professes to inform the Court that:

“Any individual without a master’s degree in social work hired to perform the duties of a psychiatric social worker will receive an ‘exceptional’ credentialing status requiring an MSW to supervise their day to day practice, including assessments, treatment planning, and discharge planning.”¹³

This declaration of process appears to enable the State to claim that the chicken came before the egg. Ms. Kelso does not offer any evidence that Ms. Miville was ever offered the opportunity to become

¹² He also identifies Kent Olson as an FT2 who did not perform such duties, but he does not indicate that Mr. Olson was a resident on the same units as were Mr. Higgins and Ms. Miville.

¹³ Lines 9-12, Page 2, Declaration of Laurel Kelso, [CP 20.]

“credentialed” by “exception” as was Mr. Higgins. Dr. Mehlman does not offer that Ms. Miville was enabled to continue her quasi-social work activity that had been among her primary duties for 15 years through the “exceptional credentialing” process, if indeed that was a new requirement. What is clear, circumstantially, is that Ms. Miville was selected out of the process and denied the ability to continue working as she had been previously engaged to work.

III. Protected Activity:

A. Litigation:

Ms. Miville was involved in the Rust Litigation. [CP 296.] Dr. Darrell Hamilton, MD, professed to have no real knowledge of the Rust Litigation. [CP 350.] However, he was the Clinical Director of the Legal Offender Unit¹⁴ when the Rust Lawsuit was filed concerning the living conditions, health care and therapy received by residents of the Legal Offender Unit. His assertion is not worthy of belief. Likewise, Dr. Mehlman professed not to have knowledge of the involvement of Ms. Miville in the Rust Litigation, but his assertion is not worthy of belief. He does acknowledge that the Rust litigation and Settlement Order was the incipient cause for a change in the direction of the Center for Forensic

¹⁴[CP 141.]

Studies (CFS).¹⁵ He notes that the CFS was historically perceived as isolated and resistant to change.¹⁶

B. Labor Relations:

Ms. Miville has established that she was consistently and pervasively involved in labor relations matters as a representative of co-workers and on her own behalf. She has established that she represented a series of co-workers in grievance procedures before the very individuals who were making decisions about her own job duties and assignments.

Each individual, Dr. Hamilton and Dr. Mehlman, deny¹⁷ any specific knowledge about her actions although Dr. Mehlman professes some inkling that she was a labor representative¹⁸. Their professed indifference to Ms. Miville's conduct as a shop steward is belied by the administrative personnel who worked with each of them.

Rick Hall, who was a labor relations specialist for the Hospital in 2000 and 2002 opined that the supervisors of Ms. Miville did not like her although she got on well with her co-workers.¹⁹ Melanie Quimby, who worked as Secretary Supervisor for Dr. Mehlman from 2001 through

¹⁵ [CP 24.]

¹⁶ Ibid.

¹⁷ [CP 342-43], Dr. Hamilton vaguely remembers a grievance Ms. Miville filed and that she was one of a group of shop stewards.

¹⁸ Lines 20-22, Page 4, Declaration of Rick Mehlman, [CP 26.]

¹⁹ [CP 203.]

2006, opined that Dr. Mehlman really did not like Mary Miville.²⁰ It was her view that the work Ms. Miville did for the union was the basis for the ill-feelings that Dr. Mehlman had toward Ms. Miville.²¹ She also indicated that he treated her differently than other employees in CFS by wanting to be informed when she was in the area and why she was there.²² Dolly Garcia, was the Labor Relations Manager at the Hospital from 1999 through 2003. She worked closely with Dr. Mehlman and Dr. Hamilton on labor matters.²³ She expressed the observation that both men were strongly opposed to the efforts that Ms. Miville as a union representative to assist her co-workers.²⁴ It was her observation that the changes that Dr. Mehlman caused in the work assigned to Ms. Miville was designed to marginalize her.²⁵

C. Patient Welfare:

Ms. Miville raised patient care issues in her participation in the factual basis for the Rust Lawsuit that caused a Settlement Order to be entered concerning the enhancement of patient care, patient therapy and health treatment in the Legal Offender Unit. Even Dr. Mehlman notes that

²⁰ [CP 113.]

²¹ Ibid.

²²[CP 114.]

²³[CP 116.]

²⁴[CP 117.]

²⁵ [CP 118.]

the creation of the Center for Forensic Studies grew out of the Rust
Litigation.²⁶

But, Ms. Miville did not stop with her involvement in the Rust
Litigation. She continued to bring to the attention of her supervisors, and
in particular Dr. Mehlman, what she perceived to be short staffing²⁷, lack
of security²⁸, patient abuse²⁹, crowded wards³⁰ and other related problems.
Each state hospital was required to adopt a workplace safety plan that
included security, staffing, personnel policies and clinical and patient
policies and procedures. RCW 72.23.400. Ms. Miville's reporting related
to issues that the hospital policies and procedures required in compliance
with the statute.

IV. Disparate Treatment & Retaliation:

In a gender based employment discrimination case, the plaintiff
bears the burden of production to establish a prima facie showing. When
the plaintiff meets that burden, the burden of production shifts to the
employer to rebut the presumption of discrimination. Hill v. BCTI
Income Fund-1, 144 Wn.2d 172, 185-87, 23 P.3d 440 (2001). The

²⁶ [CP 24.]

²⁷ [CP 174-75.]

²⁸ [CP 163.]

²⁹ [CP 144.]

³⁰ [CP 167], [CP 168.]

employer's burden is met by production of admissible evidence³¹ of a legitimate, nondiscriminatory, nonretaliatory reason for the adverse action. Grimmwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988). If the employer fails to meet the burden of production, the employee is entitled to judgment as a matter of law. Kastanis v. Education Employees Credit Union, 122 Wn.2d 483, 490, 865 P.2d 507 (1993). If the employer can produce some evidence of a nondiscriminatory reason for the adverse action, the temporary presumption is rebutted and removed. Hill, 144 Wn.2d at 182. The burden then shifts to the employee to demonstrate pretext or that the reason proffered by the employer is unworthy of belief.³² Hsi H. Chen v. State, 86 Wn.App. 183, 190, 937 P.2d 612 (1997).

An employee who opposes employment practices reasonably believed to be discriminatory is protected by the "opposition clause" whether or not the practice is actually discriminatory. Graves v. Department of Game, 76 Wn.App. 705, 712, 887 P.2d 424 (1994). Thus, whether the employee can prove that her belief was well founded is not dispositive of the retaliation claim. The employee need only demonstrate

³¹ Appellant's Brief, Pages 10-12 addressed the failure of the trial court to exclude inadmissible evidence. That argument will not be repeated in this brief.

³² Pretext is demonstrated by demonstrating that the reasons have no basis in fact, that even if based in fact, the employer was not motivated by these reasons, or the reasons are insufficient to motivate an adverse employment decision. Hsi, 86 Wn.App at 190.

that her belief was reasonable under the circumstances. Graves, 76 Wn.App. at 712. An employer's retaliatory motive need not be the employer's sole or principle reason for the adverse action, so long as the employee establishes that retaliation was a substantial factor. Wilmot v. Kaiser Aluminum & Chemical Corporation, 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991). Employers rarely openly reveal that retaliation was the motive for adverse employment actions. The employee must resort to circumstantial evidence to demonstrate the retaliatory purpose. Kahn v. Salerno, 90 Wn.App. 110, 130, 951 P.2d 321 (1998). An employee can meet this prong of the test by establishing that he or she participated in an opposition activity, the employer knew of the opposition activity, and the employer took adverse action. Wilmot, 118 Wn.2d at 69.

Ms. Miville's production of evidence is summarized below:

A. Lack of job opportunities:

In her submissions to the court, Ms. Miville has identified positions for which she was qualified and had an interest and for which she had sought appointment.³³ She also established that although certain job duties and responsibilities that establish the FT 2 classification were taken from her, there was a male who was enabled to continue the usual scope of duties that Ms. Miville had accomplished during her tenure of

³³ Declaration of Mary Miville, Exhibit D [CP170], Exhibit J [CP 183], Exhibit K [CP 186], [CP 154-56.]

employment. Ms. Miville specifically raised the issue of discrimination³⁴ in her communications with her supervisor after it became obvious that a male FT 2 was receiving opportunities that she was not.³⁵

B. Investigative Actions:

Although it was prior to the date the statute of limitations ran, Ms. Miville showed that she was treated differently than was a male who was alleged to have engaged in patient abuse.³⁶ This was a decision made by Dr. Mehlman.

C. Retaliation:

Ms. Miville contends that her involvement in the Rust Litigation started the enmity that continued³⁷ through the time that Dr. Mehlman

³⁴ Respondent has asserted that Appellant did not identify “hostile working environment” in her Tort Claim [Page 20, Brief of Respondent]. The tort claim statute does not require a listing of the “legal basis” for any claim. Instead, a review of the Tort Claim [Attached as Exhibit B, CP 62-64] demonstrates the summary contentions of the Appellant. There is no statute or case-law that requires expression of the words “hostile working environment” in a tort claim or, as a penalty, that claim cannot be pursued. Respondent reads the Tort Claim Statute far too narrowly. This court is aware that the term “discrimination” encompasses a broad range of conduct and claims. The true question is whether the text of the claim sufficiently advises the governmental entity of the nature of the claim and the basis of the claim. The Appellant’s Tort Claim did just that – informed the department of the nature and basis for her claims.

³⁵ [CP 172.]

³⁶ [CP 144.]

³⁷ Respondent has misapplied the ruling in Antonius v. King County, 153 Wn.App. 256, 103 P.3d 729 [Found at page 22 of the Brief of Respondent]. A hostile work environment claim is different from discrete acts (such as termination, denial of transfer, failure to promote. Antonius, at page 264). With the exception of the Rust Litigation and her banishment to Medical Records, there were few discrete acts that transpired prior to 24 October 2002 [three years prior to the day she signed her Tort Claim] that form the basis for the claims she presently makes. National Railroad Passenger Corp. v. Morgan, 536 US 101, 122 S.Ct. 2061, 153 L.Ed.2d (2002), relied upon in the ruling in Antonius,

served as Director of the CFS. Further, her efforts to engage in the actions that she had previously been assigned as an FT 2 with the consequent peril of being downgraded for not performing the level of duties required of an FT 2 are set forth in her submissions³⁸.

D. Production of rationale by State:

In the submissions by Dr. Mehlman and others, the State has articulated reasons why each of the occasions that Ms. Miville claims were a violation of law had a non-discriminatory reason.

E. Pretext Production:

Ms. Miville contends that the trial court made decisions wherein she made determinations of fact when the parties offered differing views of the same incident or event. In short, the trial court made evidentiary rulings to achieve a status of uncontroverted evidence that permitted a ruling as a matter of law. No more was that more evident than in the trial court's consideration of whether the Appellant had met the burden of production to show there was pretext in the rationale offered by the State.

It is noted that to show pretext, Ms. Miville, as the employee must produce evidence that shows that even if the rationale is based in fact, the motivation for the action was different from what is stated or the reason

held that a hostile working environment is composed of a series of separate acts that collectively constitute one "unlawful employment practice.", at page 117.

³⁸ [CP 151.]

stated is unworthy of the adverse action taken by the State. Here, the labor relations persons and the chief administrative assistant have all expressed their view that Dr. Mehlman did not favor Ms. Miville. Since the Appellant cannot produce direct evidence of discriminatory motive, circumstantial evidence must be used. The Appellant contends that the motivation of Dr. Mehlman that he professes is unworthy of belief given the effort he made, at literally every turn, to deny, displace and devalue Ms. Miville. The Appellant has cited a series of circumstances and events that are descriptive of efforts by Dr. Mehlman to "keep her in check" (to borrow a phrase)³⁹. His contention that Ms. Miville was not acceptable as a candidate for open positions (for which she was qualified) is unsupported except by the superficial reasons that he offers.

Because she has also claimed that there has been retaliation, her subjective view of the conduct of Dr. Mehlman is met because he was aware of her efforts on the Rust Litigation⁴⁰, her attempt to gain

³⁹ [CP 112.]

⁴⁰ Under Title VII it is "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or *participated in any manner* in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). The "explicit language" of Title VII's "participation clause is expansive and seemingly contains no limitations." Deravin v. Kerik, 335 F.3d 195, 203 (2d Cir. 2003).

Courts have held that the "participation clause" protects an employee who: (1) defends himself against charges of discrimination, *id.* at 203, 205; (2) involuntarily participates as a witness in a Title VII proceeding, *see Merritt v. Dillard Paper Co.*, 120

promotion, her objection to disparate treatment in work assignments, and the adverse⁴¹ consequence of his decision making. Her belief was reasonable under the circumstances that were established by her production of evidence. The trial court denied the Appellant the favor of interpretation that is paramount in a summary judgment motion – to have the disputed or ambiguous facts interpreted in a manner most favorable to the non-moving party.

F.3d 1181, 1186-89 (11th Cir. 1997); and (3) "actively participate[s]" in assisting a co-worker to assert her Title VII rights, Eichman v. Ind. State Univ. Bd of Trs., 597 F.2d 1104, 1107 (7th Cir. 1979).

⁴¹ The Washington State Legislature has provided the Court with a list of actions it has determined would constitute retaliation where an individual has filed a Whistleblower Complaint. While a claim of retaliation in a gender-based claim does not equate to the affirmative act of "blowing the whistle" on a problem in the operation of government, the list of administrative actions that can be taken provide a ready comparison for purposes of consideration of whether there has been retaliation after an employee has claimed unequal treatment.

- (a) Denial of adequate staff to perform duties;
- (b) Frequent staff changes;
- (c) Frequent and undesirable office changes;
- (d) Refusal to assign meaningful work;
- (e) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations;
- (f) Demotion;
- (g) Reduction in pay;
- (h) Denial of promotion;
- (i) Suspension;
- (j) Dismissal;
- (k) Denial of employment;
- (l) A supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistleblower; and
- (m) A change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish.

When this lack of legal weight is denied to the Appellant, in the face of the disputed facts described above and in the Appellant's opening Brief, the result is an error of law. The trial court should have denied the Motion for Summary Judgment. Indeed, the prevailing law establishes that Ms. Miville had met the burden of production to show pretext on the discrimination and on the retaliation claim. Michak v. Transnation Title Insurance Co., 149 Wn.2d 788, 794, 64 P.3d 22 (2003).

V. Conclusion:

The essential problem in all forms of discrimination and retaliation causes of action is the proof of the motivation of the employer. Courts have recognized the obvious – employers don't disclose the true basis of their adverse administrative actions. This problem, when combined with the ambiguity of terms used by the courts to assess claims of violation of law, inevitably permit each party in a discrimination/retaliation lawsuit to argue that contentions of the opposing party are a) unsupported by the proffered evidence, b) fail to meet the tests imposed to determine whether a violation has occurred, or c) lack corroboration in an objective way.

This pedagogic conundrum is exacerbated by the fact that the test used by courts to assess the merits of a claim or defenses to a claim change depending upon what stage of the proceeding is being viewed by

the court. The shifting burden procedure is applicable in a summary proceeding but not at trial.

In a summary proceeding such as was presented to the trial court in this cause, the court is admonished not to resolve controverted issues or to weigh evidence. The Appellant contends that The Honorable Christine Pomeroy did just that. She resolved many of the controverted facts and did so in favor of the moving party instead of granting to the Appellant the benefit of construing the evidence in light most favorable to the Appellant.

Notwithstanding the argument of Respondent, the Appellant contends that the trial court also erred as a matter of law in her interpretation of those facts which could be resolved without controversy. An examination of the oral ruling on partial summary judgment and then the reconsideration decision addressed in the briefs discloses the misapplication of the standards applicable in the consideration of dispositive motions in the context of a claim of discrimination or retaliation.

Appellant contends that the summary judgment should not have been entered and that this cause should be permitted to proceed to trial. The Appellant clearly established the sequence of adverse actions that, while not reducing her income, seriously affected her ability to promote, transfer and continue with her career. It is significant that persons who

had intimate knowledge of the actions and attitudes of the decision maker in this claim have provided declarations to support the contentions of the Appellant.

Thus, while the Appellant cannot produce direct evidence of the discriminatory or retaliatory animus of Dr. Mehlman toward her, she has provided the court with the closest possible evidence corroborating her contentions. The rule of law provides that her subjective belief in regard to retaliation must be given weight. This, the trial court did not do.

This Court should reverse the summary judgment ruling of the trial court and remand the proceeding for trial. And, the Court should grant the request of the Appellant for the award of attorney fees and costs involved in this Appeal.

Respectfully Submitted this 22nd Day of January 2009.


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CERTIFICATE OF SERVICE:

I, Kelsy Vincent, hereby certify that I caused the original and one copy of the Reply Brief of Appellant to be filed with the Court and copies to be served on all parties of record as follows:

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

Dated this 22nd day of January, 2009.


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