

73365-6

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NO. 73365-6

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

ANNE L. BAILEY,

Plaintiff/Appellant,

v.

KENT SCHOOL DISTRICT,

Defendant/Respondent.

RESPONDENT'S BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

ORIGINAL

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I. Introduction

This is an employment case. Plaintiff Anne Bailey, a special education teacher at Kent-Meridian grew tired of teaching alongside a contentious co-worker. She complained to her Principal about the coworker's mannerisms for years, and then, ultimately, took medical leave. When Bailey was ready to return, she demanded the creation of a "non-teaching job" as accommodation for her disability. The District refused to provide such a thing; so Bailey took additional leave, then quit.

When Bailey filed suit, she raised six or seven causes of action. Before summary judgment was decided, she voluntarily dismissed multiple claims. Therefore, on summary judgment, only three claims were adjudicated: hostile work environment, retaliation, and FMLA violations. The trial court found that plaintiff, the employee, had failed to present evidence on at least one element of each of her legal claims. It dismissed her claims on summary judgment. This Court should affirm.

Specifically, Judge Hollis Hill, the King County trial court judge, properly found that Kent School District had not created or maintained a **hostile work environment** based on any protected class. Instead, plaintiff's ongoing disputes with a contentious

colleague—even those that ultimately made the workplace uncomfortable—are simply not the type of “hostile work environment” at which the discrimination statute is aimed. The environment may have been hostile, *but not for any statutorily-forbidden reason*. Instead, there was, at most, a pedagogical dispute between two strong personalities, communicated without the usual professional courtesies. That is not a cognizable “hostile work environment.” Dismissal was proper.

The trial judge also correctly determined that, as to “**retaliation**,” the vast majority of plaintiff’s actions were *not protected activities* under RCW 49.60. Her six years worth of complaining emails about her co-worker, for example, were about the co-worker’s interpersonal and educational practices—not about race, gender, or any other protected issue, nor about “student rights.” Instead, Judge Hollis found that plaintiff’s sole “protected activity” was a June 10, 2012 letter, in which plaintiff buried a single sentence regarding unfair treatment of a minority colleague, by a colleague. (It was not a gripe about conduct directed toward plaintiff herself). In an effort at full disclosure, that same letter also contains a buried, one-sentence allegation of unfair treatment of unnamed minority students. The trial judge did not specifically mention this

comment in her written Order. However, even assuming the June 2012 letter as a whole was “protected activity,” the trial court properly found that plaintiff’s case *still foundered* on the third prong: *retaliation for* that activity. There was no showing of a nexus between plaintiff’s protected activity (the June 10, 2012 statements) and the District’s December 2012/January 2013 refusal to create a new position for her. There was no connection between the letter and the District’s decision to make Bailey wait until the semester break before returning to the classroom. Instead, as to refusing to create a new, “quasi-administrative position” for plaintiff, the District had already been steadily refusing to do so since 2011, and there were legitimate reasons for declining to do so. (Such a position simply wasn’t within the District’s budget or needs). And, as for the details of plaintiff’s work assignment upon her return in January 2013, there were legitimate reasons for requiring plaintiff to wait until the semester break before moving students and re-forming her classes. Plaintiff made no showing to the contrary, so the trial court properly dismissed that claim, too.

Finally, as to the **FMLA claims**, plaintiff argued below, and on appeal, that the District’s implementation of FMLA was in error. First, she claimed that when Kent School District required her to

exhaust her accumulated paid sick leave before going onto unpaid leave, the District violated FMLA. She relies on an 11th Circuit case, which does not so hold. The trial judge properly determined that the statute *allows* Kent's policy, and that plaintiff was never on "unprotected leave." Second, as to plaintiff's return to work, FMLA rules specifically allow educational institutions (like the District) to make teachers wait until the start of the next school term before putting them back into the classroom. The trial court also found that the "interim" position, offered to plaintiff between Christmas Break and the start of the second semester, *was* equivalent work, given its short duration and full compensation / benefits. The trial court ruled correctly on FMLA, as well as the other two claims.

In short, the District did not contravene WLAD or any other statute. While plaintiff was disabled, the District gave her paid, protected leave. When she was temporarily cleared to return to work, the District responded with an interim offer, reasonable in nature, and in compliance with the law. Its reasons for denying plaintiff's other requests were legitimate, and plaintiff offered no rebuttal proof to the contrary. The trial judge properly dismissed plaintiff's claims on summary judgment.

II. Argument

A. Standard of Review, and the Importance of the Record

This court reviews summary judgment de novo, standing in the same position as the trial court, and reviewing the record in its entirety. *Keck v. Collins*, 181 Wash App 673, 25 P.3d 306 (2014).

Summary judgment is proper if the records on file with the trial court show “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” CR 56(c). A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome. *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974); *Ranger Ins., Co. v. Pierce County*, 164 Wash.2d 545, 552, 192 P.3d 886 (2008).

Initially, the moving party bears the burden of proving no genuine issue of material fact exists. *LaPlante v. State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975). A defendant may meet this burden by showing the plaintiff lacks evidence supporting his or her case. *Young v. Key Pharms., Inc.*, 112 Wash.2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Then, the burden shifts

and the plaintiff must present admissible evidence showing a genuine issue of material fact exists. *Id.* at 225; see CR 56(e). Summary judgment is required if the plaintiff “ ‘fails to make a showing sufficient to establish ... an element essential to that party's case, and on which that party will bear the burden of proof at trial.’ ” *Id.* at 225 (quoting *Celotex Corp.*, 477 U.S. at 322).

Here, *this Court's review of the entire record is critical*— because plaintiff's motives, allegations and complaints are fleshed out there in “real-time” (contemporaneously with the allegations she made). The District made every attempt, in its original Motion, to parse the trial court record down to the bare minimum. However, given the employment context, and the sheer duration of plaintiff's repeated complaints about her employment situation, this Court is respectfully asked to review all the Exhibits as attached to the Motion and Declaration of Eric Roy (CP 14-116), the Declaration of Barringer (CP 146-159), and the Declaration of Klug (CP 160-173).

B. Statement of Facts

The District cannot accept plaintiff's argumentative Statement of Facts, and therefore provides the following:

1. Kent School District

Kent School District is a large (28,000 student) public school

district. The District (hereinafter, KSD) operates 4 high schools, 6 middle schools, 2 Academies and 28 elementary schools. (CP 147). The pertinent school here is Kent Meridian High School (KMHS). KMHS has 2,100 students, total, and approximately 200 special education students. (CP 147).

At KMHS, special education teachers have a “case load” of students. Each teacher is responsible for administrative duties for students on their case load (writing or updating Individual Education Plans, attending meetings, and other duties that are peripheral to educating special education students. (CP 147). Further, each teacher has a “class load” of students. Each special education teacher is expected to teach around 24-75 special education students per day. (CP 147).

One of the pivotal issues underlying this suit is a philosophical disagreement about whether special education teachers should only have to teach students who are also on their “case load.” Plaintiff Bailey, who was responsible for making class assignments, did not believe that was possible. She routinely assigned students to other teachers’ “class list” without regard for whether those students were also on that teacher’s “case load.” Conversely, Bailey’s co-worker, Tabitha Browning, strongly

preferred to only teach students who were also on her case load. Browning occasionally balked when receiving a non-case-load student onto her class list. It is *that* disagreement—a pedagogical dispute about student placement—that led plaintiff to conclude that Browning was “hostile” to her.

2. Plaintiff Anne Bailey’s job at Kent Meridian

Plaintiff Bailey was hired to teach special education. She had a written job description (CP 55-58), as well as a collective bargaining agreement. She had worked under Principal Wade Barringer since 2008. (CP 26).

Bailey taught for two years. Then, she was asked to take on an additional role, as a co-Curricular Leader. It paid an extra stipend. The position was not a true administrator position—not a “Department Head.” Instead, it was an appointment within the department, for a teacher willing to take on extra duties (largely, writing overdue IEPs and doing class assignment / placement of new students). The Curricular Leader taught fewer classes and instead, had an extra class hour to work on related duties.

In 2008-2009, Bailey took the Curricular Lead position. However, she did not get the training that she thought she should, from her predecessor, Ms. Browning. During that year, Bailey

taught four classes, had one teacher planning period (like all teachers), and had one hour devoted to curricular lead duties.

In 2009-2010 and 2010-2011, Bailey continued as Curricular Lead. She negotiated with the District to teach only three classes; to have the one, standard “planning period”, and then, to have *two hours* devoted to Curricular Lead duties. The District allowed that schedule change, and has continued to abide by that agreement ever since. For the 2011-2012, Bailey served as Curricular Lead, alone. Then, for the 2012-2013 school year, Bailey was going to continue in the curricular lead role. She would be sharing it, 50/50, with Shundra Rogers. Despite the job-sharing, the District was still prepared to let Bailey have two full hours a day to devote to Curricular Lead duties.

3. Interpersonal Conflict with Browning

During the years that Bailey was Curricular Leader, Bailey also taught classes. However, she claims, she did so at a personal price—working extreme hours, and dealing with a lot of “kick-back” from Browning, on issues both large and small. Over the years, she wrote myriad complaining emails, about co-worker Browning.

One of the biggest issues, according to Bailey, was that Browning refused to follow the protocol for accepting new students

to her class lists and case loads. Bailey, as Curricular Lead, was in charge of receiving new students' test scores, and then placing students on a "class list." Bailey assigned students to Browning and other teachers. But, when Bailey assigned new students to Browning's classes, Browning would second-guess or "undermine" plaintiff, balking at accepting additional students. Browning also allegedly treated Bailey disrespectfully (interrupted her classes, refused to leave voicemails, the "cold shoulder," talked about her to other teachers, etc). (CP 60-73). This "treatment" by Browning is the "intimidation" of which plaintiff complains.

So, why did Browning treat plaintiff this way? There is *only one answer* in the record. Browning's clear preference was to only teach those students who were also on her "case load." So, when she received non-case-load students into her classes, she "made waves" for plaintiff Bailey. And, this fact was well-known to the District administrators. In fact, the building Principal testified:

"[Browning] was very adamant about having only kids on her caseload in her classes[.] * * * That way, she has control of her kids' learning. If they're kids that are being served in math, then instead of having another math teacher, she has control over their IEP. She knows their goals. She knows exactly what they need to be learning versus having to—the other non-case manager special ed teacher having all the accommodations and information about those students' goals, it would cut out the middleman and she would have

that direct knowledge of what those students needed, so therefore, having all of her kids in her caseload, she'd be able to teach exactly what the IEP team and she had decided were the goals for that student.”

(CP 52). *This* reason—a desire to only teach case-load students, was the motivation for Browning’s “kick-back” against Bailey. There is no other evidence in the record.

What did plaintiff produce, to rebut this evidence on summary judgment? Nothing. She argued only that *some* of the students that Browning objected to were students of color. Plaintiff did not even attempt to prove that the students were rejected *because of* their color. In fact, *there was no race-based pattern to whom Browning “refused”*. (CP 148-149). The *only consistent pattern* was Browning’s preference to teach students who were on her case load. (CP 52). Notably, Browning never made any sort of racial remarks, nor were there ever *any* complaints—from parents, students, or other teachers—that Browning was treating students differently *based on race*. (CP 53). There was never any sign that Browning was trying to “only teach white kids.” *Browning’s classes were full of minorities*. (CP 149). Instead, the only *complaints* about Browning, from parents and students, were about her abrupt communication style. (e.g., CP 87-91).

And, when Bailey herself complained about Browning, it was not for purposes of “advocacy” for any students of color. Instead, her complaints were about her own personal situation—her dissatisfaction with how Browning treated her.

For example, in 2011, Bailey wrote a more formal, lengthy letter to Dr. Barringer, the Principal. (CP 74-82). It was slightly more formal than her previous years-worth of complaining emails. This 2011 formal letter had two apparent purposes. First, she suggested that KMHS should create a non-teaching / quasi-administrator position, within the Special Education Department. She described such a position, and then, listing her own credentials, she implied that it should be awarded to her. (CP 74-82). Dr. Barringer did not have any funding for such a position, nor was such a position consistent with departments elsewhere in the District. In the same letter, Bailey described her desire to leave classroom instruction. (CP 74-82). At that time, Bailey was not under a disability—she just thought such a position would work well in the department.

Secondly, Bailey’s 2011 letter contained yet another complaint about Browning. Bailey again described how Browning fought Bailey on accepting new students. (CP 74-82). It contained comments like, “Why is one individual allowed to circumvent team

procedures, protocol, and agreed-upon processes?”, and “Other * * * teachers have to accept new students mid-year—why is one individual allowed to test/move students—no difference.” (CP 74-82). She did *not* allege that Browning was racially discriminating—but instead, that she was “bullying” *in the manner by which* she “refused” various student assignments. (CP 74-82).

Barringer read Bailey’s letter in its entirety, and met with Bailey about it. He took notes. (CP 51). Afterward, Barringer concluded, the issues raised by Bailey’s complaint were not “disciplinary” in nature—they were interpersonal and/or procedural problems, not unlike other personality conflicts elsewhere in the school. (CP 50) (“there was nothing that I felt in those conversations that was anything for me to really be concerned about.”). There was no basis for discipline. For the remainder of the 2010/2011 school year, and the 2011/2012 school year, Bailey continued to send emails, complaining about Browning. (CP 83-93).

By June 2012, the conflict between Bailey and Browning came to a head. Bailey prepared a formal, multi-page, written “grievance” against Browning. (CP 95-108). Her letter recited, year by year, the instances in which Browning, “publicly humiliated, degraded, belittled, maligned her,” and “intimidated,” “threatened,”

and “berated,” her:

The maligning and bullying behind the scenes, and circumventing of our department protocol became so severe that I was frequently in tears, had daily migraines, and had difficulty sleeping.

She supported her 14-page grievance with 50+ pages of old emails, showing that Browning fought against many of Bailey’s student-placement decisions. (CP 95-108). Again, the letter was not “advocacy” for the affected students—it was advocacy for her own personal and mental health, as against Browning’s “bullying.”

When the grievance came to Barringer’s attention, he sat down with Human Resources and went through the grievance, page by page. His primary concern was the surprisingly-deep interpersonal conflict. He noted the brief (one sentence) implication of “racism” against Browning, but he had never seen that conduct, nor had anyone except plaintiff complained. (CP 53). There were so many racial minority students in special education that, taken alone, the list of student names was not compelling. And, although Bailey was “complaining” (briefly—one sentence) about poor treatment of a racial minority colleague, that colleague had not complained, and was still employed by the District. Barringer eventually offered mediation to the two women, through Washington Education

Association (WEA). Meanwhile, Bailey kept complaining about the unfairness of Browning refusing *non-case-load students*. (CP 112). It was not a complaint about refusing minority students—it was a complaint about non-case load students. (CP 112).

Mediation occurred August 3, 2012. Browning herself behaved appropriately. (CP 36) (“Tabitha said that she’d like to work this out so the two [] could continue working together,” and “she was sincere”). Instead, now Bailey alleged that *the mediator* had been coercive and bullying. (CP 25) (“[the mediator’s] voice was raised and angry throughout the mediation;”); (CP 37) (the mediator made “a constant barrage of questions, loud and angry tones;” “it was the conduct of the mediator and [] union representatives that offended [Bailey].”).

The mediation ended around noon. Later that day, Bailey withdrew her grievance. (CP 114). She called Human Resources, and asked questions about taking a leave of absence. At that point, however, she had not decided to request any leave.

Notably, plaintiff sent an email to Barringer on the evening of the mediation, asking about an updated letter of recommendation. (CP 116). Bailey requested such letters almost annually. Her stated reason was to keep her out-of-state certifications up to date. Dr.

Barringer assumed that, despite Bailey's fleeting reference to HR about "medical leave," and despite her asking for a letter of recommendation, she would be returning to start school as scheduled, on August 27. Barringer wrote her a very positive recommendation letter. (CP 472).

Then, on August 6, Bailey's husband, Ed, told Barringer that Bailey was "very upset by the "illegal bullying mediator and the lack of mediation." (CP 474). Mr. Bailey requested that Barringer bring the mediator to the office for 10 minutes, "to show how she acted unprofessionally," and then "dismiss" her. (CP 474). Barringer declined. It was not "his" mediator nor did he think such a session would be productive.

Plaintiff's husband has testified that:

- Q. Was it your wife's plan to return in the fall of 2012 and teach classes?
- A. Yes.
- Q. Did that plan change after the mediation?
- A. Yes.
- Q. Why did it change, from your view, as her husband?
- A. Her passion was stolen.
- Q. Elaborate, please.
- A. She was head over heels for the students. After that, she just had no passion.
- Q. In your view, as her husband, was the mediation a traumatic experience for her?
- A. She was traumatized, yes.
- Q. Prior to the mediation, had she mentioned to you potentially going on medical leave for the fall of 2012?

- A. No.
- Q. Prior to the mediation, had she mentioned to you not being able to teach three classes in the fall of 2012?
- A. No.
- Q. So as of the day before mediation, the plan was for her to return to Kent-Meridian in the fall of 2012, teach three classes and do her department head duties?
- A. Yes.

(CP 46-47). Yet this mediation—the cause of Bailey’s disability-- was not a “District” act. Even Bailey concurs with that fact.

4. Bailey gives very little notice, and goes on medical leave

As of the middle of August, Bailey was slated to return to school for a few teacher preparation days, before school began in earnest on August 27. For the Fall, she would be teaching three class hours, have one planning period, and have two hours of duties in the co-Curricular Leader position.

Between August 16 and August 23, Bailey came to school and prepared for classes. On August 16, she wrote, “I plan to be in the building all next week.” (CP 476). On August 22, she wrote Barringer to ask, “The team is wondering if we will be receiving the same kind of pressure as last year regarding IEP compliance and/or if it will intensify this year?” (CP 478). That same day— August 22—Bailey wrote to ask for a meeting with Barringer about

“department head items.” (CP 480-481).

Then, suddenly, Bailey submitted a letter dated August 24 - the Friday before the week that school would start. The letter was from Remi Gallevo, M.D., and stated that Bailey would be on medical leave from August 22 through October 1, 2012. (CP 483). It did *not* identify Bailey’s “disability” or medical issue. All it said was that Bailey “has recently been under my care for acute medical condition. I would recommend medical leave for 6 weeks. She is currently undergoing evaluation and treatment.” (CP 483).

The letter came as a shock to the District, since plaintiff had been actively working with Rogers and Barringer about “start of school” issues, just days earlier. At that point, with school imminent, Dr. Barringer suddenly had two important sets of duties to fill for approximately six weeks: Bailey’s 3 hours of classroom instruction, and also, her ½ portion of the Curricular Lead job.¹

¹ There is a strong pedagogical preference *against* bringing “substitute” teachers into special education classes, because of the unique demands of that student population. (CP 153). Having multiple teachers, or “guest” teachers, can be very confusing for special education students. Instead, when a special education teacher is gone, the District strongly prefers to have another, known, in-District special education teacher cover that class, for the sake of familiarity and continuity for the students. (CP 153). Further, a long-term substitute teacher would not be able to assist with the ½ Curricular Lead position, because that position required

Faced with Bailey's sudden six-week absence, Barringer made the decision to redistribute the students who would have been in Bailey's classes, to other existing KSD teachers. He also asked existing teachers to handle "case load" responsibilities for Bailey's students. And he asked Rogers to perform the full Curricular Lead position until Bailey's October 2 return. (CP 153).

Critically, during this same, August 22-24 time period, Bailey *again* made it clear that she wanted a "non-teaching" position for that school year. (Her first request had been back in 2011, long before her disability arose). She again asked Dr. Barringer, but it was not within his power to create any such position. Very quickly, he confirmed with the District that no such position was possible.

Plaintiff admits that *she was never "promised"* a non-teaching position. However, plaintiff claims that, by the very fact of divvying up her case load and class lists among other students, Dr. Barringer was making an implicit promise that he would, somehow, create a "non-teaching" position for her upon her return. She believes he would only have redistributed her students if he knew she would not be returning to teach. (CP40, 41). In other words,

specialized knowledge of IEPs and student placement.

plaintiff *hoped* and *assumed* that Dr. Barringer would create a non-teaching position, based on her assumptions about why he divvied up her students. But Dr. Barringer was merely following preferred protocol for covering for a teacher's medical absence. No such promise was made, nor implied by his conduct. (CP 40, 41).

5. August through October 2012

School began as scheduled on August 27. Between August and mid-September, Bailey did not report to school at all. Then, on September 20, about ten days before her medical excuse expired, Dr. Barringer wrote to Bailey, checking on her status. (CP 485). At that point, he assumed she would be returning on October 1, per her doctor's note. On September 30, Bailey emailed back, stating,

I have appointments Monday and Tuesday this week and then will give you an update on my current status. In regards to my questions, when I return to work, will my job title be SE Co-Department Head/Student Services Coordinator? Will it also be possible to schedule time to meet with you upon my return to discuss my role and responsibilities?

(CP 487-488). In other words, plaintiff was anticipating that she was coming back into a new, quasi-administrative job that she had proposed in her February 2011 letter (CP 74-82). She was clearly attempting to return to a new/different position, with a "better" title. Barringer responded the next day, stating, "we should meet prior to

you coming back to catch up and *make sure you are coming back to what you are expecting.*" (CP 487-488). In response, Bailey provided a new medical excuse which "advis[ed her] to refrain from working 10/1/12 thru 11/2/12," again without clarifying her condition, her diagnosis, or accommodations that might be needed. (CP 490).

Barringer had been counting on Bailey's return to be October 1. Given her new extension, he was now faced with another choice. Bailey would miss the bulk of the first semester. Her students would be well-settled in other teachers' classes by her new return date of November 1. Further, Bailey had not been available to help Rogers with the Curricular Lead duties, despite the fact that Bailey had still been receiving her half of the stipend for that position. Barringer decided, at that point, to simply *maintain* the re-distributed class-loads he had created in August, through the remainder of October. He also gave Rogers the full stipend for the Curricular Lead job.

Plaintiff herself did not respond to Barringer at all until October 15, when she wrote to him, asking, "could we possibly schedule a time the week of Oct. 29-Nov. 2, to meet or speak on the phone?" (CP 492). Dr. Barringer called her on November 1 - a day before she was due to return. During that call, Bailey inquired about, and Barringer explained to her, that *there was no non-*

teaching position for her. He followed that up with an email on November 2, explaining the same. (CP 494). In that November 2 email, Barringer also told Bailey, “you won’t have classes or kids on a caseload for a couple weeks at least, until we have time to create that.” (CP 494). He needed time to pull her students back out of other teachers’ classes. In response, and without explanation, plaintiff simply filed an Application for Family and Medical Leave on November 2. (CP 496-499); and stated she might be disabled for six months. (CP 496-499). It requested FMLA leave *until February 4, 2013.* (CP 496-499). For the first time, the psychotherapist’s supporting documents indicated that Bailey’s incapacity was “adjustment disorder with mixed anxiety and depression,” and that she was “ruling out PTSD, *due to the environment at work.*” (CP 496-499).

In this newest letter, Bailey’s doctor expressed that she would likely be “cleared” to return to work on February 4, 2013. The semester ended January 25, 2013. So, at that point, Barringer decided to simply maintain the redistributed class loads and caseloads *for the rest of the semester.* Second semester would begin January 28, 2013. If Bailey returned as scheduled, she would only miss the first few days of Semester #2.

6. Implementing FMLA, and the Interactive Process

Then, on November 9, 2012, Bailey filed an EEOC Complaint of Discrimination against KSD. (CP 501-504). In it, she asserted, “I have filed internal reports of harassment and discrimination with Respondent. I had verbal district approval for a non-teaching position for 2012-13 school year. I was informed during the 11/1/12 phone call to return to work *as a teacher* or resign.” (CP 501-504). The “internal reports” that she was referring to were, presumably, the written complaints about her interpersonal complaints about Browning. On the same day, she filed a nearly-identical EEOC complaint against the Union, about the August 2012 mediation. (CP 501-504).

Next, in a November 27 letter, written by Bailey’s attorney, Bailey again asserted that Dr. Barringer had “promised” her a “non-teaching” position for the 2012-2013 school year. (CP 506-507). The “promise” was implicit, she believed, in the fact that Barringer had redistributed her students to other teachers. Further, she officially requested a “non-teaching” position as an accommodation for her disability, for the remainder of the year. (CP 506-507). In another letter on December 5, 2012, Bailey’s therapist stated,

"[Bailey] has been advised to refrain from work from November 2, 2012 to 2/4/2013. It may be possible for her to return to work earlier, *provided the requested accommodations are in place.*" (CP 509). The only requested accommodation at that point, *or ever*, was the creation of a new "non-teaching position." The District understood that plaintiff was *not* medically cleared to return to teaching.

The District requested a meeting with plaintiff, to engage in the "interactive process" required by law. The meeting occurred December 10, 2012. Bailey attended with her attorney. Multiple District personnel also attended. At the meeting, the District reiterated that "teaching" was an essential function of Bailey's job and that a "non-teaching" position would not be created for her.²

² Although there are non-teaching jobs in the District for "teachers on special assignment" (TOSA), they are created out of need, are rare, and are not used as an "accommodation" for a teacher with a disability. (CP 161). They are also posted on the District's website and subject to an open, competitive selection process. (CP 161). Plaintiff brought up names of specific other teachers that she believed had been assigned "non-teaching jobs"—and the District explained to her that those teachers had been specifically hired for those unique positions. Such jobs were only created based on District-wide need. No KSD teacher, ever, had been offered a "non-teaching" job as an accommodation for a disability.

The District did offer to return Bailey to the job she was supposed to have had—teaching three class-room hours, and three hours of non-classroom duties. In addition, at Bailey’s request, it agreed that two out of the three teaching hours could be “co-teaching.” And, it agreed that Bailey would not have to teach math. The District also told Bailey that she could only resume actual classroom instruction at the start of the second semester, to avoid disruption for students nearing the end of their first term. Even so, the District offered that Bailey could, potentially, return for few days in *late* January, to prepare for her late January return.

At the end of that meeting, it was agreed that Bailey would return to work in her former capacity—as a *teacher*--at the beginning of second semester—January 28.

7. Plaintiff’s Unilateral Attempt to “Return to Work”

On December 13, just three days after the meeting, Bailey’s attorney wrote to the District and stated, “We propose that Ms. Bailey return immediately after the winter break (on January 3).” This was a total switch from the December 10 meeting. And, there was no doctor’s release for her to return to work on January 3.

The attorney’s December 13 letter also listed non-teaching duties that Bailey could perform between January 3 and the new

semester. They were, again, in the nature of a quasi-administrator. (CP 511-513). The District immediately responded on December 14, stating, "We thought we had an agreement on December 10 that you would return at the beginning of second semester." (CP 515-517). The District again explained why plaintiff could not be given a non-teaching position, and also, *why* she could not simply return to her list of preferred duties on January 3. (CP 515-517) The District wrote a similar explanation again on December 17. (CP 519-521). It also reminded her that, according to plaintiff's current medical excuse, she was not even cleared to return to work on January 3, as she was proposing to do. (CP 514-522).

KSD was closed for Winter Break, between December 20 and January 3, 2013. One day *after* the KSD offices closed, plaintiff produced a written letter from Gallevo, M.D., that Bailey was in fact now "medically cleared" to return to work on January 3, 2013, *without any restrictions*. (CP 523). Counsel also stated that Bailey would simply "show up" on January 3, prepared to teach.

KSD, through counsel, wrote back and reminded Bailey's attorney that Bailey's students were not going to be reassigned to her with only a few weeks left in their semester. This was in keeping with FMLA "special rules" for teachers. Instead, Bailey

would be able to resume her teaching duties at the new semester—January 28. (CP 524-528). The District also told Bailey that it would guarantee her a substitute teaching position *every day* from January 3 through 25, *at her regular rate of pay and benefits*. Finally, Bailey was told that she could ask Dr. Barringer if he had any other duties for her. However, the District made it clear: Bailey would not be allowed to simply “be at school” between January 3 and 25, getting paid to do quasi-administrative tasks of her own choosing. (CP 522-528).

But, on January 2, at 3:45 p.m., Bailey’s attorney emailed and again asserted that Bailey would be at school the next morning, expecting to teach her classes. She wrote:

Ms. Bailey will arrive at Kent-Meridian high School tomorrow morning expecting to perform the same or similar job duties as she performed at the end of last year and for which she is contracted to perform this year. She expects to be treated as any other employee returning from medical leave and she expects the district to comply with federal FMLA laws[.] (CP 535).

This response *completely ignored* the District’s unique status under FMLA, as an educational institution that was nearing the end of a school semester.

The District responded immediately—that same afternoon--by reiterating that plaintiff’s usual classes would not re-form until

January 28, but that in the meantime, she could substitute teach or take the other options provided back in December. (CP 530).

In disregard of this, Bailey showed up at school at 7:00 a.m., on January 3, 2013, the first day after the holiday break. She reported to Dr. Barringer's office, as if expecting to be given her classes/students. (CP 530). Dr. Barringer was at a loss for what to do with her, because she would not have a class load until the semester break. Barringer called the District's attorney. Barringer put Bailey on speaker phone, and they had a three-way call. (CP 530). The District's attorney reminded Bailey that there were no duties for her to perform, since she was not anticipated to return until beginning of second semester, and because it was too disruptive to move students around, with only three weeks left in the semester. He reiterated her options for the "gap time" between January 3 and 25. He also reminded her that she could not simply create a non-teaching job by showing up and doing whatever quasi-administrative duties she wished. (CP 156, 530).

Much like with Browning, and with the August mediation, plaintiff left the three-way call claiming that she had been "bullied," "intimidated," and "harassed." She went to her office, and sent an email stating that, "There is currently no assignment available for

me at Kent Meridian.” (CP 532). The District responded, stating, “Mr. Lind did say that you have the opportunity to come observe * * * for one period per day for the next three weeks.” (CP 532). Instead, Bailey apparently went back to her therapists, told them that she had been “bullied” and intimidated by the District, and now could not return to work at all.

Meanwhile, in an effort to work with her, the District took another look at possible duties for Bailey to fill the “gap time” between January 3 and 25 (CP 537). It found that it would have enough work for Bailey, to justify allowing her to return on *January 14*. (CP 537). Dr. Barringer emailed plaintiff about that potential on January 6, with no response. (CP 539). He emailed that offer to Bailey again on January 9, again with no direct response. (CP 541). Instead, Bailey emailed Human Resources, on January 10, indicating that she would be using the full 12 weeks of FMLA leave, ending February 1, 2013. (CP 543).

Then, on January 17, 2013, therapist Galaszewski, Ph.D., wrote to the District. Her letter was based on Bailey’s version of the January 3 three-way telephone meeting. It stated, “she [Bailey] was released to go back to work on January 3, 2013, earlier than the expected return on her FMLA of 2/4/213. However, the occurrences

on 1/3/2012 exacerbated her condition. I am recommending that Bailey stay out for the full twelve weeks of FMLA through February 3, 2012.” (CP 545). And again, on January 31, just two days before plaintiff was scheduled to return, Bailey presented yet another doctor’s note. This time therapist Galaszewski stated, “unfortunately, when [Bailey] returned to work [on January 3], the district’s attorney’s behavior was hostile and intimidating and this caused trauma to my client and exacerbated her condition. Therefore, in my professional opinion, Ms. Bailey cannot return to this work environment again.” (CP 547).

Immediately upon receipt, the District requested a meeting with Ms. Bailey. (CP 549-550). Instead, Bailey’s attorney responded on February 6, 2013, stating, “Ms. Bailey will follow her medical provider’s recommendation included in the letter that has been forwarded to you, that she not return to her employment with the Kent School District.” (CP 552).

The District had no choice, at that point, but to treat Bailey’s response as a “resignation.” The District wrote to Bailey on February 14, 2013 attempting to confirm that she was resigning. (CP 554). She made no response. And, from that time forward, plaintiff has never returned to work. In 2014, she filed this action.

C. Hostile Work Environment

Workplace harassment claims often give rise to “hostile work environment” claims. *See, e.g., DeWater v. State*, 130 Wash.2d 128, 134, 921 P.2d 1059 (1996). To establish a hostile work environment claim, the employee must demonstrate that there was (1) offensive, unwelcome contact that (2) occurred *because of* being in a protected class, (3) affected the terms or conditions of employment, and (4) can be imputed to the employer. *Glasgow v. Georgia-Pacific Corp.*, 103 Wash.2d 401, 406–07, 693 P.2d 708 (1985).

1. “Bullying” is not enough

Merely having a “bully” in the workplace is not enough. Under the second element, a plaintiff must show that the “harassment” was “*because of* being a member of the protected class.” Employers have routinely won summary judgment, when they can show that the workplace “harasser” was *not* motivated by the victim’s membership in any protected class, but was, instead, an “Equal Opportunity jerk”—*i.e.*, simply a hard person to work with. *See, e.g., Crownover v. State ex rel. Dept. of Transp.*, 165 Wash.App. 131, 265 P.3d 971 (2011). A “hostile work environment” claim *does not arise* unless the harasser is motivated by the

victim's protected status.

Here, Bailey did not produce any evidence that her “harasser,” Browning, was motivated by *plaintiff's* race, gender, sexual orientation, or any other protected class. Plaintiff has conceded that she, herself, is not in any protected class. In fact, *plaintiff herself complained*, repeatedly, that Browning was *motivated* by genuine and deep-seated resistance to teaching students not on her case-load. (CP 59-60, 64-72). Bailey's own emails are her undoing, as the trial court found. As plaintiff herself repeated complained, Browning's motive was not plaintiff's race, *nor even the students' race*. Instead, Browning was motivated by the relative ease of only having to teach classroom students who were also on her case-load. (CP 59-60, 64-72). And, plaintiff Bailey became Browning's “target”—*not because of Bailey's innate characteristics* (i.e., race), but because *she was in charge of assigning* those new students to Browning.

2. “Advocacy for protected class”

Bailey's argument morphed below, and again on appeal, into an “associational discrimination” claim. She argued, “Ms. Bailey's protected class status arises out of her actions to protect the disabled students of color.”

Associational discrimination occurs when a non-minority is discriminated against for “siding with” a minority.³ But not every federal circuit recognizes race-based association discrimination claims. In those that do, the required showing is strenuous. See *Holcomb v. Iona College*, 521 F3d 130 (2d Cir 2008) (discrimination against white man because he married black woman). The law requires a showing that the adverse action was *because of* the plaintiff’s inter-race association. *Id.*

At the time of *Holcomb*, only the 2nd, 5th, 6th and 11th circuits allowed such claims. The 9th Circuit has not embraced associational discrimination. In the 9th Circuit case plaintiff cites—*Johnson v. Riverside Healthcare System*, 534 F.3d 1116, 1122 (9th Cir 2008)—the Court held only that poor treatment of other minorities could be “relevant to” discrimination, but the plaintiff himself *was* in the protected class.⁴ *Id.* at 1122. Clearly racially

³ See *Barrett v. Whirlpool*, 556 F3d 502, 515 (6th Cir 2009) (white females, friendly with black females, called “nigger lover,” and told to “stay with their own kind.”); see also *EEOC v. RTG Furniture Corp.*, No. 8:04-cv-T24-TBM (M.D. Fla, 2006); *EEOC v. Jax Inn’s*, No. 3:04-cv-978-J-16-MMH (M.D. Fla. 2006).

⁴ In *Johnson*, a black male doctor encountered one serious episode of race-based poor treatment. However, standing alone, the episode was not pervasive enough to establish his claim. So he offered evidence that another black man had also been treated poorly. The *Johnson* court said, “it is true that discriminatory conduct directed at an individual other than the plaintiff *may be relevant* to a plaintiff’s hostile work environment claim in certain circumstances.” However, *Johnson* did not address “associational discrimination,” nor did it import such a cause of action from other federal districts.

motivated treatment of other minorities was “indirect” evidence that the treatment of the plaintiff was, more likely than not, also racially motivated.

Even if “associational discrimination” claims were cognizable in this court, they still require a showing that the non-minority suffered adverse actions “*because of*” their advocacy for, or association with, minorities. Bailey did not present any such evidence.

a. Bailey wasn’t a race advocate

Bailey would first need to show that she “*advocated*” for students of color. But Bailey had complained about Browning steadily since 2007, and *all* of her complaints were about her own inconvenience from Browning’s circumvention of protocol. (CP 59-93). The first and *only* time that plaintiff Bailey allegedly “went to bat” for students of color was one six-word phrase, buried in her lengthy June 2012 diatribe. (CP 94-108). Bailey spent 10 pages complaining that Browning’s antics created more work for Bailey. Then, on page 6, Bailey threw in a single phrase:

Tabitha continually circumvents department and building protocol regarding IEP team decisions, SE student placements, SE student scheduling and registration, and

presses staff to make changes to change decisions, in particular with students of color that have a specific skill set, behaviors, or are challenging.

(CP 100). This phrase is not “advocacy” for those students. But even assuming this was “advocacy,” the remedy she sought was *not* protection for those students of color—it was *relief for herself* from the workload created by Browning. Exhibit 15 continues by stating, “I am unable to function at my job under the constant * * * maligning of my leadership;” “[Tabitha’s] continued harassment has * * * impacted my health.”). Even in mentioning students of color, Bailey was not “advocating” for any protected class—she was advocating for herself.

b. The District wasn’t retaliating for “advocacy”

Further, Bailey would have to show that the District mistreated her *because of* this advocacy. *Barrett v. Whirlpool*, 556 F.3d 515 (2009). There is absolutely no nexus here. District personnel who saw Bailey’s June 2012 letter did not perceive Bailey as raising race issues. They perceived it as yet another gripe against the mannerisms of a co-worker. Because of that, they provided an opportunity for interpersonal mediation. The District’s later actions toward Bailey have no connection whatsoever to Exhibit 15’s alleged “race advocacy.”

3. “Unprofessional” does not equal “hostile”

Further, Bailey produced no evidence to satisfy the third element—that the allegedly harassing conduct sufficiently affected the terms and conditions of her employment. Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment. *Glasgow*, 103 Wash.2d at 406, 693 P.2d 708; *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Plaintiff testified that Browning never physically threatened her, nor used discriminatory words toward her or others. Instead, Browning's conduct which supposedly made Kent Meridian High School unbearable, was in the nature of rudeness or professional discourtesy. The “tone” of the Bailey/Browning relationship is set forth in Bailey's repeated written complaints. (CP 59-72). It is a far cry from “unbearable.” Plaintiff's “hostile work environment” claim was properly dismissed.

D. Retaliation

An employer may not retaliate against an employee for opposing the employer's discriminatory practices, or for filing a discrimination claim against the employer. RCW 49.60.210. To establish discriminatory retaliation under RCW 49.60.210, an employee must prove that “(1) he or she engaged in

statutorily protected activity, (2) an adverse employment action was taken, and (3) there was a causal link between the employee's activity and the employer's adverse action." *Estevez v. Faculty Club of UW.*, 129 Wash.App. 774, 797, 120 P.3d 579 (2005).

The protected activity opposed by the employee must be one recognized under chapter 49.60 RCW, and the plaintiff must prove that he or she reasonably believed that *the employer's conduct was unlawful discrimination. See Coville v. Cobarc Services, Inc.*, 73 Wash.App. 433, 440, 869 P.2d 1103.

Ms. Bailey claims retaliation, either for making various complaints against Browning, or for asserting her FMLA rights. However, for these claims to be cognizable, the employee must first show that she opposed some activity, by the employer, which is recognized under chapter 49.60 RCW, the anti-discrimination statute. "Retaliation" in a vacuum is not cognizable. It must be retaliation for engaging in a statutorily-protected activity.

1. Bailey was not discriminated against

Bailey herself did not personally experience *any* discrimination. She testified:

Q. During your years at Kent-Meridian, did anyone,

including Ms. Browning, make any sexually inappropriate comments to you?

* * *

- A. No.
- Q. During your years at Kent-Meridian, did any staff make any comment to you about the fact that you're a female teacher, that you're a woman?
- A. No.
- Q. During your years at Kent-Meridian, did any staff make any ageist remarks to you, like say that you were too old to be teaching, or anything like that?
- A. No.
- Q. Did anyone at Kent-Meridian make any comments to you relating to your national origin?
- A. I don't recall any statements like that.
- Q. And Ms. Browning's behavior toward you was never sexually inappropriate?
- A. No.

(CP 30-31).

Ms. Bailey was not treated differently for any characteristic she possessed.

2. Retaliation was not for protected activity

Bailey's first "theory" of retaliation was that she was retaliated against for complaining about Browning. But Bailey's complaints against Browning were not based on any aspect of RCW 49.60. Instead, Bailey's complaints against Browning were based on disagreements about how to assign students to case loads, on differing communication styles, and on opposing pedagogical philosophies. That much is apparent from the very

face of Bailey's complaints about Browning. (CP 64-82, 86-90).

In fact, in her testimony, Bailey has described that Browning's "harassing behavior" was because of professional disagreements about student placement:

- Q. Was this interference with your job as curricular leader, did she do that personally toward you, meaning in one-to-one contact?
- A. No, she interfered with my students I was managing, made complaints, which interfered with my students I was managing, giving them inaccurate information, creating more workload on me. It had a direct impact on me, my workload, my students. Made complaints to my supervising administrators, complaints to other staff in the department, which created dissension. All of that directly came back, impacted me, my workload personally.
- Q. So that's what you consider to be the harassing behavior?
- A. Yes.

(CP 38). Plaintiff was complaining about Browning's responses to various student placements. That is not a cognizable RCW 49.60 activity.

3. Bailey was not "whistle-blowing" on racial discrimination by Browning.

Bailey claims, now, that Browning was disproportionately rejecting students of color for placement in her classes, and that Bailey was somehow a "whistle-blower" against Browning's race discrimination. However, Bailey never heard Browning make *any*

racial remarks (CP 28). Furthermore, none of the parents complained that Ms. Browning was discriminating because of color. (CP 32). (“They complained about the different treatment. They did not say of color.”). The students themselves did not complain that Browning was treating them differently because of race. (CP 33). Bailey has no idea what percentage of Kent-Meridian students are even racial minorities—but it is more than 60%. (CP 27); (CP 148-149). Browning did not balk at any particular group of minorities—her classes were full of minorities. And, plaintiff cannot identify any race-based pattern in those students that Browning “rejected.”

Instead, in those times when Browning did balk at a particular student’s placement, *there was an identified educational-based reason why she resisted.*⁵ Principal Barringer knew that Browning had a strong preference for teaching only “case load” students. She had articulated a legitimate educational reason why she felt that way. (CP 52). That is the *only* pattern in Browning’s resistance to certain students’ placement.

⁵ For example, in 2011-2012, the two teachers met about a particular student that Browning “rejected.” Browning explained that “he doesn’t belong in this class. He needs to be in a lower level class. He can’t do the math.” (CP 34-35). Bailey tried to get Browning to consider a different educational approach with the student, and Browning responded that “he takes up too much of our time; he doesn’t belong in here.” (CP 35).

In short, there is no underlying showing that Browning was, in fact, discriminating against students of color, or that plaintiff was “whistle-blowing” about that fact. Instead, like plaintiff summarized:

Q. These individuals that were complaining or reporting to you [about Browning,] did they make a specific connection between how the student was being treated and that student’s color or ethnicity?

A. I think it was pretty obvious. I don’t recall a specific—I don’t recall.

(CP 32-33)

Further, even if Bailey’s conduct had been directed at “discrimination,” Bailey cannot point to any evidence that KSD’s actions toward her were related to her many complaints against Browning. To the contrary! Plaintiff herself testified:

Q. Did anyone from the Kent School District threaten you with discipline or a letter of improvement or anything like that, with respect to your complaint against Tabitha [Browning]?

A. No. * * * * *

Q. So, after you made the complaint against Tabitha, no one at the district said that, you know, you wouldn’t have your job for the fall of 2012; correct?

A. That’s correct.

Q. No one at the district said you’d be subject to any kind of discipline for complaining about Tabitha [Browning]?

A. Correct.

(CP 39, 42-43).

Instead, the District took Bailey's complaints at face value. When Bailey complained about Browning, Dr. Barringer met with and counseled Browning. When Bailey formally filed a grievance, Dr. Barringer referred them both for mediation. His goal was to enable both teachers—good teachers—to remain in the department. Bailey's complaints about Browning are simply not a cognizable basis for a "retaliation" claim, and even if they were, there is no evidence that they triggered, or were the cause of, the District's later conduct toward Bailey.

4. Retaliation for Having a Disability / Exercising FMLA rights

In contrast, Bailey's claim of disability, or her assertion of rights under FMLA could, theoretically, be the basis for a cognizable "retaliation" claim. This would be akin to a claim that she was retaliated against for having a disability. However, plaintiff did not assert her rights under FMLA until *long after* the District had already denied her requested accommodation. Plaintiff had asked for the creation of a new, non-teaching position back in February 2011. It was denied. She asked again in summer 2012. Both times, her request was denied because there simply is no student need, or funding, for such a position. The fact that her

November/December 2012 request for such a position was also denied is therefore not “retaliatory” for her November 2012 assertion of FMLA rights.

Plaintiff has now identified three claimed “adverse employment actions”: (a) the District refusing to return her to work on January 3; (b) the District offering her only a substitute position for three weeks; and (c) the District “yelling at her” on January 3. She claims these actions were “retaliation” for having complained about Browning in June 2012, and for requesting accommodations in November/December 2012. But the District has provided its reasons for those actions, and they are not based on “retaliation.” So, to survive summary judgment, plaintiff must present evidence showing that the District’s stated reasons are pretextual/unworthy of belief. *See Domingo v. Boeing Employees’ Credit Union*, 124 Wash.App. 71, 98 P.3d 1222 (2004) (“If a plaintiff cannot present evidence that the defendant’s reasons are untrue or mere pretext, summary judgment is proper.”)

As to retaliation for complaining about Browning, plaintiff’s gripes about Browning were not a statutorily protected activity under RCW 49.60.210 (the first element of a retaliation claim). Any “advocacy” in her June 2012 letter (CP 95-108) was not for minority

students--but for herself. There is no other way to construe it. Nor can she show any *nexus* between her complaints about Browning and any action taken by the District. She admits as much. (CP 39, 42-43) (no threats/discipline from District after she complained).

As to the District retaliating for Bailey claiming a disability, there is also no pretext. The first reason the District did not put Bailey back to work on January 3 is because *her first request to return to teaching* before the beginning of the second semester was at 3:00 p.m. on January 2. *Right up through January 2*, plaintiff was still insisting on a non-teaching position (which she now admits was an *unreasonable* accommodation). (CP 528, 534-535). By January 6, however, the District did make an offer of interim employment, reiterated on January 9.

The second reason was that disruption for students would be substantial. Three weeks remained in the term. The District repeatedly advised that an end-of-term return would be disruptive (CP 515-522). It had legal authority in 29 CFR 825.600 (“employer *may require the employee to continue taking leave* until the end of the term[.]”) The decision for plaintiff to stay on leave through January 25 was not “retaliation” for anything—it was driven by the lateness of plaintiff’s change-of-heart, and good educational policy (a policy specifically *recognized by the federal government* in creating 29 CFR 825.600).

The decision to offer plaintiff a substitute position was also allowed by 29 CFR 825.602 (“the employer has the option *not to require the employee to stay on leave* until the end of the school term[.]”) On January 2, when plaintiff finally agreed that she had to teach and was medically cleared to do so, the District had the option of returning her to the classroom, *or not*. It had already opted not to, until the end of term. Then, when plaintiff insisted on working between Jan. 3 and 25, the District prepared alternative duties for her. One of three options presented—full time substitute teaching—had the same duties, same pay, same benefits, and same hours. The fact that, *for three weeks*, she would have slightly less “status” and “authority” than a regular teacher is not a violation of FMLA. See 29 CFR 825.215(f) (*de minimus* exception), and *Christiano*, 93 Wash. App at 95 (no violation by offering similar part-time position with transfer to similar full time position within four months).

Another option was to start January 14, doing “catch-up” work on IEPs and other necessary tasks. Again, there was simply no retaliation here.

In short, there is no evidence that Bailey engaged in statutorily-protected activity covered by RCW 49.60, or that she was treated unfavorably as a result. Her “retaliation” claims must fail.

E. FMLA

The purpose of the FMLA is to protect an employee's job while she is on a leave for a serious health condition. 29 U.S.C. § 2601(b)(2). Employees returning from FMLA leave, “shall be entitled” to be restored to his former position, or an equivalent position, of employment. 29 U.S.C. § 2614(a)(1). The FMLA requires an employee returning from FMLA leave to be “restored to the same position . . . or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.” FMLA Field Operations Handbook § 39a02(a). RCW 49.78.280(1)(a)(ii) provides a nearly identical provision.

1. Educational law is different

In the context of education, however, FMLA is modified when it comes to restoring an educator to his former position. *FMLA has a specific set of rules for teachers.* These rules apply to “public school boards and public and private elementary and secondary schools.” FMLA Field Operations Handbook § 39L00(a). While the state statute does not contain a similar provision for educational agencies, the statute must be “construed to the extent possible in a manner that is consistent with similar provisions, if any, of the [FMLA]. . . .” RCW 49.78.410. In essence, this means that the FMLA rules for educational agencies should be read into the

state statute. *See id.*

In a school setting, the employer district may require an employee to take continued leave, notwithstanding the ability or willingness of the employee to return to work sooner. *See* 29 U.S.C. § 2618(d)(1)(A)-(B). Specifically, if an employee begins FMLA leave “more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continuing taking leave” until the end of the school term, providing two elements are satisfied. First, the leave must be of at least three (3) weeks in duration. *See id.* at (d)(1)(A). And, the employee’s return to employment must occur during the 3-week period prior to the end of the term. *See id.* at (d)(1)(B). Those conditions were met here. Plaintiff’s stated return date was well within the 3-week period prior to January 28. Therefore, the District had the right to ask her to wait until the semester break. The sudden reversal and new medical excuse, presented without warning on January 2, does not somehow “undo” the District’s right to wait for the semester break.

These federal regulations share the same goal as Dr. Barringer and KMHS. It is disruptive and unnecessary to insert a returning teacher back into the teaching schedule, right at the end of a school term. Therefore, returning a teacher to work at the start

of the next term is deemed legally adequate.

Here, given the timing of Ms. Bailey's leave (longer than three weeks) and attempted return near the end of the term, the KSD had no duty to offer Bailey an equivalent position until the second semester, which began January 28, 2013. The District could have required Bailey to simply continue on "leave" status until January 28. She had no right to demand reinstatement before January 28.

2. An "equivalent position" within the education context

Furthermore, Bailey was offered a return to an equivalent position, starting January 3. Ms. Bailey was offered guaranteed opportunities for full time substitute teaching, along with her pre-leave compensation package (except for the Curricular Lead stipend, which went 100% to Rogers). Under the FMLA's special educational agency rules, the determination of an "equivalent employment position" is made on a case-by-case basis, looking to "established school board policies and practices, private school policies and practices, and collective bargaining agreements." 29 U.S.C. § 2618(e). This is also consistent with the WFLA. See RCW 49.78.410. Given KSD policies and practices, this offer was

substantially equivalent to a full-time teaching position.⁶

To the extent that Bailey suddenly stated she was ready to “return to work” on January 3, the KSD satisfied its obligation to offer Bailey an equivalent job position upon her return from FMLA leave.

Plaintiff’s last argument is that the District’s “exhaustion FMLA policy is illegal. The KSD policy allows employees to take FMLA leave after exhausting any available paid leave, thereby *extending* their total amount of leave.⁷ (CP 422-439). The enacting regulation, 29 CFR 825.207(e), *specifically allows this*.

Nevertheless, plaintiff cites an 11th Circuit case, *Strickland v. Water Works*, 239 F.3d 1199 (2001), which holds find that *mis-use* of such a policy *could* violate the purposes of FMLA (forcing “unprotected” leave to be used first could lead to abuse). But here, the District’s own policies create the “safety net” that plaintiff alleges was

⁶ In *Christiano v. Spokane County Health Dist.*, the employee was placed in a similar part-time position at the same pay rate and transferred to a similar full-time position within 4 months. 93 Wash.App. at 95. The court held that the employer satisfied its policy of providing an employee returning from leave with a similar position. *Id.* at 95. Similar to the *Christiano* case, Ms. Bailey was not only offered a full-time similar teaching position at the same pay rate, with the same benefits, but was going to be returned to her normal full-time position within three weeks—on January 28.

⁷ Here, for example, plaintiff was given *twice as much leave* as FMLA would give, by first taking August through November as “paid” leave, and then November through February as FMLA (unpaid but protected) leave.

missing. The District's own leave policy (Policy 5230) provides that, when the District requires an employee to first use paid sick leave, *that paid sick leave is also protected*, and the employee's right to return, still intact. (CP 422-439). Rather than forcing "unprotected leave," the District gives employees *additional* protected leave, *with pay, and* a guaranteed right to return. (CP 422-439). Plaintiff was never on any sort of "unprotected" leave. (CP 422-439).

III. Conclusion

The trial court found that Bailey had failed to present evidence to support at least one element of each of her three claims. Upon de novo review of the record, this Court should also so find. This Court should uphold the grant of summary judgment to Kent School District, as against plaintiff's claims of hostile work environment, retaliation, and alleged FMLA violations.

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Respectfully submitted,



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