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COURT OF APPEALS
STATE OF WASHINGTON
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No. 73365-6

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

ANNE L. BAILEY,

Petitioner/Appellant,

v.

KENT SCHOOL DISTRICT,

Defendant/Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This is a case about a teacher who was so severely harassed in the workplace that she suffered psychological injuries for which she was forced to take medical leave. Upon her return, her employer, despite her employer's knowledge of her fragile mental state, subjected her to aggressive intimidation. Further, her employer refused to allow her to return to work and failed to offer her an equivalent position. These events resulted in her doctor concluding that it was unsafe for her to return to this workplace.

Appellant Ms. Bailey seeks reversal of the April 9, 2015 King County Superior Court order dismissing her claims against the Respondent Kent School District (KSD). First, the trial court erred when it dismissed her retaliation-based hostile work environment claim when she complained about the adverse treatment of disabled students of color. Second, the trial court erred when it dismissed her retaliation claim after she sought an accommodation from KSD, complained to KSD that she was being treated in a disparate manner, and filed a discrimination charge with the EEOC for KSD's failure to accommodate her disabling condition. Third, the trial court erred when it dismissed her claim that KSD violated her rights under the Family Medical Leave Act (FMLA).

II. STATEMENT OF REPLYING FACTS

In its responsive brief, KSD made several misstatements of fact. KSD asserts that Ms. Bailey's hostile work environment claim arises from a "pedagogical dispute about student placement." Response p. 8. This is false. Ms. Bailey's work environment became hostile following an accumulation of persistent hostility and intimidating conduct from Ms. Browning arising out of Ms. Bailey's efforts to protect students of color with disabilities. This conduct includes Ms. Browning's name calling and undermining Ms. Bailey's authority during meetings over which Ms. Bailey was presiding. CP 271. Ultimately, Ms. Browning's incessant harassment frequently left Ms. Bailey in tears, with daily migraine headaches, and disrupted sleep patterns. CP 271.

KSD claims the reason Ms. Browning would continuously undermine Ms. Bailey's decision to assign new students to Ms. Browning's classes was because Ms. Browning preferred to only teach those students who were on her caseload. Response p. 10. However, the issue is not that Ms. Browning resisted the placement of new students in her class; rather, the issue is that Ms. Browning only resisted placement of *students of color*. CP 230. In fact, Ms. Browning demonstrated a consistent pattern of treating students of color differently than other students. In addition to refusing to allow several new African American students to enter her class, Ms.

Browning also imposed discipline and criticism on students of color that she did not impose on other students—she even stated audibly in class that she did not want a certain African American student in her class. CP 226-228.

KSD further claims that Ms. Bailey's complaints about Ms. Browning were not for purposes of advocacy for students of color—this is inaccurate. Response p. 12. Ms. Browning only started harassing Ms. Bailey after Ms. Bailey complained that Ms. Browning was treating students of color differently. Ms. Bailey raised concerns about Ms. Browning's treatment of students of color in order to personally advocate for those students. In February 2011, Ms. Bailey wrote a letter to Dr. Barringer in which she specifically identified the problems that were occurring as a result of Ms. Browning's discriminatory conduct. CP 237. Additionally, in Ms. Bailey's June 2012 complaint to Dr. Barringer, she named several of the students against whom she believed Ms. Browning was discriminating—several African American students and two Hispanic students. CP 272-276. Further, Ms. Bailey received complaints from several students of color and from the parents of students of color that they believed Ms. Browning was treating their children differently than other students. CP 32-33.

KSD states that the mediation engaged in between Ms. Bailey and Ms. Browning was the *cause* of Ms. Bailey's disability. Response p. 17. KSD's assumption of causation from correlation is incorrect. The mediation

took place as an attempt to *remedy* Ms. Bailey's complaints that Ms. Browning was targeting her. CP 123. Furthermore, there is not one shred of expert evidence to suggest that Ms. Bailey's disabling condition was caused by the August 2012 mediation.

Dr. Barringer's promise of a non-teaching position was not an "implicit" one on which Ms. Bailey unreasonably relied as KSD characterizes it—Dr. Barringer explicitly agreed with Ms. Bailey that the Special Education program would benefit from her service in a non-teaching position. CP 390. He then told her he would have to get approval from KSD's Special Education Administration for such a position. CP 318. When Dr. Barringer did not get the approval he sought, he presented Ms. Bailey with an ultimatum—either teach full time or resign. CP 252. During this encounter, Dr. Barringer told Ms. Bailey that she had "emotional problems" and proceeded to communicate with her in a cold, distant, and stern manner, completely unlike their previous collegial interactions. CP 252-253.

KSD complains that Ms. Bailey changed her position just three days after their December 10, 2012 meeting (referring to a letter sent from Ms. Bailey's counsel to KSD's counsel on December 13, 2012; *see* CP 213). Response p. 25. KSD claims that at the December 10 meeting, it was agreed that Ms. Bailey would return to teaching on January 28 and that just three

days after this meeting on December 13, Ms. Bailey informed the District that she would return on January 3. *Id.* This is an incorrect statement of the facts. At the December 10 meeting, everyone agreed that Ms. Bailey would return to work in January 2013. CP 213. No final decision had been made by the District about her date of return during that meeting. CP 213. The December 13 letter to KSD expresses Ms. Bailey’s request to return to work “early in January”—which is consistent with the decision made at the December 10 meeting for Ms. Bailey to return in January 2013. KSD admits that as of December 21, Ms. Bailey was medically cleared by her doctor to return to work January 3, 2013. Yet, KSD refused to allow her to return to work, denying her the opportunity to prepare for the upcoming semester. CP 528. Ms. Bailey’s return date was more than three weeks before the end of the semester, at which point she was entitled to return to work in the same or similar position. CP 154. KSD’s Human Resources Director was unable to identify any other teacher returning from medical leave who was denied the opportunity to return to work when released to return and required to await the beginning of a new semester. CP 307.

KSD states that Ms. Bailey’s return date was well within the three-week period prior to the new semester starting on January 28, 2013. Response p. 47. This is false. Ms. Bailey’s return date was January 3, which is more than three weeks before January 28—exactly 25 days or three weeks

and four days. Although this may not be a large margin, it meets the statutory requirement that if a teacher returns to work more than three weeks before the end of the term, the teacher is to be returned to his or her job.

Contrary to KSD's assertion, when Ms. Bailey arrived at school on the morning of January 3, she had no expectations of teaching. Response p. 28. Rather, Ms. Bailey made it clear that she was returning early to prepare for the upcoming semester. Although KSD offered Ms. Bailey a potential substitute position starting January 3, 2013, KSD provided her absolutely no assurance that she would ever return to a full-time teaching position in special education. Finally, already in a fragile state after suffering from severe anxiety and depression, General Counsel Lind's objectively aggressive and hostile confrontation with Ms. Bailey on the morning of January 3 so severely exacerbated her disabling condition that her medical provider refused to allow her to return to work thereafter. CP 283.

III. ARGUMENT OF COUNSEL

A. The trial court's dismissal of Ms. Bailey's retaliation-based hostile work environment claim was error and should be reversed.

1. Ms. Bailey's claim arose due to her attempts to protect students from race and disability discrimination—which is distinguishable from associational discrimination.

Ms. Bailey's hostile work environment claim arose from her attempts to advocate for the disabled students of color who were being

treated differently. An employee's complaints about the treatment of others is considered a protected activity, even if the employee himself is not a member of the class that he claims suffered from discrimination, and even if the discrimination he complained about was not legally cognizable. *Ray v. Henderson*, 217 F.3d 1234, 1240 (2000). When a person reasonably believes he or she is opposing discriminatory practices, RCW 49.60.210(1) protects that person whether or not the practice is actually discriminatory. *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 743, 332 P.3d 1006, 1011 (2014). Washington cases likewise have held that a plaintiff need not prove the conduct opposed was in fact discriminatory but need show only that he or she reasonably believed it was discriminatory. *Id.*

By contrast, associational discrimination occurs when a nonminority is discriminated against for *associating* with a minority. *See Holcomb v. Iona College*, 521 F.3d 130 (2nd Cir.2008). This does not apply here. Ms. Bailey was not targeted for *associating* with minorities—rather, she was targeted for attempting to *protect* minority students from disparate treatment. Ms. Bailey witnessed Ms. Browning treating disabled students of color differently than other students and subsequently reported it to protect those students from discrimination. It was Ms. Bailey's complaints about Ms. Browning's treatment of the disabled students of color that triggered

Ms. Browning's harassment of Ms. Bailey. Ms. Bailey's actions are, therefore, protected activity.

2. Ms. Browning's harassment of Ms. Bailey amounted to more than mere bullying or unprofessionalism.

Ms. Bailey was the continuous target of Ms. Browning's harassment because of Ms. Bailey's advocacy for the disabled students of color against whom Ms. Browning was discriminating.

To determine whether conduct was severe or pervasive enough to affect the terms and conditions of employment, we look at the totality of the circumstances, including the frequency and severity of harassing conduct, whether it was physically threatening or humiliating, or merely an offensive utterance, and whether it unreasonably interfered with the employee's work performance.

Alonso v. Qwest Commc'ns Co., 178 Wn. App. 734, 751, 315 P.3d 610, 619 (2013). KSD contends that merely having a bully in the workplace is not enough for a hostile work environment claim. Response p. 31. It is undisputed that Ms. Browning bullied Ms. Bailey. Response p. 31. But when viewed in the totality of the circumstances, the hostility Ms. Bailey suffered goes beyond mere bullying. Ms. Browning repeatedly and continuously harassed Ms. Bailey throughout the entire 2011-2012 school year. Ms. Browning specifically targeted Ms. Bailey. Ms. Browning persistently undermined Ms. Bailey's leadership authority with their colleagues and administrators. Ms. Browning called Ms. Bailey names and humiliated her during staff meetings over which Ms. Bailey was presiding.

Ms. Browning even placed bets with Ms. Bailey's colleagues that Ms. Bailey did not have it in her to succeed in her job.

Ms. Browning's active torment of Ms. Bailey significantly interfered with Ms. Bailey's ability to successfully do her job. Ms. Browning's actions were so severe that Ms. Bailey suffered physical symptoms of distress which bled from her work life into her personal life—her distress triggered migraines on a daily basis and caused disruptions to her sleep patterns. Eventually, her condition was so disabling Ms. Bailey was forced to take medical leave.

B. The trial court's dismissal of Ms. Bailey's retaliation claim against KSD was error and should be reversed.

- 1. Ms. Bailey suffered retaliation from KSD after she sought an accommodation, complained to KSD that she was being treated in a disparate manner, and filed a discrimination charge with the EEOC for KSD's failure to accommodate her disabling condition.**

Making a request for an accommodation is a protected activity. *Coons v. Secretary of U.S. Dept. of Treasury*, 383 F.3d 879, 887 (9th Cir.2004). Filing a complaint with the Equal Employment Opportunity Commission (EEOC) is a protected activity. 42 U.S.C.S. § 2000e-3(a). Making an informal complaint of discrimination to a supervisor is also a protected activity. *Ray*, 217 F.3d at 1240.

Ms. Bailey was retaliated against for engaging in three distinct types of protected activity. First, for seeking an accommodation for her disabling

condition in August 2012. Second, for filing an EEOC charge of discrimination in November 2012 after KSD failed to accommodate her disabling condition. Third, for claiming that she was being treated in a disparate manner in November 2012.

In August 2012, Ms. Bailey and Dr. Barringer discussed how Ms. Bailey could best transition back to work following her medical leave. She told him that her doctor thought a non-teaching position that focused on administrative duties in Special Education would be a reasonable accommodation as it would best assist her transition back to work. CP 318. Although Dr. Barringer agreed, he had to get approval from KSD's Special Education Administration. CP 318. KSD did not approve Ms. Bailey's accommodation for a non-teaching position. CP 322.

On November 1, 2012, Dr. Barringer sternly berated Ms. Bailey. CP 320. Before Ms. Bailey's medical leave, she had a good working relationship with Dr. Barringer. However in the phone conversation she had with him on November 1, Dr. Barringer was cold, stern, and degrading—even telling her she had “emotional problems.” CP 252. Not only did Dr. Barringer announce that KSD refused to provide any accommodations for Ms. Bailey's disabling condition, Dr. Barringer demoted her from her paid Curricular Leader position. CP 252. This treatment was especially damaging because of Ms. Bailey's disabling condition. Because Ms. Bailey

believed Dr. Barringer's treatment of her was motivated by KSD's antipathy toward her disabling condition and requests for accommodations, she filed a discrimination charge with the EEOC dated November 9, 2012. CP 221.

On November 27, 2012, Ms. Bailey's counsel wrote a letter to KSD seeking the accommodations she had been denied by Dr. Barringer and notifying KSD that they had failed to engage in the requisite "interactive process." CP 210-211. The letter also complained that Ms. Bailey was being treated differently than non-disabled employees. *Id.*

Thus, all of these activities, seeking an accommodation for a disabling condition, filing a complaint with the EEOC, and complaining for being treated in a disparate manner, are protected activities.

2. Ms. Bailey subsequently suffered adverse action when KSD refused to allow her to return to her position, failed to offer her equivalent employment, and constructively discharged her from employment.

Immediately after Ms. Bailey sought an accommodation for her disabling condition, filed a complaint with the EEOC, and complained about being treated in a disparate manner, she suffered adverse employment action. Adverse employment actions include demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827, 833 (2004); *Ray*, 217 F.3d

1234; *Robel v. Roundup*, 148 Wn.2d 35, 74 n.14, 59 P.3d 611 (2000) (a demotion may constitute an adverse employment action). And, if an employee establishes that he or she participated in statutorily protected opposition activity, the employer knew about the opposition activity, and the employee was then discharged, a rebuttable presumption of retaliation arises that precludes summary dismissal of the case. *Currier*, 182 Wn. App. at 747.

In response to Ms. Bailey's attempts to obtain an accommodation, her filing a discrimination charge with the EEOC, and her complaining about being treated in a disparate manner, KSD adversely affected her employment in several respects.

First, KSD refused to allow Ms. Bailey to return to her job on January 3, 2013. CP 288. KSD's stated reason for refusing to allow her to resume working at the school was because only three weeks remained in the term. However, the first day of Ms. Bailey's return to work was January 3 and the semester ended on January 25. Although her return date was close to the three-week cutoff, it was earlier than three weeks before the term's end. As such, KSD did not have a valid reason for refusing to allow Ms. Bailey to return to work on January 3, 2013.

Second, KSD failed to offer Ms. Bailey equivalent employment upon her return from medical leave. Rather, KSD offered Ms. Bailey a

position as a *substitute* teacher—that would not necessarily be in special education or even the same school. KSD asserts that offering a substitute position qualifies under the *de minimus* exception to the FMLA (Response p. 45); however, this exception simply does not apply here. The exception explains that “the requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.” 29 C.F.R. § 825.215(f). A substitute teaching position is different in terms of status, authority, responsibility, and title—none of which are intangible or unmeasurable aspects of the job. It is, in fact, a different job altogether. Additionally, KSD fails to recognize that Ms. Bailey’s pay would have been less because she would no longer have a stipend for her role as Curricular Leader—even Dr. Robert Beeman, the Assistant Superintendent for Human Resources, admitted that it is not an equivalent position. CP 374.

Third, KSD constructively discharged Ms. Bailey from her employment on January 3, 2013. When Ms. Bailey attempted to return from her medical leave, she was loudly ordered her to disregard her lawyer’s advice and repeatedly yelled at by General Counsel Lind in a phone conversation in which he berated her and eventually dismissed her. CP 286-289. Mr. Lind did so both without Ms. Bailey’s representation by counsel

(despite her requests) and knowing that she had just returned from medical leave for psychological injuries. Because of this hostile encounter with the General Counsel of the District, Ms. Bailey's medical providers concluded she could not safely return to this workplace. As such, Ms. Bailey was constructively discharged from her employment with KSD.

Thus, as a result of engaging in protected activity, Ms. Bailey suffered adverse action when KSD refused to allow her to return to her position, failed to offer her equivalent employment, and constructively discharged her from employment.

C. The trial court's dismissal of Ms. Bailey's claim against KSD for violating her FMLA rights was error and should be reversed.

- 1. Ms. Bailey was scheduled to return to work more than three weeks before the end of the semester and therefore had a right to receive equivalent employment starting January 3, 2013.**

If an employee begins FMLA leave more than five weeks prior to the end of the academic term, the school may require the employee to continue taking leave until the end of such term if (1) the leave is of at least three weeks in duration and (2) the return to employment would occur during the three week period before the end of such term. 29 U.S.C. § 2618(d)(1)(A)-(B). The second prong was not met here. Ms. Bailey's stated return date was January 3 and the start of the new semester was January 28.

That is a period of exactly three weeks and four days (25 days total). Thus, Ms. Bailey was entitled to receive equivalent employment.

Nonetheless, KSD asserts that Ms. Bailey suddenly alerted KSD ‘without warning’ on January 2 that she was medically cleared to return to work on January 3. Response p. 47. However, Ms. Bailey first told KSD she was medically cleared to return to work and would do so on January 3 in a letter dated December 21. CP 528. KSD had a duty to offer Ms. Bailey an equivalent position until the end of the semester.

2. KSD failed to offer Ms. Bailey equivalent employment.

The FMLA provides that an employee returning to work following FMLA leave is entitled “to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” 29 U.S.C. § 2614(a)(1)(B).

As discussed above, KSD failed to offer Ms. Bailey equivalent employment when it offered her a substitute teaching position. Such a position would not necessarily have been at the same school, nor even in special education. A substitute teaching position is different in status, authority, and job duties. KSD admits that it would have been less in salary because she would no longer receive her Curricular Lead stipend. Response p. 48. KSD failed to satisfy its obligation to provide Ms. Bailey equivalent employment upon her return from FMLA leave.

3. KSD violated Ms. Bailey's FMLA rights by denying her the right to apply for FMLA leave until she exhausted all paid leave.

Ms. Bailey was denied FMLA protections for approximately four months after seeking FMLA leave because KSD required Ms. Bailey to exhaust all of her paid leave before granting her FMLA leave. Such an action is unlawful according to the Eleventh Circuit:

Neither Congress nor the Department of Labor could have intended...to allow employers to evade the FMLA by providing their employees with paid sick leave benefits. Otherwise, when an employee misses work for an illness that qualifies under both his employer's paid sick leave policy and the FMLA, his employer could elect to have the absence count as paid sick leave rather than FMLA leave and would then be free to discharge him without running afoul of the Act.

Strickland v. Water Works and Sewer Board City of Birmingham, 239 F.3d 1119, 1205 (11th Cir.2001). KSD argues that it did not violate this requirement because its leave policy protects employees who take paid leave by promising they will be assigned to the same position held at the time the leave commenced. Response p. 50. KSD further asserts that its policy "allows" employees to take FMLA leave after exhausting any available paid leave. Response p. 49. KSD did not "allow" Ms. Bailey to exhaust her paid leave before taking FMLA leave; rather, KSD *denied* Ms. Bailey the opportunity to take any FMLA leave until she exhausted her paid leave. Regardless of KSD's own policy during the four months, Ms. Bailey

was denied the statutory protections of the FMLA. KSD violated the law when it refused to allow Ms. Bailey to take FMLA leave when she first requested it in August 2012.

IV. CONCLUSION

The trial court's dismissal of Ms. Bailey's three claims of hostile work environment, retaliation, and FMLA violations should be reversed. In its responsive brief, KSD made several misstatements of fact and failed to establish that no genuine dispute of material fact exists.

For all the reasons set forth above and those articulated in Ms. Bailey's opening brief, she respectfully requests this Court reverse the summary dismissal of her causes of action and remand this case back to the trial court for a trial on the issues. Ms. Bailey further requests that this Court rule that she is entitled to fees on review pursuant to RAP 18.1 and RCW 49.60.030(2).

Dated this 28th day of October, 2015.

Respectfully submitted,

s/ Susan B. Mindenbergs

Susan B. Mindenbergs

WSBA No. 20545

Attorney for Appellant Anne L. Bailey

CERTIFICATE OF SERVICE

I, Irene Calvo, am a citizen of the United States and a resident of the State of Washington. I am over the age of twenty-one years, am not a party to this action, and am competent to testify to the following:

On October 28, 2015 I caused the foregoing original and one copy of Appellant's Reply Brief to be filed with the Clerk of the Court of Washington State Court of Appeals, Division I via legal messenger and to be served via electronic mail and U.S. Mail on counsel for Respondent, ROY, SIMMONS, SMITH & PARSONS, PS, Eric E. Roy and Jill Smith, 1223 Commercial Street, Bellingham, Washington 98225.

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

DATED this 28th day of October, 2015.



Irene Calvo, Paralegal