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No. 33956-I

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PAULA KING TYNER, individually,

Appellant,

vs.

THE STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND
HEALTH SERVICES (DSHS); RAINIER SCHOOL; LARRY
MERXBAUER, in his individual capacity; JAN BLACKBURN, in her
individual capacity; JODY PILARKSI, in her individual capacity; and
TINA FLEISCHER, in her individual capacity,

Respondents.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
The Honorable John A. McCarthy

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERRORS

1. The Trial Court erred in its application of the rules applicable of Summary Judgment and based on such a misapplication erred in dismissing Appellant's case in its entirety.
2. The Trial Court erred in determining as a matter of law, Appellant's speech which requested that a potential claim of sexual harassment be subject to a thorough outside investigation by an unbiased investigator, did not constitute speech for a matter of public concern.
3. The Trial Court erred in applying what is known as the "Pickering balancing test," when there was no evidence that the employer actually engaged in such a balancing test prior to making adverse employment decisions regarding Appellant's employment and when the Respondent failed to properly put the balancing test at issue.
4. The Trial Court erred in failing to recognize that when a public employer denies causation (i.e. a retaliatory motive) it cannot thereafter rely on the "Pickering balancing test", (a justification defense), which by its definition requires the employer to admit that a motivating factor in the adverse employment decision was the employee's speech, but that the adverse employment action was justified because the speech unduly disrupted legitimate governmental interests.
5. The Trial Court erred in determining that there were no genuine issues of material fact with respect to whether or not Appellant's speech regarding the need for an outside investigator, on a potential claim of sexual harassment, was not a substantial or a motivating factor in the adverse employment decisions taken against her, when the retaliatory adverse employment actions commence a few days after the protected speech and when the retaliating supervisor indicated that she was in disagreement with Appellant's speech.
6. The Trial Court erred in inappropriately weighing the evidence in violation of the rule applicable to a Motion for Summary Judgment when it determined that there is no genuine issue of material fact regarding retaliatory adverse employment actions in response to Appellant's speech.

7. The Trial Court erred in determining that the individual Respondents were entitled to qualified immunity.
8. The Trial Court erred in dismissing Appellant's RCW 49.60.210 retaliation claim when there were substantial factual issues as to whether Appellant's good faith opposition activities (requesting a thorough and unbiased investigation of a potential sexual harassment claim) was a motivating factor in the adverse employment actions taken against the Appellant.
9. The Trial Court erred in determining that the Respondents had engaged in no adverse employment actions, under either 42 U.S.C. Section 1983 (First Amendment) and RCW 49.60.210, when the evidence established that in retaliation for Appellant's reasonable opposition activity, she had all of her job duties removed, was taken out of a supervisory position and was transferred to another job site and was thereafter subject to a mean spirited and psychologically destructive investigation.

II. ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Whether the Trial Court erred and misapplied the rules applicable to Summary Judgment when it dismissed Appellant's claim that her First Amendment Rights to Freedom of Speech were violated by adverse employment actions and her claim that she was subject to retaliation in violation of RCW 49.60.210, when the facts taken in the light most favorable to the Appellant indicate that shortly after she suggested that a potential sexual harassment claim be investigated by an outside investigation, she was subject to adverse employment actions within a few days of her suggestion, and the alleged retaliatory supervisor indicated to her that she was upset by Appellant's speech and was the principle participant in the adverse actions that followed thereafter?
2. Whether or not a request that a co-workers potential claim of sexual harassment be subject to an outside investigation, constitutes speech on a matter of "public concern" worthy of protection under the First Amendment?

3. Whether or not the Respondents in the instant case, properly put the “Pickering balancing test” at issue, when the retaliating supervisor denied any retaliatory intent and no efforts were made at the time that the adverse employment decisions to balance Appellant’s rights to freedom of speech against the employers legitimate management interests?
4. Whether, assuming agruendo, that the Respondents in the instant case actually put the “Pickering balancing test” at issue, the Trial Court nevertheless, was in error when it determined that on balance, the employers legitimate interest out weighed Appellant’s right to speak out on issues of First Amendment Rights on “issues of public concern” when there is no evidence that any legitimate governmental interest was disrupted by Appellant’s speech and no evidence that the adverse employment decisions that followed shortly after the speech, were predicated on any employer predictions that the Appellant’s speech had the potential of being disruptive?
5. Whether or not there was sufficient evidence warranting denial of Respondent’s Motion for Summary Judgment, with respect to whether or not Appellant’s speech was a substantial or a motivating factor in the adverse employment decisions taken against Appellant, when the alleged adverse employment actions were taken within a few days of Appellant’s protected speech, that the management decision makers were aware of, and Appellant’s supervisor expressed opposition and upset (which was later denied) in response to Appellant’s speech on a matter of public concern?
6. Whether or not there is sufficient evidence to allow Appellant’s First Amendment Freedom of Speech claim to survive summary judgment when there was an extremely close temporal connection between the speech and adverse employment action, followed by a negative reaction from the supervisor behind the adverse employment actions and when there was additional and substantial circumstantial indicia that the justification for the adverse employment actions taken against Appellant were pretextual?

7. Whether or not Appellant presented sufficient evidence below, that she was subject to a “adverse employment action” sufficient to survive summary judgment, when shortly after she engaged in speech and opposition to discrimination, she was immediately removed from her job duties, transferred to a distant location and was subject to an investigation that was unreasonable as to its scope and subject matter?
8. Whether or not a request/suggestion that a potential sexual harassment complaint investigation be done by an outside investigation (i.e. an investigation conducted by someone from outside of the general work environment), constitutes reasonable opposition activity protected by RCW 49.60.210?
9. Whether or not there was sufficient evidence to survive summary judgment on the issue of whether or not Appellant was a victim of reprisal, in violation of RCW 49.60.210, when shortly after her suggestion that a potential of sexual harassment claim brought by a subordinate co-worker be subject to an outside investigation, she was subject to immediate reprisal by a supervisor, who admitted to Appellant that she was upset by the opposition and when there was substantial circumstantial evidence indicating that the actions taken were pretextual?
10. Whether or not the instant case should be remanded for a plenary trial on both of Appellant’s above-referenced claims?

III. STATEMENT OF THE CASE

Appellant, Paula Tyner commenced her employment at Rainier School in the year 1986. During the years 1992 thorough 2002, she was a Developmental Disabilities Administrator I (DDA I). Up until the time of the events at issue herein, she had an unblemished work record as a DDA I. (CP 511,529-564). As discussed in the declaration of Paula Tyner, filed below,

as a DDA I she had a substantial amount of supervisory responsibilities over an interdisciplinary team who were involved in the rehabilitation and treatment of the residents of Rainier School. (CP 512). As a DDA I, part of Ms. Tyner's job duties was to insure that the work product of the interdisciplinary team, under her supervision, complied with Rainier School policy, State law, and Federal regulations and statutes. Id. As a DDA I, Appellant's supervisors always provided her with good to very good annual evaluations of her work performance. There are no written indicators that prior to the events at issue herein, Ms. Tyner had any difficulties in the area of interpersonal relationships or in the manner she supervised her staff. (CP 511-514). Over the years subordinate co-workers had complained about Ms. Tyner's management, but apparently unimpressed by such complaints, no enforcement or actions were ever taken and Ms. Tyner continued to get good reviews. (CP 733, 738, 748, 779, 784, 823).

The events at issue commenced when Jody Pilarski arrived at PAT B (the designation for Appellant's then work group) in June 2000 as a DDA II, and as Appellant's direct supervisor. Ms. Pilarski had transferred from another work group known as PAT A. On her arrival and for the months thereafter, there was no indication that there were any work related difficulties between Ms. Tyner and Ms. Pilarski.

Ms. Pilarski has indicated that prior to the events bringing rise to the controversy at issue herein, on occasion, Appellant's subordinate staff would come to her with their various complaints about the method and manner in which Appellant would supervise their work. In response to these complaints, Ms. Pilarski's reaction always was to tell the subordinate employee to go discuss the issue with Ms. Tyner and try to work it out with her. A Mr. Ed Densmore in particular went to Ms. Pilarski on a number of occasions complaining about the method and manner in which Ms. Tyner supervised his work. (CP 382-385)(CP 179-180).

Also, there were occasions, where Appellant asked Ms. Pilarski to intervene on personnel issues, which Ms. Tyner thought needed to be addressed.(CP 515-516). The specific personnel issues involved aggressive behavior by one of her subordinate staff who was named Steve Bailey. Apparently Mr. Bailey had acted in a manner that was intimidating to Ms. Tyner and a smaller male co-worker named Andrew Good. Ms. Pilarski's response to Ms. Tyner's concerns was similar to that she had provided to Ms. Tyner's subordinate staff that had complained about her, i.e.: that they should get together and try to work the issues out. Id.

Another matter of particular concern for Ms. Tyner, was an event involving an anonymous memo circulated to al her staff outlining Ms. Tyner

use of leave. Ms. Tyner viewed this as being an effort to undermine her authority and to demoralize the staff under her supervision. As part of her job duties as a supervisor, Ms. Tyner was in a position of monitoring subordinate staff attendance, and someone apparently was trying to turn the tables on her and monitor her attendance. On this issue, Ms. Tyner approached Ms. Pilarski and asked her to investigate. Ms. Pilarski indicated she was aware that a speech therapist named Sue Thomas had in fact written the memo. (CP 515-516). Ms. Tyner found Ms. Pilarski reluctant to conduct an investigation to verify the fact that Ms. Thomas had drafted the memo, and reluctant to take any sort of corrective action. No investigation was conducted until Ms. Tyner initiated the investigation herself under the terms of Rainier School's internal policies. Id.

Curiously, as a byproduct of the investigation, it is found that the identity of the memo write could not be determined. This was in marked contrast to Ms. Pilarski's previous statements that she knew who had written the memo and in fact it was Sue Thomas. This created a concern on Ms. Tyner's part with respect to the thoroughness and quality of any personnel investigations done under Ms. Pilarski's purview. (CP 513-517)(CP601-632).

The events that brought rise to the demise of Ms. Tyner's employment at Rainier School began on February 15, 2001. On that date, Ed Densmore,

an HPA under Ms. Tyner's supervision had a confrontation with a Patty Paeper who was a psychological assistant working under Ms. Tyner's supervision. Apparently Ms. Paeper had approached Mr. Densmore and requested that he fill out a survey form related to what is known as a "PKU diet" that had been requested by a psychologist named Larry Thompson. Mr. Densmore, who had a history of rude and aggressive behavior responded to Ms. Paeper in an extremely negative fashion and essentially refused to answer the survey. Larry Thompson who had overheard the confrontation had to intervene out of the concern that Mr. Densmore was potentially out of control and that the matter could seriously escalate. Ms. Pilarski had in fact collaborated with Larry Thompson and also desired that the PKU survey be undertaken.

Ms. Tyner first learned of the event that day when she found Patty Paeper to be extremely upset. Ms. Tyner, tried to discover what had made her so upset, but Ms. Paeper refused to discuss the issue with Ms. Tyner at that time. Id.

Ms. Tyner thereafter allowed the matter to simmer hoping that emotions would subside. On February 22, 2001, she discussed the issue with Ms. Pilarski and told her she was going to look into it in the following week while Ms. Pilarski was on a prescheduled vacation. As a result, commencing

February 22, 2001, Ms. Tyner made a substantial effort to coordinate a meeting between herself, a representative of the HR department, Ms. Paeper, Mr. Thompson, and Mr. Densmore.

Mr. Densmore, who has admitted to responding on repeated occasions to Ms. Tyner's directives in the insubordinate manner of refusing to meet with her, issued an email to Ms. Tyner and a copy to Jody Pilarski indicating that in fact he viewed the matter as resolved and made substantial efforts not to meet with Ms. Tyner despite her request for a meeting. (CP 620).

On March 1, 2001, Ms. Tyner met with Mr. Thompson, Patty Paeper, and a Sharon Buss of the HR department. During the course of that meeting, Ms. Paeper disclosed that there had been a number of incidents involving Mr. Densmore that could be construed as sexual harassment. Specifically Ms. Paeper revealed that in fact Mr. Densmore in the past had given her a rose and had a perverse practice in engaging in what he called, "belly bumping" with her. (CP 264-265). Specifically, he would bump his belly up against her belly apparently in some kind of celebratory fashion. At the meeting, Ms.

Buss remarked that such weird conduct could constitute sexual harassment.¹
(CP 514-515).

After Ms. Paeper and Mr. Thompson were excused, Ms. Tyner had a private meeting with Sharon Buss of the HR department. During the course of that meeting, Ms. Tyner told Ms. Buss that she did not believe Jody Pilarski, who under Rainier School policy would be tasked with the investigation of any sexual harassment claim by Ms. Paeper, should do any investigation because in Ms. Tyner's opinion, Ms. Pilarski was not thorough and was potentially biased in her investigations. Ms. Tyner asked that Ms. Buss maintain her concerns confidentially. Id.

As a state employee, Ms. Tyner had attended a number of seminars that spoke to the issue of sexual harassment. (CP 516). During the course of these seminars, it was made clear that outside resources were available to

¹
An internal investigation ultimately was done with respect to Ms. Paeper's allegations of sexual harassment and it was determined that sexual harassment had not occurred. With respect to the, "belly bumping", it was determined that this was not sexual harassment essentially because Mr. Densmore also engaged in such conduct with male subordinates and said it was just a joke. (CP 264-265). It is respectfully submitted that such an analysis confused disparate treatment gender discrimination with a hostile work environment. See e.g. Schonauer v. DCR Entertainment 79 Wn App 808 , 905 P.2d 392 (1995). (1995)(discussing the distinction between sexual harassment and disparate treatment). The Court can take notice that sexual harassment/hostile work environment claims are predicated on what would or would not be offensive to an objectively reasonable woman. An objective reasonable woman could take substantial offense to, "belly bumping" behaviors, while at the same time the same behaviors would not be offensive to an objectively reasonable man. See EEOC v. N.E.A. of Alaska, 422 F. 3d 840 (9th Cir. 2005),(Exploring whether similar mistreatment to both males and female, can nevertheless form the basis for a gender hostile work environment claim), In other words, in this matter, Appellant does not concede the point that Mr. Densmore was not engaging in actual sexual harassment.

Rainier School to conduct such investigations and it was not necessary that such investigation be done internally. Ms. Tyner, given Ms. Pilarski's previous lackadaisical response to the concerns that Ms. Tyner had raised with her, viewed this as a situation where it appropriate to bring in an outside investigator.

Despite the fact that Ms. Tyner thought her comments to Ms. Buss were confidential, Ms. Buss shared her concerns with Lester Dickson, the new HR Director at Rainier School. (CP352). Unfortunately, Mr. Dickson shared Ms. Tyner's concerns with Ms. Pilarski. This set into motion a series of events that ultimately resulted in Ms. Pilarski retaliating against Ms. Tyner by engaging in a harassing investigation and removing her from all job duties and transferring her to a different location. (CP 517-521).

Ms. Pilarski was informed of Ms. Tyner's concerns on or about March 5th or 6th, 2001. On March 8, 2001, Ms. Pilarski called a meeting with Ms. Tyner, which Ms. Tyner initially assumed simply would be about the Ed/Patty situation. Instead, Ms. Pilarski used this meeting as a launching pad for an investigation of Ms. Tyner regarding "concerns" raised by Mr. Densmore who was otherwise the target of a sexual harassment investigation. (CP 517)(CP 634-639). Ms. Pilarski admits she was aware of Ms. Tyner's

desire that Ms. Pilarski not be involved in the Ed/Patty investigation, but in her deposition minimized her reaction to it. (CP 185-186).

Apparently, while Ms. Tyner was trying to arrange a meeting with Mr. Densmore to discuss the events of February 15, 2001, Mr. Densmore was secretly communicating with Ms. Pilarski and apparently complaining about the method and manner in which Ms. Tyner supervised him as an employee. (CP 260). Mr. Densmore complained about such sundry items as when Ms. Tyner, was unhappy with Mr. Densmore's work performance she would tell him to see her, "in my office". Mr. Densmore also complained that on occasions, Ms. Tyner would leave a sticky note on his chair saying, "see me P" and that somehow was creating a "hostile work environment". (CP 262-263). Mr. Densmore also complained the fact that Ms. Tyner had held a meeting on the Ed/Patty incident without him present even though Ms. Tyner made substantial effort to schedule a meeting with him.

Armed with such information, Ms. Pilarski became extremely hostile and accusatory towards Ms. Tyner at commencement of the March 8, 2001 meeting. The situation was so toxic that Ms. Tyner immediately requested that she be provided a representative at the meeting which was her prerogative under Rainier School policy. (CP 517). She went ahead and

found a co-worker named Dennis Green who agreed to sit in on the meeting with her.

During the course of the March 8, 2001 meeting, Ms. Pilarski was visibly upset and attacked Ms. Tyner for indicating to Sharon Buss that Ms. Pilarski would, “blow off” the investigation into the Ed/Patty matter. Ms. Pilarski also used the word “thorough” as a sword in addressing this issue. Ms. Tyner was shaken by the tone of the March 8, 2001 meeting. (CP 517-518).

As a result of being placed on, “alternative assignment” on March 9, 2001, she had all job duties removed from her and she was transferred from Rainier School to Region 5, DSHS headquarters located in Tacoma, WA. (Id). She was stripped of all job responsibilities and job duties. She was required to do demeaning clerical work for months. Once she had graduated from doing clerical work, she called on to do case management type work that was consistent with the type of work that did some 15 to 20 years earlier in her career. (CP 518-519). Mr. Densmore who engaged in conduct creating a gender hostile work environment and while under investigation, was allowed to stay at Rainier School and do his regular duties, and was only restricted in his contact with Ms. Paeper. (CP 242).

On examination of the so-called investigation materials, it is apparent that Ms. Pilarski's "thorough" investigations was no "investigation" at all, but was simply an effort to solicit any negative information she could regarding Ms. Tyner, no matter how stale or innuendo or hearsay laced. (CP 726-834). It was not an investigation but a career assassination.

In the meantime, Ms. Pilarski called Ms. Tyner's staff in for interviews and asked them a series of questions calculated to elicit negative comments with respect to Ms. Tyner. As a result of Ms. Pilarski's efforts, she was able to solicit a number of negative comments from subordinate staff with respect to Ms. Tyner. Other subordinate staff flat out refused to participate in Ms. Pilarski's efforts and viewed that Ms. Pilarski was trying to put words in their mouths. (CP 703-704).

While on alternative assignment, Ms. Tyner used internal processes to challenge the allegations that were being made against her. Ultimately, the matter was resolved when the matter was placed before a high placed administrator at Region 5, Anita Delight, who held fact finding hearings and determined that none of the allegations, even if true with respect to Ms. Tyner, violated any policies of Rainier School. (CP 520). As a result of Ms. Delight's conclusions that there had been no misconduct by Ms. Tyner, Ms. Tyner should have been returned to her position at Rainier School. However,

at the time Ms. Delight was reaching her conclusions, Rainier School was going through a reduction in force that resulted in the loss of one DDA I position. Unfortunately, Ms. Tyner was the least senior DDA I at Rainier School and was subject to this RIF.

Ms. Tyner, as part of the RIF process was provided with two bumping options to either an HPA position at Rainier School or an HPA position at Western State Hospital. Upon receiving the potential HPA position, Appellant contacted Lester Dickson, the HR manager at Rainier School to discuss her return to Rainier School in the available HPA position. Mr. Dickson told Ms. Tyner that she would not be allowed to return to Rainier School. (CP 706-712). Not wanting the Western State position because it involved an entirely different population base, Ms. Tyner through her own efforts, was able to procure a licenser position in the foster care area of DSHS. To date, Ms. Tyner has been extremely successful in her endeavors at her new job. (CP 522).

In the instant matter, it is clear that Ms. Tyner was subject to retaliation and reprisal for her comments on March 1, 2001 regarding the need to have an outside investigation of the potential sexual harassment charges involving Ed Densmore and Patty Paeper. Ms. Pilarski's actions and statements during the course of the March 8, 2001 meeting provide a

substantial causal link between Ms. Tyner's statement and the subsequent adverse actions taken against her. In addition, it is noted that there is a close temporal relationship between Ms. Pilarski's discovery of Ms. Tyner's March 1, 2001 comments and her effort to commence a sweeping investigation to gather allegations against Ms. Tyner that ultimately were viewed to be unfounded. It is also noted that subordinate staff of Ms. Tyner's had previously complained to Ms. Pilarski about the method and manner in which Ms. Tyner had supervised their work performance but no actions were taken.

A reasonable jury could conclude that the triggering event with respect to Ms. Pilarski's desire to investigate Ms. Tyner's performance, and the other adverse actions taken against Ms. Tyner was Ms. Pilarski's learning of the position taken by Ms. Tyner on March 1, 2001. Otherwise, the situation begs the question as to what had changed? In other words, Ms. Pilarski had previously received complaints from Mr. Densmore, and others, about Ms. Tyner's supervision efforts and had done nothing about it. The only thing that appeared to have changed was the fact that Ms. Pilarski learned of Ms. Tyner's concerns about the method and manner in which Ms. Pilarski would investigate the sexual harassment claims brought forth by Ms. Paeper.

B. Procedural History

On or about February 20, 2004, Appellant filed the instant case (CP 1-5). Within her complaint, Appellant alleged two causes of action based on the above fact pattern. In her complaint, she alleged that her First Amendment rights to Freedom of Speech were violated and as a result she had a cause of action pursuant to 42 U.S.C. § 1983, for violations of her first amendment right to speak out on matters of public concern. In addition, it was claimed the above referenced adverse employment actions were violative of RCW 49.60.210, the anti retaliation provision of Washington's Law Against Discrimination (WLAD), (CP 4).

On or about March 23, 2004, the Respondents named in the above caption duly filed their answer. (CP 6-10). Thereafter, both parties engaged in substantial discovery.

On or about June 24, 2005, Respondents moved for summary judgment as to all of Appellant's claims. Within the summary judgment materials, the Respondents contended, inter alia, that Appellant could not establish a "prima facie" case of retaliation in violation of her First amendment rights because her speech did not involve matters of public concern. The Respondents also contended that the interests of Rainier School in engaging in personnel issues outweighed Appellant's right to speak out

under what is known as, “The Pickering balancing test”. With respect to this claim, it was also alleged that individual Respondents were entitled to qualified immunity.

Further, the Respondents contended that Respondent Tina Fleisher, an individually named Defendant, should be dismissed because she did not personally participate in any of the complained activity. The Respondents did not contend that the other Respondents individually should be dismissed.²

In addition, the Respondents contended that Appellant’s opposition activity was not protected by RCW 49.60.210 and that Appellant could not establish that the alleged legitimate reasons for the adverse actions taken against her were pretextual. It was also contended by the Respondents that the actions taken against Appellant were not severe enough to constitute “adverse employment actions” actionable under by RCW 49.60.210. (CP 15).

Curiously, within Respondents’ summary judgment materials there was an erroneous effort to try to shift the burden of proof onto Appellant to establish the affirmative defense available to the public employer under what

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In Respondents’ reply materials, there was a contention that Respondent Larry Merxbauer should be dismissed from the case. It is noted that Appellant had no opportunity to respond to such a contention because it first came forward within Respondent’s reply brief. As such, the individual liability of Appellant Larry Merxbauer is not ripe nor subject to review by the Appellate Court in that it was not appropriately raised within the Trial Court.

is known as “The Pickering balancing test”. This matter was subject to extensive briefing below. (See CP 103-107).³

In response, Appellant provided an extensive reply on all issues. In Appellants reply substantial depositions were provided supporting the above contentions as well as a detailed declaration by Appellant Paula Tyner which explained in detail the above referenced meeting with her supervisor Ms. Pilarski. (CP 510-712). Also included was a declaration from Janice Schwarz, a board certified clinical social worker who specialized in the treatment of depression, anxiety, and other issues. Within her declaration, Ms. Schwarz indicated that she began treating Appellant on or about April 10, 2001 following the adverse employment actions that were taken against

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Case law cited to the Trial Court below unequivocally establishes that both what is known as “The Pickering balancing test” and the defense available pursuant to the United States Supreme Court’s opinion in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 297 S.O. 568, 50 L.Ed. 2d. 471 (1977), are affirmative defenses upon which the Respondent employer has the affirmative burden of proof. See White v. State, 78 Wn. App. 824, 898 P. 2d 331 (1005), reversed on other grounds, 131 Wn. 2d 1, 929 P.2d 396 (1997); Benjamin v. WSBA, 138 Wn. 2d 506, 980 P. 2d 742 (1999). Current Federal precedent appears to be unequivocal on this point. See Roe v. San Diego, 356 F. 3d 1108, 1112 (9th Cir. 2003), overruled on other grounds, San Diego v. Roe -U.S.-(12/06/04); Ulrich v. City and County of San Francisco, 308 F. 3d, 968-976 (9th Cir. 2002); Gilbrook v. City of Westminster 177 F. 3d 839, 853-54, 866-67 (9th Cir. 1999).

In the instant case, there was **no evidence** that the public employer engaged in “The Pickering balancing test” or made a reasonable prediction of harm to governmental interest prior to taking adverse action against Appellant. During the course of oral argument, defense counsel made conclusary allegations on the issue that should be deemed **insufficient as a matter of law**. This issue is being referenced in this footnote because there is a possibility of repetition of this erroneous attempt to improperly shift the burden to the Appellant in a manner contrary to the above-referenced law.

Appellant at Rainier School. Ms. Schwarz indicated that indicated that Ms. Tyner as a byproduct of the actions taken by Respondents suffered from both a depressive disorder as well as Post Traumatic Stress Disorder (PTSD). She indicated that such diagnosis were a direct byproduct of the stresses generated by the adverse employment actions taken against Appellant by her then employer Rainier School (and the above individually named Respondents). (CP 712-715).

In reply, the Respondents did not respond to the destructive nature of their conduct and the adverse impact it had on Appellant. Instead, the Respondent simply reiterated the positions previously stated and its erroneous interpretation of the law.

On or about October 7, 2005 the Honorable John A. McCarthy of the Pierce County Superior Court heard Respondents' motions for summary judgment. (RP 1-62). To his credit, Judge McCarthy allowed extensive oral argument on the above referenced motion. Unfortunately, Judge McCarthy indicated that he did not have great knowledge with respect to this area of the law and granted Respondents' motion for summary judgment with respect to all issues. (RP 60-62). Thereafter, orders were duly entered dismissing Appellant's case in its entirety. (CP 858-59). This appeal followed. (CP 865-68).

A. Principles Generally Applicable to Summary Judgment Motions In Employment Related Cases.

Appellate Courts review grants of summary judgment de novo. Trimble v. WSU, 140 Wn. 2d 88, 92-93, 993 P.2d 259 (2000). Summary judgment is only appropriate if there no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. All facts and reasonable inferences from the facts, are to be considered in a light most favorable to the non-moving party. Id. See also Balise v. Underwood, 62 Wn. 2d 195, 199-200, 381 P.2d 966 (1963), (provides a detailed discussion regarding the rules applicable to summary judgment motions pursuant to CR 56).

In employment cases it has been recognized that since factual motivational inquiries are involved, summary judgment is highly inappropriate. Such a proposition is well supported by federal and state case law. See Miller v. Fairchild Industries, 41 FEP Cases 809 (9th Cir. 1986); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983); Peacock v. Duvall 684 F.2d 644 (9th Cir. 1982).

As Steckl indicates, summary judgment may be appropriate on such claims if (and only if), the Appellant wholly fails to bring forth any specific facts that would call into question whether the employer's so-called

"legitimate reasons" for the adverse employment decisions are pretextual. However, federal precedent strongly indicates that wrongful discharge Appellants are to be given every benefit of the doubt in favor of presenting their claim to the finder of fact. See, e.g. Miller, supra; Lowe v. City of Monrovia, 775 F2d 998, 1008-09 (9th Cir. 1985); Delgado v. Lockheed-Georgia Co. Div. of Lockheed, 815 F2d 641, 644 (11th Cir. 1987). As noted in part in Peacock at pages 646:

... "first amendment causes of action necessarily involve complicated question of motive and intent. A fair resolution of these difficult issued requires a full trial on the merits. Indeed, we have recently reiterated that this decision as to an employer's true motivation plainly is one reserved to the trier of fact. For this reason, courts have traditionally held summary judgment is inappropriate when questions of motive predominate in the inquiry about how big a role these protected behavior played in the employment decision. (Citations omitted). Without a search inquiry into their motives, those intent on punishing the exercise of constitutional rights could easily mush their behavior behind a complex web of post hoc rationalizations."

Very little evidence is needed for a Plaintiff to overcome summary judgment in cases involving employment discrimination or unlawful retaliation. See Gibson v. King County, 397 F. Supp. 2d 1273, 1277 (WD.WA 2005) (the standards for summary judgment are "high").

A victim of an unlawful employment decision is not required to prove his case at time of trial by direct evidence. U.S. Postal Service Bd. of Gov.

v. Aikens, 460 U.S. 711, 716-17 (1982). Such unlawful motives "are seldom admitted". Missouri Education Association v. New Madrid County R-1 School Dist., 810 F.2d 1164-67 (8th Cir. 1987). As noted in A.P.W.U. v. U.S. Postal Service, 830 F.2d 294, 311 (D.C. Cir. 1987), when motivations are at issue, a Plaintiff need not rely on direct evidence, but may properly look to circumstantial evidence to prove his or her case. Indeed, circumstantial evidence alone may be strong enough to overcome direct evidence to the contrary. Rutherford v. American Bank of Commerce, 565 F.2d 1162-64 (10th Cir. 1977). See also, Anthony v. Sundlun, 952 F.2d 603, 605-06 (1st Cir. 1991). See also Renz v. Spokane Eye Clinic, 114 Wn. App. 611, 123-24, 60 P. 3d 106 (2002); Hill v. BCTI, 144 Wn. 2d 172, 179-80, 23 P. 3d 440 (2001); see also de lisle v. FMC Corp., 57 Wn. App. 79, 83, 786 P. 2d 839 (1990).

In unlawful discharge cases (as with any other cases), the purpose of a summary judgment motion is to determine whether factual issues exist after viewing all the evidence most favorable to the non-moving party and not decide the issues based on trial by affidavit. Ramirez v. Nat. Distillers and Chemical Corp., 586 F.2d 1316, 1318 (9th Cir. 1978).

When a claim involves allegations that a public employee has been retaliated against for exercising expressions protected by the First

Amendment to the Federal Constitution, once it has been shown that there is a question of fact as to the employer's motivations, summary judgment must be denied and the case must be submitted to the jury. See, Schwartzman v. Valenzuela, 846 F.2d 1209, 1212 (9th Cir. 1988); Burgess v. Pierce County, 918 F.2d 104, 107 (9th Cir. 1990).

As succinctly explained in Anthony v. Sundlund, supra., the federal courts have repeatedly held in public employment first amendment cases circumstantial evidence alone is sufficient to support denial of summary judgment or a jury verdict and no "smoking gun" evidence is required. 952 F.2d at 605.

As explained in Anthony at 605:

Circumstantial evidence is often particularly helpful when, as here, a case turns on a protean issue such as an actor's motive or intent. As the Court wrote in a closely analogous context almost a half a century ago:

[While objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does...[courts and juries every day pass upon knowledge, belief and intent - the state of men's minds having before them no more than evidence of their words and conduct, from which, in ordinary human experiences mental condition may be inferred.

952 F.2d at 605 quoting American Communities Ass'n v. Douds 339 U.S. 382, 411, 705 S. Ct. 674, 690 94 L.Ed. 925 (1950). Ultimately, the question

to be resolved is whether the circumstantial evidence gives rise to a "plausible inference" from which a fact-finder could conclude the existence of an unlawful motive. Id. What an actor says is simply not conclusive on a state-of-mind issue - a contrary state of mind "may be inferred from what he does and from a factual mosaic tending to show that he really meant to accomplish that which he professes not to have intended." Id. at 606.

With respect to Appellant's First Amendment claim in order to create a factual issue as to causation, i.e. whether reprisal for speech was "a substantial or a motivating factor in the adverse employment decision, the Plaintiff must establish that the employer was aware of the speech and any one (not all) of the following well recognized circumstantial indicia of improper motive:

. . . (i) establish proximity in time between . . . expressive conduct and the allegedly retaliatory action; (ii) produce evidence that the Respondents expressed opposition to the speech, either to [the plaintiff] or to others; or (iii) demonstrate that the Respondents proffered explanation for their adverse actions were false and pretextual. Alpha Energy Savers v. Hansen, 381 F. 3rd 917, 929 (9th Cir. 2004); see also, Coszalter v. City of Salem, 320 F. 3rd 968, 973, 977, (9th Cir. 2003); Brunick v. Clatsop County, 204 Or. App. 326, 129 P. 3rd 738 (2006).

In any event, like on any other motion for summary judgment, in an employment related case, the evidence of the non-moving party must be believed and all justifiable inferences are to be drawn in his or her favor.

Allen v. Scribner, 812 F.2d 426, 430 (9th Cir. 1987). Only if there are no issues of material fact and the facts show the moving party is entitled to judgment as a matter of law, should such a motion be granted. Id.

On summary judgment, a judge should not weigh the evidence but simply determine whether or not genuine issues exist for trial. Id.

Generally, a public employee's first amendment based claim has three elements. The first two elements generally involve questions of law for the court. And as described above, can but does not always have two parts. See Chateaubriand v. Gaspard, 97 F.3rd 1218. 1222 (9th Cir. 1996):

1. That the employee engaged in protected speech;
2. That the employee took an adverse employment action; and
3. That the speech was “a substantial or motivating factor” in the adverse employment decision. See also Hyland v. Wonder, 972 F.2d 1129, 1135-36 (9th Cir. 1992). White v. State, 131 Wn.2d 1, 929 P.2d 396 (1997). (The pretextual nature of speech invokes an issue of law while the second and third elements are factual issues).

In the instant case, it is simply for the jury to decide whether the action taken against Appellant were in whole or in part for illegal retaliatory reasons or were solely undertaken for legitimate purposes. As discussed below, there are substantial circumstantial indicia that in fact Appellant Paula Tyner was a victim of vicious retaliation violative of the First Amendment and RCW 49.60.210.

B. Free Speech - Public Concern.

The question is whether the Appellant's expression can fairly be "considered as relating to any matter of political, social, or other concern of the community ..." Connick v. Meyers, 461 U.S. 138, 146 (1983). When an employee merely speaks out on matters that "relate solely" his "parochial concern" as an employee, no First Amendment interest is at stake. Cox v. Dardanelle Public School Dist., 790 F.2d 668, 672 (8th Cir. 1986). When speech addresses a mixture of public and private concerns, it is nevertheless afforded protection. See also, Thompson v. City of Starkville, Miss., 901 F.2d 456, 464-65 (5th Cir. 1990). This issue is whether or not the speech "touches" on matter of public concerns. See Roe v. San Diego, supra.

In determining whether speech involves a "matter of public concern" the Court must consider the "content, form, and context" of the speech. Connick, 461 U.S. at 147-48, Ulrich v. City and County of San Francisco, 308 F. 3rd at 978.

Under Ninth Circuit precedent, content is the most important factor in accessing public concern and motive is only a marginal factor in close cases. Johnson v. Multnomah County, 48 F.3 at 424. Gilbrook v. City of Westminster, supra. The fact that speech occurs in a private setting to superiors or co-workers, as opposed to a public forum, makes no difference

in determining whether speech is protected. Givehan v. Western Consolidated School Dist., 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). Cox v. Dardanelle Public School Dist., 790 F.2d at 672. The Ninth Circuit has specifically held that speech relating solely to the manner in which the government, through its employees, performed its duties on a single occasion warrants First Amendment protection. See Gillette v. Delmore, 886 F.2d 1194, 1197-98. (9th Cir. 1989).

When speech addresses the proper functioning of governmental operations or the performance of its duties, it is protected. See Roth v. Veteran's Administration, 856 F.2d 1401, 1405 (9th Cir. 1988). The protected nature of speech is objective and is not dependent on the speaker's subjective beliefs even if that belief is that the speech only relates to a personal matter. See Zorzi v. County of Putnam, 30 F.3d 885-897 (7th Cir. 1996). Judge Morgan in White I distilled a test to determine if matters of public concern predominate over a "private stake" in the subject matter. White v. State, 78 Wn. App at 834. Under Judge Morgan's test, you simply eliminate all matters of personal interest and determine if what remains, nevertheless constitutes a matter of "public concern".

Speech on matters of inherent public concern need not be correct and nor is it necessary for the speeches to actually state something is unlawful or

wrong. See Thomas v. City of Beaverton, 379 F. 3d at 802, 809 (9th Cir. 2004). Rather, when accessing “context” the Courts should consider the “implicit message” of the speech and the other aspects of the speakers actions. Id.

It has long been recognized that speech relating to discrimination issues involves matters of inherent public concern. As early as 1979, the US Supreme Court recognized in Givhan v. Western Line Consolidated School District 439 US 410 (1979), that even purely private speech addressing issues of discrimination is worthy of First Amendment protection. See Rendish v. City of Tacoma 123 F. 3d 1216 (9th Cir.1997), (support of co-worker’s discrimination claim protected by 1st Amendment), See also Azzaro v. County of Allegheny 110 F3d 968, 978-79 (3rd Cir.1997)(discussing interplay between the 1st Amendment and the Title 7 Anti-Retaliation provision and holding that speech addressing discrimination issues are worthy of 1st Amendment protection).

Speech opposing or involving discrimination constitutes speech on a matter of inherent public concern worthy of the highest of first amendment protections, whether the discrimination involves a single incident or a pattern of conduct. See Alpha Energy Savers v. Hansen, 381 F. 3rd at 926.

Speech regarding the treatment of co-workers is not considered speech regarding ones own job, and as such is not considered a personal matter unworthy of first amendment protection. See Thomas v. City of Beaverton, 379 F. 3d 802, 808-09, (9th Cir. 2004). (In order to find speech unprotected due to personal interest, the content must be regarding your own job conditions and not the working conditions of co-workers). See also Hyland v. Wonder, 972 F. 2d 1129, 1138 (9th Cir. 1992).

In addition, speech that occurs during or relates to the employees performance of his or her job duties is clearly entitled to full 1st Amendment protection. This issue is exhaustively discussed by the 9th Circuit in the case of Ceballos v. Garcettii 361 F 3d at 1174-1175.

In the instant matter, Appellant's speech relating to the method and manner in which a sexual harassment allegation should be investigated clearly is worthy of 1st Amendment protection. The Court need go no farther than the preamble to Washington State's Anti-Discrimination Statute, RCW 49.60.010 to find a profound statement of the public concern nature of our Anti-Discrimination laws. A reasonable corollary to such a proposition is that when someone potentially is a victim of discrimination, particularly in the area of a gender hostile work environment, an appropriate investigation should be done, particularly by public employers who should be model

employers when it comes to eradicating discrimination. In fact, the public importance of an employer engaging in a proper investigation of claims of sexual harassment and the like, is evidenced by the method and manner in which hostile environment laws operate. Should the employer engages in an appropriate investigation, when dealing with questions of coworker harassment, it may escape liability if proper remedial efforts are taken. See e.g. Schonauer v. DCR Entertainment 79 Wn App at 820; Glasgow v. Georgia Pacific Corp 103 Wn 2d 401, 405, 693 P 2d 708 (1985), see also Nichols v. Azteca Restaurant, 256 F. 3d 864, 877 (9th Cir. 2001)(Under both Washington State [RCW 49.60 et seq] and Federal law (Title V II) an employee has an affirmative defense to liability for discriminatory employment practices and hostile work environment created by co-workers, if it has in place effective internal remedies and policies to stop such misconduct and the aggrieved employee failed to take advantage of such remedies). See also Burlington Industries v. Elderth, 524 U.S. 742, 765, 1185 S.Ct. 2257, 141 L. Ed 2d 633 (1998).

The Court can take notice that not only is a proper investigation in such matters paramount to protect the rights of the affected victim employee, but also necessary in order to provide a public employee, who is accused of such allegations with a reasonable modicum of due process. Further, should

such an investigation not be done, the public treasury is at risk in that the failure to do such investigation could expose the public employer to substantial economic liabilities under either RCW 49.60, the common law, or Federal statute.

Further, there is clearly no indication that Ms. Tyner had any personal stake in the subject matter. Her job duties would not have changed one way or the other if an internal or external investigation was done with respect to Ms. Paeper's allegations against Mr. Densmore. It is humbly submitted there is simply no question that Ms. Tyner's concerns were worthy of 1st Amendment protection and protection under RCW 49.60.210. Applying the above principles to the speech at issue in the instant case, it is simply inescapable that Appellant's speech in fact did address a matter of public concern. Clearly, the Trial Court was in error on this issue. Appellant's speech occurred in the "context" of her discussing a potential sexual harassment issue with a member of the Human Resources Department, a Sharon Buss. During the course of these discussions, it was Ms. Buss who initially raised the issue of whether or not Mr. Densmore's conduct constituted "sexual harassment". Given this context, and her previous knowledge of the method and manner in which Ms. Pilarski engaged in personnel type investigations, it was clearly appropriate for Ms. Tyner to raise

her concerns about the thoroughness of any potential investigation into the sexual harassment claim of Ms. Paeper. The form and context of the speech was under circumstances where Ms. Tyner was speaking privately to a Human Resource professional, in a private setting, wherein the likelihood of any disruption resulting from such speech was at its barest minimum. In addition, the speech was intended to be confidential and only for Ms. Buss' ears. Unfortunately, Ms. Buss told her supervisor Lester Dickson, who in turn told Ms. Pilarski thus providing her the incentive to engage in her retaliatory conduct.

Further, given the content of the speech was addressing a matter of inherent public concern, i.e., whether or not Ms. Paeper was a victim of sexual harassment, and whether or not such allegations would be properly and thoroughly investigated. Such matters not only implicate concerns regarding "invidious discrimination," but also go to the question of whether or not the employer would be liable for such conduct or whether or it would have available to it the above discussed affirmative defense.

Even if by some stretch of the imagination, Ms. Tyner' speech could be characterized as relating in part to her "personal interests", at best the speech involved a mixture of personal and public interests, given the fact that Appellant was not discussing issues regarding her own job, but was trying

to make sure that interests of her co-worker Ms. Paeper, were being appropriately addressed. In addition, Mr. Densmore's interests also would have been protected given the fact that if the allegations were not properly investigated, in that he could have been subject to unwarranted discipline.

Again, it is noted, there is simply no question that Appellant engaged in speech on "matters of public concern". This case ultimately turns on the simple question of whether or not there was a question of fact as to causation.

C. The Balancing Test.

As noted in Chateaubriand v. Gaspard, 97 F.3d 1218 (9th Cir. 1996), quoting the case of Roth v. Veterans Administration, 856 F.2d 1401, 1405 (9th Cir. 1988) "Statements regarding criminal misuse of public funds, wastefulness, inefficiency in managing and operating government entities are matters of **inherent public concern**". Speech addressing issues of discrimination is also a matter of inherent public concern. See also Voight v. Savoy, 70 F.3d 1552, 1562 (9th Cir. 1995). The magnitude of the employee speech determines the extent to which the employer must justify its competing interest. In the instant matter, we are dealing with, in all respects, speech on matters of "**inherent public concern**". As such, the justifications by the employer for punishing speech must be extremely high in order to

justify the suppression of such speech based upon legitimate governmental interest. See Alpha Energy Stores v. Jansen, 381 F. 3d at 930 (the stronger the public interest the more rigorous the showing of disruption to legitimated government interests must be made).

Here, beyond conclusory lawyer arguments before the Trial Court , no evidence was submitted below that Appellants private speech on a matter of inherent public concern disrupted any of the below material legitimate government interests or that the adverse employment actions were based on a reasonable prediction that such disruption could occur.

In order to put “The Pickering balance test” at issue, the public employee must produce evidence that it considered real or potential disruption when making the adverse employment decision. See Chateaubriand v. Gaspard, 97 F 3d at 1224, see also, Kincade v. City of Blue Springs, MO, 64 F. 3d 389, 398-99 (8th Cir. 1995). (Bare allegations of disruption not enough to put Pickering balance at issue).

If the Respondents had done so, they would be obligated to establish that the speech qua speech created or had the potential of creating some disruption to some legitimate governmental interest. In balancing the competing interest, the Court must examine a number of factors, none of which are controlling:

1. Did the speech impair discipline or control by superiors?;
2. Did it disrupt co-worker relations?;
3. Did it erode close working relationships premised on personal loyalty and confidentiality?;
4. Did it interfere with the speed or performance of his or her duties?; or
5. Did it obstruct the routine office operations?

See generally Fazio v. City and County of San Francisco, 125 F.3d 1328, 1331, footnote 1 (9th Cir. 1997).

Clearly in making such a showing, the public employer need not allege that the employee expression actually disrupted the workplace, but a reasonable prediction of disruption would be sufficient. Here we have an absence of any indication that anybody made a reasonable prediction of disruption occurring as a by-product of Appellant's free speech. In the instant matter, even if the balancing test were at issue, there is simply no question that under the totality of the circumstances, Appellant's speech is worthy of protection and the employers interests are minimal.

What is at issue here is whether or not the speech created disruption, not whether or not the government has the right to make various decisions (if done for appropriate reasons). The Respondent's contention below that the

Appellant is asserting that her interests in speaking is outweighed by governmental interests is unsupported. What is at issue, is whether or not the speech disrupted any operations of government and the defense in this instance has absolutely failed to articulate any interest that was disrupted by the speech. As previously discussed, whether or not (for whatever reasons) the individual Respondents had a dislike for Appellant or were justified in their actions, for reasons other than her free speech more properly goes to their Mt. Healthy defense or causation. As in White v. State, supra, he Appellate Court should reject the government's efforts to inappropriately categorize evidence in a misguided effort to have factual issues decided as a matter of law.

As noted in the opinion of Ceballos v. Garcetti, 361 F.3d at 1175, "The right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, against public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies, of government agencies and officials 'are positioned uniquely to contribute to the debate on matters of public concern'". See also Weeks v. Beyer, 246 F.3d 1231, 1235 (9th Cir. 2001), see also Gilbrook v. City of Westminster, 177 F.3d at 870. Stripping public employees of their rights to report or discuss significant matters would

seriously undermine our ability to maintain the integrity of our governmental operations and to make informed decisions.

In the instant matter, the Respondents failed to articulate a legitimate interest that was in any way undermined by Ms. Tyner's speech of March 1, 2001. While it is true, the government is free to take appropriate personnel actions, it is simply not free to take illegitimate personnel actions based on improper motives. It is hornbook law that retaliation by a state actor for the exercise of constitutional rights is unlawful, even if the act, if taken for different reasons, would have been proper. See Wilson City of Fountain Valley; 372 F. Supp 2d 1178, 1188 (C.D. Cal 2004); Mt. Healthy City Board of Education v. Douglas, 429 U.S. at 283-84. The employer's right to engage in personnel actions, is simply is not the issue in this case. The right to take inappropriate and unlawful actions is simply not a right that is worthy of balancing under the Pickering analysis.

It would simply be hard to imagine that, even if, the Respondents somehow were offended by Appellant's relatively benign protected speech it is difficult to see how such speech could have disrupted anything. To the extent that someone may have been offended by the speech, the Respondents cannot rely on disruptions which they unreasonably instigated or exacerbated

to defeat a public employees right to freedom of speech. See Roth v. Veterans Administration, 856 F. 2d 1401, 1408 (9th Cir. 1988).

Further, even if we assume arguendo, that only Ms. Pilarski had a retaliatory motive “a subordinate cannot use the non-retaliatory motive of a supervisor as a shield against liability if that supervisor never would have [acted adversely] but for the subordinate retaliatory conduct”. Stahan v. Kirkland, 287 F. 3d 821, 826, 826 (9th Cir. 2002).

D. Adverse Actions.

The notion of what constitutes an adverse action has been liberally construed in the first amendment context. See Dahmer v. Flynn, 60 F.3d 253, 257 (7th Cir. 1994); Thomas v. Carpenter, 881 F.3d 828 (9th Cir. 1989). See also Rutan v. Republican Party, 497 U.S. 62, 75 n.8 (1990); Bart v. Telford, 677 F.2d 622 (7th Cir. 1982).

What constitutes “an adverse employment action” may be the same whether or not one is conducting a 1st Amendment analysis or an analysis under RCW 49.60.210. See Ray v. Henderson 217 F 3d 1234, 1243 (9th Cir.2000). See also Kirby v. City of Tacoma 124 Wn App 454 (2004) (relying on the Ray opinion for its definition of adverse employment action). As noted in Coszalter v. City of Salem 320 F3d 968, 976 (9th Cir.2003) quoting Ray v. Henderson supra, a retaliatory act need only be, “reasonably

likely to deter employees from engaging in protected activity”, in order to be an actionable adverse employment action. Generally, just simply bad mouthing and verbal threats are not enough, but sufficient adverse employment actions may be viewed in the form of the removal of a benefit or the imposition of a burden. *Id* at 975. For example, in Allen v. Scribner 812 F 2d 426, 428, Amended, 828 F 2d 1445 (9th Cir.1987), the Court found that the assignment to another position was an adverse employment action. See also Collins v. State of IL., 830 F. 2d 692 n. 7-10 (7th Cir. 1987), (Collecting cases where adverse employment actions short of discharge have been found actionable). In Thomas v. Carpenter 881 F 2d 828, 829 (9th Cir.1989), the Court found that banishment from certain meetings and denial of participation in a training exercise were sufficiently adverse to be actionable. In Ulrich v. City and County of San Francisco 308 F 3d 968, 977 (9th Cir.2002), the Court found that being subjected to an investigation and being prohibited from rescinding a resignation and having an adverse report filed against the employee was sufficiently adverse and retaliatory to be actionable. In fact, in the previously cited Rutan case and in Bart v. Telford the Appellate Courts found that failure to give an employee a birthday party when all other employees were getting a birthday party could be a sufficient

adverse employment action to constitute an actionable violation of a public employees 1st Amendment rights.

A reasonable jury in this case clearly could find that Ms. Tyner was a victim of retaliatory adverse employment action. She was stripped of her responsibilities and transferred to a demeaning “make work” clerical position. She was subject to a humiliating investigation and ultimately banished from Rainier School. She has as a result received significant psychological injuries. There is no question that a person would think twice before speaking up after they had observed what Ms. Tyner has been through.

E. The Substantial Factor Test

When considering circumstantial proof, the fact-finder can look to a number of circumstantial indicia of a retaliatory or improper motive including disparate treatment. Clement v. Airport Authority of Washoe County, 69 F.3d 321, 335 (9th Cir. 1995). The temporal relationship between protected speech, past superior job performance, and lack of documented criticism. Schwartzman v. Valenzuela, 846 F.2d 1209, 1212 (9th Cir. 1988); Walther v. Lone Star Gas Co., 952 F.2d 119, 124 (5th Cir. 1992). Even if the temporal relationship is not particularly close, interim harassment and disparate scrutiny may nevertheless maintain the causal link. See Mays v. Williamson and Sons Janitorial Services, Inc., 775 F.2d 258 (8th Cir. 1985).

When using a circumstantial proof methodology, a fact-finder is allowed to disbelieve the employer's explanation for its actions and, from such lack of credence or pretext, infer an improper motive. St. Mary's Honor Society v. Hicks, 509 U.S. 502, 113 S.Ct. 24, 42-3, 125 L.Ed.2d 407 (1993). Sometimes, the circumstantial proof from which to discern the operation of impermissible motives is to examine historical events to simply see what, in fact, happened. Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977).

All or some of the above factors can come into play and a fact-finder, in a first amendment case (like any other case), has the right to credit all, some, or none of the evidence presented by the parties. Wytwal v. Saco School Bd., 70 F.3d 165, 171 (1st Cir. 1995). As previously noted, supervisory knowledge, combined with a temporal link, or supervisory disfavor of the speech, or pretext, is enough to overcome a motion for summary judgment on the issue of maturism. See Alpha Energy Savers, supra. Here, the proof strongly suggest the operation of an improper motive.

In the instant matter, the proof of improper motive is predicated on Ms. Pilarski's own words during the course of the March 8, 2001 meeting where she essentially admitted, for all intent and purposes that she intended to investigate Ms. Tyner because of Ms. Tyner's comments that Ms. Pilarski

would, 'blow off' the Ed/Patty investigation. In addition, the Court can take notice that Ms. Pilarski and other supervisors of Appellant had previously received employee complaints about Appellant's style of management, prior to these events and had taken no action against Ms. Tyner. In fact, she received good if not superior annual performance reviews. It was only after Ms. Pilarski became aware of Ms. Tyner's criticism of her investigative skills, that Ms. Pilarski and Ms. Blackburn made the determination to act on the employee complaints. In addition, there certainly was a disparity in treatment between Ms. Tyner and Mr. Densmore. Ms. Tyner had her job responsibilities removed in their entirety while Mr. Densmore, the alleged harasser was allowed to continue to perform his regular job duties, with limitations.

Further, here the timing of events speak volumes as to retaliatory intent and on unlawful motive. Appellant spoke out on March 1, 2001. Ms. Pilarski learned of such speech and/or opposition on March 5 or 6, 2001 when she spoke to HR Director and on March 8, 2001, Ms. Pilarski wantonly confronted Ms. Tyner with her displeasure over the content of her speech. The next day, March 9, 2001 Appellant was removed from her duties. A reasonable jury could easily find in favor of Appellant on Appellant's retaliation claim. It was error for the Trial Court not to allow this strong case to go to the jury.

F. Qualified Immunity

It is noted however that qualified immunity was previously sought in the White case and was denied at the Court of Appeals level. Ultimately the Supreme Court did not address the issue of qualified immunity in White because it ultimately determined the case failed due to factual sufficiency issues. In addition, a whole host of federal case law exists denying qualified immunity in this context. This case is not so unique that it would fall outside of the cases wherein qualified immunity was denied for violating public employee's First Amendment Rights. See Gilbrook v. City of West Minster, supra; see also Chateaubriand v. Gaspard, supra; see also Burgess v. Pierce County, 918 F.2d 104, (9th Cir. 1989). See also Edwards v. D.O.T., 66 Wn. App. 552, 565, 832 p.2d 1332 (1992).

It is noted that in the Burgess opinion, it was found that as early as 1989 that a public employee's First Amendment rights were clearly established for the purposes of qualified immunity.⁴

However, to the extent that employer actually engages in a Pickering balance test, a qualified immunity questions does become somewhat more complex. See Moran v. Washington, 147 F.3d 839, 849-50 (9th Cir. 1988). However, even in such a scenario, qualified immunity can and should be

⁴ This is particularly so when there is a factual issue as to the employers motivation. See Burgess, supra.

denied when the outcome of the balancing test would clearly weigh in favor of the employee. See Gilbrook v. Westminster, supra. Here, clearly to the extent any balancing was performed, the balancing clearly would have weighed in favor of the protected status of Appellant's speech. Ultimately it will be for the jury to determine whether or not such speech was the motivating animus behind the adverse employment decision. See also Rivera v. City and County of San Francisco, 316 F. 3d 857, (9th Cir. 2002)(Denial of qualified immunity based on 1992 facts and law).

G. Plaintiff's RCW 49.60 Claim

Many of the elements, principles, and concepts discussed above, are applicable to Appellant's RCW 49.60.210 opposition claim. Generally, the elements of Appellant's RCW 49.60 claim are as follows:

1. When employee engages in statutorily protected activity;
2. When adverse employment action was taken; and
3. The statutorily protected activity was a substantial factor in the employers adverse employment decision. See Schonauer v. DCR Entertainment 79 Wn App 827; See also Allison 118 Wn 2d, 821 P. 2d 3 (1991); Delahunty v. Cahoon 66 Wn App 829, 832 P.2d 78 (1992).

In the instant matter, as discussed above, clearly Appellant has established that she was a victim of an adverse employment action. In addition, the same evidence that would be supportive of causation on Appellant's 1st Amendment claim is also supportive of causation on Appellant's RCW 49.60 claim.

In the instant matter, it can easily be found that Appellant engaged in “opposition” based on a good faith belief that a subordinate employee was engaging in conduct made unlawful under RCW 49.60 (i.e. creating a gender hostile work environment). While her opposition did not take the form of picketing, as in Delahunty, it was nevertheless a reasonable response to the situation. The Court can notice and as discussed above, sexual harassment/hostile work environment type claims by their very nature are highly dependant on an employer taking prompt efforts to investigate and to take remedial measures to protect the victim employee. Appellant’s suggestion that an outside investigation occur in order to insure a thorough unbiased investigation clearly is conduct that would further be goals of RCW 49.60 which is to eradicate discrimination within work places within the State of Washington.

Generally, in order to establish that Appellant had engaged in statutorily protected opposition activity, it need only be shown that the conduct complained of at least arguably was violative of the law and it is not necessary to show opposition addressed actual illegality. See Kahn v. Salerno, 90 Wn. App. 110, 130, 951 P. 2d 321 (1998). Generally, to determine whether an employee has engaged in protected opposition activity, the Court must balance the setting in which the activity arose and the interests and motive of the employer and the employee. Id. See also Little v.

Windermere Relocation, Inc. 301 F. 3d 959, 969 (9th Cir. 2002)(Opposition activity is protected under Title VII when it is based on a reasonable belief that the employer has engaged in an unlawful employment practice. See also, EEOC v. Crown Zellerbach Corp., 720 F. 2d 108 (9th Cir. 1983).

In the instant matter, Appellant engaged in oppositional speech in a manner that would be supportive over laws against discrimination. Although, failure to engage in an unbiased and un-thorough investigation by an employer is not per se illegal, the underlying conduct of Mr. Densmore, may very well have been. As such, it would go without saying that the issue on which Appellant was engaging in her oppositional speech, were matters on which affording protection, would serve the broad remedial purposes of RCW 49.60.

There is also no indication that her oppositional activity in any way was destructive or disruptive to the work environment. As previously noted, Appellant's relatively benign opposition was done in a private setting and to an appropriate Human Resources official. If in fact any disruption occurred within the work environment, it was a byproduct of the Human Resources failure to keep Appellant's concerns confidential and informing Ms. Pilarski of such concerns.

What is remarkable about this case is although, Appellant's speech and oppositional activity are clearly worthy of protection, the amount and

kind of retaliation that occurred appears extremely disproportionate given the relatively benign nature of Appellant's speech. Be that as it may, Appellant ultimately should not be held accountable for the blatantly unreasonable nature of the employers response to her oppositional activity.

As with Appellant's first amendment claim, the proximity and time between protected activity and the adverse employment action, as well as previously noted satisfactory work performance and evaluations prior to the adverse employment action are factors to be considered and which suggest the existence of retaliatory motives. See Vasquez v. DSHS, 94 Wn. App. 976, 985, 974 P. 2d 348 (1999). In fact the employers knowledge of such oppositional activity followed by an adverse employment action presents a rebuttal presumption in favor of the employee that generally would precluded the dismissal of the employee's case. Id.

In the instant matter, given the timing and the adverse reaction of Ms. Pilarski to the opposition, as well as Appellant's previously good work performance, combined with indications of disparate treatment, it was simply erroneous for the Trial Court not to allow Appellant's RCW 49.60 retaliation claim to proceed to the jury.

IV. CONCLUSION

For the reasons stated above, the instant case should be remanded for a full trial on the merits on both of Appellant's theories of liability. It is

beyond question that Appellant's speech involved a matter of public concern. There are also substantial factual issues from which a reasonable jury could readily conclude that a substantial or a motivation factor in the adverse employment decisions taken against Appellant were retaliation for speech. Given the existence of such factual issue, it is simply for the jury to sort out whether or not the adverse actions taken against Appellant were for legitimate or illegitimate reasons. Additionally, the Trial Court erred in addressing The Pickering balancing test in its oral ruling on summary judgment. In this matter, the Respondent employer simply failed to properly put the Pickering balance at issue. Even if it did so properly, Appellant's protected speech overwhelmingly outweighs any employer interest in this case.

In any event, for the reasons stated above, the rulings of the Trial Court on *de novo* review clearly should be reversed and this matter should be remanded for a jury trial.

DATED this 19th day of April, 2006.



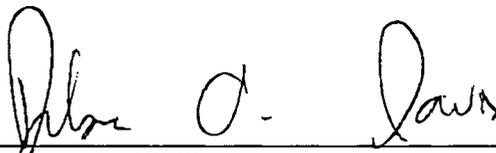
Paul A. Lindenmuth, WSBA # 15817

Attorney for Plaintiff

Ben F. Barcus and that on this same date I deposited for delivery via ABC/Legal Messengers, true and correct copies of Plaintiff's/Appellant's Opening Brief in the above-captioned case addressed to:

Glen A. Anderson, Esq.
Office of the Attorney General
Tort Claims Division
629 Woodland Square Loop S.E.
Olympia, WA 98504-0126

DATED this 21st day of April, 2006 at Tacoma, Washington.



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**COURT OF APPEALS
OF AND FOR THE STATE OF WASHINGTON
DIVISION II**

ORIGINAL

PAULA TYNER, individually,)
)
 Plaintiff/Appellant,) ~~No. 33080-6-II~~
)
 vs.) **CERTIFICATE OF**
) **SERVICE OF**
 THE STATE OF WASHINGTON;) **APPELLANT'S OPENING**
 DEPARTMENT OF SOCIAL AND) **BRIEF**
 HEALTH SERVICES (DSHS);)
 RAINIER SCHOOL; LARRY)
 MERXBAUER, in his individual)
 capacity; JAN BLACKBURN, in her)
 individual capacity; JODY PILARKSI,)
 in her individual capacity; and TINA)
 FLEISCHER, in her individual)
 capacity,)
)
)
)
 Defendants/Respondents,)
)
 _____)

I, DEBRA A. DEVAUL, certify under penalty of perjury under the laws of the State of Washington, that I am a Legal Assistant at *The Law Offices of Ben F. Barcus* and that on this same date I deposited for delivery via ABC/Legal Messengers, true and correct copies of Plaintiff's/Appellant's Motion for Extension of Time, along with a copy of this Certificate of Service in the above-captioned case addressed to:

Glen A. Anderson, Esq.
Office of the Attorney General
Tort Claims Division
629 Woodland Square Loop S.E.
Olympia, WA 98504-0126

DATED this 19th day of April, 2006 at Tacoma, Washington.



DEBRA A. DEVAUL

I, DEBRA A. DEVAUL, certify under penalty of perjury under the laws of the State of Washington, that I am a Legal Assistant at *The Law Offices of Ben F. Barcus* and that on this same date I deposited for delivery via ABC/Legal Messengers, true and correct copies of Plaintiff's/Appellant's Motion for Extension of Time, along with a copy of this Certificate of Service in the above-captioned case addressed to:

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DEBRA A. DEVAUL