

NO. 34357-6-11

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

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**JANE DOE I**, Appellant,

v.

**THE STATE OF WASHINGTON, DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES; WESTERN STATE  
HOSPITAL; BARRETTE GREEN; and WASHINGTON  
FEDERATION OF STATE EMPLOYEES, LOCAL 793,**  
Respondents.

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**BRIEF OF RESPONDENT WASHINGTON  
FEDERATION OF STATE EMPLOYEES**

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**I. COUNTERSTATEMENT OF THE ISSUES AS TO THE RESPONDENT WASHINGTON FEDERATION OF STATE EMPLOYEES (WFSE)**

1. Did the trial court err in holding that appellant/plaintiff's (Salazar's) claims of sexual harassment, retaliation, outrage and negligent retention against the WFSE are each barred by applicable three-year statutes of limitations?

2. If not time-barred, should Salazar's claims against the WFSE for sexual harassment, retaliation, outrage and negligent supervision be dismissed on summary judgment as insufficient as a matter of law?

**II. COUNTERSTATEMENT OF THE CASE**

**A. *Statement of Proceedings***

Salazar filed a complaint against Barrette Green (Green), the State of Washington (State), and the WFSE on February 8, 2005.<sup>1</sup> On May 2, 2005, the WFSE filed its Answer and Affirmative Defenses, asserting in part that Salazar's claims were barred by statutes of limitations.<sup>2</sup>

Before trial, the WFSE moved for summary judgment of dismissal of Salazar's complaint.<sup>3</sup> The motion was heard January 20, 2006. The court

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<sup>1</sup> CP 1-17.

<sup>2</sup> CP 35-49.

<sup>3</sup> CP 434-35 and 507-09.

granted the WFSE's motion for summary judgment and dismissed all of Salazar's claims.<sup>4</sup> Salazar appealed.<sup>5</sup>

**B. Counterstatement of Facts<sup>6</sup>**

Salazar is an employee of the Department of Social and Health Services (DSHS). At times pertinent to her complaint, she was employed as a Registered Nurse 3 (RN3), a supervisory position at Western State Hospital (WSH).<sup>7</sup> As an RN3 she reported to Melanie Fulmer, the RN4. In 1998 Salazar was promoted to an RN4 position. After her promotion, she was supervised by Dr. Darrell Hamilton.<sup>8</sup> Contrary to the allegations in Salazar's complaint, the defendant Green never supervised her.

The WFSE is a statewide labor organization of state employees affiliated with the American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO. It is AFSCME Council 28. WFSE Local 793 is certified to represent a unit of WSH employees.<sup>9</sup> Salazar was

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<sup>4</sup> CP 1924-26. The court based its ruling on the statute of limitations, not reaching the other issues. The court also granted the summary judgment motions of dismissal to the defendants State and Green. CP 1921-23 and 1930-32.

<sup>5</sup> CP 1933-43.

<sup>6</sup> Salazar's statement of facts spends very little time on the facts relevant to her claim. Instead, as before the trial court, Salazar focuses on the reports of other allegations involving Green. In the trial court, WFSE moved to strike many of these "proofs" as inadmissible hearsay, opinions and conclusions. (CP 1797-98). That motion is raised again, *infra*.

<sup>7</sup> CP 461, Certified Statement of Edward Earl Younglove III, Attachment A, Salazar Personnel Appeals Board (PAB) Tr. p. 67, lines 8-13.

<sup>8</sup> CP 461, Salazar PAB Tr. p. 69, line 17 through p. 73, line 24.

<sup>9</sup> CP 494-96, Certified Statement of Liz Larsen.

never a member of WFSE Local 793.<sup>10</sup> In fact, at no time was Salazar ever a member of any bargaining unit represented by the WFSE.<sup>11</sup> The WFSE has never represented a bargaining unit comprised of any RN3s or RN4s at WSH.<sup>12</sup> Salazar was, however, a member of Service Employees International Union (SEIU) 1199. SEIU is an entirely different employee organization that represents nurses at WSH.<sup>13</sup>

Green was an employee at WSH from the late 1980s until his dismissal November 24, 2003. During the time relevant to Salazar's complaint (1998 and 1999), Green was also the Chief Shop Steward of WFSE Local 793. The Chief Shop Steward position is a volunteer position.<sup>14</sup>

According to Salazar, in 1998 she and Green developed a relationship which culminated in his asking her if he could come over to her house and have oral sex, to which she agreed. While the two were engaged in that activity, she claims she asked Green to stop and he did.

**Q.** [By Mr. Younglove] So after this phone call and after these either one or two occasions in his office when he tried to kiss you, and you say on another occasion he kissed your breast, you invited him to your house, correct?

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<sup>10</sup> CP 463, Salazar PAB Tr. p. 76, lines 24-25.

<sup>11</sup> CP 1959-62, Supplemental Declaration of Edward Earl Younglove III, Salazar Deposition, p. 92, line 12 through p. 94, line 9.

<sup>12</sup> CP 494-95, Cert. Stmt. of Larsen.

<sup>13</sup> CP 1959-62, Supp. Decl. of Younglove, Salazar Dep., p. 92, line 12 through p. 94, line 9.

<sup>14</sup> CP 495-96, Cert. Stmt. of Larsen.

A. [By Ms. Salazar] Yes.

Q. For the express purpose of his coming over and the two of you having some form of sex, correct?

A. Yes. If you can -- yes.

Q. For that purpose?

A. Yes.

Q. Over the telephone, correct?

A. No.

Q. I mean, he told you -- oh, you were talking in person?

A. Yes.

Q. And he asked if he could come over to your house, correct? For the purpose of sex, correct?

A. Oral sex.

Q. And did you give him directions to your house?

A. I believe I did.

Q. And the purpose -- and when he came over the two of you did have this sexual contact that you described, where you went into your bedroom and you took off your clothes, and you've described that behavior, is that correct?

A. Yes.

Q. And Mr. Green, you knew why he was coming for that purpose, and you consented to his coming for that purpose, correct?

A. I did.<sup>15</sup>

All of Salazar's alleged contacts with Green occurred prior to late 1999, more than five years before Salazar filed suit.

Q. [By Mr. Younglove] Now, the events involving Mr. Green in terms of your having any kind of contact with him, physical or verbal of a sexual nature, did those all occur prior to late '99 when you returned to the RN 3 position in admissions?

A. [By Ms. Salazar] No. It occurred prior to that.

Q. I thought that's what I asked. Prior to -- prior to late '99, correct?

A. Yes.<sup>16</sup>

No official of Local 793 or the WFSE had any knowledge of any claim of any sexual impropriety by Green until 2000, when Kathleen Lizee (Lizee) filed a complaint. In response, the WFSE attempted to investigate Lizee's complaint; however, she refused to cooperate.<sup>17</sup> Lizee instead sued Green and the State. The court dismissed Green from Lizee's lawsuit.<sup>18</sup> He has consistently denied Lizee's harassment claims, as well as those of Salazar. Lizee and the State settled her claim, and the State conducted an

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<sup>15</sup> CP 465, Cert. Stmt. of Younglove, Attachment A, Salazar PAB Tr. p. 83, line 12 through p. 84, line 15; see also CP 454-55, p. 41, line 6 through p. 43, line 19.

<sup>16</sup> CP 1953, Supp. Decl. of Younglove (December 29, 2005 Dep. of Salazar), p. 83, lines 12-20.

<sup>17</sup> CP 494-506, Cert. Stmt. of Larsen.

<sup>18</sup> Pierce County Cause No. 01-2-09414-4.

investigation into allegations which had surfaced against Green during the litigation (Salisbury investigation).<sup>19</sup>

In a 2001 affidavit for the *Lizee* case, Jose Aguirre (Aguirre) claimed to have written a letter to the Local 793 executive board in 1997, complaining of Green's sexual behavior toward two female shop steward trainees.<sup>20</sup> However, Aguirre admits that his letter did not relay what either shop steward trainee told him about any complaints that Green may have harassed them. He also admits he had no discussions with either the Local executive board or anyone connected with the WFSE concerning this complaint.<sup>21</sup> A review of Aguirre's letter reveals that it makes no reference to any complaints that Green engaged in any inappropriate sexual behavior.<sup>22</sup>

In February 2002, during a deposition in *Lizee's* case against the State, Salazar denied that she had any sexual contact with Green. She also denied that she had complained of any such behavior to the union or anyone else.<sup>23</sup> In fact, she denied any inappropriate conduct on his part whatsoever.<sup>24</sup>

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<sup>19</sup> Brief of Appellant, p. 3.

<sup>20</sup> CP 1445-47.

<sup>21</sup> CP 1813-15, Second Supplemental Certified Statement of Edward Earl Younglove III, Attachment 1 (Aguirre Deposition, pgs. 56-58).

<sup>22</sup> CP 1817-18, Second Supp. Cert. Stmt. of Younglove, Attachment 2 (Aguirre letter).

<sup>23</sup> CP 472-87, Cert. Stmt. of Younglove, Attachment B, Salazar Dep. in Pierce County Cause No. 01-2-09414-4.

<sup>24</sup> CP 474-76, Salazar Dep., p. 11, lines 20-22; and p. 13, lines 1-4.

Not until late 2003, when the WFSE received a copy of the Salisbury report in the predisciplinary proceedings against Green, did the WFSE become aware of any other employee's complaints about Green. By this time, Green was on home assignment. In November 2003 DSHS dismissed him as a result of the investigation. He has never returned to work at WSH.<sup>25</sup>

Salazar was aware of DSHS's sexual harassment policies and of her obligation to report harassment.<sup>26</sup> She never did. Although she was familiar with members of the leadership of Local 793 and of the statewide union (WFSE) employed at WSH, she never told anyone connected with the WFSE about her allegations concerning Green.<sup>27</sup> She cannot articulate any basis for any person connected with the WFSE being aware of Green's alleged conduct which she now alleges constituted sexual harassment.<sup>28</sup> Salazar did not tell anyone at all about Green's conduct until June of 2003. At that time she told the State's investigator (Salisbury), who was investigating the complaints against Green that ultimately led to his dismissal from his employment. Not only did she not tell anyone about the

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<sup>25</sup> CP 494-506, Cert. Stmt. of Larsen.

<sup>26</sup> CP 461, Salazar PAB Tr. p. 69, lines 12-16.

<sup>27</sup> CP 1963-66, Supp. Decl. of Younglove, Dec. 29, 2005 Dep. of Salazar, p. 95, line 9 through p. 98, line 11.

<sup>28</sup> CP 1966-70, Supp. Decl. of Younglove, Dec. 29, 2005 Dep. of Salazar, p. 98, line 24 through p. 102, line 14.

complaints, she actively prevented the discovery of those incidents, for example, by claiming she lied both to Kathleen Lizee and to her attorney during a deposition given under oath.<sup>29</sup>

Salazar admits that only with the benefit of looking back on Green's conduct, through the lens of having directly experienced his harassing behavior, is she able to see that some of his conduct might appear inappropriate.<sup>30</sup> On the other hand, she has no knowledge that the union was aware of any conduct or complaints which would have put it on notice that Green might be capable of any of the behavior she alleges.

Salazar has now identified a number of later incidents subsequent to Green's termination that she characterizes as possible retaliation by Green or others. She feels a lawsuit Green brought against her and the State (and others) was retaliatory.<sup>31</sup> Salazar claims to have found a partially skinned rabbit on her front porch in December of 2003, and during the same month found a toy stuffed bear in her mail cubicle at work.<sup>32</sup> She suspects that either Green or some of his "thug" friends may have been responsible for these actions. However, she is not aware of anyone who claims to have any

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<sup>29</sup> CP 1966, *Id.*, p. 98, lines 3-23.

<sup>30</sup> CP 1975, *Id.*, p. 114, lines 6-18.

<sup>31</sup> CP 1376, Declaration of Loren Cochran, Exhibit K, U.S.D.C. CV03-5653. The WFSE was not a party nor did it have any other role in this litigation.

<sup>32</sup> CP 1955, Supp. Decl. of Younglove (Dec. 29, 2005 Dep. of Salazar), p. 85, lines 6-11.

information as to who might be responsible for either incident.<sup>33</sup> Salazar also claimed that between the spring and fall of 2005, after this lawsuit was commenced, she suffered a series of nail punctures to her automobile tires, and had some hang-up phone calls.<sup>34</sup> Once again, she is unable to attribute that conduct to any individual.

Since 2000 Salazar has worked as a CSN in the Center for Forensic Services. In that position, she works with individuals who have been acquitted from crimes on the basis of insanity, and who are on conditional release status. Many of these individuals are released from the hospital without any direct supervision. Salazar testified that these individuals have ready access to her mailbox at work where she found the green bear. She testified that based on her experience, some of these individuals engage in bizarre behavior.<sup>35</sup> However, there is no evidence linking any individual to any of these later allegedly "retaliatory" acts.

### III. ARGUMENT

#### A. *Summary judgment on review.*

On summary judgment, we "engage[ ] in the same inquiry as the trial court." *Faylor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wash.2d 488, 493, 886 P.2d 147 (1994). We will not resolve factual issues, but rather must determine if a genuine

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<sup>33</sup> CP 1971-74, Supp. Decl. of Younglove (Dec. 29, 2005 Dep. of Salazar) p. 103, line 17 through p. 106, line 24.

<sup>34</sup> CP 1955, Supp. Decl. of Younglove (Dec. 29, 2005 Dep. of Salazar), p. 85, lines 12-19.

<sup>35</sup> CP 1956-59, Supp. Decl. of Younglove (Dec. 29, 2005 Dep. of Salazar), p. 89, line 5 through p. 92, line 11.

issue as to any material fact exists. *Balise v. Underwood*, 62 Wash.2d 195, 199, 381 P.2d 966 (1963). "A material fact is one upon which the outcome of the litigation depends." *Id.* The moving party has the burden of proving there is no genuine issue of material fact and all inferences are construed in the light most favorable to the nonmoving party. *Id.*; see also Civil Rules (CR) 56(c). [Footnote omitted.] If the moving party meets its burden, the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." *LaPlante v. State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975); *Snohomish County v. Rugg*, 115 Wash.App. 218, 224, 61 P.3d 1184 (2002) (stating that a nonmoving party must set forth evidentiary facts, not suppositions, opinions, or conclusions); see also CR 56(e). . . .

*In re Estate of Black*, 153 Wn.2d 152, 160-61, 102 P.3d 796 (2004).

[I]f the plaintiff fails to make a showing sufficient to establish an essential element of his case, the trial court should grant the summary judgment motion because there can be no genuine issue of material fact in that situation; a complete failure of proof concerning an essential element of the plaintiff's case renders all other facts immaterial. *Id.* The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 377, 972 P.2d 475 (1999).

*Little v. Countrywood Homes*, 132 Wn.App. 777, 779-80 \_\_\_ P.3d \_\_\_ (2006).

[A] trial court's disposition [on summary judgment] may be affirmed [on appeal] on any theory within the pleadings and the proof. *Timms v. James*, 28 Wash.App. 76, 81, 621 P.2d 798 (1980). Thus the decision may be upheld where there is an alternate ground on which the summary judgment could have been granted.

*Carey v. Reeve*, 56 Wn.App. 18, 23, 781 P.2d 904 (1989).

In this case, the trial court properly granted the WFSE's summary judgment motion and dismissed each of Salazar's claims based on the applicable statutes of limitations. Although the court did not need further bases to dismiss the claims, it could have also dismissed them for failure to present sufficient evidence as a matter of law.

***B. The court should not consider much of Salazar's submissions.***

Salazar relied on numerous inadmissible documents in opposing defendant Washington Federation of State Employees' (WFSE's) Motion for Summary Judgment. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ." CR 56(e).

The Declaration of Loren A. Cochran attached the following inadmissible (at least for the purpose of establishing facts or opinions asserted therein) documents:

Exhibit A, Salisbury Report dated July 1, 2003.<sup>36</sup>

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<sup>36</sup> CP 1138-41.

Exhibit B, Special Master's Report by Special Master Michael Reese in *Lizee v. State of Washington*<sup>37</sup> (a case in which the WFSE was not a party and had no role).<sup>38</sup>

Exhibit C, Hobson Report in *Green v. State of Washington*<sup>39</sup> (another case in which the WFSE was not a party, nor did it have any role).

Exhibit D, Department of Social and Health Services (DSHS) letter of termination to Green.<sup>40</sup>

Exhibit E, Collinsworth Report.<sup>41</sup>

Exhibit F, DSHS Secretary Dennis Braddock newspaper quote.<sup>42</sup>

Exhibit H, Order Granting Summary Judgment in *Green v. State* (a case in which, as noted previously, the WFSE was neither a party nor a participant in any other way).<sup>43</sup>

Exhibit I, Personnel Appeals Board Findings on Green's termination.<sup>44</sup>

Exhibit K, Complaint of Barrette Green in *Green v. State*.<sup>45</sup>

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<sup>37</sup> CP 1143-53.

<sup>38</sup> CP 1143-53.

<sup>39</sup> CP 1155-1216.

<sup>40</sup> CP 1218-27.

<sup>41</sup> CP 1229-76.

<sup>42</sup> CP 1278-79.

<sup>43</sup> CP 1313-32.

<sup>44</sup> CP 1334-49.

<sup>45</sup> CP 1376-1409.

Exhibit L, Statements of Sherer Murtiashaw Holter, a DSHS representative.<sup>46</sup>

Exhibit M, Statement of Darrel Hamilton, a DSHS representative.<sup>47</sup>

Each of the foregoing documents contains allegations about which the individual making the assertion is not competent because they lack personal knowledge (ER 602), are repeating hearsay (ER 802), and/or are expressing inadmissible opinions (ER 701). Therefore, the court should not consider those documents to decide issues involving the WFSE.

***C. The trial court properly ruled that Salazar's claims against the WFSE are barred by the three-year statutes of limitations.***

Each of Salazar's claims is subject to a three-year statute of limitations. "The three-year statute of limitations applies to actions under this act [RCW Ch. 49.60, Sexual harassment and retaliation]." *Washington v. Boeing Co.*, 105 Wn.App. 1, 7-8, 19 P.3d 1041 (2000). Claims of outrage are subject to a three-year statute of limitations. *Milligan v. Thompson*, 90 Wn.App. 586, 592, 953 P.2d 112 (1998). "The statute of limitations for negligent failure to supervise . . . is three years." *Mayer v. Huesner*, 126 Wn.App. 114, 123, 107 P.3d 152 (2005). Salazar's complaint was not filed until February 8, 2005. All of Salazar's interactions with Green occurred

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<sup>46</sup> CP 1411-34.

<sup>47</sup> CP 1436-43.

prior to the fall of 1999, more than five years prior to the filing of Salazar's complaint. All Salazar's claims are time-barred.

It is not unfair to expect Salazar to bring her claims in a timely fashion. Statutes of limitation are not punitive.

Statutes of limitation assist the courts in their pursuit of the truth by barring stale claims. A number of evidentiary problems arise from stale claims. *See generally* *Ruth* [v. *Dight*, 75 Wash.2d 660, 664-65, 453 P.2d 631 (1969)]. *See also* Note, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U.Pitt.L.Rev. 501, 512-14 (1982). As time passes, evidence becomes less available. For example, the defendant might have had a critical alibi witness, only to find that the witness has died or cannot be located by the time the action is brought. Likewise, witnesses who observed the plaintiff's behavior shortly after the alleged act may no longer be available. Physical evidence is also more likely to be lost when a claim is stale, either because it has been misplaced, or because its significance was not comprehended at the time of the alleged wrong. In addition, the evidence which is available becomes less trustworthy as witnesses' memories fade or are colored by intervening events and experiences. Old claims also are more likely to be spurious than new ones. "With the passing of time, minor grievances may fade away, but they may grow to outlandish proportions, too." *Ruth*, at 665, 453 P.2d 631. Thus, stale claims present major evidentiary problems which can seriously undermine the courts' ability to determine the facts. By precluding stale claims, statutes of limitation increase the likelihood that courts will resolve factual issues fairly and accurately.

*Tyson v. Tyson*, 107 Wn.2d 72, 75-76, 727 P.2d 226 (1986).

As shown *infra*, the trial court properly ruled that each of Salazar's claims was time-barred.

1. **The harassing and retaliatory incidents are not part of a "single sexual harassment" claim under *Antonius v. King County*, 153 Wn.2d 256, 103 P.2d 729 (2005).**

Despite the seemingly obvious time bar to her complaints, Salazar argues they are not barred because:

(1) In November 2003, after being fired from his employment, Green instituted a lawsuit against her, several other individuals and the State of Washington,

(2) Shortly after Green was terminated, she found a dead rabbit on her porch and a Christmas bear in her mail cubicle at work, and

(3) In 2005 she had several flat tires.<sup>48</sup>

Initial problems with Salazar's position are: (1) the WFSE was not a party and had no role in Green's personal lawsuit; and (2) the other more recent incidents cannot be attributed to any individual, much less anyone for whom the WFSE can be held liable. Salazar herself admits there is no evidence linking either the dead rabbit on her porch or the Christmas bear in her mail cubicle to either Green or any member of the WFSE.<sup>49</sup> The patients at WSH have access to her unsecure mail cubicle and occasionally engage in bizarre behavior.<sup>50</sup> In fact, Salazar herself did not even attach any

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<sup>48</sup> Appellant's Opening Brief, pgs. 27-28.

<sup>49</sup> CP 656, Declaration of Jason M. Rosen (Dec. 29, 2005 Dep. of Salazar), p. 24, lines 12-18.

<sup>50</sup> CP 1956-59, Supp. Decl. of Younglove (Dec. 29, 2005 Dep. of Salazar), p. 89, line 5 through p. 92, line 11.

significance to the bear, thinking it was merely a gift from one of her patients.<sup>51</sup> Anyone in the world could access her front porch. Salazar has no explanation other than conjecture as to the cause of her frequent flat tires.

Salazar argues her claims are not barred because the court has adopted the single incident view of sexual harassment claims. *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2005). *Antonius* adopted the following analysis set forth in *Morgan, Crowley v. L.L. Bean, Inc.*, 303 F.3d 387 (1st Cir. 2002):

Under *Morgan*, a "court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period." *Morgan*, 536 U.S. at 120, 122 S.Ct. 2061. *The acts must have some relationship to each other to constitute part of the same hostile work environment claim, and if there is no relation, or if "for some other reason, such as certain intervening action by the employer" the act is "no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts" as part of one hostile work environment claim. Morgan*, 536 U.S. at 118, 122 S.Ct. 2061.

(Emphasis added.) *Antonius*, at 271.

Both Salazar's various claims and their diverse nature make the "single incident" analysis inapplicable to her case. She claims that during a brief period in 1998 and before the end of 1999, Green created a hostile work environment for her by kissing and fondling her breast in his office

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<sup>51</sup> CP 656, Decl. of Rosen (Dec. 29, 2005 Dep. of Salazar) p. 23, lines 6-13.

at work; coming to her house on two occasions when she invited him to come over, the first being for the express purpose of having oral sex; and a phone call from a hotel to her home in which she alleges Green made obscene requests. These are all obviously outside the three-year statute of limitations for the bringing of a hostile environment harassment claim. But Salazar claims that three events occurring in 2003 and 2005 (the lawsuit, the rabbit and bear, and her flat tires) did occur within the statutory period, making her claim timely.

The court held, in *Antonius, supra*, that for the "single incident" analysis to apply, there must be no intervening action by the employer. Certainly, Green's termination in November 2003, based in part on Salazar's allegations and predating all of these later incidents, constitutes such an intervening action by the employer. For that reason alone, *Antonius* has no application to this case, but there are other reasons it does not apply.

Salazar claims that Green filed a lawsuit against her the day after he was fired, and that this was a timely act and a part of the same actionable hostile environment as the early sexual incidents. Green's decision to bring a lawsuit is certainly outside any capacity he had with either the employer or the WFSE. Neither the WFSE (which had no role in the case whatsoever) nor his employer (actually at this point in time, his *former* employer, whom Green also sued) can be accountable for Green's

having brought that action. In addition, the bringing of his lawsuit is conduct which is very dissimilar to the sexual conduct she alleges occurred in 1998 and 1999.

As to the other "incidents" (the rabbit, the Christmas bear and her flat tires) Salazar's supposition that they could have been the work of persons whom she views as Green's "thugs" is pure speculation. In addition, these incidents too are remarkably dissimilar from the sexual conduct she complains occurred in 1998 and 1999. Even the more than four-year hiatus between the earlier sexual conduct and later incidents makes Salazar's case distinguishable from *Antonius, supra*.

In adopting the single employment practice analysis, the court, in *Antonius*, did say that a gap between a series of harassing events is not in and of itself fatal, but can be a consideration. The female corrections employee in *Antonius* was subjected to a sexually hostile environment for a 15-year period, during which she enjoyed only a one-year hiatus. Here, Salazar claims to have been harassed for a relatively brief period in 1998 and 1999, and then claims four to seven years later a few anonymous retaliatory incidents in 2003 and 2005. It is significant that the *Antonius* court noted that in *Lucas v. Chicago Transit Authority*, 367 F.3d 714 (7th Cir., 2004), the Court found a three-year gap warranted a finding that the discriminatory acts were not part of the same hostile environment. Here,

both the substantial gap in time and dissimilar nature of the incidents complained of justify such a finding.

Green's alleged harassment of Salazar and the alleged later retaliatory acts are not part of a single hostile environment.

**2. Neither inadequate remedial measures nor Green's presence at WSH extend the limitation period on Salazar's RCW Ch. 49.60 claims.**

Salazar argues two other grounds for her sexual harassment claims not being barred by the statute of limitations. She argues that the employer's inadequate remedial measures, and Green's mere presence at work, extended the statute of limitations. First, Salazar does not even appear to argue that Green's continued employment or presence at WSH extended the statute of limitations as to the WFSE.<sup>52</sup> Second, her arguments for extending the limitations period are not well taken in any event.

Salazar is unable to cite to any authority for extending the applicable statute of limitations based on the employer's not taking prompt remedial action or by the mere continued employment of the harasser. None of the cases, *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995); and *Steiner v. Showboat*

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<sup>52</sup> Appellant's Brief, pgs. 31-32.

*Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), cited by Salazar even concerned the issue of the running of a statute of limitations.

In her brief, Salazar argues that the State knew of Green's sexual harassing behavior back to 1988, and did nothing, and that his behavior continued through the trial of Kathleen Lizee in 2003 (Appellant's Brief, p. 29).<sup>53</sup> There is absolutely no evidence that the WFSE was aware of any such 1988 claims. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . ." CR 56(e). As argued previously, the Salisbury report upon which Salazar relies in making this assertion is not based on personal knowledge, but is a compilation of hearsay, opinion and conclusions. Furthermore, the report does not contain even an allegation that the WFSE was aware of Green's behavior back in 1988-1989.

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<sup>53</sup> The Clerk's Papers' reference in support of this proposition is to the Declaration of Darrell L. Cochran in Support of Plaintiff's Response to Motion for Summary Judgment filed July 5, 2005. CP 248-353. This pleading apparently was filed in response to defendant Green's earlier summary judgment motion, and was not a pleading considered by the court in ruling on the WFSE's motion for summary judgment. See Order on Summary Judgment (CP 1924-26). It appears these references are to the "report to management" by Salisbury Consulting, dated July 1, 2003. This same document was submitted by Salazar in opposition to the WFSE's motion for summary judgment as Exhibit A to the Declaration of Loren A. Cochran in Support of Plaintiff's Opposition to Defendant WFSE's Motion for Summary Judgment (CP 1134-1457). In its Reply Brief in Support of Motion for Summary Judgment, the WFSE moved to strike certain of Salazar's submissions, including the Salisbury report. CP 1797-1801.

The only competent evidence regarding the WFSE's knowledge of events reflects that the WFSE first became aware of any allegation of a sexual nature involving Green in the year 2000 (this is well after all of Salazar's interactions with Green), when it received a complaint from Lizee.

The WFSE attempted to investigate Lizee's allegations, but was unable to because of Lizee's refusal to cooperate. Instead, Lizee chose to pursue her lawsuit. The lawsuit ultimately led to the State's investigation and Green's discipline in November 2003. Green's discipline was the first time the WFSE became aware of any of the other allegations (including Salazar's) against Green.<sup>54</sup>

The three-year statute of limitations attributable to Green's alleged sexually harassing behavior directed toward Salazar expired sometime in late 2002, several years prior to the commencement of this lawsuit in February 2005. The trial court correctly held that Salazar's claims against the WFSE for violations of RCW Ch. 49.60 were barred by the statute of limitations.

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<sup>54</sup> CP 494-506.

**3. Salazar's claim of outrage is also time-barred.**

Salazar contends that the court should apply a discovery rule as an equitable exception to the statute of limitations applicable to her claim for the tort of outrage. She argues, in essence, that she could not be held to comprehend what she alleges was Green's outrageous behavior until she became aware of the claims of other WSH employees disclosed in the Salisbury report in 2003.<sup>55</sup>

Salazar bases this argument on her reading of *Beard v. King County*, 76 Wn.App. 863, 889 P.2d 501 (1995). The case does not support Salazar's argument. In *Beard*, the court upheld the dismissal of plaintiffs' claims (including their claim for outrage) on the basis that the statute of limitations was not tolled by the discovery rule. The plaintiffs in that case, former police officers, filed claims of outrage based on their having been improperly sued because of an improper investigation. They argued that the statute of limitations should not have commenced to run until they learned that confidential police information had been improperly leaked to the plaintiff's attorney. In rejecting this argument and upholding dismissal of the claims, the court stated:

The limitation period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist, whether or not the party can then conclusively

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<sup>55</sup>Appellant's Brief, p. 33.

prove the tortious conduct has occurred. A smoking gun is not necessary to commence the limitation period. An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken. At that point, the potential harm with which the discovery rule is concerned--that remedies may expire before the claimant is aware of the cause of action--has evaporated. The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable. If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time-barred.

*Beard* at 868.

Obviously, Salazar was well aware of the complete details of each of her alleged sexual encounters with Green when they occurred in 1998 and 1999. She claims, however, that she could not appreciate just how outrageous this conduct was until 2003, when she learned through the Salisbury investigation that Green was allegedly "harassing" other females at WSH. Of course, Salazar's personal encounters with Green put her on notice. In addition to her own experiences, Salazar at least knew of Lizee's claims before expiration of the limitations period. Lizee's attorney took Salazar's deposition in February 2002.<sup>56</sup> Although during that deposition Salazar denied any sexual interactions with Green or inappropriate conduct on Green's part (*Id.*), she was obviously aware of at least Lizee's

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<sup>56</sup> CP 472-487.

allegations against him by that time. In fact, she admitted that Lizee had asked her much earlier if Green had harassed her, and Salazar told Lizee that he had not.<sup>57</sup>

Finally, it is inconsistent for Salazar to claim that the WFSE should be held accountable because it should have known of Green's alleged activities, and at the same time argue she should not be charged with the same knowledge.

Salazar was aware of the essential facts, which she alleges constituted outrageous conduct, back in 1998 and 1999, when she had her sexual encounters with Green. Her claim is barred by the applicable three-year statute of limitations.

**4. Salazar's negligent retention claim is barred by the statute of limitations.**

Salazar contends that her claim of negligent retention against both the State and the WFSE commenced after the State ceased retaining Green as an employee, and the WFSE ceased retaining Green as a union official.

Salazar's argument is nonsensical. She does not contend that she was subjected to any interactions with Green at any time between late 1999 and Green's dismissal, the period she contends he was negligently

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<sup>57</sup> CP 466, Cert. Stmt. of Younglove, Attachment A, PAB Tr. p. 89.

retained.<sup>58</sup> The problem with Salazar's claim is that even if the State's continued employment of Green and Green's continued involvement in the union could be construed as negligent retention, it caused no injury to Salazar. The gravamen of a negligent retention claim is that the negligent retention occasioned some injury.<sup>59</sup> In this case, the injury element is absent. The retention of Green as an employee and as the union president from 2002 to 2003, even were it to be shown to be negligent (something which is not conceded, *infra*), does not revive Salazar's claim for injuries which she alleges occurred in 1998 and 1999.

Salazar's negligent retention claim against the WFSE, as to any harm she alleges occurred as a result of that retention, was properly dismissed as barred by the applicable statute of limitations.

***D. Even if not time-barred, each of Salazar's claims against the WFSE is properly subject to dismissal on summary judgment as a matter of law.***

Even though the trial court dismissed each of Salazar's claims against the WFSE on the basis of the three-year statute of limitations applicable to each claim, each claim is also subject to dismissal on the

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<sup>58</sup> Salazar has no evidence connecting Green or the WFSE to the dead rabbit, the Christmas bear or her flat tires, *supra*.

<sup>59</sup> See *Haubry v. Snow*, 106 Wn.App. 666, 679, 31 P.3d 1186 (2001), quoted *infra*, at pgs. 37-38.

alternative basis that Salazar, even viewing the evidence in the light most favorable to her, failed to sufficiently establish the elements of each cause of action as a matter of law.

**1. Salazar's sexual harassment and retaliation claims against the WFSE are properly dismissed on summary judgment as insufficient as a matter of law.**

Salazar's principal complaint against the WFSE is one of sexual harassment (hostile work environment), a form of sex discrimination prohibited by RCW Ch. 49.60. Specifically, with regard to labor unions, RCW 49.60.190 provides that:

It is an unfair practice for any labor union or labor organization:

\* \* \*

(3) To discriminate against any member, employer, employee, or other person to whom a duty of representation is owed because of . . . sex . . . .

Insofar as Salazar's first three causes of action against the WFSE (discrimination in the form of a hostile workplace in violation of RCW Ch. 49.60; discrimination in the form of disparate treatment in violation of RCW Ch. 49.60; and retaliation in violation of RCW Ch. 49.60), Salazar's claims fall under this provision.

- (a) **With regard to the WFSE, RCW 49.60.190 does not pertain to Salazar.**

Salazar fails to state a cause of action because she does not even allege that she is a member of any of the classifications specified in the statute. Salazar was never a member of Local 793 or the WFSE. She was never a member of any bargaining unit represented by Local 793 or the WFSE. Salazar does not argue she was ever employed by the WFSE. Salazar's first three causes of action for discrimination against the WFSE should be dismissed for that reason.

However, Salazar argues that RCW 49.60.190 applies to her because she is an employee (of DSHS). Her argument constitutes a ludicrous attempt to extend the reach of RCW 49.60.190, to any person who is an employee of *any* employer.

*Principles of Statutory Interpretation.* Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wash.2d 9, 19, 978 P.2d 481 (1999). Our starting point must always be "the statute's plain language and ordinary meaning." *Id.* When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise. *State v. Wilson*, 125 Wash.2d 212, 217, 883 P.2d 320 (1994). Just as we "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language," *State v. Delgado*, 148 Wash.2d 723, 727, 63 P.3d 792 (2003), we may not delete language from an unambiguous statute: " 'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.' " *Davis v. Dep't of Licensing*, 137

Wash.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)). The plain meaning of a statute may be discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 11, 43 P.3d 4 (2002); *State v. Clausing*, 147 Wash.2d 620, 630, 56 P.3d 550 (2002) (Owens, J., dissenting) (noting that "[a]pplication of the statutory definitions to the terms of art in a statute is essential to discerning the plain meaning of the statute"). Where we are called upon to interpret an ambiguous statute or conflicting provisions, we may arrive at the legislature's intent by applying recognized principles of statutory construction. A kind of stopgap principle is that, in construing a statute, "a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." *Delgado*, 148 Wash.2d at 733, 63 P.3d 792 (Madsen, J., dissenting) (citing, among other cases, *State v. Vela*, 100 Wash.2d 636, 641, 673 P.2d 185 (1983)).

*State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

As originally adopted, RCW 49.60.190(3) prohibited discrimination against only members, employers and employees. The language "or other person to whom a duty of representation is owed" was added later. There is little mystery behind the purpose of this additional language. Unions owe a duty of fair representation not just to members, but also to individuals in a bargaining unit for which the union is the exclusive bargaining representative. See *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967). Many employees in a bargaining unit may opt not to affiliate with the union which represents them by becoming members. Even where there may be a union or agency shop in effect, employees may satisfy this

obligation by paying a fair-share fee while still abstaining from membership. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066 (1986). Nevertheless, the union still owes the employee a duty of representation.

The addition of the language to RCW 49.60.190 (adding "to whom a duty of representation is owed") was to make clear that a union may not discriminate against either its members or any other persons to whom a duty of representation is owed (i.e., bargaining unit members).

In addition to representing employees of another employer, in this case employees of DSHS, a union may have employees of its own, e.g., see Declaration of Liz Larsen. Ms. Larsen is an employee of the WFSE, employed as the union's Director of Administration. RCW 49.60.190 prohibits a union from discriminating against its employees. Salazar's argument that the reference to "employee" is to any employee of any other employer would lead to an absurd result.

RCW 49.60.190 has no application to this case since Salazar was never a member of the WFSE or a member of any bargaining unit represented by the WFSE, and she was never an employee of the WFSE.

**(b) Even if RCW 49.60.190 applied to Salazar, her sexual harassment claims against the WFSE should be dismissed.**

Even if the WFSE could be liable to a member of another union under RCW 49.60.190, the interactions between Green and Salazar did not constitute sexual harassment, and even if they did, could not be imputed to the WFSE.

The elements of a work environment sexual harassment case are (1) the harassment was unwelcome; (2) the harassment was because of sex; (3) the harassment affected the terms or conditions of employment, and (4) the harassment is imputed to the employer. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985).

No reported Washington state court case has been decided with regard to a union's liability under RCW 49.60.190. In *Woods v. Graphic Communications*, 925 F.2d 1195 (9th Cir. 1991), the federal court found the union had violated the federal and state provisions regarding discrimination, and specifically the provisions of RCW 49.60.190.

Woods, a black union member, alleged pervasive racial discrimination on the part of his union. He alleged that his shop steward and shop committeeman had both engaged in explicit racially derogatory conduct and hostility, and failed to take steps on his behalf to grieve what the court described as "the plant's racial atmosphere." Finding the pervasive racial

hostility in the workplace and participation in that hostility by the two union representatives, the court found a violation of RCW 49.60.190 as well as a breach of the union's duty of fair representation. The court found:

Woods [the black employee] complained more than once of exactly this phenomenon [pervasive racial hostility in the workplace] yet the Union chose not to file a grievance. This brings the case squarely within the rule of *Goodman* [*Goodman v. Lucan Steel Company*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987)]. We affirm the district court's holding that the Union violated Wash. Rev. Code § 49.60.190.

*Woods* at 1200.

The facts in this case are remarkably dissimilar from those in *Woods* in several important respects. First, as previously noted, Salazar was never a member of the union nor of any bargaining unit represented by the union. The union owed her no duty of representation whatsoever. Second, Salazar has never contended that she complained to anyone, much less complained to anyone associated with the union, regarding Green's behavior, or even that anyone associated with the union had any knowledge, either actual or constructive, of what she alleged was Green's behavior. And, in fact, the union did not.

Upon reflection (after learning of the other allegations against Green disclosed in the *Lizee* case and the Salisbury investigation), Salazar now views Green's behavior as unwelcome; however, she did not at the time. For example, though she may not be able to explain why she agreed,

she admits that she agreed to Green's request that he come over to her house for oral sex.

Salazar's alleged harassment by Green was also not sufficiently severe or persistent to support a claim of pervasive conduct affecting her employment.

The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether the harassment at the work place is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the totality of the circumstances.

*Glasgow*, at 406-07. Even if true, Salazar's claims are not sufficiently severe or persistent to support a jury's finding that they constituted sexual harassment affecting the terms or conditions of her employment.

There is no evidence that would even remotely suggest that if Green were sexually harassing Salazar (by having oral sex with her at her house, placing her hand on his pants in her house, or calling her at her home from a hotel) that he was acting within the scope of his authority for and on behalf of the union. The union has no liability for Green's personal interactions. There is no evidence that Green's position in the union was in any way responsible for Salazar's interactions with him. At the time, both were supervisors. Salazar had no connection whatsoever with the WFSE. There is absolutely no evidence that the union took or threatened

any action whatsoever with regard to Salazar's employment, or otherwise took any action providing a basis for such a claim.

To the extent Salazar has pled retaliation under RCW Ch. 49.60, she has failed to prove *sine qua non* of such a claim, that she made a complaint or that anyone associated with the union was aware of any complaint she was making with regard to Green's behavior. Further, she has not identified any action by the WFSE which she contends was retaliatory. She has not even presented any competent evidence on which a jury could determine who was responsible for the rabbit, the bear or her tires.

As was said in *Home Ins. Co. v. Northern Pac. R. Co.*, 18 Wash.2d 798, 802, 140 P.2d 507, 509, 147 A.L.R. 849:

'The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture. It is also the rule that the one having the affirmative of an issue does not have to make proof to an absolute certainty. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the thing in question, such as the occurrence of a fire, happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable. In applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference.'

The following statement from 9 Blashfield, *Cyclopedia of Automobile Law and Practice*, part 2, Perm.Ed., §6126, p. 520, is quoted in *Paddock v. Tone*, 25 Wash.2d 940, 949, 172 P.2d 481:

'The burden of proving proximate cause is not sustained unless the proof is sufficiently strong to remove that issue from the realm of speculation by establishing facts affording a logical basis for all inferences necessary to support it[.]'

\* \* \*

We have frequently said that, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred. *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 P. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 P. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 P. 1118; *Whitehouse v. Bryant Lumber & Shingle Co.*, 50 Wash. 563, 97 P. 751; *Chilberg v. Colcock*, 80 Wash. 392, 141 P. 888; *Parmelee v. Chicago, M. & St. P. R. Co.*, *supra*; *Johanson v. King County*, 7 Wash.2d 111, 109 P.2d 307; *Home Ins. Co. v. Northern Pac. R. Co.*, *supra*. . . .

[A]nd, in *Parmelee v. Chicago, M. & St. P. R. Co.*, *supra*, we quoted from *Wheelan v. Chicago, M. & St. P. R. Co.*, 85 Iowa 167, 175, 52 N.W. 119, as follows:

'In *Asbach v. Chicago, B. & O. Railway Co.*, 74 Iowa 250 (37 N.W. 182), it is said: 'A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well settled rule.' It seems to us that we may reasonably draw other conclusions as to the cause of this injury from the facts in evidence than those contended for by the plaintiff. 'Verdicts must have evidence to support them, and must not be founded on mere theory or supposition.' *Bothwell v. C., M. & St. P. Railway Co.*, 59 Iowa, 192, 194 (13 N.W. 78). A jury will not be permitted merely to conjecture how the accident occurred.

*Cumberland & P. R. Co. v. State*, 73 Md. 74, 20 A. 785 (25 Am.St.Rep. 571). And it is said that 'in matters of proof we are not justified in inferring from mere possibilities the existence of facts.' *Baltimore & O. R. Co. v. State*, 71 Md. 590, 18 A. 971. . . .'

*Gardner v. Seymour*, 27 Wn.2d 802, 808-811, 180 P.2d 564 (1947).

Salazar's claims under RCW 49.60.190(3) should be dismissed as legally deficient.

**2. Salazar's outrage claim against the WFSE should be dismissed as legally insufficient.**

In addition to being time-barred, Salazar's outrage claim fails because (1) the conduct of which she complains is legally not sufficiently outrageous; and (2) Green's behavior cannot be imputed to the WFSE.

To prevail on a claim for outrage, a plaintiff must prove three elements: "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff." [Footnote omitted.] The first element requires proof that the conduct was " ' so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Dicomes v. State*, 113 Wash.2d 612, 630, 782 P.2d 1002 (1989) (quoting *Grimsby v. Samson*, 85 Wash.2d 52, 59, 530 P.2d 291 (1975)). Although the three elements are fact questions for the jury, this first element of the test goes to the jury only after the court "determine [s] if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." *Id.*

*Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002).

The WFSE submits that given the consensual nature of the sexual interactions between Salazar and Green, Green's conduct was not

outrageous. Salazar does not cite any case where the court has held that a co-worker's "grooming" someone by flattery and attention, resulting in consensual sexual interaction, even if he did it to others as well, is outrageous. Salazar also makes an oblique reference to Green's having displayed what appeared to her to be a gun in a manila envelope. However, Salazar has not contended that she submitted to Green's advances because of some fear of a gun. In fact, Salazar's reaction was to show Green her own gun.<sup>60</sup>

Even if Green's behavior could be described as outrageous, the tort of outrage is an intentional tort. It is also known as the tort of intentional infliction of emotional distress. *Haubry v. Snow*, 106 Wn.App. 666, 680, 31 P.3d 1186 (2001). Generally, vicarious liability is not normally imposed for intentional sexual misconduct. See *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 718-19, 985 P.2d 262 (1998); and *Bratton v. Calkins*, 73 Wn.App. 492, 497, 870 P.2d 981 (1994). See also *Robel, supra*, at 51-56 (discussion of tort of outrage and imputed liability). A union may be liable only for the actions of its members committed in the course of their duties. *Titus v. Tacoma Smeltermen's Union*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963).

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<sup>60</sup> CP 465, Cert. Stmt. of Younglove, Attachment A, PAB Tr. p. 84, line 22 through p. 85, line 7.

An employee's conduct will be outside the scope of employment if it "is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958); *see also* RESTATEMENT, *supra*, § 228

*Robel* at 53. Certainly, Salazar could not contend that her interactions with Green were somehow committed in the course of his duties as an official of the WFSE.

To the extent that Salazar attempts to argue that some union conduct, other than Green's, was outrageous, she fails to specify what that conduct was. Failing to discover Green's alleged conduct toward a number of women can hardly be considered outrageous when Salazar did not know it either and, in fact, helped hide his conduct by acting friendly with Green, and by not telling anyone about his conduct. In fact, she lied to keep others from knowing.<sup>61</sup>

In addition to being untimely, Salazar's outrage claim against the WFSE would have been dismissed as legally insufficient.

**3. Salazar's negligent retention claim should be dismissed as legally insufficient.**

Salazar claims the WFSE is liable to her for its negligent hiring and retention of Green.

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<sup>61</sup> See, *supra*, at fn. 57.

The torts of negligent hiring, supervision and retention have generally been described as follows:

[A]n **employer** may be liable to a third person for the employer's negligence in hiring or retaining a servant who is incompetent or unfit. Such negligence usually consists of hiring or retaining the employee with knowledge of his unfitness, or of failing to use reasonable care to discover it before hiring or retaining him. The theory of these decisions is that such negligence on the part of the employer is a wrong to such third person, entirely independent of the liability of the employer under the doctrine of respondeat superior. It is, of course, necessary to establish such negligence as the proximate cause of the damage to the third person, and this requires that the third person must have been injured by some negligent or other wrongful act of the employee so hired. [Footnote omitted.]

(Emphasis added.) *Haubry* at 679.

Even if this theory is applicable to a volunteer, such as a union steward, there is nothing to suggest, other than Salazar's general and vague allegations of "power" by virtue of his union position, that Green's position with the union had any relationship to his contacts with Salazar. Salazar was neither a member of the union nor in a bargaining unit represented by the union. More specific to the elements of this claim, Salazar is unable to show any evidence that any WFSE official had actual or constructive knowledge of allegations that Green was a "serial harasser" of women, as she now alleges, at least not until several years after his contacts with Salazar ceased. As Salazar admits, the claims regarding Green's behavior

directed toward Lizee did not surface until after Salazar's alleged interactions with Green.

Now, with the benefit of hindsight, Salazar is suggesting that the WFSE should have been aware of Green's behavior toward other women which was not revealed until much later. She takes this position even though she admits she herself did not know of the behavior either, and that she actually inhibited the union and anyone else from learning of the alleged behavior.

Finally, even if the WFSE had removed Green from his union position earlier, he would still have been a WSH DSHS employee and, in any event, there is no showing Green used his WFSE position to harass Salazar.

If the trial court had not dismissed Salazar's negligent retention claim against the WFSE as time-barred, it could have properly dismissed the claim for lack of a sufficient legal basis.

#### **IV. CONCLUSION**

Each of Salazar's claims against the Washington Federation of State Employees was properly dismissed by the trial court as being barred by the applicable three-year statutes of limitations. Alternatively, each of

Salazar's claims would be properly dismissed on summary judgment for lack of sufficient legal basis.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of July, 2006.

YOUNGLOVE LYMAN & COKER, P.L.L.C.



Edward Earl Younglove III, WSBA#5873  
Attorney for Washington Federation  
of State Employees

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COURT APPEALS

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CLERK OF COURT  
*C*

NO. 34357-6-II

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

JANE DOE I,	)
	)
Plaintiff,	)
v.	)
	)
THE STATE OF WASHINGTON,	)
DEPARTMENT OF SOCIAL AND	)
HEALTH SERVICES, et al.,	)
	)
Defendants.	)

AMENDED  
PROOF OF SERVICE

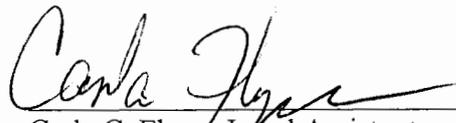
I, Carla C. Flynn, being over the age of eighteen, a resident of the State of Washington, and not a party to this action, certify that I am the assistant to the Attorney for the Defendant, Washington Federation Of State Employees herein. On the 18th day of July, 2006, I did deliver a copy of the Brief Of Respondent Washington Federation Of State Employees, by sending the same by ABC Legal Services to:

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DATED this *20* day of July, 2006.

A handwritten signature in cursive script, appearing to read "Carla Flynn", written over a horizontal line.

Carla C. Flynn, Legal Assistant  
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