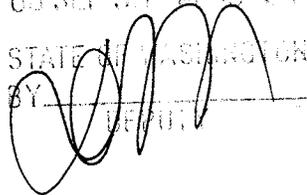


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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY 

No. 37862-1-II

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

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DEPARTMENT OF SOCIAL AND HEALTH SERVICES,  
ET AL

Respondent

v.

MARY E. MIVILLE

Appellants

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY

---

BRIEF OF APPELLANTS

---

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## I.

### ASSIGNMENT OF ERROR

#### A. Assignments of Error

1. The Trial Court erred when it failed to exclude evidence proffered by the Defendant in a summary proceeding subject to Plaintiff's Motion to Strike.
2. The Trial Court erred when it resolved issues of disputed fact while considering a motion for summary judgment and failed to grant all inferences in favor of the non-moving party.
3. The Trial Court erred when it determined that the Plaintiff had failed to make a *prima facie* showing or meet her burden to show that the reason articulated by the Defendant, Department of Social and Health Services, for an adverse employment action was not pretextual.

#### B. Issue Pertaining to Assignments of Error

1. Whether the Trial Court properly excluded evidence proffered by the Defendant that was subject to Plaintiff's Motion to Strike.
2. Whether the Trial Court properly considered summary judgment by resolving material facts were at issue.
3. Whether the trial court properly granted summary dismissal when the Plaintiff had made a *prima facie* showing and met her burden of persuasion to establish the articulated reason of the Defendant agency were pretextual.

## II.

### STATEMENT OF THE CASE

#### A. Procedural Steps:

This cause of action was filed on 10 February 2006 in Thurston County Superior Court. The Plaintiff, Mary E. Miville, sought relief in a claim under the Revised Code of Washington, Chapters 49.44 and 49.60<sup>1</sup>. She alleged there to have been discrimination practiced against her due to her gender and that she was subject to retaliation. This matter progressed until the Defendants filed a Motion for Summary Judgment on or about 20 December 2007. It was noted for hearing before The Honorable Christine Pomeroy in Thurston County Superior Court on 25 January 2008. The hearing on the Motion was continued until the 28<sup>th</sup> of March 2008. A Motion to Strike Pleadings in Support of Summary Judgment filed by the Plaintiff was noted for hearing on the same day.

A hearing for oral argument was held on the 28 of March 2008 before Department #5 of the Superior Court. Judge Pomeroy first took up the Plaintiff's Motion to Strike and ruled on several of the issues raised in the Motion after hearing argument from both parties. She then took up the Motion for Summary Judgment and heard argument of both parties.<sup>2</sup> After argument, Judge Pomeroy entered a four sentence ruling, followed by a six sentence explanation. The Ruling from the Court dismissed all claims but "retaliation on an adverse employment workspace issue."

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<sup>1</sup> She also sought claims of negligent supervision, intentional infliction of emotional distress and negligent infliction of emotional distress. Those claims are not being pursued in this appeal.

<sup>2</sup> Page 13-43.

Defendant's Counsel filed a Motion for Reconsideration on 10 April 2008. No written order on Partial Summary Judgment had been entered. On the 25<sup>th</sup> of April 2008, the Motion for Reconsideration came on for hearing before Department # 5. At the conclusion of the Oral Argument, Judge Pomeroy took the matter under advisement and indicated that a ruling would be issued within two weeks.

On the 22<sup>nd</sup> of May 2008, a written Order Granting Motion for Reconsideration was issued by Judge Pomeroy. The three page written ruling expressed the rationale adopted by the Court to grant the Motion. Thereafter, on the 5<sup>th</sup> of June 2008, an Order Granting Defendant's Motion for Summary Judgment and Motion for Reconsideration was entered by The Honorable Christine Pomeroy. A timely Appeal was filed on 19 June 2008 with Division II of the Court of Appeals.

B. Facts Relevant to the Appeal:

The Plaintiff, Mary E. Miville, began employment with the Department of Social and Health Services(DSHS) at Western State Hospital (WSH) in Steilacoom in 1985<sup>3</sup> as a Therapy Supervisor in the Legal Offender Unit. At the time she began working, she qualified for the position with a Master's Degree.<sup>4</sup> She began working as a shop steward in the early 1996 for her union and continued in that role through the date the

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<sup>3</sup> Line 19, Page 3 – Line 20, Page 3, Affidavit of Mary Miville.

<sup>4</sup> CP 154.

Order was entered dismissing her lawsuit.<sup>5</sup> As part of her training to be a shop steward, she gained knowledge of the operation of the personnel system and its procedure used at WSH for hiring, firing, discipline, performance evaluations, promotions, transfers, assignments, temporary and probationary appointments, the grievance process and procedure and interpretation of the collective bargaining agreements for unions representing employees at WSH.<sup>6</sup> She also became knowledgeable about the DSHS policies and procedures adopted for implementation at WSH.<sup>7</sup>

During the period from 1985 until 2001 when Dr. Richard Mehlman, Ph.D, became co-director of the Legal Offender Unit (LOU) at WSH, Dr. Darrell Hamilton, MD, who was a psychiatrist, was the Director of the LOU. Dr. Mehlman, Ph.D., had been employed in the Adult Psychiatric Unit (APU) of WSH prior to transferring to LOU. Dr. Mehlman, Ph.D. did not have experience with Forensic Therapists or mentally ill offenders at WSH until he was assigned in 2001.<sup>8</sup>

During Dr. Hamilton's tenure of direction, Ms. Miville was a member of an in-patient treatment team. Ms. Miville had been promoted to Forensic Therapist II in the early 1990s. As a part of the in-patient treatment team, Ms. Miville appeared in the Superior Courts regarding the

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<sup>5</sup> CP 139-40; 143-44 .

<sup>6</sup> Line 23, Page 1 – Line3, Page 2, CP 140-41.

<sup>7</sup> Line 4, Page 2 – Line 8, Page 2, CP 140.

<sup>8</sup> Line 9 – 16, Page 3, CP 141.

specific patient who had been committed to WSH under Not Guilty by Reason of Insanity determinations by the court; wrote bi-annual court letters on patients who had been committed to the LOU; wrote clinical treatment plans for mentally ill offenders; prepared psycho-social assessments for patients; engaged in one-on-one counseling, family counseling, group counseling, case presentations to the treatment team; coordinated individual treatment interventions – all for patients assigned to her caseload.<sup>9</sup> Specific treatment plans were required for each of her patients on a quarterly basis. These duties were significantly different than those assigned to social workers in the other units at WSH. The patients committed to the LOU required special attention as criminally insane due to dangerousness and security needs. In fact the Forensic Therapists in the LOU were a specialized group of therapists trained to treat those who were criminally committed or under evaluation ordered by the Superior Courts because of criminal charges.<sup>10</sup> Ms. Miville was involved with this patient population in her employment for over 16 years. That experience with the criminal justice system enhanced her ability to perform tasks associated with screening and coordinating interactions between WSH and the courts.<sup>11</sup>

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<sup>9</sup> Line 17-23, Page 9, CP 147.

<sup>10</sup> Line 3 – 7, Page 9, CP 147.

<sup>11</sup> Line 14 – 20, Page 8, CP 146.

Dr. Rick Mehlman, Ph.D, became sole Director of the newly named Center for Forensic Services (CFS) in February 2001. He continued in the role until February 2007.

The Rust Lawsuit was settled in the Spring of 2001.<sup>12</sup> Ms. Miville had been required to testify in deposition concerning her observations of the operations in the LOU which the Rust lawsuit had challenged as inadequate and unconstitutional.<sup>13</sup> Ms. Miville had provided information about the lack of adequate treatment and care prior to the filing of the lawsuit that supported the contentions of the Plaintiffs in the lawsuit.<sup>14</sup>

The role of the LOU/CFS is to deal with patients ordered for evaluation or criminal commitment to stabilize them psychiatrically, with medication if needed. Some of the patients in the LOU/CFS were sent by the courts to stabilize, evaluate and restore competency and to inform the court if the patient can assist in their own defense. The adult psychiatric units and center for adult services from where Dr. Mehlman, Ph.D., had come did not have such a focus. In the LOU/CFS, the level of security was far greater than in the other units at WSH.<sup>15</sup>

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<sup>12</sup> Dr. Mehlman has asserted that he did not know of Ms. Miville's involvement in the Rust litigation. However, when she was subjected to deposition in that litigation, her supervisor was Dr. Nakashima who reported to Dr. Mehlman. Line 14 – 21, Page 7, CP145.

<sup>13</sup> Line 18, Page 2, Footnote 3, CP 140.

<sup>14</sup> Line 20, Page 2 – Line 2, Page 3, CP 140-41.

<sup>15</sup> Lines 7 – 23, Page 4, CP142.

In February 2001, Ms. Miville was assigned to Ward S-8, an in-patient treatment ward. Later that year, in December 2001, Ms. Miville was reassigned to Medical Records<sup>16</sup> by Ms. Jan Gregg, CEO, because of complaints by patients on Ward S-8. The investigation did not begin until Ms. Miville filed a grievance after being assigned to Medical Records for about three months. She was exonerated on the complaint. With receipt of the letter of exoneration, Ms. Miville was, by letter, immediately reassigned to Ward S-5, even though her permanent position was on Ward S-8 and there had been no issues about her work performance.<sup>17</sup>

Ward S-5 was an Admissions Unit in the CFS that was designated for short-term offenders who were referred by the Court for an evaluation of competency and/or sanity. A few were there for competency restoration. Ms. Miville, as a Forensic Therapist II, prepared initial psycho-social assessments on offenders who were admitted. Her monthly output was over 30 each month. She also wrote a similar number of treatment plans for offenders on her caseload.<sup>18</sup>

Ward S-5 was in the admissions unit in the CFS. Ms. Miville had worked a 4/10 shift for years. Dr. Mehlman removed the 4/10 work week from Ms. Miville. She was the only person working in the CFS who had a

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<sup>16</sup> Lines 6-7, Page 11, CP 149.

<sup>17</sup> Line 1-6, Page 12, CP 150,

<sup>18</sup> Line 22, Page 11 – Line 2, Page 12, CP 149-50.

4/10 work week or had it removed.<sup>19</sup> The designation of Ward S-5 was changed to Ward F-1. Dr. Mehlman attempted to describe the duties of Ms. Miville in Ward F-1 but erred because those assigned to that unit were present for a 15-day evaluation period, not for competency restoration.<sup>20</sup>

The actual work assigned in the Admissions Unit required less expertise and knowledge, and education than was possessed by Ms. Miville. The work assigned was being accomplished by occupational and recreational therapists. Ms. Miville was concerned that the lower level of work she was assigned would cause her classification as a Forensic Therapist II to be reallocated if she continued to work as she had been reassigned.<sup>21</sup>

In April 2002, Ms. Miville applied for a promotion as a Psychologist 3<sup>22</sup> because a male had departed. Ms. Miville was aware that departed male had been performing the same duties that Ms. Miville had been performing. She was denied the promotion.<sup>23</sup>

In October 2003, Ms. Miville reported patient abuse by her immediate supervisor, Jeff Thurston to her second line supervisor, Cheryl

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<sup>19</sup> Line 11-15, Page 12, CP 150..

<sup>20</sup> Paragraph r), Page 12-13, CP 150-51.

<sup>21</sup> Paragraph s), Page 13, CP 151.

<sup>22</sup> Exhibit D, Declaration of Mary Miville, CP 170.

<sup>23</sup> Lines 8 – 14, Page 9, CP 147.

Reis.<sup>24</sup> Ms. Miville repeatedly asked for new assignments and transfers to other Wards which were denied by Dr. Mehlman, Ph.D.<sup>25</sup>

In the Fall of 2003, Ms. Miville applied for a promotion as a Program Manager on Ward F-6. She wrote a memorandum to Dr. Mehlman, Ph.D. on 12 November 2003, when she did not receive any word about the application. The position required a Bachelor's Degree. When the notice of position was posted, Ms. Miville had been a Forensic Therapist for 18 years and possessed a Master's Degree.<sup>26</sup> In January 2004, a less well qualified, younger female was appointed at the Program Manager for Ward F-6. Dr. Mehlman, Ph.D., asserts that Ms. Miville was not qualified to fill the Program Manager position.<sup>27</sup> Ms. Miville was never interviewed for the position.

In May 2004, Ms. Miville sought to have reinstated the production of psycho-social and treatment plans in her position working on Ward F-1. She wrote a memorandum and pointed out that another Forensic Therapist II on Ward F-2, a male, was performing those duties.<sup>28</sup> She questioned why she was being treated differently than was her male counterpart.

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<sup>24</sup> Exhibit A, Declaration of Mary Miville, CP 162.

<sup>25</sup> Exhibits D, J, K, Declaration of Mary Miville, CP 170, 183, 186.

<sup>26</sup> Exhibit J, Declaration of Mary Miville, CP 183.

<sup>27</sup> Paragraph aa, Page 18, CP 156.

<sup>28</sup> Exhibit E, Declaration of Mary Miville, CP 172.

Ms. Miville was reassigned to the Therapies and Recovery Center (TRC) in June of 2004 on a part time basis and then full-time in September 2004. Ms. Miville filed a grievance on the reassignment in September 2004.<sup>29</sup> The TRC assignment included being placed in a “classroom” that was located outside the Ward and behind two locked doors. On the 18<sup>th</sup> of November 2004, Dr. Mehlman, Ph.D, issued a directive to all supervisors requiring them to gain his approval to release a subordinate who asked for time away from work to perform Union Activities before the release from work was granted.<sup>30</sup>

Melanie Quimby, a former direct subordinate of Dr. Mehlman, who worked as his secretary, indicated that she learned from Dr. Mehlman that his purpose in issuing the restrictive memorandum related to Union Activities was to “...keep Mary Miville in check.” Dr. Mehlman had imposed the requirement on all shop stewards but the target was Mary Miville.<sup>31</sup>

### **III.**

#### **SUMMARY OF ARGUMENT**

- A. The Trial Court failed to exclude inadmissible evidence in its consideration of the Motion for Summary Judgment.

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<sup>29</sup> Exhibit I, Declaration of Mary Miville, CP 181.

<sup>30</sup> Exhibit M, Declaration of Mary Miville, CP 192.

<sup>31</sup> Paragraph 6, Affidavit of Melanie Quimby, CP 112.

The trial court did consider Plaintiff's Motion to Strike Pleadings offered in opposition to the Motion for Summary Judgment. [CP 225-242.] The Trial Court did not strike certain statements made in declarations offered by the State in support of its position. The net effect of the failure to strike certain statements apparently permitted the trial court to determine that the Defendant had offered legitimate, non-discriminatory reasons for undertaking what the Plaintiff contended were discriminatory actions against her. The court ruled that 17 of the 18 statements attributed to Dr. Mehlman, Ph.D., identified in the Motion would be admitted and the 18<sup>th</sup> statement, which was identified as hearsay would be admitted but not to prove the truth of the statement. [RP 13].<sup>32</sup> The trial court also permitted introduction of the complete declaration of Laurel Kelso, who did not join the staff until February 2006.

Plaintiff contends that the responsive comments made by the Trial Court in regard to counsel's argument on parts a) through n)<sup>33</sup> of the declaration of Dr. Mehlman, Ph.D., did not follow the applicable rules of evidence cited by Plaintiff and were incorrectly determined to be admissible. [RP 4-9.] Further, her ruling which did not limit the scope of knowledge of Laurel Kelso, abridged the applicable evidence rule and should not have been admitted. [CP 225-222.]

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<sup>32</sup> Hearing Dated, 28 March 2008.

<sup>33</sup> Id.

These rulings by the trial court were in error and enabled the trial court to improperly consider inadmissible evidence which led to an improper ruling on summary judgment.

B. The Trial Court resolved disputed material facts and failed to grant all reasonable inferences to the non-moving party in her determination to grant summary judgment.

In her verified complaint [CP 6-9] and declaration [CP 139-192] Ms. Miville established a sequence of events and circumstances taking place over a period of years that supported a claim of discrimination and retaliation practiced against her. She established her knowledge of the personnel system, the duties and activities of Forensic Therapists in the LOU/CFS and her involvement with a) reporting patient abuse and neglect (to Dr. Mehlman and others), b) serving as a shop steward and assisting others employees in adverse dealings with administration (including Dr. Mehlman); her efforts to obtain promotions (that were given to others); the sequence of events that showed proximity of her actions and the retributive conduct of Dr. Mehlman; and her qualifications to serve in a higher level position (that was denied by Dr. Mehlman). [CP 139-192]

The trial court, having viewed the verified statement of Ms. Miville, and then viewing the representations made by Dr. Mehlman,

Ph.D., [CP 23-45, 382-417] failed to either recognize that there was a dispute in the facts asserted, or determined that the representations of Dr. Mehlman carried the day, and found no material facts at issue that would preclude entry of the ruling on summary judgment. [See Paragraph D-1 for a specific listing of disputed facts.]

The trial court, in its oral ruling on the 28<sup>th</sup> of March 2008, granted summary judgment on age and gender discrimination. [RP 43.] The trial court permitted the retaliation claim to continue on “adverse employment workspace.” [RP 43.] After the Motion for Reconsideration was heard on 25 April 2008<sup>34</sup>, The Honorable Christine Pomeroy issued, on 22 May 2008, a written ruling she termed: Order Granting Motion for Reconsideration, that granted the motion on summary judgment on retaliation. [CP 540 - 542.]

This apparent determination on the part of the Trial Court was error requiring reversal of the ruling on summary judgment and trial on the contested facts.

C. The Appellant, Ms. Miville, presented a *prima facie* showing of discrimination and/or retaliation, and established that the proffered statements by the Defendant, Dr. Mehlman, Ph.D.,

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<sup>34</sup> Report of Proceedings, 25 April 2008 [misabeled on cover page as 28 March 2008]

were pretextual, therefore the Motion for Summary Judgment should have been denied.

Ms. Miville supported a “continuing violation” claim of discrimination and/or retaliation in her declaration that continued into the period covered by the three year statute of limitations. [CP 139-42; 147-50; 155-56.] She met her burden and established a prima facie case showing that she as a member of a protected category [CP 7] she suffered a hostile working environment [CP 8-9], affecting the terms and conditions of her employment [CP 8-9; 144; 147-49; 151; 153-54; 156; 157], that was imputed to her employer. [CP 7; 110-115; 116-119]; She further established that she took part in protected actions [CP 7-8, 140-41; 143-44; 145; 146; 149] that her employer took adverse employment action [CP 8-9; 144; 147-49; 151; 153-54; 110-115] and that there was a nexus between her efforts and the adverse actions by her employer. [CP 110-115.]

Dr. Mehlman, Ph.D., proffered its explanation of the adverse actions that were taken and entered a denial that his motivation was either discriminatory or retaliatory.

Ms. Miville, then established that the proffered reasons of Dr. Mehlman, Ph. D., were not worthy of belief or were incorrect.

In this analysis, the Trial Court relied upon either inadmissible evidence or failed to recognize controverted material facts that precluded summary judgment. The resulting determination that first granted a partial summary judgment, leaving a limited retaliation claim, then, after a premature Motion for Reconsideration, ended the litigation with a complete summary judgment in favor of the State of Washington and other Defendants.

The Appellant, Ms. Miville, contends that rulings by the lower court were in error and that the decision should be reversed and the matter remanded for trial.

#### **IV.**

#### **ARGUMENT**

##### **A. SCOPE OF REVIEW:**

The appellate court, when reviewing a determination made by a trial court on summary judgment, engages in the same inquiry as the trial court. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Summary judgment is appropriate if depositions, answers to interrogatories and admissions together with the affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one upon which the

outcome of the litigation depends in whole or in part. Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Facts and reasonable inferences are viewed in a light most favorable to the nonmoving party. Michak v. Transnation Title Ins. Co., 149 Wn.2d 788, 794, 64 P.3d 22 (2003). Questions of fact can be determined as a matter of law only where reasonable minds can reach but one conclusion. Sherman v. State, 128 Wn.2d. 164, 184, 905 P.2d 355 (1995).

But the nonmoving party must set forth specific facts to defeat a motion for summary judgment. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 255-26, 770 P.2d 182 (1989). In discrimination cases, the plaintiff must establish specific and material facts to support each element of his or her prima facie case. Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).

Summary judgment in favor of the employer in a discrimination case is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury. Kuyper v. Dep't of Wildlife, 79 Wn. App. 732, 739, 904 P.2d 793 (1995), *review denied*, 129 Wn.2d 1011, 917 P.2d 130 (1996).

## B. WASHINGTON LAW AGAINST DISCRIMINATION

### 1) Hostile Working Environment:

Chapter 49.60 RCW, the Washington Law Against Discrimination provides that

It is an unfair practice for any employer:

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person:

2) Retaliation:

RCW 49.60.210, related to retaliation provides:

1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

C. APPLICABLE CASE LAW:

1) Elements of Hostile Working Environment:

The four elements of a prima facie hostile work environment claim are: (1) The harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer.

Glasgow v. Georgia-Pacific. Corp., 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). The third element requires that the harassment be "sufficiently

pervasive so as to alter the conditions of employment and create an abusive working environment. . . to be determined with regard to the totality of the circumstances." Glasgow, at 406-07.

To meet this burden, an employee is not required to produce direct or "smoking gun" evidence. Sellsted v. Washington Mut. Sav. Bank, 69 Wn. App. 852, 860, 851 P.2d 716 (1993). Circumstantial, indirect, and inferential evidence is sufficient to discharge the plaintiff's burden. Sellsted, at 860.

The United States Supreme Court recently noted, "reassignment" of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position.' Burlington North. & Santa Fe Ry. Co. v. White, --- U.S. ----, 126 S.Ct. 2405, 2417, 165 L.Ed.2d 345 (2006) (citations omitted). To determine whether West One's conduct was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment, we look at the totality of the circumstances. Adams v. Able Bldg. Supply, Inc., 114 Wn.App. 291, 296, 57 P.3d 280 (2002). In Burlington, the high court held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have

dissuaded a reasonable worker from [engaging in the protected activity]." 126 S.Ct. at 2415.<sup>35</sup>

Discrimination claims in the State of Washington are analyzed according to the three-step, burden-shifting protocol articulated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In Hill v. BCTI Income Fund-I, 144 Wn.2d. 172, 180, 23 P.3d 440 (2001) the State Supreme court confirmed its use of the analysis. First, the employee bears the burden of making a *prima facie* showing of discrimination. Hill, at 181. If this burden is met, then a "'legally mandatory, rebuttable presumption' of discrimination temporarily takes hold, and the evidentiary

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<sup>35</sup> In the Burlington case, Burlington argued that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description. We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found "[r]etaliatory work assignments" to be a classic and "widely recognized" example of "forbidden retaliation." 2 EEOC 1991 Manual §614.7, pp. 614-31 to 614-32; see also 1972 Reference Manual §495.2 (noting Commission decision involving an employer's ordering an employee "to do an unpleasant work assignment in retaliation" for filing racial discrimination complaint); EEOC Dec. No. 74-77, 1974 WL 3847, 4 (Jan. 18, 1974) ("Employers have been enjoined" under Title VII "from imposing unpleasant work assignments upon an employee for filing charges"). To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Oncale v. Sundowner Services, Inc. 523 U.S. 75, at 81.

burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to `raise[] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff.'" *Id.* If the employer "meets this intermediate production burden, the *presumption* established by having the *prima facie* evidence is rebutted and `having fulfilled its role of forcing the defendant to come forward with some response, [the presumption] simply drops out of the picture.'" *Id.* at 182 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). This burden is one of production, not persuasion; it "can involve no credibility assessment." St. Mary's Honor Center, at 509. [Emphasis Added]

a) Pretext:

"Once the presumption is removed . . . the plaintiff [is] then . . . `afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext.'" *Id.* There are at least two routes by which a plaintiff may demonstrate a material question of fact at this final stage of the analysis. First, a plaintiff may succeed "indirectly by showing that the employer's proffered explanation is unworthy of

credence,"<sup>36</sup> because it has "no basis in fact."<sup>37</sup> Second, a plaintiff may succeed "directly by persuading the court that a [prohibited] reason more likely motivated the employer."<sup>38</sup> Both of these routes, in effect, amount to a showing that the prohibited reason, rather than the proffered reason, actually motivated the employer's action.

The first route typically requires the plaintiff rebut the facts underlying the employer's stated reason. The second route, in contrast, focuses instead on rebuttal of the employer's ultimate factual claim regarding the absence of discriminatory intent.

In order to establish the first route, the non-moving party must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir.2004). To defeat the employer's claim on summary judgment, "the plaintiff's burden is only to demonstrate a genuine dispute of material fact

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<sup>36</sup> Texas Department of Community Affairs, v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207

<sup>37</sup> Smith v. Allen Health Sys., Inc. 302 F.3d. 827, 834 (8th Cir.2002)

<sup>38</sup> Burdine, at 256.

as to whether the proffered reasons were unworthy of belief." Morgan v. Hilti, Inc., 108 F.3d 1319, , 1321 (10th Cir.1997).<sup>39</sup>

b) Continuing Violations Exception to Statute of Limitations:

Serial continuing violations could be alleged "where a chain of similar discriminatory acts emanating from the same discriminatory animus exist[ed] and where there ha[d] been some violation within the statute of limitations period that anchor[ed] the earlier claims ." Provencher v CVS Pharmacy, 145 F.3d 5, 14 (1998); Milligan v. Thompson, 90 Wn. App. 513, 595, 953 P.2d 112 (1998). The continuing violation doctrine acted as an equitable exception to the statute of limitations for such suits, allowing a plaintiff to recover damages for otherwise time-barred acts. Washington v. Boeing Co., 105 Wn. App. 1, 8, 19 P.3d 1041 (2000). The Court of Appeals used three factors to evaluate a serial continuing violation claim, i.e., to determine whether there was the necessary substantial relationship between the timely and untimely conduct:

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<sup>39</sup> An employee can demonstrate that the reasons given by the employer are not worthy of belief with evidence that: (1) the reasons have no basis in fact, or (2) even if based in fact, the employer was not motivated by these reasons, or (3) the reasons are insufficient to motivate an adverse employment decision. Hsi H. Chen v. State, 86 Wn .App. 183, 190, 937 P.2d 612 (1997).

Whether the alleged acts involve[d] the same type of discrimination tending to connect them in a continuing violation; (2) whether the alleged acts [were] recurring; and, (3) most importantly, whether the untimely act ha[d] the degree of permanence that should have triggered the employee's awareness of and duty to assert his or her rights.

Milligan, at 595.

2) Elements of Retaliation in Employment:

To establish a *prima facie* case of retaliatory conduct, a plaintiff must show that (1) he engaged in statutorily protected activity and that (2) his employer took an adverse employment action against him for which (3) retaliation was a substantial motivating factor. Washington v. Boeing Co., 105 Wn. App. 1, 14, 19 P.3d 1041 (2000) (citing Delahunty v. Cahoon, 66 Wn. App. 829, 832 P.2d 1378 (1992)).

If the Plaintiff establishes a *prima facie* case of retaliation, the burden then shifts to Defendant to produce admissible evidence of a legitimate, non-retaliatory reason for the adverse employment action. Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 618, 60 P.3d 106 (2002)(citing Grimwood v. University of Puget Sound, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988)). If defendant meets this burden of production, the burden shifts back to the Plaintiff to create a genuine issue of fact that the legitimate reason is merely a pretext. Renz, 114 Wn. App. at 619 (citing Grimwood, 110 Wn.2d at 364). Because employers rarely

will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purposes.

Vasquez v. State, 94 Wn. App. 976, 985, 974 P.2d 348 (1999).

The courts consider the passage of time in evaluating whether an employee's protected activity caused the employer's adverse action.

Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wash.2d 46, 69, 821 P.2d 18

(1991). To support an inference of retaliatory motive, the adverse

employment action must have occurred fairly soon after the employee

engaged in the protected activity. Villiarimo v. Aloha Island Air, Inc., 281

F.3d 1054, 1065 (9th Cir. 2002) (quoting Paluck v. Gooding Rubber Co.,

221 F.3d 1003, 1009-10 (7th Cir. 2000)).

#### D. APPLICATION OF LAW TO FACTS:

##### 1) Hostile Working Environment:

The employee, Ms. Miville has established, *prima facie*, that she was subject to a hostile working environment. The actions and conduct of Dr. Mehlman, Ph.D. was unwelcome to the employee. The actions in question are those of Dr. Mehlman, Ph.D. There is no evidence that any male person sustained the forms of hostile conduct as did Ms. Miville.

The record demonstrates that over the period from when Dr. Mehlman became the co-director of the LOU and then the Director of the CFS, that Ms. Miville had been subjected to a series of discriminatory acts

emanating from Dr. Mehlman, Ph.D. Provencher, *supra*. Those acts which transpired prior to the date the statute of limitations began to run on 10 February 2003, that establish the context of later actions were:

a) Dr. Mehlman, Ph.D., did not have experience working with Forensic Therapists or mentally ill offenders at WSH until he was reassigned in 2001.<sup>40</sup>

b) Ms. Miville had 16 years of experience in working with in-patient mentally ill offenders who had been committed by court. Her experience included preparation of clinical treatment plans, psycho-social assessments, testimony in superior court on behalf of WSH, bi-annual court reports on patients, development of specific treatment plans by herself and as a part of a treatment team for in-patient competency restoration by the time Dr. Mehlman, Ph.D. became involved in the LOU/CFS.<sup>41</sup>

c) *Dr. Mehlman, Ph.D. contended that the employee was not so qualified.*<sup>42</sup>

d) Ms. Miville had provided information concerning the lack of treatment and care for mentally ill offenders in a deposition for the Rust

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<sup>40</sup> CP 141.

<sup>41</sup> CP 146, 147.

<sup>42</sup> CP 32-34.

Lawsuit approved by her supervisor, Dr. Nakashima who reported to Dr. Mehlman, Ph.D.<sup>43</sup>

d) *Dr. Mehlman, Ph.D., professed no knowledge of the employee's involvement in the Rust Lawsuit.*<sup>44</sup>

e) Ms. Miville worked extensively as a shop steward prior to 2001 and through the period when the lawsuit was filed in 2006. She represented individuals civil servants who were members of the WSFE and nurses who were members of Union # 1199 at WSH. Her representation included individuals with grievances before Dr. Mehlman, Ph.D.<sup>45</sup>

f) *Dr. Mehlman, Ph.D., contends that he was only generally aware that Ms. Miville was one of several shop stewards.*<sup>46</sup>

g) Ms. Miville was the only person working a 4/10 work week in the CFS.<sup>47</sup>

h) *Dr. Mehlman, Ph.D. contends that "all staff" working a 4/10 had their hours changed, implying that there were other staff.*<sup>48</sup>

i) Ms. Miville filed a complaint of patient abuse by her male Supervisor, Jeff Thurston, on Ward F-1 which was reported to Dr.

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<sup>43</sup> CP 145.

<sup>44</sup> CP 26.

<sup>45</sup> CP 139, 143-44, 146, 148.

<sup>46</sup> CP 26.

<sup>47</sup> CP 150.

<sup>48</sup> CP 29.

Mehlman. When a complaint came in on the Patient Abuse line, Dr. Mehlman restricted from the Ward while an investigation was done, but Thurston was still allowed to complete his normal duties on the Ward.<sup>49</sup>

j) *Jan Gregg, CEO. removed Ms. Miville from the Ward by assigning her to Medical Records when an allegation of patient abuse was lodged.*<sup>50</sup>

k) The “investigation” was putatively based on a “petition” prepared by in-patient residents on the Ward where Ms. Miville was assigned. She has never been provided with a copy of the “petition”.<sup>51</sup>

l) *Dr. Mehlman, Ph.D. asserts he received a “petition” from patients that sparked the “investigation” of Ms. Miville and led to her reassignment to Medical Records.*<sup>52</sup>

m) Ms. Miville was reassigned away from working with mentally ill in-patient offenders when she left Medical Records after filing a grievance because the “investigation” of the allegations of patient abuse had not been completed after three months.<sup>53</sup>

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<sup>49</sup> CP 144.

<sup>50</sup> Id.

<sup>51</sup> CP 148-49.

<sup>52</sup> CP 27-28.

<sup>53</sup> CP 148-49.

n) *On 4 March 2002, Dr. Mehlman, Ph.D. reassigned Ms. Miville to Ward S-5, Admissions Ward, to work with short-time offenders.*<sup>54</sup>

o) Ms. Miville was reassigned to Ward S-5 within moments of receiving the letter of exoneration of the patient abuse allegations although there were openings on the Ward where she had been working.<sup>55</sup>

p) *Dr. Mehlman, Ph.D. asserts that no formal discipline was taken against Ms Miville as a result of the patient abuse allegations.*<sup>56</sup>

q) While working on Ward S-5, Admissions Ward, Ms. Miville prepared 30+ Psycho-sexual assessments each month. Ms. Miville wrote 30+ treatment plans each month.<sup>57</sup>

r) *Dr. Mehlman, Ph.D. asserted that while working on Ward S-5, Ms. Miville contributed to 60 treatment plans a year.*<sup>58</sup>

s) Ward S-5 became Ward F-1 when the patients were moved to the CFS building in mid-2002. Half of the patients assigned to Ward F-1 were present for a 15-day competency evaluation to be performed for the court. Competency restoration would have been inappropriate. No staff on

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<sup>54</sup> CP 28.

<sup>55</sup> CP 149.

<sup>56</sup> CP 28.

<sup>57</sup> CP 149-50.

<sup>58</sup> CP 150.

F-1 conducted competency restoration or prescribed medication that the offender did not agree to take.<sup>59</sup>

t) *Dr. Mehlman, Ph.D. asserts that the duties Ms. Miville performed on F-1 were similar to what she had performed on Ward S-5 (competency restoration).*<sup>60</sup>

u) Ms. Miville had conducted psycho-social assessments for over 16 years when she was relieved of that duty on Ward F-1.<sup>61</sup>

v) *Dr. Mehlman, Ph.D. asserts that only social workers could conduct psycho-social assessments.*<sup>62</sup>

w) Ms. Miville sought promotion to the Ward Program Manager position on Ward F-6 in November 2003, but was denied. She pointed out that the advertised qualifications for the position did not include credentials as a licensed Psychologist.<sup>63</sup>

x) *Dr. Mehlman, Ph.D. asserts that a “majority” of the Ward Program Manager positions require licensed Psychologist credentials.*<sup>64</sup>

y) Many incumbents in Ward Program Manager positions in CFS do not have psychology degrees. They are recreational therapists, social workers and two Registered Nurses.<sup>65</sup>

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<sup>59</sup> CP 150-51.

<sup>60</sup> CP 30

<sup>61</sup> CP 147-48.

<sup>62</sup> CP 29.

<sup>63</sup> CP 155.

<sup>64</sup> CP 33.

ee) Ms. Miville applied for a temporary Ward Program Manager position on Ward F-6. She was never interviewed. The position went to a Bachelor's level degreed person with less time and experience who had no experience with mentally ill offenders.<sup>71</sup>

ff) *Dr. Mehlman, Ph.D. selected a Bachelor's level employee who was in a Ph.D. candidate program from a habilitation program in adult psychiatric services a different part of WSH than CFS for one year.*<sup>72</sup>

gg) In October 2003, Ms. Miville issued a memorandum related to security issues on Ward F-1.<sup>73</sup>

hh) *No response was provided to the memorandum.*

ii) Ms. Miville issued a new memorandum to Dr. Mehlman, Ph.D. regarding staffing on Ward F-1 in February 2004.<sup>74</sup>

jj) *No response was provided to the memorandum.*

kk) Ms. Miville issued a memorandum asking to assist in the treatment plans and psycho-socials for Ward F-1. She pointed out that the other remaining Forensic Therapist, a male, John Higgins, working on Ward F-2, was engaged in preparing treatment plans and psycho-social assessments that had been taken from her.<sup>75</sup>

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<sup>71</sup> CP 156, Exhibit J, CP 186.

<sup>72</sup> CP 33, CP 195.

<sup>73</sup> Exhibit A, CP 163.

<sup>74</sup> Exhibit B, CP 165.

<sup>75</sup> Exhibit E, CP 172.

ll) *Dr. Mehlman, Ph.D. contends that Mr. Higgins prepared the plans and assessments under supervision, but provides no explanation why Ms. Miville could not do the same. He admitted that Mr. Higgins had the same background but did not think Ms. Miville had the same experience working with a pretrial population.*<sup>76</sup>

mm) On 11 April 2005, Ms. Miville protests that she is not allowed to prepare treatment plans and psycho-social assessments for Ward F-1 as a part of her duties through a memorandum to Dr. Mehlman, Ph.D., that expresses that what she has been doing to cover staff losses on the unit.<sup>77</sup>

nn) *No response was provided to the memorandum.*

oo) Ms. Miville was assigned to the Therapy and Restoration Center (FTC) and encountered problems with a lack of equipment for her work location.<sup>78</sup>

pp) *Dr. Mehlman, Ph.D. expresses his understanding that Ms. Miville was provided with a desk, phone and computer of her own.*<sup>79</sup> *He has no direct knowledge.*

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<sup>76</sup> CP 391-92, CP 195.

<sup>77</sup> Exhibit F., CP 174.

<sup>78</sup> Exhibit G, CP 177.[This was the incident that survived the Partial Summary Judgment ruling in March 2008.]

<sup>79</sup> CP 32.

qq) Ms. Miville was reassigned from inside the Ward at the FTC to a location outside the Ward through two locked doors that staff members of the FTC and WSH did not have the ability to gain access, thereby limiting Ms. Miville's access to patients and other staff, and her ability to perform her shop steward duties.

rr) *Dr. Mehlman, Ph.D., asserts that the office space of Ms. Miville was "on par with or better than other staff."*<sup>80</sup>

ss) Ms. Miville files a grievance related to the work space she was assigned at the TRC. The previous use of the room had been storage.<sup>81</sup>

tt) *Response to grievance was provided by Defendants.*<sup>82</sup>

uu) Ms. Miville receives a copy of a memorandum from Dr. Mehlman that restricts the operations of shop stewards and requires prior approval from Dr. Mehlman before they can perform their duties authorized by the collective bargaining agreement.<sup>83</sup> Melanie Quimby declared that the issuance of the memorandum was directed at Mary Miville to "keep her in a box" or words to that effect.<sup>84</sup>

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<sup>80</sup> CP 31-2.

<sup>81</sup> CP 152, Exhibit I, CP 181.

<sup>82</sup> CP 400-411.

<sup>83</sup> CP 159, Exhibit M, CP 192;

<sup>84</sup> CP 110-15.

vv) *Dr. Mehlman, Ph.D. denies making any derogatory statements about Ms. Miville or singling her out for her union activities.*<sup>85</sup>

The United States Supreme Court in Burlington Northern v. White, *supra*, 126 S.Ct., at 2432-35, has indicated that “whether a particular reassignment is materially adverse depends upon the circumstance of the particular case and should be judged from the perspective of a reasonable person.” This perspective was provided when Ms. White who was classified as a “general laborer” was shifted from her original position driving a fork-lift to that of a “maintenance worker” in a railroad yard after she had complained of sexual harassment and retaliation. The high court noted that there are generic employment titles that could include a large number of tasks and duties, but just because the railroad continued her in the same job class did not mean that she was doing the same work. The high court found it ill-conceived that the title of a job could excuse a substantial change in actual duties.

In the preceding summary descriptions of the averments by Ms. Miville (in normal font) and the averments by Dr. Mehlman, Ph.D, and Ms. Gladd, the contradictions are set forth. The facts claimed by Ms. Miville contradict those claimed by the declarants supporting the Defendants point of view. The employee has set forth a *prima facie* case

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<sup>85</sup> CP 396-97.

of hostile work environment resulting from her grievances, complaints, requests for transfer, promotion, to retain her authorized work hours, her identification of staffing and patient issues starting at the inception of Dr. Mehlman, Ph.D. appointment to the LOU/CFS. Further, her long experience and knowledge of her job, the personnel system and the operations on the Wards where she has been assigned, when combined with her union grievance duties and position as shop steward provide a basis for the court to grant the inferences that the law requires to her when the Defendant offers or attempts to offer an explanation of its actions.

The employer did provide or articulate what it considered a non-discriminatory reason for each of the myriad of resolutions or decisions it made in regard to issues raised by Ms. Miville. Thus, the issue of the presumption of a hostile working environment drops out of the picture, St. Mary's Honor Center, *supra*.

What remains then is to review, *de novo*, the rationale offered by the employer to determine if any material part of its offer was “pretextual”. The analysis shifts to a question of whether the employee offered sufficient direct or circumstantial evidence that the proffered statements are unworthy of credence. This burden is only to demonstrate that there is a genuine dispute of material fact to defeat summary judgment. Cooper v. Southern Co., *supra*. If the employee can

demonstrate “weaknesses, incoherencies, or contradictions”, so that a reasonable factfinder would have to make the determination of credibility, then the burden of showing pretext is met and the motion for summary judgment must be denied.

As a part of the *prima facie* showing, the employee has demonstrated that following an unsubstantiated allegation of patient abuse, she was immediately reassigned from her permanent position on Ward S-8 to Ward S-5 even though there was no performance problems with her work. Once assigned to Ward S-5 that became Ward F-1, the employee was removed from her 4/10 work schedule that she had previously grieved and had been granted. In 2002, she applied for a position as a Psychologist 3 because the departing male had been performing the same duties she had performed on Ward S-8. She was denied the promotion. In the Fall of 2003, she applied for a Ward Program Manager position in CFS that was ultimately awarded to a younger female who held a Bachelor’s Degree and had only worked at WSH for a year in an area foreign to the CFS. In May 2004, the employee sought reinstatement of the work she had previously been doing, to produce psycho-social assessments and treatment plans when she learned that a male on the companion Admissions Unit, F-2, had been performing those duties. She was denied that opportunity.

In June 2004, the employee was reassigned to the TRC on a part-time basis and then in September on a full-time basis. She was placed in a location outside of the Ward, behind two locked doors that staff from the Ward and other staff did not have the ability to access. Thereby limiting her ability to interact with staff on the Ward or others who were seeking her expertise as a shop steward. In November 2004, Dr. Mehlman, Ph.D. issued a memorandum requiring his authorization for shop stewards to be relieved of duty to perform union business instead of the person's supervisor. This effort by Dr. Mehlman was directed at Ms. Miville.

The employee contends that she was denied training opportunities that had to be approved by Dr. Mehlman, Ph.D.<sup>86</sup> Dr. Mehlman denies that he received any requests for training from Ms. Miville.<sup>87</sup> His denial is not credible because he removed her 4/10 workweek, a subject of objection by Ms. Miville.

The preceding comparison of averments by Ms. Miville and Dr. Mehlman, Ph.D. demonstrates that there were the very inconsistencies, weaknesses, contradictions and incoherencies that a reasonable factfinder could find unworthy of credence under the rule in Cooper v. Southern Co., supra. These contradictions and inconsistencies demonstrate genuine disputes of material fact. Dr. Mehlman's claim that the Bachelor's level,

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<sup>86</sup> CP 157-58.

<sup>87</sup> CP 34.

one year employee who had never worked with mentally-ill offenders was better qualified than Ms. Miville is a prime example. Further, his lack of knowledge of the depth and scope of the experience and work history of Ms. Miville fueled his denial of her request for work commensurate with a male counter-part in the same admissions unit. She reasonably saw that the reassignments, including the assignment to the TRC, were materially adverse to her and her career. The proffered rationale offered by Dr. Mehlman, Ph.D., was pretextual and unworthy of belief. Not just because of the inconsistencies and contradictions noted in paragraphs a) through uu) above, but because there are factual issues in controversy that only a trier of fact can determine.

Ms. Miville has established a *prima facie* case and then demonstrated that the proffered reasons offered by the Defendants are pretextual. The ruling by The Honorable Christine Pomeroy should be reversed and the claim remanded for trial.

## 2) Retaliation:

Ms. Miville repeatedly engaged in statutorily protected activity. She repeatedly served as a shop steward for her own union and that of the nurses employed at WSH. She repeatedly identified issues related to patient care and staffing that began with the inception of appointment of Dr. Mehlman to the LOU/CFS at a time when Ms. Miville had provided

damning information concerning patient care and treatment for the Rust lawsuit.<sup>88</sup> She repeatedly raised issues concerning security for staff and offenders in the CFS. Finally, she repeatedly raised complaints when she was reassigned, when her duties were changed or when she was not even interviewed for promotional opportunities for which she was qualified.

Ms. Miville had an extensive history in the representation of other employees at WSH.<sup>89</sup> Indeed, her activities in regard to union representation were well known among the administrators of the LOU/CFS. The Labor Relations Manager, Dolly Garcia, who dealt with Dr. Mehlman, Ph.D., and Dr. Darrell Hamilton, MD, opined that they were “strongly opposed” to the continual efforts of Ms. Miville to seek redress for employees at WSH.<sup>90</sup> Ms. Garcia noted that there were significant and continuing union problems during the transition from the LOU to the CFS and the changes that occurred in the operation of the CFS as a result of the bargaining agreements that were in place prior to the transition. She observed that Ms. Miville was viewed as a “primary trouble-maker” by Dr. Mehlman, Ph.D. and Dr. Hamilton, MD.<sup>91</sup> It is

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<sup>88</sup> It was dissembling of Dr. Mehlman to assert his lack of knowledge in Ms. Miville’s honest participation in providing support for the claims of the patients who had been committed to the Legal Offender Unit and were not receiving adequate treatment or care since her supervisor who reported to Dr. Mehlman had to approve her appearance in deposition.

<sup>89</sup> See contentions of Rick Hall, Labor Relations Specialist at WSH, CP 57-58.

<sup>90</sup> CP 117-18.

<sup>91</sup> CP 118-19.

against his backdrop that Dr. Mehlman has denied knowledge about the actual extent of the involvement by Ms. Miville with union matters.

Ms. Miville contends that there have been a series of retaliatory acts that have affected her employment. The rule in Burlington Northern v. White, *supra*, tells us that whether a particular reassignment is materially adverse should be judged from the perspective of a reasonable person in the plaintiff's position. An examination of the classification description for Forensic Therapist<sup>92</sup> expresses a broad range of potential duties. What was taken from Ms. Miville, when she was transferred to the CFS and what became Ward F-1 and then to the TRC on a permanent basis was the opportunity to a) communicate and work with judges and the criminal justice system, b) participation in program-wide clinical and administrative activities, c) analysis and presentation of program interpretation, development or research material. Indeed, of the six paragraphs of typical work identified in the Specifications for the Class of Forensic Therapist 2, she began engaging in only one of the described activities – group training through the classes she provides. Over 80% of her former duties are gone. That was not true for her counterpart, the male Forensic Therapist on Ward F-2. He was able to engage in 80% of his

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<sup>92</sup> CP 379-81.

former duties because he was preparing psycho-social assessments and treatment plans.

Ms. Miville was denied promotional opportunities, training and the ability to perform shop steward duties without the permission of Dr. Mehlman, Ph.D. Some of these incidents were proximate<sup>93</sup> to the time when Ms. Miville would raise an issue. Others, like the shop steward representations, were consistent over time. The removal of her 4/10 workweek occurred shortly after her reassignment, as was noted above. Her reassignment to the TRC came shortly after she had requested reinstatement of her prior work duties that would have been similar to those of her male counter-part on Ward F-2. It was also after she identified staffing and security problems on Ward F-1.

These events were in retaliation for the reporting, the union representation, and the complaints, including grievances, initiated by the employee. The ability of the employer to express a legitimate, non-retaliatory reason for each of the actions without there being a genuine issue of material fact does not exist.

Employers rarely reveal they are motivated by retaliation. Plaintiffs must resort to circumstantial evidence to demonstrate retaliatory purposes. In consideration of a Motion for Summary Judgment, the

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<sup>93</sup> Wilmot v. Kaiser, *supra*; Villariamo v. Aloha Island, *supra*.

reviewing authority must grant all inferences to the non-moving party and must not resolve controverted issues of material fact. This The Honorable Christine Pomeroy did not do.

Her ruling on retaliation should be reversed and the claim remanded to the Superior Court for trial to permit a trier of fact to decide these issues.

## V.

### ATTORNEY FEES AND COSTS

The Appellant here request that the Court award attorney fees under RAP 18.1. The rule provides that the prevailing party can recover costs incurred on appeal, including but not limited to reasonable attorney fees. RAP 14.2, 14.3. The Appellants now request an award of attorney fees and an award of costs if they succeed on appeal. If the Appellants prevail on the appeal of this adverse summary judgment ruling and the Court remands the matter to the trial court; it remains to be determined if they will prevail on the trial in this matter. McClarty v. Totem Electric, 119 Wn. App. 453, 472, 81 P. 3<sup>rd</sup> 901 (2003). The rule in McClarty, which has been confirmed in the high court's decision in Riehl v. Foodmaker, Inc., 152 Wn.2d 138 94 P.3d 930 (2004), would require the trial court to make the determination. Consequently, the Appellants request that the Court reserve the matter of attorney fees and costs for the trial court if remand occurs.

## VI.

### CONCLUSION

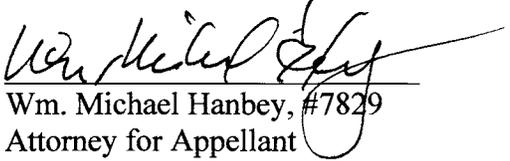
The Appellant, Mary Miville, asserts that there were material facts at issue that precluded the summary ruling by The Honorable Christine Pomeroy. The oral ruling and written ruling by Judge Pomeroy failed to adequately address the issue of continuing violation and the impact the earlier decisions made by administrators at the LOU/CFS in regard to Ms. Miville. Further, those who worked with the administrators expressed their personal observations of the view in which Ms. Miville was held by Dr. Mehlman.

The trial court did not carefully review the representations made by each of the parties in accord with prevailing law to determine that there was pretext in the proffer made by the Defendant, Richard Mehlman, Ph.D.

The Appellant has demonstrated that she had engaged in protected activity on a regular and specific basis during the tenure of Dr. Mehlman at LOU/CFS. Her reward was reassignment, limitation of duties, denial of promotional opportunities, denial of training and restriction of her union related duties. Dr. Mehlman, Ph.D., was the decision-maker. His responses, when compared with the facts provided by Ms. Miville, are either not credible or are contradicted by Ms. Miville. Under either circumstance, the summary ruling should not have been entered.

Appellant seek reversal of the summary judgment and remand to the trial court to permit a trier of fact to determine these claims. Further, Appellant seeks attorney fees and costs to be authorized for this appeal as set forth above.

RESPECTFULLY SUBMITTED THIS 29<sup>TH</sup> DAY OF SEPTEMBER  
2008.

  
Wm. Michael Hanbey, #7829  
Attorney for Appellant  
PO Box 2575,  
Olympia, WA 98507  
(360) 570-1636

**CERTIFICATE OF SERVICE:**

00 SEP 30 11:17 AM

STATE DEPARTMENT OF  
BY \_\_\_\_\_

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

Court of Appeals, Division II  
950 Broadway, Suite 300  
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I certify under the penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

**Dated this 29th day of September, 2008**

  
**Kelsy Vincent, Legal Assistant to  
Attorney for Appellant**