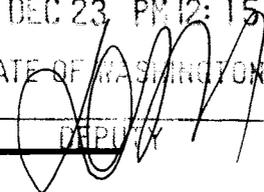


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DIVISION II

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STATE OF WASHINGTON
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NO. 37862-1-II

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

MARY E. MIVILLE, a single person,

Appellant,

v.

ROBIN ARNOLD-WILLIAMS, Secretary, Department of Social and
Health Services, and the DEPARTMENT OF SOCIAL AND HEALTH
SERVICES and the STATE OF WASHINGTON, and RICHARD
MEHLMAN and "JANE DOE" MEHLMAN, a married couple,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

Mary Miville (“Miville”) essentially claims that since September 2000, she has been involuntarily reassigned duties and work space, had her schedule changed, and has been denied promotions, transfer requests, and training opportunities.¹ She claims that these employment actions amounted to a hostile work environment on account of her gender, as well as retaliation for having engaged in protected activities.² Ms. Miville primarily contends that the protected activities consisted of her work as a union shop steward (since 1996).³ However, Miville did not allege a retaliation claim under RCW 49.32, nor does she address this claim in her brief.⁴

Although Miville originally set forth a claim for disparate treatment on account of her age and gender based on the same employment actions referenced above,⁵ she does not discuss a separate disparate treatment claim in her appeal brief.⁶ Ms. Miville additionally acknowledges that she has abandoned claims for negligent supervision,

¹ Clarke Decl., Ex. A at ¶¶ 3.6-3.9, 8.3. CP at 53-54, 57-58.

² CP at 10, 12-14.

³ *Id.* Miville additionally claims that her protected activities included complaints made on behalf of patients, filing grievances on her own behalf, and/or because she was a witness in litigation against the agency, however, she fails to specifically identify any protected oppositional activity under RCW 46.90.

⁴ See Appellant’s Br. at 16-42. See also p. 37, *infra*.

⁵ In her complaint, Miville also made a vague disparate treatment claim based on sexual orientation (CP at 7) but did not assert this claim at the motion for summary judgment phase.

⁶ *Id.*

negligent infliction of emotional distress, and outrage.⁷ Thus, the only claims remaining on appeal are Miville's claims for gender-based hostile work environment and retaliation.

II. PROCEDURAL HISTORY OF THE CASE

Unhappy with her assigned duties as a forensic therapist at Western State Hospital, Mary Miville filed suit in the Thurston County Superior Court on February 10, 2006.⁸ She claimed disparate treatment, hostile work environment and retaliation under Washington's Law Against Discrimination (WLAD).⁹ Miville sued the state of Washington, the Department of Social and Health Services, Secretary Robin Arnold-Williams,¹⁰ and Rick Mehlman, the former director of the Center for Forensic Services at Western State Hospital.¹¹

On December 20, 2007, Defendants filed a motion for summary judgment asserting that: (1) certain claims are barred as they are outside the three-year statute of limitations; (2) other claims are barred since they are not set forth in Miville's tort claim; (3) the evidence fails to support a prima facie case for discrimination, hostile work environment or

⁷ Appellant's Br. at n.1.

⁸ Clarke Decl., Ex. A. CP at 49-60.

⁹ Miville cites RCW 49.60 and 49.44 for her disparate treatment claims, and RCW 49.60 for her retaliation claim. CP at 12-14.

¹⁰ Miville sues Arnold-Williams solely in her official capacity. Clarke Decl., Ex. A, at ¶ 2.2. CP at 51.

¹¹ Dr. Mehlman served as the center's director from February 2001 through February 2007. He is sued in his official and personal capacities. Clarke Decl., Ex. A at ¶ 2.5. CP at 51-52.

retaliation; and 4) the evidence fails to show that Defendants' legitimate, non-discriminatory and non-retaliatory reasons for the challenged employment actions are pretextual.¹² Ms. Miville filed her opposition papers, together with a motion to strike portions of Defendants' evidence.¹³ Defendants filed their reply materials, together with a motion to strike Plaintiff's inadmissible evidence.¹⁴

After continuances by Plaintiff, a hearing was held on March 28, 2008.¹⁵ The Honorable Christine Pomeroy denied Miville's motion to strike, but agreed that some of the challenged evidence was opinion only, or would not be considered for the truth of the matter asserted.¹⁶ The court granted Defendants' motion to strike in substantial part, agreeing that Miville's witnesses, Melanie Quimby and Dolly Garcia, primarily offered conclusory opinions about Dr. Mehlman's attitude toward Miville, unsupported by factual assertions.¹⁷

Turning to the motion for summary judgment, the trial court ruled from the bench that Miville's gender and age-related claims would be dismissed. Additionally, the court concluded that summary judgment should be granted on all but a portion of Miville's retaliation claim.

¹² CP at 77-102.

¹³ CP at 120-138, 225-242.

¹⁴ CP at 430-441.

¹⁵ RP (3/28/08) at 3-43.

¹⁶ RP (3/28/08) at 4-13. CP at 225-24, 429-41.

¹⁷ RP (3/28/08) at 43. CP at 225-24, 429-41.

Specifically, the court held that allegations relating to “adverse work space” remained for the jury to decide. The court explained that summary judgment was precluded because of a comment attributed to Dr. Mehlman by witness Melanie Quimby to the effect that, “This should keep [Miville] in check.”¹⁸

Defendants thereafter filed a motion requesting that the court reconsider its ruling.¹⁹ Defendants noted that witness Quimby did not relate the “keep [Miville] in-check” comment to reassignments in Miville’s workspace. Rather, this comment was purportedly made after Dr. Mehlman issued a directive requiring authorization for any staff activities, including union activities, scheduled during core patient treatment services (four hours each day).²⁰ In addition to filing a motion to reconsider, Defendants filed a second motion for summary judgment specifically addressing the remaining “adverse work space” retaliation claim.²¹

¹⁸ RP (3/28/08) at 43.

¹⁹ CP at 442-49.

²⁰ *Id.* The directive was issued in November 2004, two months after Miville was reassigned to the TRC full-time and after other staff in the TRC complained that Miville was having them lead some of her group sessions. The *Rust* lawsuit settlement required increases hours for patient core treatment. *See* pgs. 8-9, *infra*, and n.30-31.

²¹ CP at 452-61. These motions were filed prior to the issuance of any formal opinion on the summary judgment motion. *See e.g., Felsman v. Kessler*, 2 Wn. App. 493, 468 P.2d 691 (1970) (where a court has filed a memorandum opinion ruling on a motion for summary judgment, a party may place additional matters before the court in an effort to change its mind until such time as an order is entered formally disposing of the motion).

After further oral argument on April 25, 2008,²² the lower court agreed that Defendants' motion for reconsideration should be granted and that none of Miville's claims could withstand summary judgment.²³ On June 5, 2008, the court entered its formal order dismissing the case.²⁴

III. RESTATEMENT OF THE ISSUES

A. Procedural Bar

1. Is summary judgment properly affirmed on Miville's hostile work environment claim as a consequence of Miville's failure to initially raise this claim in her underlying tort claim?

2. Is summary judgment properly affirmed on portions of Miville's hostile work environment and retaliation claims because Miville is effectively challenging discrete employment decisions that occurred outside the three-year limitations period and, thus, a continuing violations theory is not applicable?

3. Is summary judgment properly affirmed on a portion of Miville's retaliation claim (alleged work as a union shop steward) because Miville fails to cite or argue any authority in support of a union activity retaliation claim in the briefing she filed for this appeal?

²² RP (4/25/08) at 3-14.

²³ CP at 540-42.

²⁴ CP at 543-44.

4. Is summary judgment properly granted on a portion of Miville's retaliation claim (alleged complaints/involvement as witness in litigation on behalf of patients) because she fails to cite or argue any First Amendment retaliation claim?

B. No Prima Facie Case

1. Is summary judgment properly affirmed on Miville's hostile work environment claim for the additional reason that the conduct at issue amounts to no more than discrete employment decisions which do not support a prima facie claim of gender-based hostile work environment?

2. Is summary judgment properly affirmed on Miville's retaliation claim for the additional reason that the challenged employment decisions (a) do not constitute adverse employment actions, and/or (b) because no causal link is established to support a prima facie case of retaliation based on protected activities?

C. No Pretext

1. Is summary judgment properly affirmed on Miville's hostile work environment and retaliation claims for the further reason that Defendants' legitimate, non-discriminatory and non-retaliatory reasons for the challenged employment decisions were not shown to be pretextual?

IV. RESTATEMENT OF THE CASE

A. Background Facts

Western State Hospital (“WSH”) is a mental health facility in Steilacoom, Washington, operated by the Washington Department of Social and Health Services (the “Department”). Within WSH is the Center for Forensic Services (“CFS”), a 10-ward, 300-bed hospital unit which evaluates pre-trial defendants’ competency to stand trial, and for competency restoration for those adjudicated not guilty by reason of insanity.²⁵

Mary Miville began her employment at WSH on October 7, 1985, as a Forensic Therapist 1 at the CFS. She was promoted to the position of Forensic Therapist 2 on September 16, 1991, a position which she continues to hold.²⁶ Since 1996, Miville also has served as a shop steward with her local union.²⁷

B. Professional Staff Changes At The Center For Forensic Services

Since 2001 no new forensic therapist positions have been authorized. In addition to Miville, only two other forensic therapists remain employed at CFS. Vacancies instead were reallocated to positions

²⁵ Mehlman Decl., ¶ 2. CP at 24.

²⁶ Clarke Decl., ¶ 2. CP at 47.

²⁷ Clarke Decl., Ex. A at ¶ 3.4. CP at 52.

requiring either a master's degree in psychology, or a master's degree in social work. Duties formerly performed by forensic therapists—such as writing psychosocial assessments—were transferred to social workers and psychologists.²⁸ These staff changes were partly due to higher credentialing standards imposed by hospital certification and funding sources, such as the Center for Medicare and Medicaid Services and the Joint Commission for Accreditation of Health Care Organizations.²⁹

By the time Dr. Rick Mehlman assumed his position as CFS Director in February 2001, multiple deficiencies at the facility had already been identified in the *Rust* litigation, a class action lawsuit. Dr. Mehlman, a clinical psychologist by profession, was charged with the responsibility to chart a new course for the CFS. As part of the *Rust* Settlement Order reached shortly after Mehlman's arrival, the Department agreed to increase active treatment for patients to a minimum of 20 hours per week. Newly funded staff positions were authorized. Staff reassignments and adjustments of duties were made in an effort to provide better services for patients.³⁰

Under Mehlman's direction, the CFS was certified by the Center for Medicare and Medicaid Services in the 2003-2004 time period.

²⁸ CP at 391-392

²⁹ Mehlman Decl., ¶ 9. CP at 26-27.

³⁰ Mehlman Decl., ¶ 4. CP at 25.

Additionally, the *Rust* court monitors and the Joint Commission Survey, which spells out standards of patient care and hospital safety, pointed out vast improvement in treatment delivery to patients by 2005. Dr. Mehlman served as CFS director until February 2007, when he assumed another position within the agency.³¹

C. Miville's Administrative Job Reassignments

1. Medical Records Department

In December 2001, Miville was temporarily reassigned to the medical records department. This reassignment was at the direction of the hospital's CEO following the receipt of a petition signed by 14 patients assigned to Miville's caseload on ward S-8, a competency restoration ward for clients judged not guilty by reason of insanity (NGRI clients). The patients complained about psychological abuse by Miville.³²

Ms. Miville's reassignment pending investigation was consistent with procedures for reviewing allegations of patient abuse. The assigned investigator was unable to substantiate misconduct, but expressed concern about Miville's poor relationships with patients. No disciplinary action was taken against Miville, and she received no loss of salary.³³

³¹ Mehlman Decl., ¶ 1. CP at 23.

³² Mehlman Decl., ¶ 11. CP at 27-28.

³³ Mehlman Decl., ¶ 12. CP at 28.

2. Admissions Ward/Work Schedule

At the conclusion of the investigation, Miville was reassigned on March 4, 2002, to an admissions ward on S-5 to work with short-term defendants admitted for evaluations. By the time of Miville's reassignment, therapy staff working on NGRI treatment wards were required to work a 5-day, 8-hour workweek to meet programming needs required under the *Rust* Settlement Order (four hours per day, 20 hour per week of active treatment for NGRI clients). Miville's reassignment to an admissions ward accommodated her expressed desire to continue working a 4-day, 10-hour shift.³⁴ Miville's salary was unaffected by this reassignment.

Within a period of months, treatment services were increased for patients housed in the admission wards. Like other staff, Miville was required to work a 5-day, 40-hour workweek.³⁵ A new building was completed to house the CFS in approximately the summer of 2002. Admissions ward S-5, where Miville was assigned, became admissions ward F-1.³⁶

³⁴ Mehlman Decl., ¶ 13, Ex. A. CP at 28-29, 38. A Forensic Therapist 2 (male) working on a NGRI treatment ward, and previously working a 4-day, 10-hour shift, was also required to change to five, eight-hour days. Mehlman Decl. ¶ 13. CP at 28.

³⁵ CP at 29, 150. In fact, Miville asserts she was the last CFS employee required to change to a 5-day schedule.

³⁶ Mehlman Decl. ¶ 14. CP at 29.

3. Therapies and Recovery Center, Part-Time

During Dr. Mehlman's tenure, the Therapies and Recovery Center (TRC) was established to increase active treatment for CFS clients. The TRC was eventually housed in an adjacent, new building designed to function as the primary, centralized treatment center for CFS patients.³⁷

Effective June 23, 2004, Miville was reassigned to the TRC on a part-time basis to provide competency restoration services. This entailed leading group therapy sessions of approximately 6-10 patients each, for a total of two hours each day. Miville continued to be assigned part-time to the F-1 admissions ward, where she provided similar services for those patients who did not attend group sessions in the TRC. Miville's salary was not affected by her part-time assignment to the TRC. Forensic Therapist Kent Olsen (male) was also reassigned to the TRC to assist with staffing and programming needs.³⁸

Due to limited office space, Miville was reassigned to a private office adjacent to ward F-1 so that the newly appointed F-1 Ward Program Manager could have an office on the ward. Miville was moved because she was the only employee working on ward F-1 part-time. At the time Miville did not complain about her new office.³⁹

³⁷ Mehlman Decl., ¶ 16. CP at 29-30.

³⁸ Mehlman Decl., ¶¶ 16-17, Exs. B and C. CP at 29-30, 39-42.

³⁹ Mehlman Reply Decl., ¶¶ 18-19, CP at 388-89.

4. Therapies And Recovery Center, Full-Time

The newly appointed F-1 Ward Program Manager, Jeff Thurston, subsequently complained to Dr. Mehlman that Miville was not routinely performing her assigned part-time duties on ward F-1. This was apparently due to her unwillingness to lead group sessions without a co-leader, even though two staff persons were not required. Miville's actions resulted in numerous sessions being cancelled due to unavailability of a second staff person.⁴⁰

In September 2004, Miville was assigned to work full-time in the TRC to provide competency restoration services (four hours of group sessions per day). Ms. Miville was also assigned to a classroom office within the TRC to facilitate the performance of her full-time duties. Dr. Mehlman believed that by working full-time in the TRC, Miville could serve a larger group of patients in a more secure environment. Ms. Miville's prior duties on the F-1 admissions ward were absorbed by existing ward staff.⁴¹

D. Miville's "Transfer" Requests To Vacant Social Worker Positions

Dissatisfied with her full-time assignment to the TRC, and wanting to prepare psychosocial assessments, Miville submitted requests to fill

⁴⁰ Mehlman Decl., ¶ 18, CP at 31.

⁴¹ Mehlman Decl. ¶ 18, Ex. D. CP at 31, 44.

vacant social worker positions on one of the wards. To fill a social worker position, an employee must have a master's degree in social work and be licensed. Ms. Miville, who had a master's degree in educational ministries, did not qualify.⁴²

E. Miville's Promotional Requests

1. Psychologist 3 Positions

In addition to believing that she should be allowed to fill vacant social worker positions, Miville also opines that she is qualified by experience to work as a Psychologist 3. Ms. Miville is not qualified and never formally applied for any Psychologist 3 position. She does not have the required master's degree in psychology. Other forensic therapists and employees who successfully competed for Psychologist 3 positions during Dr. Mehlman's tenure included two women over the age of 50.⁴³

2. Temporary Ward Program Manager Position

The only position for which Miville formally sought promotion was the temporary Ward Program Manager position on ward F-6, a co-ed

⁴² Mehlman Decl. ¶ 21. CP at 32. Kelso Decl. ¶¶ 3-5. CP at 20. If a qualified applicant could not be hired, persons with a clinical master's degree could be "credentialed" by the WSH social work department to work under the supervision of a licensed social worker. Miville did not qualify as she did not have a clinical master's degree. *Id.* CP at 33.

⁴³ Mehlman Decl. ¶ 22. CP at 33.

ward for evaluation and competency restoration.⁴⁴ Because it was a temporary position, however, competitive interviews were not required. In approximately January 2004, Dr. Mehlman recommended Kelsey Fassieux for the position. Ms. Fassieux had worked at WSH as a rehabilitation program administrator while working on her Ph.D. in clinical psychology. She was highly recommended by several employees for her leadership abilities and clinical experience.⁴⁵

Ms. Miville's gender or status as a union shop steward had no bearing on her failure to promote. Other promotional advancements by Dr. Mehlman during his tenure at the CFS included women (including those over the age of 40) to managerial positions, as well as the promotion of several employees who had been officers in their respective unions, including F-1 Ward Program Manager Jeff Thurston (who would later express concerns about Miville's work performance).⁴⁶

⁴⁴ Ms. Miville is not qualified to compete for most other ward program manager positions, the majority of which require credentials as a licensed psychologist. CP at 33.

⁴⁵ Mehlman Decl. ¶ 24. CP at 33-34. Although Dr. Mehlman could not recall at the time of his deposition specific information about Fassieux's master's degree, the record shows she had a master's degree in special education. Glad Reply Decl., ¶ 13. CP at 365.

⁴⁶ Mehlman Decl. ¶ 25. CP at 34.

F. Training Opportunities

Although Miville complains in her lawsuit about being denied specified training opportunities,⁴⁷ there is no record of her alleged request to attend the weekly Continuing Medical Education (CME) lectures or Forensic Series lectures held at the CFS. In any event, Miville and other therapy staff, whether employed on the wards or in the TRC, are not within the target audience for either series.⁴⁸ Similarly, as to Miville's request to attend an extensive course on mediation, there is no record that other therapy staff were allowed to attend such training at state's expense.⁴⁹

G. General Directive Regarding Core Treatment Hours

In November 2004, Dr. Mehlman issued a staff directive which Miville complains was designed to restrict her communications as a shop steward.⁵⁰ The directive, which affected all CFS treatment staff, required authorization before staff activities (to include union activities) could be scheduled during core treatment hours (8:30-10:30 a.m. and 1-3 p.m.,

⁴⁷ Clarke Decl., Ex. A at ¶ 3.7. CP at 53.

⁴⁸ Regular attendance by persons responsible for providing therapy during core hours would also cause disruption to and/or cancellation of active treatment sessions. Mehlman Decl. at ¶ 26. CP at 34-35.

⁴⁹ Ms. Miville complains that Dr. Mehlman denied her request to attend a 40-hour course on mediation in 2004. All training requests must be submitted with justification as to how the training will enhance job performance or lead to professional growth in a relevant area. Mediation training did not appear relevant to improving services for clientele at the CFS, and no other employee was authorized to attend this type of training at state expense. Mehlman Decl. at ¶ 27. CP at 35.

⁵⁰ CP at 35, 146, 396.

Monday through Friday). Any exceptions for cause required notification to Dr. Mehlman by the approving supervisor. This directive became necessary to ensure continuity of patient care and services.⁵¹ Ms. Miville admitted in her deposition that the policy did not prevent her from performing her union shop steward activities.⁵²

V. SCOPE AND STANDARDS OF REVIEW

This Court's review of an order granting summary judgment is *de novo*, and the Court engages in the same inquiry as the trial court. *Tyrrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). An appellate court may affirm the trial court on any ground supported by the record, even if not considered or applied by the trial court. *See e.g., LaMon v. Butler*, 112 Wn. 2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814, 110 S.Ct. 61, 107 L. Ed. 2d 29 (1989); *see also Piper v. Department of Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004).

VI. ARGUMENT AND AUTHORITIES

A. **The *McDonnell Douglas/Hill v. BCTI* Burden-Shifting Analysis Applies To Appellant's Claims**

The burden shifting analytical framework first articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411

⁵¹ Mehlman Decl. ¶ 28. CP at 35-36.

⁵² CP at 260.

U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to state discrimination claims. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81, 23 P.2d 440 (2001). This same framework is used for retaliation cases as well. *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002).

In this and most employment cases where there is no direct evidence of discrimination or retaliation, the employee must first produce the facts necessary to support a prima facie case. *Id.* Unless a prima facie case is set forth, the employer is entitled to prompt judgment as a matter of law. *Hill*, 144 Wn.2d at 181. Opinions or conclusory facts are not enough. *Chen v. State*, 86 Wn. App. 183, 191, 937 P.2d 612, *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997). Furthermore, to survive summary judgment, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value." *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 549, 85 P.3d 959 (2004) (citations omitted).⁵³

Only if the employee can establish a prima facie case does the burden of production shift to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment decision. *Hill*, 144 Wn.2d at 181-82. Once such a reason is identified, the burden of

⁵³ Defendants filed a motion to strike inadmissible evidence proffered by Miville. CP at 430-40. *See supra* at 3, n.14, 15, 16, and 17.

production shifts back to the employee to show that the proffered reason “was in fact pretext.” *Id.*

To show pretext, the plaintiff must present evidence that the articulated reason for the action is unworthy of belief and was not believed in good faith by the decision maker. *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 90, 98 P.3d 1222 (2004); *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793, 795 (1995). “If the plaintiff proves incapable of doing so, the defendant becomes entitled to judgment as a matter of law.” *Hill*, 144 Wn.2d at 182. The burden of persuasion remains with the employee/plaintiff at all times. *Hill*, 144 Wn.2d at 181-82 (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)); *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 134, 769 P.2d 298 (1989).

In *Hill*, the Washington Supreme Court additionally followed the Court’s guidance in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), and held that even where an employee produces some evidence of pretext, other factors may still warrant judgment as a matter of law. *Hill*, 144 Wn.2d at 182-87. As stated by the Court of Appeals in *Milligan*:

A court may grant summary judgment even though the plaintiff establishes a prima facie case and presents some evidence to challenge the defendant's reason for its action.

...

[W]hen the 'record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,' summary judgment is proper.

Milligan, 110 Wn. App. at 637, quoting *Reeves*, 530 U.S. at 148 (internal quotations omitted); *Hill*, 144 Wn.2d at 184-85.

Consequently, mere competing inferences are not enough to defeat summary judgment. Only when the record contains a *reasonable* but competing inference of retaliation or discrimination will the employee be entitled to a jury decision. *Id.* Applying the foregoing standards to this case, as argued below, the trial court's dismissal was correct and should be affirmed because the record does not contain a reasonable inference of discrimination or retaliation.

B. Miville's Hostile Work Environment Claim Is Properly Subject To Summary Dismissal

Ms. Miville's complaint makes reference to unlawful harassment based on gender and a harassing environment.⁵⁴ A hostile work environment claim is subject to dismissal on several grounds: (1) such a

⁵⁴ Clarke Decl., Ex. A, ¶¶ 3.5, 3.6. CP at 52-53.

claim was not initially set forth in Miville's tort claim; (2) the factual allegations asserted as the basis for the hostile work environment are identical to those Miville asserted in support of her original disparate treatment claim, and there are no highly offensive or sexually-specific actions alleged; and (3) because Miville is challenging discrete employment actions, she is not entitled to challenge employment decisions that are outside a three-year statute of limitations.

1. Miville Is Procedurally Barred From Bringing Claims Not Previously Asserted In Her Tort Claim

Ms. Miville should be barred from asserting a claim for hostile work environment because she failed to identify this cause or supporting facts in her tort claim.⁵⁵ Her hostile work environment claim was asserted for the first time in her complaint.⁵⁶

The statute for filing tort claims against the state, RCW 4.92.100, requires substantial compliance with the state tort filing statute. *Mercer v. State*, 48 Wn. App. 496, 739 P.2d 703 (1987) (there must be substantial compliance with the claim content requirements of RCW 4.92.100). Her hostile work environment claim is not properly before this court.

⁵⁵Similarly, Miville failed to assert a claim for age or sexual orientation discrimination, or a common law claim for negligent supervision in her tort claim—all claims which she now abandons on appeal.

⁵⁶Clarke Decl., Exs. A and B. CP at 46-64. Defendants raised this failure as an affirmative defense in ¶ 12.6 of their Answer. Clarke Decl. Ex. C. CP at 65-76. The only claims which Miville fairly asserted in her tort claim are claims alleging gender discrimination and retaliation.

2. Miville's Evidence Does Not Support A Prima Facie Case Of Hostile Work Environment

To establish a prima facie case of a gender-based harassment, plaintiff must show that: (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, 406-07, 693 P.2d 708 (1985).

Ms. Miville complains that since September 2000 she has been involuntarily reassigned duties and work space, had her schedule changed, and has been denied promotions, transfer requests, and training opportunities. Even assuming that Miville reasonably found these challenged employment actions to be unwelcome and imputable to her employer, she cannot establish two essential elements of a prima facie case. First, there is no competent evidence, either direct or circumstantial, suggesting that Dr. Mehlman (or other DSHS managers) were motivated to make any of the challenged employment decisions on account of Miville's gender.

Second, the employment decisions at issue do not constitute harassment that effectively alters the terms or conditions of employment. Rather, Miville is challenging discrete employment decisions which

typically occur in any workplace: reassignments, transfers, promotions, office and schedule changes. Harassing conduct must be *extreme* in order to alter the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). In a gender harassment case, the extreme conduct required generally consists of pervasive, highly offensive, sexually specific actions directed at an employee due to his or her gender. *See Faragher*, 524 U.S. at 775. Conduct which does not reach this extreme level does not satisfy the "conditions of employment" element of the prima facie case. *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000); *MacDonald v. Korum Ford*, 80 Wn. App. 877, 886, 912 P.2d 1052 (1996). The lower court did not err in dismissing Miville's hostile work environment claim.

3. The Statute Of Limitations Bars Claims Outside The Limitations Period

Ms. Miville complains about employment decisions that she alleges occurred as far back as September 2000.⁵⁷ Her claims are governed by a three-year statute of limitations under RCW 4.16.080(2). *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004); *Lewis v. Lockheed Shipbuilding & Constr. Co.*, 36 Wn. App. 607, 613,

⁵⁷ CP at 53, 148-149.

676 P.2d 545 (1984) (3-year limitation period applies to employment actions brought under RCW 49.60).⁵⁸

To avoid the 3-year limitations period, Miville contends she is entitled to the benefit of a “continuing violations” theory, see Appellant’s Br. at 14. The United States Supreme Court has expressly rejected the applicability of this doctrine involving discrete acts of discrimination or retaliation. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). Rather, the continuing violations doctrine has limited application to hostile work environment claims. In contrasting the two types of claims, the Court noted, “[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire, are easy to identify.” *Morgan*, 122 S. Ct. at 2073. The Washington State Supreme Court cited *Morgan* with approval in *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004).

Although Miville casts her claim as a hostile work environment claim, in reality she is simply challenging *the same discrete employment decisions* that form the basis of her retaliation claim, and her original

⁵⁸ For employment discrimination claims in general, the statute of limitation begins when the discriminatory or retaliatory acts occur, *not* when the alleged consequences of the acts manifest themselves. *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 809-10, 818 P.2d 1362 (1990), citing *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct 498, 66 L.Ed.2d 431 (1980).

disparate treatment claim (now abandoned).⁵⁹ Thus, Miville is not entitled to sue over events that occurred outside the three-year limitations period.

The statute of limitations cutoff is calculated by the lawsuit filing date (February 10, 2006), minus three years and 60 days (December 10, 2002).⁶⁰ So, Miville's complaints about her assignment to the Medical Records Department pending an investigation in December 2001,⁶¹ her assignment to an admissions ward in March 2002,⁶² and the schedule change to a 5-day workweek in the summer of 2002,⁶³ are all outside the applicable limitations period.

C. If Analyzed Under A Disparate Treatment Theory, Miville's Claims Are Properly Subject To Summary Dismissal

In her complaint, Miville alleged that since 2000 she has been involuntarily reassigned duties and work space, had her schedule changed, and has been denied promotions, requests for transfer and training

⁵⁹ Appellant fails to argue any gender-based disparate treatment claim, constituting a waiver. RAP 10.3(a)(6).

⁶⁰ The tort claim rules add 60 days to the end of the 3-year statute of limitations. See e.g. *Castro v. Stanwood School District*, 151 Wn.2d 221, 86 P.3d 1166 (2004).

⁶¹ In any event, patient abuse allegations constitute a legitimate basis for temporarily removing an employee from direct patient care responsibilities. See *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.2d 827 (2004), *review denied*, 154 Wn. 2d 1007 (2005) (investigatory actions, although inconvenient, do not constitute adverse employment actions).

⁶² CP at 6, 38.

⁶³ CP at 29.

opportunities on account of her gender.⁶⁴ The lower court correctly analyzed Miville's claims under a disparate treatment theory (gender and age) and properly held that summary judgment was appropriate. On appeal, Miville fails to argue any gender-based disparate treatment claim, constituting a waiver. RAP 10.3(a)(6). In any event, the record before this Court does not support any claim that Miville was singled out for different treatment on the basis of any discriminatory animus.

1. Miville Did Not Establish A Prima Facie Case Of Disparate Treatment Based On A Failure To Promote Or "Transfer"

To establish a prima facie case of discrimination in the promotional context, an employee must show that he or she: (1) belongs to a protected class; (2) applied for and was qualified for an available promotion; (3) was not offered the position; and (4) the promotion went to a person outside of the protected group. *Kuyper*, 79 Wn. App. at 735.

Here, the record shows that Miville sought promotion to only one position for which she met the minimum qualifications, the F-6 ward program manager position in 2004. Ms. Miville fails to meet element (4) of her prima facie case because the person selected was also a member of the same protected class (female). The selected candidate had superior educational credentials (master's degree in special education, and doctoral

⁶⁴ Clarke Decl., Ex. A at ¶¶ 3.6-3.9, 8.3. CP at 53-54, 57-58.

candidate in psychology) and, unlike Miville, she also had supervisory experience.⁶⁵ Ms. Miville's personal opinion that her length of years of experience at Western State Hospital in the lower classification of Forensic Therapist 2 better qualified her for the position is her subjective opinion only, and is insufficient to create a genuine issue of material fact. *See e.g. Chen*, 86 Wn. App. at 191.

Additionally, Miville sought to be "transferred" to vacant positions, however, they were positions for which she did not qualify either because she lacked a master's degree in social work (Psychiatric Social Worker 3 positions) or a master's degree in psychology (Psychologist 3 positions).⁶⁶ Miville fails to satisfy element (2) of her prima facie case pertaining to the denial of her requests for transfer. Moreover, Miville fails to satisfy element (4) of her prima facie discrimination case because other forensic therapists and other employees, regardless of protected class status, who were qualified to fill higher level social worker and psychologist positions were, in fact, promoted. Miville was not singled out for different treatment.

⁶⁵Glad Reply Decl., ¶ 13. CP at 365. Mehlman Reply Decl., ¶ 26. CP at 392-93. Although Miville failed to detail her own educational credentials in her Affidavit, the record shows that her master's degree is in the non-clinical field of educational ministries. Clarke Reply Decl., Ex. A at pp. 5-6. CP at 249-50.

⁶⁶See Glad Reply Decl., ¶¶ 3-9, Exs. A-B. CP at 363-64, 368-74.

2. Miville Did Not Establish A Prima Facie Case Of Disparate Treatment Relating To Other Challenged Employment Decisions

Regarding allegations of discrimination in the employment context generally, a plaintiff must establish a prima facie case by showing that he or she: (1) belongs to a protected class; (2) was treated less favorably in the terms or conditions of employment than a similarly situated non-protected employee; (3) who does substantially the same work as the plaintiff. *Domingo*, 124 Wn. App. at 84; *Washington*, 105 Wn. App. at 13.

a. Reassignment In Job Duties

Ms. Miville complains about job reassignments since September 2000 that altered her assigned duties. As a preliminary matter, job reassignments that occurred prior to December 10, 2002, are outside the applicable 3-year statute of limitations as discussed in section B above.⁶⁷ Ms. Miville's reassignment to the TRC in 2004 is the only job reassignment within the limitations period.

⁶⁷Miville's reassignment in December 2001 pending an investigation into patient abuse allegations is well outside the applicable 3-year statute of limitations. Nonetheless, Miville herself testified that she has represented several employees over the last several years in such circumstances. Clarke Reply Decl., Ex. A, p. 75. CP at 264. She admits that her F-1 Ward Program Manager (male) was restricted temporarily from the ward pending an investigation that he used inappropriate language toward a patient. Miville Affidavit, ¶ 3(f). CP at 144. But she fails to show how this single event, able to be quickly investigated, was comparable to allegations raised by 14 patients on her caseload which resulted in the need to investigate and temporarily reassign Miville to medical records. Mehlman Reply Decl., ¶¶ 4-6. CP at 383-84.

It is apparent that Miville disagrees with changes implemented by administrators at the CFS that affected the forensic therapist job classification in general. Among other changes, forensic therapist vacancies were reallocated to Psychologist 3 and Psychiatric Social Worker positions—which required higher educational/licensure credentials. Certain duties that had once been performed by forensic therapists, such as psychosocial assessments, were reassigned.⁶⁸ Over the years, these changes impacted all forensic therapists—not just Miville. Those forensic therapists with the necessary advanced degrees were able to be promoted to fill vacant Psychologist 3 and Psychiatric Social Worker positions.

By the time of Miville's reassignment to the TRC in 2004, only three forensic therapists remained at the CFS. Like Miville, one Forensic Therapist 2 (male, over 40, no union role) was also reassigned full-time to the TRC (earlier in 2004).⁶⁹ The remaining Forensic Therapist 2 continued to work on one of the wards.⁷⁰

⁶⁸ Mehlman Reply Decl., ¶¶ 11-15; 23-25, Ex. A. CP at 386-88, 390-92, 399-411. Clarke Reply Decl., Ex. B at p. 25. CP at 326.

⁶⁹ Glad Reply Decl., ¶ 11. CP at 365. Mehlman Reply Decl., ¶ 24. CP at 391-92. Miville does not dispute that when she was assigned part-time to the TRC in June 2004, it was to take over the competency restoration classes being conducted by a staff psychologist who was transferring. Clarke Reply Decl., Ex. A, p. 93. CP at 274. She further does not dispute that, prior to her full-time assignment to the TRC, her F-1 Ward Program Manager complained that she was not conducting group sessions on the ward in a consistent manner. Miville admits that she failed to lead approximately 30% of her group sessions on ward F-1 because she required that another staff person be present.

Ms. Miville cannot establish elements (2) or (3) of her prima facie case by contending that she was treated less favorably in the terms or conditions of employment than a similarly situated non-protected employee doing the same work. First, the duties to which Miville was assigned in the TRC were not unfavorable but were similar to her assigned duties as a forensic therapist on ward F-1 to provide competency restoration services. Miville suffered no loss of pay by the reassignment. Second, other employees, to include another forensic therapist (male, Kent Olsen), were similarly reassigned to work in the TRC to assist with staffing and programming needs.

Even if Miville could succeed in establishing a prima facie case, Defendants had legitimate, non-discriminatory reasons for reassigning Miville to the TRC in 2004. By way of history, the TRC did not even exist prior to Defendant Mehlman's arrival in 2001. Thereafter, the TRC played an increasingly important treatment mission for patients at the Center for Forensic Services. When Miville was initially reassigned part-time to the TRC in the summer of 2004, it was specifically due to the

Clarke Reply Decl., Ex. A, pp. 96-98. CP at 276-278. She admits that the TRC is a more "settled environment" with a more stable clientele and she is able to consistently lead her group sessions without the assistance of another staff person. Clarke Reply Decl., Ex. A, pp. 96-98. CP at 276-278.

⁷⁰ The remaining forensic therapist, because of his work experience and master's degree in vocational rehabilitation counseling, was credentialed by the social work department to assist with psychosocial assessments and continued to be assigned to a ward. Mehlman Reply Decl., ¶ 24. CP at 391-92. Kelso Decl., ¶¶ 3-5. CP at 20.

departure of a psychologist leading competency restoration groups. Miville had the requisite qualifications and experience to take over these specific duties.

It was also reasonable to assign Miville full-time to the TRC in September 2004 after the F-1 Ward Program Manager complained that Miville was refusing to lead group sessions without another staff person present, which led to the cancellation of several sessions. Ms. Miville was able to serve a larger number of clients by working full-time in the TRC.

b. Work Hours

As a preliminary matter, Miville's claims regarding the need to change her schedule from a 4-day, 10-hours per day workweek, to a 5-day, 8-hour schedule, is outside the statute of limitations. This change allegedly occurred in the summer of 2002.⁷¹ Nevertheless, it is very interesting that Miville argues that she was "singled out" for mistreatment given the fact that she was one of the last two employees in the entire CFS (330 employees) to work a 4-day workweek.⁷² Ms. Miville was initially allowed to keep her 4-day workweek by agreeing to move to an admissions ward where, at the time, group treatment was not being provided five days a week. When treatment hours were increased on the admissions ward as well, Miville's

⁷¹ CP at 29.

⁷² Mehlman Reply Decl., ¶¶ 7-10. CP at 384-86. Miville Affidavit at ¶ 3. CP at 150. *See also*, Clarke Decl., Ex. B. CP at 61-64.

schedule was necessarily changed. The only other remaining employee working the same 4-day schedule (male, over 40, non-union role) also had his work schedule changed to a 5-day workweek.⁷³

c. Office Space

Ms. Miville complains about changes in her office space when she was: (1) moved to a different office adjacent to the F-1 ward to make room for the newly appointed F-1 Ward Program Manager,⁷⁴ and (2) when she was reassigned to work full-time in the TRC in September 2004.⁷⁵

Office space was indeed limited in the new CFS building following the *Rust* settlement.⁷⁶ Without question, Ward Program Managers needed on-ward offices. As the only staff member not working full-time on ward F-1 at the time, Miville was selected to move to an office adjacent to the ward to allow the newly appointed manager to have an office.⁷⁷ Although Miville complains about the inaccessibility of staff to her new office due to its high security location, she does not specify how she was unable to

⁷³ Mehlman Reply Decl., ¶¶ 7-10. CP at 384-86. Additionally, there is no evidence that Miville was, in fact, required to work noon to 8:00 p.m. She provides no detail regarding the dates of this alleged reassignment or whether she, in fact, ever worked these hours. Human Resources personnel have no record showing Miville worked a noon to 8 p.m. schedule. Mehlman Reply Decl., ¶ 10. CP at 386. Glad Reply Decl., ¶ 12. CP at 365.

⁷⁴ Miville Affidavit, ¶ 3(t). CP at 151.

⁷⁵ Miville Affidavit, ¶ 3(t); Exhibits G, H, I. CP at 151, 176-81.

⁷⁶ Mehlman Reply Decl., ¶ 17. CP at 388. Dr. Mehlman explains that expansion following the *Rust* settlement required that many staff double up in offices designed for one person. *Id.*

⁷⁷ Mehlman Reply Decl., ¶¶ 16-19. CP at 388-89.

perform her duties.⁷⁸ Other professional staff, including psychologists, social workers and one other forensic therapist (male), occupied offices in this same location. They were treated no differently than Miville.⁷⁹

Although Miville objected to being moved to a classroom office in the TRC after she was assigned to work there full-time in September 2004, it is not discriminatory to attempt to assign staff to work space in proximity to their assigned worksite.⁸⁰ Miville set forth no facts to show how this classroom office was inferior to the work space assigned to other TRC staff (including another male forensic therapist), or how this assigned office space caused her to be unable to perform her duties. At most, Miville experienced a short period of inconvenience while waiting for a personal phone and computer to be installed.⁸¹

d. Training Opportunities

There is no evidence to support Miville's prima facie case regarding discriminatory training opportunities. Rather, the evidence shows that Miville was treated consistently with other staff who: (1) must submit training requests in writing, and (2) be able to demonstrate that the

⁷⁸ Although Miville also claimed in a cursory fashion that her new office lacked a window and air circulation, Miville Affidavit, ¶ 3(t), defendants' second motion for summary judgment provided photographs and maintenance information showing that these claims were baseless. CP at 493-500.

⁷⁹ Mehlman Reply Decl., ¶ 19. CP at 389.

⁸⁰ Mehlman Reply Decl., ¶ 20-21. CP at 389-90.

⁸¹ The evidence shows that Miville did not have to share her work space, phone or computer, unlike the majority of staff in the TRC. Mehlman Reply Decl., ¶¶ 20-22, Ex. B. CP at 389-90, 413.

requested training will enhance job performance or lead to professional growth in a relevant area.

The evidence fails to show that Miville submitted a written request, or was within the target audience, to attend weekly Continuing Medical Education lectures or Forensic Series lectures (which are geared towards other professional staff).⁸² There is no evidence that other employees in her job classification were allowed to attend this training. No other staff member was authorized to be trained as a mediator at state expense, as Miville requested.⁸³ There is no evidence Miville has been denied training necessary for the performance of her forensic therapist duties.

3. Miville Failed To Show That Defendants' Proffered Reasons For The Challenged Employment Actions Were Pretextual

Although repeatedly referring to Defendant Mehlman and his decisions as "ignorant" or "stupid,"⁸⁴ Miville has not shown that Defendants' explanation for changes in her work assignments, schedule, and office space were pretextual. A legitimate non-discriminatory reason is not pretextual unless it is completely fabricated by the employer to cover up

⁸² Mehlman Reply Decl., ¶¶ 29-30. CP at 394.

⁸³ *Id.* In her deposition, Miville alleged that Dr. Mehlman advised her she could inquire of the Training Director whether funding was available, but was told there were no funds. Clarke Reply Decl., Ex. A, pp. 151-152. CP at 289-90.

⁸⁴ Miville Affidavit. CP at 150, 152, 158. Clarke Reply Decl., Ex. A, p. 88. CP at 270.

the real discriminatory reason for the action. *Millbrook v. IBP*, 280 F.3d 1169, 1175 (7th Cir. 2002).⁸⁵ “‘Pretext for discrimination’ means more than an unusual act; it means something worse than a business error; ‘pretext’ means deceit used to cover one's tracks.” *Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1005 (7th Cir. 2001) (internal citations omitted). Thus, even if an employer’s decisions were “mistaken, ill considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown.” *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000); *Chen*, 86 Wn. App. at 190.

The Defendants’ motivation for each of the employment decisions challenged here by Miville was the need to meet patients’ treatment needs, consistent with certification and accreditation standards, and consistent with the state’s obligations under a prior settlement order. Ms. Miville herself acknowledges in several places in her deposition that Dr. Mehlman was “pushing” for increased treatment of patients.⁸⁶ This overriding objective necessarily means that only qualified candidates can be promoted or transferred to vacant positions. Thus, Miville failed to show that the denial of her requests to transfer to vacant social worker and psychologist positions, for which she did not meet minimum

⁸⁵It is not enough that the employer’s reason was incorrect or foolish. The employee must provide evidence indicating that the reason is phony. Pretext “means a lie, specifically a phony reason for some action.” *Millbrook*, 280 F.3d at 1175.

⁸⁶Clarke Reply Decl., Ex. A, pp. 26-27, 95-96. CP at 252-53, 275-76.

qualifications, was merely pretext for gender discrimination.⁸⁷ Similarly, as to Miville's sole formal request for promotion, she failed to show that the selection of another candidate (who was also a woman) was pretext for gender discrimination.

Additionally, Miville failed to adduce any admissible evidence to show that Defendants' reasons for her reassignment to the TRC were unworthy of belief, and gender discrimination, in fact, motivated these reassignments.⁸⁸ Meeting patients' treatment needs necessarily means that hospital administrators must have the discretion to make adjustments in staff assignments and job duties.⁸⁹ Neither Miville nor any other state employee has the right to dictate where they should work, or what duties they ought to be assigned. The lower court did not err in dismissing Miville's disparate treatment claim.

D. Miville's Retaliation Claim Is Properly Subject To Summary Dismissal

⁸⁷ The record shows that qualified women candidates were indeed promoted, and hired to fill positions for which Miville believed she was unfairly denied promotion or transfer. CP at 33, 154, 156.

⁸⁸ The record shows that male forensic therapists also had their duties reassigned, to include Kent Olsen's reassignment to the TRC. CP at 30, 365, 486.

⁸⁹ In her deposition, Miville relates that, at some point after working in the TRC, she was directed to return to work full-time on ward F-1 to assist with treatment plans. This further suggests that program needs dictated work assignments. Clarke Reply Decl., Ex. A, pp. 83-89. CP at 265. Interestingly, even though Miville alleges that she repeatedly asked to return to one of the wards, she also admits that she initially requested to stay in the TRC before eventually agreeing to return to ward F-1. *Id.* See also Mehlman Reply Decl., ¶ 25. CP at 392.

1. Factual Synopsis Of Miville's Retaliation Claim

Miville's retaliation claim is nearly identical to her hostile work environment claim, and her now abandoned disparate treatment claim.⁹⁰ However, as opposed to gender (or age or sexual orientation), Miville asserts that the challenged employment actions occurred in retaliation for protected activities. The alleged protected activities include working as a shop steward (since 1996), and/or speaking out as a patient advocate including serving as a witness in the *Rust* lawsuit concerning the adequacy of patient treatment,⁹¹ and/or because she filed grievances on her own behalf, and/or because she was a witness in a lawsuit commenced by another employee.⁹² Additionally, Miville contends that a directive issued by Dr. Mehlman restricting staff activities during core patient treatment hours, was motivated by retaliatory animus toward her.

2. Miville Did Not Allege Or Argue A Retaliation Claim Based On Protected Union Activity

As a preliminary matter, Miville presumes that her status and work as a shop steward (since 1996) constitutes protected activity under RCW 49.60. She is wrong. Union activity is not covered by RCW 49.60.

⁹⁰ Clarke Decl., Ex. A, ¶¶ 3.6, 3.8. CP at 53-54.

⁹¹ Patient advocacy is a responsibility of all staff who work at WSH. Employees not only have the right, but the obligation, to report any rule or policy violations they may observe so that corrective action, if necessary, may be taken. Mehlman Decl. at ¶ 8. CP at 26.

⁹² Clarke Decl., Ex. A, ¶¶ 3.6, 9.2. CP at 53-54.

Rather, it is addressed in RCW 49.32. Miville failed to allege a retaliation claim under RCW 49.32. Miville's brief to this court does not cite to RCW 49.32 or to any case that analyzes a union activity retaliation claim. Miville waived this argument by not addressing this issue in her brief. RAP 10.3(a)(6).

3. Patient Advocacy Is Not Protected Activity Under RCW 49.60

Similarly, Miville presumes that her alleged activities and complaints as a "patient advocate" constitutes protected activity under RCW 49.60. Patient advocacy is not covered by RCW 49.60. Miville fails to cite or argue any authority in support of a "patient advocacy" retaliation claim under RCW 49.60 and, thus, such a claim is waived. RAP 10.3(a)(6)

4. Miville Was Unable To Establish A Prima Facie Case Of Retaliation Under 46.90

To establish a prima facie case of retaliation in violation of RCW 49.60.210, an employee must show three elements: (1) that she engaged in statutorily protected activity; (2) that the employer took "adverse action" against her; and (3) that there was a causal link between the protected activity and the adverse employment action. *Washington v. Boeing Co.*, 105 Wn. App. at 14-15; *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 861-62, 991 P.2d 1182 (2000).

a. The Record Does Not Show That Miville Engaged In Statutorily Protected Activity

As previously asserted, Miville presumes without citing to the record, that she engaged in statutorily protected activity because of her status or work as a shop steward, or because she claims to be a patient advocate and was deposed in the *Rust* litigation involving patient care issues, and/or deposed in another employee's lawsuit (*Lizee*) and/or because she filed grievances on her own behalf. Nowhere in the record, however, does Miville specifically show that any of these activities involved a statutorily protected activity, i.e., that she was opposing discrimination based on a protected status, or other practices specifically forbidden under RCW 49.60.

b. Miville Was Not Subjected To An Adverse Employment Action

With the exception of her failure to promote to the F-6 Ward Program Manager position, Miville can point no other employment decision within the limitations period that rises to the level of an adverse employment action. "Not every employment decision amounts to an adverse employment action." *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996). To be actionable under the WLAD, an adverse employment action must involve a change in employment conditions that is *more* than an "inconvenience or alteration

of job responsibilities." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.2d 827 (2004), *review denied*, 154 Wn.2d 1007, 113 P.3d 482 (2005). The reduction of an employee's workload *and* pay is an example of an actionable change in employment conditions. *Kirby*, 124 Wn. App. at 465.

Relying on federal case law, Miville argues that changes in her work duties and location constitute adverse employment actions, even though she suffered no disciplinary action or reduction of pay. Appellant's Br. at 38. What constitutes an adverse action under federal law (or the state's Whistleblower statute), is not identical to the types of actions recognized under the WLAD. Yet, even when analyzed under federal law, Miville does not complain about actions that a "reasonable" employee would find "materially adverse," particularly in view of the operational changes being implemented at the CFS over a period of years that impacted many staff in the same way.

The United States Supreme Court clarified that it used the term "material adversity" to distinguish significant harms from trivial harms as Title VII "does not set forth a 'general civility code for the American workplace.'" *Burlington No. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2414-15, 165 L. Ed. 2d 345 (2006). Further, the standard

for judging harm must be objective given the specific circumstances. *Id.* at 2415.

Although Miville may have subjectively felt that changes in her duties, or office space were adverse because of her individual preferences, these changes are not adverse when judged under an objective standard. Rather, these are the types of employment decisions that commonly occur in governmental and private sector workplaces as managers strive to achieve optimal results with often limited resources, space, and staff.

Specifically, Miville's reassignment to the TRC in 2004, initially part-time and then full-time, did not constitute an adverse employment action. Miville's pay was never reduced as the result of any job reassignment. She was not disciplined or demoted. Nor was she assigned any duties that were inconsistent with the job specifications of the forensic therapist classification.

Miville's objections to having her duties reassigned appear quite similar to those of the plaintiff in *Donahue v. Central Washington University*, 140 Wn. App. 17, 163 P.3d 801 (2007). There, a tenured professor challenged his reassignment from the computer sciences department to the humanities department. He claimed the reassignment was in retaliation for having filed two earlier grievances. Division III of

the Court of Appeals concluded the reassignment did not constitute an adverse employment action:

He did not lose tenure, he was not demoted, and he did not receive a reduction in pay. At most, Dr. Donahue shows an inconvenient alteration of his job responsibilities resulting from a reassignment for CWU's needs, an insufficient basis for actionable retaliation.

Id. at 26.

Likewise, Defendants have been unable to find any case decided under the WLAD which holds that reassignment to a different office space can amount to an adverse employment action—particularly where the unrefuted evidence shows the assigned space is on par or better than work space enjoyed by other similarly situated employees. Based on the Defendants' Motion for Reconsideration, the lower court was persuaded that Miville's retaliation claim based on alleged "adverse work space" could not properly withstand summary judgment.⁹³

c. No Causal Connection Is Established

To show a causal connection, the employee must specifically show that the employer's motivation for the adverse action was the employee's exercise, or intent to exercise the protected rights. *Wilmot*, 118 Wn.2d at 68. This would necessarily require a showing of knowledge of the

⁹³CP at 540-42. Additionally, Defendants submitted a second motion for summary judgment which more specifically addressed Miville's workspace, although the lower court found it unnecessary to rule on the motion. CP at 452-61.

protected activity on the part of the alleged retaliatory actor. *Id.* at 69. Additionally, causation from temporal proximity can only be inferred if the protected activity and adverse action are very close together. *See generally, Clarke Cy School District v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L. Ed. 2d 509 (2001) (citing cases holding that three or four month lapses are too long); *Manatt v. Bank of America*, 339 F. 3d 792, 800-02 (9th Cir. 2003) (three and four months was too long to infer causation).

Even if Miville could establish that she engaged in protected activity, and that changes in her work assignments and office space constitute adverse employment actions, she does little to explain how there is any causal connection between these isolated events and any *specific* protected activity on her part. Under state law, a plaintiff bears the burden of proving that retaliation was both a substantial factor in the challenged decisions and the proximate cause of her claimed damages. *Delahunty v. Cahoon*, 66 Wn. App. 829, 841, 832 P.2d 1378 (1992). It is not this Court's responsibility to paw through the record to determine whether any protected activity occurred in temporal proximity to some alleged adverse employment action.

Regarding Miville's alleged involvement in either the *Rust* (patient care) or *Lizee* (employee) lawsuits, even if Defendants had been aware of her involvement, she fails to show why this activity would have motivated the

Defendants to retaliate. The *Rust* litigation originated prior to Dr. Mehlman's tenure as CFS Director, and resulted in a voluntary settlement. Additional resources and staffing were provided to operate the Center for Forensic Services—a favorable outcome.⁹⁴ It also does not appear that Miville's testimony in the *Lizee* matter (date unknown) was in any manner adverse to the state.⁹⁵

Instead, it appears to be Miville's primary contention that her status as a union shop steward motivated changes in her work assignments, and office space. Even if union activities came under the purview of activities protected under RCW 49.60, a matter not discussed by Miville, the evidence shows that several employees who were active in their respective unions received favorable consideration for promotion.⁹⁶ Conversely, other employees who had no particular role in their union also experienced similar changes in work assignments and office space.⁹⁷ In short, there is no logical basis to conclude that the infrequent changes that Miville experienced over a period of several years (some outside the limitations period) were motivated

⁹⁴ Mehlman Reply Decl., ¶¶ 2-3. CP at 382-83.

⁹⁵ Mehlman Reply Decl., ¶ 34. CP at 395. Clarke Reply Decl., Ex. A, pp. 160-164. CP at 293-97.

⁹⁶ In fact, Plaintiff even suggests that these particular employees received favored treatment. Miville Affidavit ¶ 3(bb). CP at 156.

⁹⁷ In particular, there is no evidence that the other forensic therapist who was transferred to the TRC was a shop steward, union officer, or otherwise engaged in protected activities.

by retaliatory animus because of her status as a shop steward or any other protected activity.

5. Defendants' Legitimate and Non-Retaliatory Reasons For The Challenged Actions Were Not Pretextual

As previously articulated, Miville cannot show she was subjected to any adverse employment action with the possible exception of her failure to be promoted to the F-6 Ward Program Manager position in 2004. Even if Miville could prove that some protected activity occurred in close proximity to this promotional decision, her retaliation claim fails for the same reasons that her gender discrimination claim fails—a candidate with better qualifications (who also happened to be in a protected class) was selected. The record also shows that other CFS employees who were active in their respective unions received favorable job promotions by Dr. Mehlman, the very decision-maker whom Miville alleges failed to promote her based on retaliatory animus because of her shop steward activities.

Regarding the other challenged employment decisions at issue, even assuming Miville could establish a prima facie case of retaliation, she was unable to show that the proffered reasons for the decisions (patient treatment needs) were pretextual. For example, regarding Miville's complaint about her work schedule (barred by the statute of limitations),

the evidence showed that all CFS staff eventually had to work a 5-day, 8-hour shift to meet patient programming needs. In fact, Miville was likely the last employee required to change her schedule. Regarding her reassignment to the TRC, Miville was one of many employees who were assigned to work in this newer, centralized treatment center, included another forensic therapist.

6. Miville's Additional Retaliation Claim Relating To A Staff Directive Was Properly Dismissed

Unique to her retaliation claim, Miville also complains about a directive issued by Dr. Mehlman in November 2004 that restricted staff activities during core patient treatment hours. Ms. Miville claims that the directive was motivated by retaliatory animus toward her, and denied her the ability to communicate with her fellow union members.⁹⁸

As is evident by a review of the document itself, the directive applied to all therapy staff and was not limited to union business. Ms. Miville was not singled out although complaints about Miville by other employees (leaving her group sessions to be monitored by other TRC staff) prompted Dr. Mehlman to issue the directive in the first instance.⁹⁹ Therapy staff were expected to schedule activities (to include union business) so as to not conflict with their core treatment duties. Exceptions required supervisory

⁹⁸ Clarke Decl., Ex. A, ¶3.9. CP at 54.

⁹⁹ *Id.*

approval.¹⁰⁰ Four hours remained in each work day wherein staff could schedule other activities (to include union business). Consequently, Ms. Miville was unable to demonstrate how or in what manner she was precluded from performing her shop steward duties or other activities after the November 2004 directive was issued. She reported that a union-related activity had to be continued on one occasion, but it was eventually scheduled.

Because Miville was unable to establish a prima facie case, or rebut Defendants' legitimate, non-retaliatory reasons for the challenged actions, the trial court properly dismissed this claim. Workplace restrictions such as these do not constitute adverse employment actions. *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996). The directive was applicable to all staff. Finally, there is no evidence to rebut Defendants' legitimate, non-retaliatory reasons for the staff directive—to ensure that patient treatment services received the highest priority.¹⁰¹

¹⁰⁰ Mehlman Reply Declaration, ¶ 35. CP at 396.

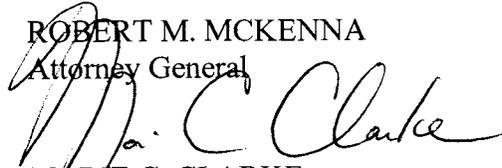
¹⁰¹ Mehlman Reply Decl., ¶ 35. CP at 396. When pressed, Miville asserted in her deposition that union activities were “equally” important to her patient treatment duties. Clarke Reply Decl., Ex. A, p. 47. CP at 259.

VII. CONCLUSION

For the foregoing reasons, Respondents respectfully ask the Court to affirm the order granting summary judgment and dismissing Miville's claims with prejudice.

RESPECTFULLY SUBMITTED this 19 day of December 2008.

ROBERT M. MCKENNA
Attorney General

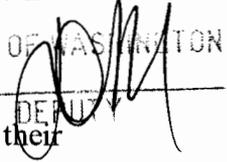


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DATED this 19th day of December, 2008, at Tumwater, WA.



MELISSA KORNMANN, Legal Assistant