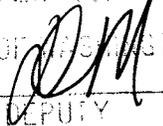


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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  DEPUTY

Case No. 38932-1-II

MACK LITTON

Appellant,

v.

CLOVER PARK SCHOOL DISTRICT

Respondent.

BRIEF OF APPELLANT MACK LITTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-2-05202-3

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I. INTRODUCTION

Appellant Mack Litton filed a Complaint for Damages against the Clover Park School District for racial and gender discrimination. CP-19. Eventually, Clover Park School District was granted its motion for summary judgment without filing one piece of uncontroverted evidence that Mr. Litton had unsatisfactory work habits. Furthermore Clover Park did not address the gender discrimination claim. CP 1-19. Moreover, Clover Park School District's motion for summary judgment was granted only on the racial discrimination claim.

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue of material fact. However, a trial is absolutely necessary if there is a genuine issue as to any material fact. The burden of proving, by uncontroverted facts that there are no genuine issues of material issues always remains with the moving party. *Laplante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Clover Park School District did not meet this burden.

III. STATEMENT OF THE CASE

Appellant Mack Litton worked for the Clover Park School District first at an elementary school then at Clover Park High School. Mr. Litton was removed from the high school and placed at Clarkmoor Elementary School. Shortly after Mr. Litton was transferred to Clarkmoor, the principal Molly Click began harassing him, creating a hostile working environment, eventually setting up scenario that led to his termination without just cause. Mr. Litton was told that Ms. Click called him “another worthless nigger.” Mr. Litton tried to report this to Carole Burger, Human Resources Director. She would not allow him to file a discrimination complaint with her office. Mr. Litton was fired on in front of the school in front of students, staff, and parents. Mr. Litton filed a lawsuit on February 12, 2008. CP 1-19.

On December 11, 2008, Clover Park School District moved to dismiss with accompanying declarations from all of the wrongdoers: Molly Click, Carole Burger, Bill Taylor, and Virgil Cabitgting. There were not one declaration from anyone from the official custodial department, the school officials who actual responsibility to supervise Mr. Litton. CP 30-43.

Ultimately, Mr. Litton was denied his opportunity to fully respond and be heard on Clover Park's motion for summary judgment because the date for the summary judgment motion was hidden from him.

II. ASSIGNMENTS OF ERROR

- No. 1 The trial erred court in entering the order of January 30, 2009, granting the defendant's motion for summary judgment.
- No. 2 The trial court erred in entering the order of dismissal granting the defendant's motion for summary judgment on the plaintiff's claim of outrage.
- No. 3 The trial court erred by not adhering to PLCR 7(3) which requires that no motion can be heard without a note for motion.
- No. 4 The trial court erred when it did not make its decision on the claim contained in the Complaint for Damages.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- No. 1 Is the nonmoving party entitled to an order granting it summary judgment when there are still uncontroverted genuine issues of material fact primarily because the Respondent has set up a false premise in the verbatim transcript.
- No. 2 Is the nonmoving party entitled to an order granting it summary judgment when the trial court did not rule on the right claims, hostile working environment and gender discrimination.
- No. 3 Did Mr. Litton have notice reasonably calculated under all circumstances to apprise him of his right to be heard on the defendant's motion for summary judgment.

IV. ARGUMENT

A. Standard of Review for Appellate Courts

Appellant courts review summary judgment orders de novo. *Fell v. Spokane Transit Auth.*, 128 Wn.2d 615, 618, 911 P.2d 1319 (1996). Summary judgment is proper when there are no genuine issues of material fact, entitling the moving party to judgment as a matter of law. CR (56). A court must consider all the evidence submitted in the light most favorable to the nonmoving party. *Id.* Summary judgment is not proper when credibility issues involving more than collateral issues exist. *Powell v. Vikings Ins. Co.*, 44 Wn.App. 495, 503, 722 P.2d 1343 (1986). *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963). The moving party is held to a strict standard. Doubts as to the existence of a genuine issue of material fact is resolved against the moving party. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). The court is obligated to search the record and independently determine whether or not a genuine issue of material fact exists. 10B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Civil 3d §2740 (1998 & Supp. 2001).

B. Lack Trials By Juries One Of The Bases Listed in The Declaration of Independence

On July 4, 1776, the Congress adopted the Declaration of Independence by the Unanimous Declaration of the Thirteen United States of America. Among other things, the signers declared “The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.”

1. He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.
2. He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.
3. For quartering large bodies of armed troops among us:
4. For protecting them, by mock trial, from punishment for any murders which they should commit on the inhabitants of these states of these:
5. For depriving us in many cases, of the benefits of trial by jury.

Declaration of Independence, July 4, 1776. As a result of the King’s transgressions, the signers enacted the 7th Amendment which provided “In suits at common law, where the value in

controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules at common law." See U.S. Const. amend. VII.

The constitution of Washington, like that of others, with one exception, commences with Bill of Rights. The contained therein are brief, general and comprehensive declaration of the right of understanding, considered to be inherent in the constitution of things, and are based on principals which no government can rightfully deny, and the assertion of them in constitutional provisions is not allowed is not supposed to add materially to tenure by which by they are held and are based on principles which no government can rightfully deny and the assertion of them in constitutional provisions is not supposed to add materially to the tenure by which they are held. These declarations, of which there are thirty-two sections in the constitution of Washington, are divided into the following classes: First, those declaratory of the general provisions of republican government; such as, "All political power is inherent in the people," and "Governments derive their just powers from the consent of the governed." Second, those that are declaratory of the fundamental rights of the citizen, as, "Every

person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right," that the rights of the people to be secure in their houses, persons, and property against unreasonable search and seizure shall not be violated. Third, those which insure to the citizen the right of an impartial trial, as "The right of trial by jury shall be preserved." "No person shall be subject to be twice put in jeopardy for the same offense." With different degrees of fullness, all the constitutions agree upon the abstract principle of equality before the law provides that the legislature shall pass laws to enforce its provisions... Lebbeus J. Knapp, John R. Kinnear & Theodore L. Stiles, *Origins of Constitution of State of Washington* (The Washington Historical Quarterly 1913).

Furthermore, the authors wrote that "In common with all other people who have inherited their system of jurisprudence from England, Americans have recognized the right of trial by jury as necessary to the maintenance of their liberties. The jury has its foundation in the thought that by such a tribunal the individual could secure against all oppressive influence ... The right of a trial by jury must be treated as a living useful force, so flexible as to be adapted to the present needs of society. *Id.*

Here, Mr. Litton was not allowed to present his case to jury which is his right by virtue of the State's Constitution. See Art. 1§ 21. See also, RCW 4.48.010.

C. Procedural Irregularities By Court

The Court did not follow its own local rules when granting Clover Park School District's summary judgment motion. The Court heard a summary judgment motion after the dispositive cut-off deadline without good cause. See PLCR(3) Pretrial Motions. All such motions shall be served, filed and heard pursuant to PCLR 7; provided that no pretrial dispositive motions shall be heard after the cutoff date provided in the Case Schedule except by order of the court and for good cause shown. The Court did not have good cause pursuant to the local rules because it failed to manage its own calendar.

The Court violated PCLR 7. This local rules that "No motion will be heard unless there is on file proof of service of sufficient notice of the hearing upon the opposing party or there is an admission of such service by the opposing party."

Here, Mr. Litton received sufficient notice on or around December 11, 2009 that a motion for summary judgment was scheduled for January 9, 2009. *CP 29*. After the initial notice,

Mr. Litton did not receive any note for calendar and the Clerk's papers do not reflect that any note for calendars for any of the continuances, except, for one notice highlighted with a yellow highlighter. This note for motion commanded that Mr. Litton appear at Remann for a hearing in front of Judge Kathryn Nelson at the same time Clover Park School District trying to get its motion for summary judgment by default. Mr. Litton appeared at Remann Hall by and through his counsel.

D. Insufficient Notice

Mr. Litton was not given the correct constitutional standard for notice regarding oral arguments for Clover Park School District's motion for summary judgment. In the Verbatim Report of proceedings the Court stated the following:

It was set over from January 9th, and the Court did set it over. There seemed to be some confusion about that. We had, not unlike today, a five page docket. Instead of 17 matters that I have set, we had, we had 28, and it was isn't fair when there are six summary judgment motions to give any opportunity for meaningful argument. So we tried to space out in time that those were set for trial toward the end of January or February, and tried to hear the ones that were set in January first. It appears that the matter was set over to the 23rd, and now we are on today.

RP 4.

In *Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 314 (1950), the Court ruled that “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”. See also *Milliken v. Meyer*, 311 U. S. 457 The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if, with due regard for the practicalities and peculiarities of the case, these conditions

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness, and hence the constitutional validity of, any chosen method may be defended on the ground that it is, in itself, reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes

Here, Mr. Litton did not receive even a mere gesture; he received no notice all and happened to attend the January 30, 2009 hearing based on intuition.

E. Court Did Not Review The Record Before Granting Clover Park School District's Motion for Summary Judgment

Before granting Clover Park School District its motion for summary judgment, the Court acknowledged it was not an expert on discrimination cases.

All right. Thank you, counsel. And obviously are very difficult for the Court. And I think Ms. Little articulated the reason is that they are very factually specific. So, I spent a considerable amount of time reading the cases, because the Court is certainly not an expert on discrimination.

Mr. Litton argues that the Court does not be an expert but it should be an expert as to the facts and circumstances of the particular record before it. That did not occur here, in direct contravention to Mr. Litton's Complaint for Damages; the Court allowed and participated in Clover Park School District's scheme to make a false record. The Court knew or should have known that Mr. Litton did not plead disparate treatment or intentional discrimination. The Court allowed Clover Park School District to plead the aforementioned claims because it did not have a sufficient defense to Mr. Litton real claim. Mr. Litton set out in his Complaint for Damages, his discrimination claim:

Hostile Working Environment: An individual claiming hostile working environment harassment must show: (1) that he/she found the conduct unwelcome; (2) the conduct was based on his/her protected status; and (3) the conduct is

objectively severe or pervasive enough to create a work environment that a reasonable person would find offensive. Hostile working environment harassment is a form of discrimination in that the harassing conduct subject employees to adverse working conditions based solely on their membership in one or more protected classes namely, in this case, race and gender.

CP 1-19, Page 2.

No reasonably observant and prepared Court could have failed to see the discrepancy between Clover Park School District's motion for dismissal and the Complaint for Damages written in a plain paragraph. Since the Court ruled on a false premise set up by Clover Park School District, this Court should overturn the order for summary judgment. The Superior Court never ruled whether there were any issues of genuine fact regarding Mr. Litton's the major claims of hostile working environment and gender discrimination.

As stated above, Americans have recognized the right of trial by jury as necessary to the maintenance of their liberties. The jury has its foundation in the thought that by such a tribunal the individual could secure against all oppressive influence ... The right of a trial by jury must be treated as a living useful force, so as to be so flexible as to be adapted to the present needs of society.

F. Clover Park School District Needed That Motion To Strike To Prevail

Clover Park School District's summary judgment motion was predicated on it receiving a motion to strike Mr. Litton's character references which admissible under 405 (b). Rule 56 allow the Court to deny a motion on any evidence admissible in Court.

V. CONCLUSION

Mr. Litton respectfully requests that the Court overturn the Order granting summary judgment and set this matter for trial.

Respectfully submitted, this 21st day of August 2009.

By 
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CERTIFICATE OF SERVICE

I, Mack Litton, on 9-28-09 mailed one copy of the Appellant Brief to the Respondent, Henry A. Saller, Jr. at 1201 Pacific Ave Ste. 1900, Tacoma, Wa 98402.

Mack Litton

Signature

Mack Litton

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Port Orchard, Wa 98367

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Date

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