

No. 38932-1-II

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

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MACK LITTON,

Appellant,

v.

CLOVER PARK SCHOOL DISTRICT,

Respondent.

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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DENNY

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REPLY BRIEF OF APPELLANT CLOVER PARK SCHOOL DISTRICT

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## STATEMENT OF THE CASE

This appeal arises from a suit to recover damages for personal injuries sustained by Appellant Mack Litton from 2005 through 2006. CP 32. Shortly after Mr. Litton began working at Clarkmoor Elementary School, sometime in the early part of January, the Principal Molly Click began harassing him about anything she could conjure up about his work performance. CP 32. Ms. Click then received the assistance of the district's administrator for human resources, Carole Burger. CP 34. Together, Ms. Click and Ms. Burger began to harass Mr. Litton and create an atmosphere of fear and intimidation. CP 34. Then the duo enlisted the aid and support of an alleged quality control and resource coordinator William Taylor. Mr. Taylor was not the administrator in charge of the custodial department. CP 34. In fact, Mr. Litton's supervisor has not supplied any documentation to confirm that Mr. Litton was having tardiness problems or that his work ethic had deteriorated. CP 35. All of the declarations presented during district's motion for summary judgment came from employees not in Mr. Litton's chain-of-command. In February 2006, this trio had fabricated enough alleged evidence to warrant his dismissal. CP 35. The pictures taken of his alleged work deficiencies were taken without Mr. Litton being present, are undated, and have not been authenticated.

Clover Park School District filed a motion for summary judgment on December 11, 2008. It filed the required note for calendar. The motion was shuffled around. Sometime on or before, January 30, 2009, Mr. Litton received a note for calendar to appear on January 30, 2009. Mr. Litton received no other note for hearing on any other issue nor did she receive the letter from Department 13. (Respondent's Brief Page 9). On January 30, 2009, Mr. Litton's attorney went to Rehmann early; she had misread the 10:00 a.m. time period and believed the hearing to be at 9:00 a.m. in the courtroom of Kathryn Nelson. When Mr. Litton's arrived at the juvenile facility, it was dark with no movement. She went to the judge's chambers it was dark as well. She realized she had been set up. Mr. Litton's counsel telephoned the district's attorney, Andrew Saller. It eventually went to voicemail. She called again and asked for Mr. Saller's legal assistant. His legal assistant answered the phone and when asked where he was, she replied, "He's at superior court for the Litton summary judgment motion. Mr. Litton's attorney jumped in her car and drove quickly to the courthouse. When the court called the case, Mr. Litton's attorney asked, "Why are we here." She made other references to the lack of notice, curiously, not surprisingly, all references to a lack of notice failed to make it in the final edits of the report of proceedings even though Mr. Litton paid the full costs for it.

After the court granted the district's motion for summary judgment, Mr. Litton appealed that decision within the requisite time period. The court, however, did not grant the district's motion to strike, various glowing references to Mr. Litton's work performance. CP 28. When the court failed to strike the letters, by this correct ruling it raised, as a matter of law, material issues of genuine fact as to the motive for illegally improperly terminating Mr. Litton.

## I. ARGUMENT AND AUTHORITIES

### A. The Respondent's Brief Misstates the Facts and Law Disparate Treatment Cause of Action

The Respondent continues to maintain that there is evidence that Mr. Litton filed a disparate treatment claim. However, the Complaint for Damages unless and until it is amended, controls. It has never been amended. CP 19. Disparate treatment was never pled no matter how elaborate of a foundation the, district is attempting to build. Notwithstanding the minor errors by Mr. Litton, again, the complaint still controls unless and until it is amended. CP 1-19. Because Mr. Litton averred a hostile working environment claim, the hostile environment claim creates a genuine issue of material fact since it was not properly adjudicated in Clover Park's summary judgment motion.

The burden was on the moving party, Clover Park, to determine the breadth and scope of its own motion and like the toilet paper placed on the floor by school officials, Clover Park cannot blame this one Mr. Litton. For

The burden was on the moving party, Clover Park, to determine the breadth and scope of its own motion and like the toilet paper placed on the floor by school officials, Clover Park cannot blame this one Mr. Litton. For the record, in determining whether a hostile working environment claim exists, courts look to all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance. *National Railroad Passenger v. Morgan*, 536 U.S. 101 (2002); *Meritor Savings Bank v. Vinson*, 447 U.S. 57, (1986). *Schonauer v. DCR Entertainment, Inc.*, 79 Wn.App. 8098 (Div. II 1995).

Here, Mr. Litton suffered through the worst hostile and degrading environment, imaginable, fueled by Ms. Click's contempt for strong men. She went beyond the bounds of human decency when she called Mr. Litton at home to tell him he would be fired if he travelled to Louisiana to bury his mother. Mr. Litton needed his job, so he did not go to the funeral. This act is demonstrative of the way Ms. Click related to Mr. Litton as a matter of course. CP 28.

Clover Park raises a minor issue that Mr. Litton admits too. His sons had been harassed, beaten up, and had their personal belongings taken by bad kids. This had been going for quite some time and

administration could not stop the harassment. Mr. Litton made it a habit to pick up his sons right after basketball practice. On this particular, the one that Clover Park thinks has great meaning, Mr. Litton could see from the parking a group of thugs and gang members surrounding his sons. Although afraid, Mr. Litton ran toward the group. The gang members started advancing menacingly toward him, Mr. Litton got on their level and he told them in terms that they could understand what would happen if they advanced a foot closer. These gang members responded to this approach because the “hey guys would you leave my family alone” approach did not work. Mr. Litton he acted like any father who was off duty would, the district did not back up its loyal employee. It’s as simple as that. CP 28.

B. Hostile Environment and Gender Discrimination Claims

Clover Park is incorrect. Even for the sake of argument even if a reasonable trier of fact would conclude that a disparate treatment claim existed by merely invoking RCW 49.60. Clover Park did not ask for summary judgment on all the claims that were plainly pled in the complaint for damages. Therefore, the claims of hostile working environment, gender discrimination, and retaliation all survived the district’s motion for summary judgment.

Appellant courts ordinarily will not consider issues raised for the first time on appeal. Moreover, an appellate court will refuse to consider any arguments not raised in its pleadings, depositions, and affidavits submitted to the trial court with the motion for summary judgment. *Ferrin v. Donnellefeld*, 74 Wn.2d 283 (1968). Clover Park did not raise these issues during its motion and oral argument for summary judgment and these issues are not a part of this appeal.

C. Genuine Issues of Material Fact

Clover Park has not resolved issues of credibility, intent, and knowledge. It merely submitted declarations from the wrong doers and assumed the court could weigh their credibility from their statements. "One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether the nonmoving party would, at the time of trial, have the burden of proof on the issue concerned. *Preston v. Duncan*, 55 Wn.2d 67 (2000 )The moving party is held to a "strict standard." See *Scull v. Par. Mountain Resort*, 119 Wn.2d 484 (1992); see also *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171 (2004) Credibility of witnesses should not ordinarily be determined on a motion for summary judgment. *Hudesman v. Foley*, 73 Wn.2d 880, (1968). *No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn. App. 844 (1993)(when parties have presented sharply conflicting evidence

on a material issue, the issue cannot be resolved as a matter of law by a summary judgment); *Mason v. Kenyan Zero Storage*, 71 Wn. App. 5,(1993); *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, (1993).

If material facts averred in an affidavit are particularly within the knowledge of the party moving for summary judgment, the case should proceed to trial in order that the opponent be allowed to disprove such facts by cross examination and by the demeanor of the moving party while testifying. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, (1990); *Hulse v. Driver*, 11 Wn. App. 509, (1974). Mr. Litton pled all through this matter that he was told he was “just another worthless nigger”, Clover Park School District school officials should take the witness stand and prove to the public that its school officials did not utter the “n-word”.

#### D. Due Process Claim

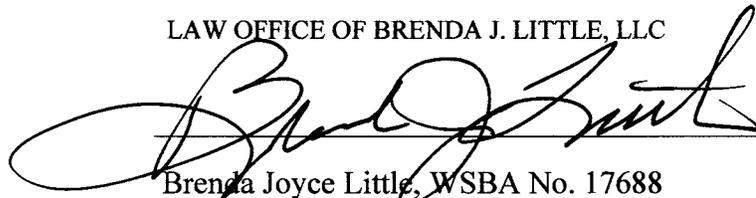
Clover Park has never denied that it failed to apprise Mr. Litton of the January 30, 2009 date for the summary judgment motion. In fact, does not argue that it did not send notice of hearing to Mr. Litton. This is a per se violation of procedural due process since all legal matters start with notice and an opportunity to be heard.

### III. CONCLUSION

For these reasons, Mack Litton, Appellant, respectfully request that the superior court summary judgment be reversed and that matter be remanded back to superior court so that Mr. Litton can have a trial by jury. Trial by jury is a fundamental right. Mr. Litton also requests attorney's fees and costs incurred on this appeal as sanctions under RAP 18.9.

RESPECTFULLY SUBMITTED this 12th day of October, 2009.

LAW OFFICE OF BRENDA J. LITTLE, LLC

A handwritten signature in black ink, appearing to read "Brenda J. Little", written over a horizontal line.

Brenda Joyce Little, WSBA No. 17688  
Attorney for Petitioner Mack Litton

**CERTIFICATE OF SERVICE**

I hereby certify under the penalty of perjury under the laws of the state of Washington, that the foregoing is true and correct,

That on October 12, 2009, I caused to be delivered a true and correct copy of each of the following to:

- 1. Reply Brief of Appellant Mack Litton to:

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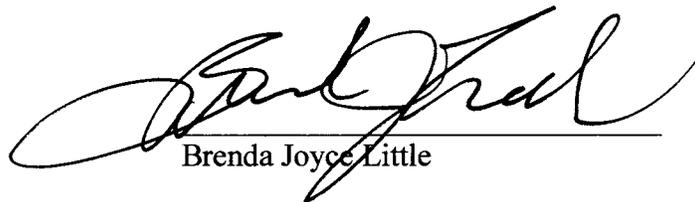
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DEPUTY

By the following methods:

- Via Electronic mail to H. Andrew Saller, Jr.; and by
- Delivering a copy to Legal Messenger, Inc. with appropriate

Instructions to deliver the same to the persons identified.

Dated this 12<sup>th</sup> day of October, 2009 at Seattle, Washington.

  
Brenda Joyce Little