

COURT OF APPEALS
DIVISION II

2014 JUL 22 PM 1:38

STATE OF WASHINGTON
NO. 45174-3-II

BY _____
DEPUTY

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

CHRISTOPHER BOYD,

Respondent,

v.

STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; and WESTERN STATE HOSPITAL,

Appellants.

APPELLANTS' AMENDED REPLY BRIEF

ROBERT W. FERGUSON
Attorney General

PETER J. HELMBERGER
Assistant Attorney General
WSBA No. 23041
OID No. 91105
Attorney General's Office
P.O. Box 2317
Tacoma, WA 98401
(253) 593-6139

AMANDA C. BLEY
WSBA No. 42450
OID No. 91023
Assistant Attorney General
7141 Cleanwater Dr. SW
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6300
Attorneys for Appellants

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF FACTS.....4

 A. Facts Related To The Patient-Abuse Investigation And
 Boyd’s Suspension.....4

 1. Maddox Was Required To Report The Allegations
 That Boyd Neglected A Patient.....4

 2. Maddox Did Not Change The Witnesses’ Version Of
 Events Or Expand The Time Of Boyd’s Delay.....7

 B. Facts Related To Threatening Comments And
 Investigation And Mr. Boyd’s Reprimand.....9

 1. Maddox Did Not Expand The Scope Of The
 Investigation Into Boyd’s Threatening Remarks.....9

III. ARGUMENT12

 A. The Hospital Did Not Waive Any Objection To Allowing
 Plaintiff To Base Liability On Non-Actionable
 Employment Actions Or Arguing A Cat’s Paw Theory
 That Was Not Supported By Substantial Evidence12

 1. The State Repeatedly, But Unsuccessfully, Argued
 To The Trial Court That Plaintiff’s Liability Theory
 Should Be Limited To Only Actionable Adverse
 Employment Actions.....12

 2. The State Moved To Dismiss Plaintiff’s Cat’s Paw
 Theory Both At Summary Judgment And In A CR
 50 Motion During Trial13

 3. The State Did Not Waive Its Objection To A Cat’s
 Paw Instruction By Proposing One After The Trial
 Judge Made It Clear Such An Instruction Would Be
 Given13

B.	The Trial Court Erred In Failing To Limit Boyd’s Liability Theory To Adverse Employment Actions That Afford A Cognizable Basis For Recovery	15
C.	The Trial Court Erred In Applying The “Cat’s Paw” Theory Of Liability And Giving Jury Instruction No. 11	18
D.	Both The Patient-Neglect And Threatening Comments Investigations Were Properly Conducted And Supported By The Testimony Of Boyd’s Coworkers	22
1.	Allegations That Boyd Neglected A Patient Were Properly Reported And Verified	22
2.	The Letter Of Reprimand Was Also Based On Independent Unfabricated Facts	29
IV.	CONCLUSION	32
V.	APPENDIX	34

TABLE OF AUTHORITIES

Cases

<i>Allison v. Hous. Auth. of City of Seattle</i> , 118 Wn.2d 79, 821 P.2d 34 (1991).....	21
<i>Arnold v. Sanstol</i> , 43 Wn.2d 94, 260 P.2d 327 (1953).....	22, 29
<i>City of Vancouver v. State Public Emp't Relations Comm'n; Vancouver Police Officers Guild</i> , ___ Wn. App. ___, 325 P.3d 213 (2014).....	19
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003).....	17, 18
<i>Favors v. Matzke</i> , 53 Wn. App. 789, 770 P.2d 686 (1989).....	16
<i>Hojem v. Kelly</i> , 93 Wn.2d 143, 606 P.2d 275 (1980).....	22
<i>Kaplan v. Northwestern Mut. Life Ins. Co.</i> , 115 Wn. App. 791, 65 P.3d 16 n.6 (2003).....	14, 15
<i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454, 98 P.3d 827 (2004), <i>review denied</i> , 154 Wn.2d 1007, 114 P.3d 1198 (2005)	17, 21
<i>Lacks v. Ferguson Reorganized Sch. Dist. R-2</i> , 147 F.3d 718 (8th Cir. 1998)	20
<i>Lobato v. New Mexico Env't Dep't</i> , 733 F.3d 1283 (10th Cir. 2013)	20
<i>Rajaravivarma v. Connecticut State Univ. Sys.</i> , 862 F.Supp.2d 127 (2012)	20
<i>Staub v. Proctor Hosp.</i> , ___ U.S. ___, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011).....	13, 19, 20, 32

Tyner v. Dep't of Soc. & Health Servs.,
137 Wn. App. 545, 154 P.3d 920 (2007),
review denied, 162 Wn.2d 1012, 175 P.3d 1094 (2008) 16, 17, 18

Wallace v. SMC Pneumatics, Inc.,
103 F.3d 1394 (7th Cir. 1997) 19

Willis v. Marion Cnty. Auditor's Office,
118 F.3d 542 (7th Cir. 1997) 20, 24, 32

I. INTRODUCTION

This case involves two separate investigations of misconduct committed by Christopher Boyd, a nurse at Western State Hospital (“Hospital”). The first investigation related to an allegation of patient abuse. The second investigation focused on allegations of threatening comments Mr. Boyd made in the presence of his coworkers. The patient-abuse investigation resulted in a suspension without pay, an actionable adverse employment action. The investigation of the threatening comments resulted in a reprimand, which does not constitute an adverse employment action.

Both investigations were completed before Boyd complained of sexual harassment and retaliation by his immediate supervisor, Patricia Maddox. Accordingly, with the exception of Ms. Maddox, none of his other supervisors could have retaliated against him in the investigation, because none were aware of any protected activity. Therefore, plaintiff had to focus on the actions of Maddox and establish that she improperly influenced the decisions of high level managers who actually made the decision to impose the suspension and the reprimand. Although Maddox’s involvement in the patient-abuse investigation was only to report those allegations made by others, after Boyd complained of sexual harassment and retaliation by Maddox the Hospital redid that

investigation. Maddox's involvement in the threatening comments investigation involved taking statements from witnesses. Boyd presented no evidence at trial that any of the statements or reports were inaccurate or fabricated. No staff member testified that they were pressured by Maddox into making their statements or that the statements were false or misleading in any respect. No witness took the stand and recanted what was in their statement. The testimony of staff at trial was identical with their prior statements. *See, e.g.*, RP at 1109-116, RP 6/19/13 at 165-182; Exs. 75, 80, 87, 132. Boyd did not present any evidence that the actual decision makers were in any way misled.

The only omission attributed to Maddox related to a recanted allegation in her report about the threatening comments investigation. Initially Irma Ward reported to her supervisor that Boyd said words to the effect that the Hospital may fire him, but "they sure will remember" him. RP at 1423. Then, when later interviewed by Maddox, Ms. Ward stated Boyd's comment was not threatening, but was made in regards to his apple cider. RP at 416-17. Although Ward's recantation was not in Maddox's report, the evidence at trial was undisputed that the HR Manager Lori Manning and Annette Southwick, who were part of the Management Resource Team (Management Team), were aware of the recantation. RP at 671, 1390-91. Furthermore, in a meeting, Maddox

verbally briefed the CEO, Psychiatric Nurse Executive, and Human Resource Manager about the recantation. RP at 419-20. Significantly, the more serious threatening comments about the best way to kill someone was with an AK-47 with a silencer, the best way to get rid of a woman's body was by setting it on fire with gasoline along with a spare tire in the trunk of the car, and Boyd's display of a kitchen knife from his workplace locker with the comment about what damage it could do, were not recanted and were supported by testimony at trial. RP at 517-18, 524-25; Exs. 98, 101. These statements alone, or together, supported the letter of reprimand. Ex. 154 (Appendix A1-16).

Because the managers at the Hospital who made the decisions to suspend and reprimand Boyd were unaware of any protected activity that could be motive for retaliation, Boyd had to make his case on a cat's paw theory, based upon the involvement of Maddox in the investigations. However, at trial there was no evidence that any of her statements were false or misled the decision makers. For that reason, the trial court erred (1) in denying the State's CR 50 motion based upon lack of sufficient evidence to show causation, (2) by instructing the jury on the cat's paw theory, and (3) by allowing the plaintiff to argue liability based on events that do not constitute actionable adverse employment

actions as a matter of law, *e.g.*, the decisions to investigate and to reprimand Boyd.

The trial court's error in allowing the plaintiff's unsupported cat's paw theory to go to the jury warrants reversal and dismissal. The trial court's error in allowing the jury to base liability upon events which do not constitute actionable adverse employment actions warrants reversal and remand for a new trial.

II. STATEMENT OF FACTS

A. Facts Related To The Patient-Abuse Investigation And Boyd's Suspension

1. Maddox Was Required To Report The Allegations That Boyd Neglected A Patient

Boyd alleges that Maddox, in making good on her alleged express threat of retaliation, "decided to start an investigation into Boyd about the December 26, 2009 event."¹ Respondent's Brief (Resp't Br.) at 39. Elsewhere, Boyd asserts that supervisors Patricia Maddox and Paula Cook-Gomez initiated complaints of what they described as an

¹ Boyd supports this by citing to RP 1119. This was likely an error because RP 1119 is the testimony of LPN Rod Bagic who at that point was testifying about the underlying events, having to make two phone calls to Boyd, Boyd's lack of response to the first call, kidding around in the second call, etc. This testimony supports, in part, why the decision was made to discipline Boyd.

unremarkable event because they were sick of Boyd's lies and manipulations.² This is incorrect.

The investigation into the patient abuse issue was initiated as follows:

On December 26, 2009, at the start of her shift, Maddox immediately learned that her staff on Ward C-1 was "buzzing" and "quite upset" because on the previous shift, Rod Bagsic, LPN on Ward C-1, had called Boyd, who was on Ward C-4, and requested that he assess a patient they were having trouble with, but Boyd "didn't come and didn't come" until they had to call the RN4 who was Boyd's supervisor. RP at 432:24-433:17. According to Maddox's direct supervisor, Annette Southwick, as well as the Psychiatric Nurse Executive, JoAnne Blacksmith, and the Human Resource Manager Lori Manning, Maddox was required to report to her chain of command the allegations made known to her on December 26, 2009. *See* RP at 1352:19-1353:9 (RN4 Southwick), 1542:14-1543:14 (PNE Blacksmith), 654:2-10 (HR Manager Manning). No one testified the reporting of possible patient abuse was optional.

² Boyd cites to RP 531 to support the assertion the event of December 26, 2009, was unremarkable. At RP 531, Hospital staff member Manuel Guingab is describing his response to Rod Bagsic's second call to Boyd to come over to his ward and assess a patient. This was the phone call in which Boyd impersonated Guingab and then handed the phone to Guingab with instructions to tell Bagsic that he was in the bathroom and giggled while this was happening. This was in fact part of the reason Boyd was disciplined. Exs. 38, 116. *See* Ex. 38 (Appendix A4-1-3).

Southwick directed Maddox to gather written statements from those present in the early morning hours on December 26, 2009. After Southwick discussed the allegations with her direct supervisor, JoAnne Blacksmith, it was decided that the matter should be brought before the Management Team. RP at 436:3-5, 1354:9-1355:20, 6/24/13 at 10:14-11:14.³ This testimony was not disputed. Maddox only gathered written statements from others to present to her chain of command, and did not provide a factual statement of her own.⁴ RP at 436-37; 458-59. The decision to investigate was made by the chain of command and the Management Team; Maddox did not make the decision to investigate Boyd. RP at 460-62.

³ The Management Team is made up of the Psychiatric Nurse Executive, who oversees the entire nursing staff, RN4 Southwick as it was her subordinates involved, and members of the Human Resource Department and Incident Management Office. RP at 654:17-24. The purpose of the team is to give clear direction once an allegation of misconduct arises so that the matter is dealt with in a proper and fair manner in determining if just cause for discipline is present. RP at 1353:16-21.

⁴ The statements gathered stated, generally, that: at roughly 1 a.m., Rod Bagsic, on Ward C-1, called Boyd, the RN supervising both wards, and requested that he assess patient J who was requesting sleep medication, Exs. 75, 76, 79-81; after roughly 30 to 60 minutes, because Boyd still had not come over, Bagsic made a second call to Boyd and upon receiving that call, Boyd impersonated a subordinate coworker and then handed the phone to the coworker with the instruction to say that Boyd was not available because he was in the bathroom, and sat giggling to himself, Exs. 76-79, 81; at that point in time, Bagsic then called Boyd's superior, Kara Himmelsbach, to direct Boyd to assess the patient, Exs. 75-77, 81; Maddox did not interview or engage with the staff about the allegations, but rather just requested a written statement. RP at 436:22-437:4, 458:20-459:1.

2. Maddox Did Not Change The Witnesses' Version Of Events Or Expand The Time Of Boyd's Delay

Relating to Maddox's limited involvement in the patient abuse investigation, Boyd asserts that Maddox prompted fabricated evidence by asking Rod Bagsic, the nurse who called for Boyd, a leading question "to change the witness's recollection of timing" of delay in Boyd's appearance. Resp't Br. at 10. This is incorrect.

Exhibit 75 is Bagsic's statement originally submitted to Maddox for her to submit to the Management Team. In Exhibit 75, Bagsic stated that he waited "for about over half an hour" and Boyd was still not present. Exhibit 87 shows the question posed was "In your statement you say that over one half hour elapsed and RN Boyd had not responded. Do you remember the exact time that you called C-4 for the 2nd time?" to which Bagsic said "1:45am". At trial Bagsic stated the interval was his recollection. RP at 1134-35.

Bagsic's recollection is consistent with the recollection of other staff members. *See* Ex. 76 (after about 30 minutes); Ex. 77 (at about 1:30); Ex. 79 (pretended to be somebody else on the phone and sat and giggled for 20 minutes); Ex. 80 (approximately one half hour later); Ex. 84 (it was more than a half hour); Ex. 81 (the elapsed time was 30 minutes); Ex. 86 (had to be at least an hour or so). Furthermore, according to the

RN4 that called Boyd to direct him to assess patient J, the log notes that she made her call at 1:59 a.m. Ex. 27. Boyd did not arrive on the ward until 2:10. Ex. 86.

According to Southwick, it was the responsibility of people in Maddox's position, to gather written statements and then submit a report, but it is the job of Maddox's supervisor and management team to determine the facts. RP at 1363:10-22, 1392:16-22, 1552:14-20. The report submitted by Paula Cook-Gomez at the conclusion of her investigation noted the discrepancy between the various reports of the time elapsed before Boyd responded to the call to assess the patient. Ex. 108, at 4. Exhibit 144 is the report completed by the Hospital Incident Management Office Investigator David Rivera, which summarizes the various witness statements regarding the events including the time elapsed. *See also*, Exs. 131-142 (the actual witness statement summaries). *See generally* RP at 1435-94.

Notably, the gravamen of the patient-abuse incident is not how long it took Boyd to go to and assess the patient, but rather the fact that he didn't go when requested, had to be requested for a second time, lied to the employee who was making the request, Rod Bagsic, and Bagsic had to call Himmelsbach who had to order Boyd to the ward, and Boyd never actually assessed the patient. Ex. 116. Boyd's focus on discrepancies in how long

he refused to come and assess the patient indicates that he still does not recognize the seriousness of his own misconduct. *See* Ex. 38.

B. Facts Related To Threatening Comments And Investigation And Mr. Boyd's Reprimand

1. Maddox Did Not Expand The Scope Of The Investigation Into Boyd's Threatening Remarks

Boyd asserts that "with Maddox in charge" of the investigation into his threatening comments, the allegations quickly expanded and that the "enhanced version made Boyd out to be a lunatic" because of Boyd's comments about how to use assault rifles to kill somebody and the best way to get rid of a woman's body is by burning it in the trunk of a car. Resp't Br. at 11. This is incorrect. Maddox did not make these allegations. Instead, she just reported what others stated.

Recall that on the shift after being appointed to investigate Boyd for patient abuse, Cook-Gomez overheard Boyd saying "the best way to shoot somebody without getting caught" is to use an "AK-47 and a silencer"; he gave a detailed description of where he would stand if he wanted to shoot someone at the Hospital; he described in detail the building in which he and Cook-Gomez worked, the way he would crouch in bushes next to the parking lot, and his vantage point into the parking lot where Cook-Gomez parked; and Cook-Gomez testified that she felt threatened by the detail of his remarks. RP 6/19/13 at 28:18-29:23, 152:11-17; Ex. 95. Cook-Gomez

did not become aware of Boyd's sexual harassment allegation against Maddox until after the threatening comments investigation had been completed. RP 6/19/13 at 83.

Georgia Armstrong, an investigator from the Incident Management Office, directed an investigation after she learned of the comments Cook-Gomez overheard. RP at 1358:16-1360:1; Ex. 83. Southwick, Maddox's supervisor, directed Maddox to conduct the witness interviews/statement gathering portion of the investigation. RP at 1360-61.

As part of the witness interviews, Maddox learned from John Simpson that he heard Boyd, in the presence of Cook-Gomez, say "at least 3 times" that he (Boyd) could "get rid of a women's body by burning it beyond recognition by putting it in a car's trunk with a spare tire and setting it on fire. The tires and the gas in the gas tank would burn it up so completely that even the bones would burn and it would be impossible to identify." RP at 517-18, 524-25; Exs. 98, 101. Simpson also stated Boyd pulled a large kitchen knife out of his locker and asked Simpson to imagine the kind of damage it could do to someone. Simpson verified at trial that those statements were made, and testified that Maddox's questions did not suggest any certain answer and that Maddox prepared an accurate, typed version of his statements, which he signed. RP at 519-20.

Finally, regarding Boyd's allegation that Maddox misled the decision makers in the threatening comments investigation because her report did not note that Irma Ward had recanted her statement, the facts are again undisputed that the Management Team was well aware of the recantation. RP at 671, 1390-91. Maddox had briefed the Hospital CEO, the psychiatric nurse executive, and the human resources manager about the recantation. RP at 419-20. The letter of reprimand was signed by Hospital CEO, Jess Jamieson. Ex. 154. The Management Team was well aware of the recantation when the decision to reprimand Boyd was made. Moreover, holding a kitchen knife and talking about the kind of damage it could do, discussing the best way to get rid of a woman's body with gasoline on a spare tire burning in the trunk of a car, and the best way to kill someone was with an AK-47 with a silencer, whether taken together or separately, clearly supports the letter of reprimand. *See* Ex. 154. RP at 517-18, 524-25.⁵

⁵ Notably, Irma Ward's recanted statement by Boyd that people at the Hospital would remember him is not mentioned at all in the body of the reprimand letter. *See* Ex. 154.

III. ARGUMENT

A. The Hospital Did Not Waive Any Objection To Allowing Plaintiff To Base Liability On Non-Actionable Employment Actions Or Arguing A Cat's Paw Theory That Was Not Supported By Substantial Evidence

1. The State Repeatedly, But Unsuccessfully, Argued To The Trial Court That Plaintiff's Liability Theory Should Be Limited To Only Actionable Adverse Employment Actions

The State first moved to limit the liability theory to actionable adverse employment actions on summary judgment (CP at 28), and on reply (CP at 447-48). There, the State argued that being subject to investigations and reassignments were not adverse actions, and that Boyd could not establish causation in any event.

Next, during trial the State moved under CR 50 motion to preclude Boyd from arguing to the jury essentially every one of the alleged adverse employment actions. CP at 1794-99. The State argued that being subject to investigations for misconduct, being reassigned during that process, a letter of reprimand, and receiving a transfer, were not adverse employment actions and Boyd should be precluded from pursuing a liability theory based on those actions. RP 6/19/13 at 4-11. The Court denied that motion. RP 6/19/13 at 10-11.

2. The State Moved To Dismiss Plaintiff's Cat's Paw Theory Both At Summary Judgment And In A CR 50 Motion During Trial

In addition, to moving for summary judgment and in a CR 50 motion to dismiss the case based upon the non-cognizability of the employment actions Boyd was asserting, the Hospital also sought summary judgment and dismissal under CR 50 based upon Boyd's failure to provide evidence of causation. *See* CP at 20, 448, 1799-1800. In short, Boyd simply had no evidence that any of the decision makers were aware of sexual harassment allegations, and therefore there could be no retaliation.

At the hearing on the CR 50 motion, the State reiterated this argument. RP at 6/19/13 at 4-11; CP at 1787-1806 (Appendix A2-1-20). Boyd's counsel argued that causation was satisfied because of Maddox's role tainting the process to which the Court agreed. RP 6/19/13 at 7-11.

3. The State Did Not Waive Its Objection To A Cat's Paw Instruction By Proposing One After The Trial Judge Made It Clear Such An Instruction Would Be Given

The plaintiff first proposed a cat's paw instruction based on *Staub v. Proctor Hosp.*, ___ U.S. ___, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011), on June 24, 2013, the day of the CR 50 motion. The Court began discussions and hearing exceptions regarding jury instructions on June 26, 2013. From the beginning of this discussion the State made it known it

was taking exception to any cat's paw instruction. RP at 1812-14. The Court made it clear it was going to give a cat's paw instruction over the State's objection and acceded to the request by plaintiff's counsel that the instruction contained a substantial factor rather than a "but-for" causation standard. RP at 1742, 1744, 1811-16.

The State was also compelled to propose an instruction because of the flaws contained in the plaintiff's proposed instruction. RP at 1816-18. The State made it clear that it was taking exception to any form of cat's paw, in spite of proposing an instruction. RP at 1846. And, although the State proposed an instruction, the Court was perfectly aware that the State was "taking exception to any kind of cat's paw submission." RP at 1843, 1849:11-24; *see* CP at 2162 (Appendix A3-1(Jury Instruction 11)).

The law is clear that if a party has lost an issue in a summary judgment motion, and in this case also in a CR 50 motion, the party is entitled to propose a jury instruction on an issue the court has ruled against the party on, and does not waive or invite error by doing so. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 804, 65 P.3d 16 n.6 (2003). The State clearly opposed allowing a cat's paw theory to go to the jury by moving to dismiss that claim at summary judgment and in a CR 50 motion. The court indicated that it was going to instruct the jury on a cat's paw theory utilizing the substantial factor test. RP at 1742, 1774, 1811-

12. After the plaintiff proposed an improper instruction, the State was entitled to submit a more favorable instruction, yet one that was consistent with the trial court's prior rulings. In doing so, the State did not waive or invite error. *Kaplan*, 115 Wn. App. at 804, n.6.

B. The Trial Court Erred In Failing To Limit Boyd's Liability Theory To Adverse Employment Actions That Afford A Cognizable Basis For Recovery

During the trial in this case, the State sought to limit plaintiff's liability claim to the one actionable adverse employment action he received – a suspension without pay based upon a finding of patient abuse. *See* CP at 1799-1800 (Appendix A2-1-20 (Defendants' Motion for Judgment as a Matter of Law Pursuant to CR 50)). Once that motion was improperly denied, plaintiff urged the jury in closing argument to impose liability based employment actions that did not constitute adverse employment actions. Specifically, counsel argued that the investigation of the patient-abuse allegation, the investigation of the threatening comments, the written reprimand for making the threatening comments, not allowing him to have patient interactions, providing information to the Department of Health about his license and the failure to respond to his complaints about working alone on Ward C-8 all constituted an independent basis for the imposition of liability against the State. RP at 1887-88. Because the court failed to give the special verdict form the

State had proposed, it is impossible to determine whether the verdict in favor of the plaintiff was based upon the actionable adverse employment action, or the numerous non-actionable actions on which the plaintiff also claimed liability.⁶

Washington Courts have consistently held that employment actions such as these are not actionable adverse employment actions. In *Tyner v. Dep't of Soc. & Health Servs.*, 137 Wn. App. 545, 563, 154 P.3d 920 (2007), *review denied*, 162 Wn.2d 1012, 175 P.3d 1094 (2008), the Court held that the temporary reassignment pending the outcome of an investigation was not an adverse employment action because the relocation and investigation were in accord with policy and the reassignment did not offer any loss of pay or benefits, and did not

⁶ Boyd asserts the State agreed to his verdict form, and therefore waived any objection to the failure to give its verdict form. Resp't Br. 46-47. However, the State made it clear to the trial judge that it was necessary to give the State's special verdict form in order to be able to determine if the jury ruled in Boyd's favor "... on what basis and under which employment action they're finding that retaliation." RP at 1830. It was only after the trial court indicated that it was not going to give the State's verdict form that the State, the next day agreed to the plaintiff's revised special verdict form. *See* RP at 1856-57. The trial judge knew precisely why the State wanted a special verdict form that delineated all of the adverse employment actions asserted by the plaintiff, both the cognizable and non-cognizable, but rejected the State's proposed verdict form. Because the trial court was aware of the specific reason why the State was requesting a detailed special verdict form and rejected its request, that error is preserved for appellate review. *See Favors v. Matzke*, 53 Wn. App. 789, 798, 770 P.2d 686 (1989) (the underlining purpose of the requirement for a specific exception is to ensure the trial judge is informed of the precise reason why counsel believes the court will commit error). On this point, the trial judge specifically noted that the parties did not need to go back after all of the instructions and verdict form were finalized and except and object and that any exception objection made by the parties was sufficient. RP at 1768.

permanently alter the employee's job responsibilities. *Id.*⁷ Both the *Tyner* and *Kirby* cases cite to federal law and *Tyner* specifically cited *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2417, 165 L. Ed. 2d 345 (2006), the case which Boyd chiefly relies upon.⁸

Because Boyd was improperly allowed to argue liability based upon events that do not constitute actionable adverse employment actions and it is impossible to determine if the jury's verdict was based on one of the several non-cognizable claims he argued to the jury, the judgment must be reversed and the case remanded for a new trial. When the issue of liability is presented to a jury upon multiple theories, and one of the theories is invalidated, the case must be remanded for a new trial. *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539, 70 P.3d 126 (2003), citing *Maryland v. Baldwin*, 112 U.S. 490, 5 S. Ct. 278, 28 L. Ed. 822 (1884) (vacating general verdict for defense after one of its multiple defenses was found to be invalid). Under the so-called Baldwin principle, remand is

⁷ As mentioned in the opening brief, this case is essentially on point with *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004), *review denied*, 154 Wn.2d 1007, 114 P.3d 1198 (2005) (investigations into allegations of misconduct and job reassignment were not adverse employment action because an "adverse employment action" requires "an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action" and something more than an "inconvenience or alteration of job responsibilities, such as reducing an employee's workload and pay." *Kirby*, 124 Wn. App. at 465 (citations omitted).

⁸ Again, it is undisputed that Boyd did not voice his complaint of sexual harassment against Maddox until after the initial investigations were nearly completed, after he had been transferred, after he had been assigned to work alone, and after his alleged misconduct had been reported to the nursing commission.

mandatory because it is “simply improper for an appellate body to attempt to divine the defense or theory upon which the jury ha[s] based its decision.” *Id.* Boyd argued that the jury should impose liability based upon employment actions that did not constitute adverse employment actions. These included conducting investigations of misconduct, reprimand for making threatening comments, providing information about his license based upon the investigations, and failure to respond to his complaints about working alone on Ward C-8. RP at 1887-88. These are invalid theories of recovery. *Tyner v. DSHS*, 137 Wn. App. at 563. When a general verdict is rendered in a multi-theory case and one of the theories is later invalidated, remand must be granted if the defendant proposed a clarifying special verdict form. To rule otherwise would give the plaintiff the benefit of the uncertainty that the defense actively sought to prevent. *Davis v. Microsoft*, 149 Wn.2d at 539-40.

C. The Trial Court Erred In Applying The “Cat’s Paw” Theory Of Liability And Giving Jury Instruction No. 11

In order to support a cat’s paw theory of liability, a plaintiff must present substantial evidence establishing that “a biased subordinate, who lacks decision making power, uses the formal decision maker as a dupe in a deliberate scheme to trigger a discriminatory employment action.” *City*

of *Vancouver v. State Public Emp't Relations Comm'n; Vancouver Police Officers Guild*, ___ Wn. App. ___, 325 P.3d 213 (2014).⁹

It is not enough to simply assert that a subordinate, non-decision maker with an improper bias or motive reported allegations and misconduct which eventually resulted in discipline. Yet that is the sole substance of Boyd's case. Indeed, that's exactly how Boyd argued the cat's paw theory to the jury:

And if you find that she [Maddox] had retaliatory animus...and that Patricia Maddox intended to cause some adverse employment action, employment action for Chris Boyd and that Patricia Maddox's efforts were a substantial factor in the ultimate decisions, then that is retaliation.

RP at 1888.

Under plaintiff's theory, if Maddox had a retaliatory animus, even if all of the statements she submitted were true and accurate, if they were a substantial factor in the decisions to reprimand or suspend Boyd, he wins his case. That is not the law. When properly applied, proximate cause is severed in a cat's paw analysis if the employer investigation "results in an adverse action for reasons unrelated to the supervisor's original biased action . . .". *Staub v. Proctor Hosp.*, ___ U.S. ___, 131 S. Ct. 1186, 179 L.

⁹ See also *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997) (citing *Conn v. GATX Terminals Corp.*, 18 F.3d 417, 420 (7th Cir. 1994)) (cat's paw occurs where subordinate supervisor "by concealing relevant information from the decision-making employee or feeding false information to him, is able to influence" the decision to discipline).

Ed. 2d 144 (2011). That is, when an independent investigation determines adverse action is justified, “apart from the supervisor’s recommendation,” cat’s paw will not apply. *Id.*¹⁰

In the case at bar, the actual decision makers were not shown to have a retaliatory animus because at the time they made their initial decision to discipline Boyd for the patient-abuse misconduct in October, 2010 – as well as essentially all other alleged adverse employment actions – they were unaware of any protected activity because he had not yet disclosed his complaint of sexual harassment and threat of retaliation by Patricia Maddox. Accordingly, only Maddox allegedly had a retaliatory animus. Yet her involvement in the patient abuse investigation was minimal and limited to reporting accurately the allegations made by others, allegations which were confirmed by the first investigation. Exs. 108, 116. Then, after Boyd did make his sexual harassment and retaliation

¹⁰ See also *Lobato v. New Mexico Env't Dep't*, 733 F.3d 1283, 1295 (10th Cir. 2013) (an employer is not liable under a subordinate bias theory – even if the biased subordinate first alerted the employer to the plaintiff's misconduct – where the employer did its own review of records available in the employer's data system); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 725 (8th Cir. 1998) (concluding that the school board's investigation, consisting of hearing testimony from the plaintiff and fifteen other witnesses, reviewing various documents, and watching a videotape, was sufficient for the investigation to be deemed independent); *Rajaravivarma v. Connecticut State Univ. Sys.*, 862 F.Supp.2d 127, 159 (2012) (cat's paw does not apply where the plaintiff was denied tenure after the university president reviewed all recommendations and evaluations, not just the biased supervisor's, and did not “blindly accept” the conclusions or recommendations of any one professor); *Willis v. Marion Cnty. Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) (where the employer reviewed the plaintiff's file and the ultimate decision was made on an independent and a legally permissive basis, the bias of the subordinate is not relevant and cat's paw did not apply).

claims against Maddox, the Hospital redid that investigation and once again confirmed the accuracy of the witness statements that Maddox originally reported. Ex. 144.

Similarly, with regard to the threatening comments investigation, Maddox's role was to obtain written statements from the witnesses involved. While this could have been a basis for a cat's paw claim if Maddox had fabricated statements that misled the decision makers who took an adverse employment action against Boyd, the plaintiff presented no evidence whatsoever that any of the evidence in the written statements she obtained was inaccurate, false, or misleading. Boyd presented no evidence, much less substantial evidence, to support his theory of liability.¹¹

In response to this argument, Boyd primarily relies on *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991). Yet, in *Allison* the plaintiff's former supervisor – the subordinate supervisor – “set up” the plaintiff by giving her poor performance evaluations and a letter of reprimand which were then relied upon by a subsequent decision maker in

¹¹ Here again, regarding Maddox's failure to mention Irma Ward's recantation, the evidence at trial clearly established the Management Team members who were involved in the decision to reprimand Boyd for making the threatening comments were specifically told by Maddox of Ward's recantation prior to issuing the letter of reprimand. RP at 419-20; Ex. 154. Importantly, because the reprimand did not constitute an actionable adverse employment action under *Kirby v. City of Tacoma*, 124 Wn. App. at 454, that theory of liability should never have been allowed to go to the jury and properly provided a basis for a verdict in favor of Boyd.

making a decision to terminate her employment. This evidence of a false set up and reliance by a subsequent decision maker is exactly the evidence Boyd failed to present.

A verdict must be supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). When a verdict is not supported by substantial evidence it must be reversed. *See Arnold v. Sanstol*, 43 Wn.2d 94, 100, 260 P.2d 327 (1953) (A verdict cannot be founded on mere theory or speculation and if there is nothing more tangible than two or more conjectural theories under one or more which a defendant would be liable and under one or more which there would be no liability, a jury will not be permitted to conjecture). Because the verdict in this case is not supported by substantial evidence the judgment should be reversed and the case remanded with directions to dismiss.

D. Both The Patient-Neglect And Threatening Comments Investigations Were Properly Conducted And Supported By The Testimony Of Boyd's Coworkers

1. Allegations That Boyd Neglected A Patient Were Properly Reported And Verified

Boyd asserts that Maddox and Boyd's immediate supervisor, Paula Cook-Gomez, decided to use the December 26, 2009, patient abuse

allegations as a means of retaliation.¹² Resp't Br. at 39-41.¹³ This assertion is meritless.

Here, all Maddox did was report to her chain of command allegations that staff members made to her on December 26, 2009, alleging Boyd failed to respond to a call to assess a patient. RP at 432:24-433:17; *see also* RP at 1119, Ex. 75; Ex. 133, at 2. This was undisputed. It was also undisputed that Maddox was required to report the allegations of patient abuse to her supervisors. *See* RP at 1352:19-1353:9 (RN4 Southwick), RP at 1542:14-1543:14 (PNE Blacksmith), RP at 654:2-10 (HR Manager Manning). Similarly, there was no dispute Southwick directed Maddox to gather written statements from those present the early morning of December 26, 2009. This was after Southwick discussed the allegations with her direct supervisor, JoAnne Blacksmith. RP at 1354:9-12, 1542:14-1543:14; *see also*, Ex. 133, at 2. This was not a rogue investigation instigated or conducted only by Maddox.

¹² It should be noted that Cook-Gomez was unaware of any sexual harassment allegations by Boyd as of January 2010, and equally unaware of an alleged retaliatory motive by Maddox. RP 6/19/13 at 83:13-24.

¹³ Recall that at Resp't Br. at 8, Boyd asserts that "Maddox decided to start an investigation into Boyd" and did so even though those present did not believe a complaint was justified, and then also asserts that Maddox created biased statements that were passed up the chain of command and relied upon by Investigator David Rivera. In citing to RP at 1119 for the proposition that employees who were present did not believe a complaint was justified, Boyd cites to the testimony of Rod Bagsic, who was explaining the misconduct Boyd engaged in by failing to respond to his call and confirming the details as he had set forth in Ex. 75. Rather than show this was not the sort of thing that merited a complaint, this testimony shows exactly why there was a complaint, subsequent investigation, and disciplinary action.

Witness statements resulted in the decision by Management Team, not Maddox, to investigate fully to determine whether discipline was appropriate, because Boyd's behavior was "egregious" due to the delay in response, the failure to assess the patient, and the impersonation of another staff member. RP at 1355:21-1356:5 (RN4 Southwick).¹⁴

The veracity of the statements reported to Maddox and then conveyed to her chain of command and the management team was confirmed by two separate investigations. First, Boyd's direct supervisor Paula Cook-Gomez, interviewed eight staff members of Wards C-1 and C-4 regarding Boyd's conduct on December 26, 2009, and obtained written statements from each. *See generally*, RP at 6/19/13 at 36-51, 34:17-35:19; Exs. 27, 84-91. The statements gathered were consistent with what was originally reported. Ex. 108. Second, following Boyd's allegation the investigations was biased because of Maddox, the Hospital Incident Management Office Investigator David Rivera interviewed 12 witnesses. This investigation confirmed the facts as originally reported.¹⁵ Ex. 144.

¹⁴ While Ginni Ratcliffe did indicate that Boyd assessed patient J. Lori Manning testified that the Management Team discounted her statement because they believed she was mistaken because it was in conflict with the statement of several other employees. RP at 610-612. There is no indication that Maddox had any influence over this decision and it was made before Manning or anyone except Maddox was aware of Boyd's sexual harassment allegation against Maddox.

¹⁵ Recall that cat's paw will not apply where "the plaintiff was able to appear before the decision-maker and present his side of the story." *Willis*, 118 F.3d at 547 (quoting *Conn v. GATX Terminals Corp.*, 18 F.3d at 420) (decision maker met with plaintiff and was aware of allegations that phony invoices were planted by a racist

See generally RP at 1435:24-1494; Ex. 131-42. Both Cook-Gomez's and Rivera's reports summarize the witness testimony and point out any discrepancies in the various witness statements.¹⁶

The management team based its decision to discipline on the two investigations, conducted by people other than Maddox, both of which showed the accuracy of the original reports.¹⁷ RP at 1369-70, 6/24/13 at 20-21. Boyd agreed that if the factual assertions set forth in the Notice of Intent were accurate, then discipline including dismissal would be appropriate. RP at 1080:10-18.

Boyd's attempt to show that Maddox fabricated evidence through leading questions is meritless. The questions and answers posed to Bagic were not leading. Ex. 87. Furthermore, those statements were consistent

supervisor and investigated those claims before deciding to terminate the plaintiff)). In this case, Boyd voiced his concerns about the biased investigation, but the various witnesses all verified their prior statements.

¹⁶ Boyd claims that Rivera's investigation simply involved the use of the biased statements prepared by Maddox. However, his testimony was that he re-interviewed all of the employees, asked them to review their prior statement and then asked them if they wanted to add or confirm their statement. RP at 1516-17; Ex. 144. Contrary to Boyd's assertions, Rivera did attempt to interview him, but Boyd did not respond. RP at 1473-75; Ex. 143.

¹⁷ Recall the Management Team determined, among other things, that Boyd (1) knowingly evaded two requests for assistance to meet a patient's needs; (2) willfully impersonated another staff member and requested that a subordinate staff member impersonate him; (3) interfered with a subordinate's ability to perform his duties in meeting the needs of a patient; (4) used profane language; and (5) provided false information surrounding a medication order obtained for a patient. Ex. 116. Accordingly, on October 16, 2010, the Hospital delivered to Boyd a Notice of Intent to Discipline, which is the formal notification required to provide an employee with an opportunity to respond. Ex. 116. Only then, was Boyd disciplined. Ex. 38.

with essentially every other statement gathered during the initial investigation. *See* Exs. 76, 77, 79-81, 84, 86, 27.

No staff member took the stand to testify that his or her statement was inaccurate or fabricated, or testified they were pressured into making those statements. No witness took the stand and recanted their testimony. In fact, those who did take the stand stood by their prior written statements as accurate accounts. At trial, Rod Bagsic, LPN, testified that on the morning of December 26, 2009, patient J had requested medication because she was agitated and having trouble. RP at 1102-07. Because of this, Bagsic called Boyd. RP at 1108-09. Bagsic testified that the first call was at 1 a.m., the second call was at 1:45 a.m., when Boyd impersonated another worker and then pretended to be in the bathroom, before Bagsic had to call the other supervisor. The medication was finally given at 2:20 a.m. RP at 1113. Boyd did not indicate to Bagsic that he was delaying his assessment because the patient had received an earlier dose of medication. Boyd told Bagsic that he would be right over but then did not show up. When Bagsic called back, Boyd impersonated another employee named Manuel. He could hear Boyd and another employee laughing. Bagsic asked Boyd why he was playing games and then called the RN4, Kara Himmelsbach. Even when Boyd did show up, he didn't say anything about the fact patient J had been previously given medication. RP at 109-

112. At trial, Bagsic specifically verified the accuracy of the contents of his prior statements, Exhibits 75 and 87. RP at 114-118.

At trial, Edwina Kawamura also testified that patient J was having problems that night and asked for help. RP at 164. Kawamura alerted Bagsic who then, as witnessed by Kawamura, began a series of phone calls to Boyd. About 30-45 minutes passed between the two calls. RP at 165-66. Kawamura also testified that Maddox asked her on December 26, 2010, the night of the incident, if she would be willing to write a written statement. Kawamura further testified that Maddox did not tell her what to say or provide any guidance what to say other than to write down what Kawamura saw. RP at 170-71. Maddox truthfully reported the incident and verified that Exhibits 80, 84, and 132 accurately reflected Kawamura's recollection of the length of Boyd's delay.¹⁸

Boyd attempts to explain away his misconduct by asserting at that he was waiting for a drug combination of Benadryl, Ativan, Restoril to take effect rather than going to assess the patient. This explanation is irrelevant and misleading because each of the supervisors in the chain of command testified their expectation is to assess the patient when requested

¹⁸ In any event, Boyd's quibbling about how long he delayed assessing the patients is of no import because Rivera's investigation, which was the primary basis for Boyd's suspension, gave Boyd the benefit of the doubt, concluding the delay was 20-30 minutes. RP at 1507; Ex. 144, at 9. Boyd admitted the delay was 20 – 30 minutes. RP at 994.

and that his explanation about waiting for a drug cocktail to take effect was meritless and counter to expectations.¹⁹ *See*, RP 6/24/13 at 25, 28-29, 30-31 (PNE Blacksmith); RP at 1393-1394 (RN4 Southwick); RP at 813, 843-844 (PNE Cook); RP 6/19/13 at 68 (RN3 Cook-Gomez).

Boyd relies heavily on the January 7, 2010, e-mail which shows animosity between Cook-Gomez, Maddox, and Boyd. Such animosity, however, is irrelevant because where the undisputed facts showed: (1) the underlying factual allegations were made by others, not Maddox, and Maddox accurately reported the allegations to her chain of command; (2) Maddox was required to report the allegations to her chain of command; (3) other employees verified the facts through written statements made in two separate investigations; and (4) the management team and upper management, not Maddox, made the decision that Boyd should be disciplined.²⁰ *See also* fn.12.

¹⁹ Boyd's explanation evolved. First, on the morning of December 26, 2009, Boyd explained he was delayed because he was in the bathroom. Next, on January 27, 2010, after having a chance to review the medical record, while Boyd explained that he was waiting for Restoril to work, he made no mention of Ativan or a drug cocktail. In fact, in his written response in which he edited previous answers, he explained the reason for the allegations was that Rod Bagsic was trying to get back at him for a prior conflict. At trial, he then added that patient J had received what amounts to a drug cocktail.

²⁰ Boyd relies on several occasions on Julia Cook's testimony that a written reprimand would have been her choice of discipline. This is incorrect. Julia Cook started as PNE on August 28, 2011, after the completion of both investigations into the patient-abuse allegation. RP at 732, 811. Cook was not aware of the investigation at that time it was occurring. RP at 731. The question posed by Boyd's counsel was limited to a delay in the assessment of the patient and there being no bad outcome. However, according to Southwick, Boyd was disciplined because of a lack of patient care, fabrication of his whereabouts, and impersonating a coworker, not giving medication. RP at 1369-70.

In short, Patricia Maddox was only involved in the patient-abuse investigation at its inception in gathering witness statements. Boyd presented no evidence that any of the witness statements were incomplete, fabricated, or in any way misled the members of the management team who actually made the decision to issue the two-week suspension. Even though witness statements Maddox obtained were not false or misleading, once Boyd complained that Maddox had a motive to retaliate against him, the Hospital had Mr. Rivera re-interview the witnesses and those witness statements which were the basis for the two-week suspension and conclusion that Boyd had neglected to treat a patient. There was no evidence to support a cat's paw theory and if the jury's verdict were based upon the two-week suspension, the only actionable adverse employment action at issue in this case, it is not supported by substantial evidence. Therefore, the judgment should be reversed and the case remanded with directions to dismiss. *Arnold v. Sanstol*, 43 Wn.2d at 100 (when a verdict is not supported by substantial evidence it must be reversed).

2. The Letter Of Reprimand Was Also Based On Independent Unfabricated Facts

In regards to the investigation into Boyd's threatening comments, although Maddox conducted the witness interviews and completed a

According to Blacksmith, the PNE at the time, Boyd was disciplined because he failed to assess a patient, he impersonated a coworker, and when the patient was asking for help and he did not respond. RP at 1555-57.

report that summarized those interviews, it remains that Maddox accurately reported statements made by others to her chain of command, and those statements served as the proper basis for a letter of reprimand.

Boyd's assertion at Resp't Br. at 8 that Maddox started an investigation into Boyd's threatening comments and then quickly expanded it to include threatening and bizarre comments is false. It is undisputed that Georgia Armstrong, an investigator from the Incident Management Office, directed an investigation, after she learned from Cook-Gomez of the comments attributed to Boyd. RP at 1358:16-1360:1; Ex. 83. Accordingly, the Hospital was aware of the statement made in the presence of Cook-Gomez prior to any involvement by Maddox. RP at 680:24-681:6 (HR Manning).

Next, Maddox's supervisor directed her to conduct interviews, gather signed witness statements, and then accurately summarize those statements in a report to the chain of command. RP at 1360:15-16; Ex. 119. Maddox accurately summarized and delivered the signed witness statement of Cook-Gomez, which confirmed what Cook-Gomez had already independently reported. Maddox also accurately summarized John Simpson's signed statement reciting Boyd's comments about the "best way to get rid of a women's body" and recounting that Boyd took a knife out of his locker while commenting about the damage it could do to

someone. RP at 517-18, 524-25; Exs. 98, 101. At trial, Simpson verified those statements and verified the accuracy of his signed witness statement. RP at 519-20.

According to HR Manager Manning, an employee taking a knife out of a locker and suggesting it could do a lot of damage to a person violates the Hospital's policy regardless if the person hearing that statement feels threatened or not. RP at 680:6-14. Similarly, discussing that the best way to get rid of a woman's body by soaking it in gasoline along with a spare tire in a trunk of a car and then burning them both is also a violation of the Hospital policy, even if the statement is not perceived as threatening. RP at 680. Again, the fact that Boyd made these statements was admitted.

Boyd's focus on the fact that Irma Ward's recantation of her statement is not mentioned in Maddox's written report is not a legitimate basis for a cat's paw theory because it is undisputed that the decision makers were informed and aware of Ward's recantation. RP at 419-20, 671, 1390-91. Maddox's report also identified the discrepancies among various witness statements.²¹

²¹ For example, at page three of the report, Maddox specifically states there is a discrepancy in the statements about whether such comments were even made because Boyd denied making those comments. *See Ex. 119.*

Mainly, Ward's recant is irrelevant because it is not exculpatory. At most, it means that Boyd said one less threatening thing, but his other statements remain undisputed. Even if it is believed that Ward thought Boyd was talking about apple cider when she felt the need to report that to her supervisor, there were still several grounds to issue Boyd a letter of reprimand.

Here, there is a legally permissible basis for a letter of reprimand as was confirmed by John Simpson and Paula Cook-Gomez with their testimony at trial. It is undisputed that the decision to provide Boyd with a Letter of Reprimand for those statements was made by Human Resources along with the Psychiatric Nurse Executive. Cat's paw liability does not apply where the underlying misconduct actually occurred and would support the decision to discipline. *Staub*, 131 S. Ct. at 1193; *Willis*, 118 F.3d at 547-48.

IV. CONCLUSION

The State respectfully requests that the judgment below be reversed and the case be dismissed because the jury's verdict is not supported by substantial evidence. There was no evidence that Patricia Maddox improperly influenced the decision to suspend or the decision to reprimand Mr. Boyd. At a minimum, the judgment should be reversed and the case remanded for a new trial because the trial court erred in

allowing the jury to base liability upon events that do not constitute actionable adverse employment actions.

RESPECTFULLY SUBMITTED this 22nd day of July, 2014.

ROBERT W. FERGUSON
Attorney General



PETER J. HELMSBERGER
WSBA No. 23041, OID No. 91105
AMANDA C. BLEY
WSBA No. 42450, OID No. 91023
Attorney for Respondents
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401
253-593-6138

V. APPENDIX

Written Reprimand dated January 30, 2012	A1
Defendants' Motion for Judgment as a Matter of Law Pursuant to CR50	A2
Court's Instruction No.11	A3
Disciplinary Letter dated January 5, 2012	A4



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

WESTERN STATE HOSPITAL

W27-19 * 9601 Steilacoom Blvd. S.W. * Tacoma Wa 98498-7213 * (253) 582-8900

January 30, 2012

CONFIDENTIAL

PERSONAL SERVICE

Christopher Boyd, Registered Nurse 2
Western State Hospital
9601 Steilacoom Blvd SW
Lakewood, WA 98498

Subject: **Written Reprimand**

Dear Mr. Boyd:

In accordance with the Master Agreement between the State of Washington and the Service Employees International Union 1199 (SEIU), this to notify you that you are being reprimanded within your position as a Registered Nurse 2 (RN2), with the Department of Social and Health Services (DSHS), at Aging and Disability Services Administration (ADSA) with Western State Hospital. This action is a result of your inappropriate and unprofessional behavior, creating an environment of intimidation while interacting with staff members, and for your failure to follow agency policies and procedures.

On January 15, 2010, Management became aware of statements made by you that were reported to be intimidating and retaliatory to staff as they were involved with an investigation regarding allegations made against you. The comments you made were unprofessional and created an environment of intimidation for the staff members.

During the investigation, John Simpson, Institutional Counselor 2 (IC2), stated he witnessed you taking a knife out of your locker while in the break room area. You stated it could do harm to someone. During the investigation you responded stating "...I have a knife, a chef's knife..." you added it was a cake knife, which you stated it is used to cut up vegetables for cooking on the ward. It is documented by security which shows a 7 ½ inch bladed knife."

During the investigation with John Simpson he stated that he "...heard Chris make statements that I thought were inappropriate for the workplace." for example, "I heard him (you) at least 3 times say he could get rid of a women's body by burning it beyond recognition by putting it in a car's trunk with a spare tire and setting it on fire. The tires and the gas in the gas tank would burn it up so completely that even the bones would burn and it would be impossible to identify."

On January 15, 2010, at approximately 11:30 pm Paula Cook-Gomez, RN3, overheard you talking with Mr. Simpson and you stated that the "best way to kill someone is long range sniping with a silencer..."

On another occasion Ms. Gomez said that during your shift she overheard you state that you could get rid of a "woman's" body by burning it beyond recognition by putting it in a car's trunk

A1-1

Ex. 154

BOYD 005233

with a spare tire and setting it on fire." And "...it would burn it up so completely that even the bones would burn and it would be impossible to identify."

On January 15, 2010, during your shift Ms. Gomez overheard you talking to Mr. Simpson stating "...one time I took my AK47 and shot a bunch of turtles...shot clean through the shell." While on reassignment on January 23, 2010, Andy McCants, IC3, stated you said you "...would be getting back at the staff on night shift. They had better watch their backs."

On February 3, 2010, at 9:25AM, Annette Southwick, RN 4, informed Wifredo Ortiz, Security Guard 2, that there was a possible threat made by you. She stated that on January 7, 2010, at 7:00AM she received an email from Teresita Cueva, Night Shift RN 4, stating you made a threat "They might fire me, but they will sure remember me."

On March 11, 2010, Patricia Maddox, Registered Nurse 3 (RN3), conducted an investigative interview with you in regards to allegations of you making threatening comments, which felt as if you meant to intimidate staff for reporting comments made by you. During the meeting you denied making threatening comments that would create an environment of intimidation while interacting with staff members.

On April 12, 2010, Ms. Southwick reported that Patricia Maddox, RN3, was told that you shared the incident regarding the knife stating you keep it in your personal locker on C-4 ward. You added "...this could do a lot of damage to a person."

The above mentioned incidents were investigated internally for your inappropriate, unprofessional behavior, creating an environment of intimidation and retaliation, as well as your failure to follow agency policies and procedures. The investigation report is attached and incorporated by this reference.

DSHS Administrative Policy 18.64: Standards of Ethical Conduct for Employees, states in relevant parts:

A. Required Standards of Behavior and Conduct

All DSHS employees... are required to perform their duties and responsibilities in a manner that maintains standards of behavior promoting public trust, faith, and confidence as described below:

3. Strengthen public confidence in the integrity of state government by demonstrating the highest standards of personal integrity, fairness, honesty, and compliance with law, rules, regulations, and DSHS policies.
4. Interact with all DSHS staff with respect, concern, and responsiveness.
5. a. Following and abiding by DSHS policies regarding nondiscrimination... workplace harassment...
c. Creating an environment free from intimidation, retaliation, hostility...

6. Comply with the requirements of this policy. Failure to comply with requirements of the policy may result in disciplinary action up to and including discharge from employment.

DSHS Administrative Policy 18.66: Discrimination and Harassment Prevention: states in relevant parts:

Purpose:

This policy identifies and prohibits behaviors that are inconsistent with a safe and harassment-free work environment.

B. Harassment

2. Examples of harassment include, but are not limited to:
 - a. Verbal: Inappropriate, unwarranted and/or unwelcome comments regarding a person's... creed, sex...or...by... negative stereotyping.
 - b. Examples of behavior or actions that could be perceived by others to create a hostile work environment include, but are not limited to:
 - a. Racial or ethnic epithets
 - b. Discriminatory verbal intimidation...

D. Retaliation

Retaliation or attempted retaliation is prohibited...

Any employee who initiates or participates in retaliation will be subject to disciplinary action, up to and including, dismissal.

WSH Policy 1.7.12 Code of Ethical Conduct states in relevant parts:

Purpose:

To promote compliance with the Western State Hospital code of ethical conduct.

- A. This Code of Ethical Conduct is a reflection of the daily operation of WSH at every level. WSH requires all employees...to meet or exceed all legal obligations pertaining to the Hospital's operations.
- E. 3. It is a violation of the Code of Ethical Conduct to take or threaten to take any action in reprisal against anyone who in good faith reports suspected violations of the Code or other WSH policies and procedures.

WSH Policy 1.9.4 Possession and/or Use of Firearms, Weapons and Explosives states in relevant parts:

Purpose:

Prohibit the possession of firearms, weapons, and explosives at Western State Hospital (WSH).

Definitions:

Weapon means any object, instrument... which is:

- a. Designed in such a manner to inflict harm or injury to another person, or
- b. Used in a manner threatening harm or inflicting injury to another person.

RCW 72.23.300 prohibits the carrying, wearing and/or use of ... weapons ... on state hospital grounds.

RCW 9.41.300 © prohibits weapons in certain places, including restricted areas of state institutions.

Western State Hospital Policy 3.4.10 Work Place Violence states in relevant parts:

Purpose:

To identify procedures, guidelines and direction to WSH management to address occurrences of workplace.

ZERO TOLERANCE

WSH has adopted a zero-tolerance policy for any act of workplace violence.

Your signature dated September 14, 2005, on the WSH "New Employee Orientation – Human Resource Briefing – Checklist that acknowledges *"I understand I have a responsibility to read and comply with all of the DSHS Administrative Policies, DSHS Personnel Policies and WSH Polices.* The documents include the DSHS Policy 6.04 (now DSHS Administrative Policy 18.64 "Standards of Ethical Conduct", WSH Policy 1.7.12 Code of Ethical Conduct, WSH Policy 1.9.4 Possession and/or Use of Firearms, Weapons and Explosives, and WSH Policy 3.4.10 Workplace Violence".

Your signature dated May 5, 2008 and August 7, 2009 on the "Employee Annual Review Checklist" acknowledges *"I declare all statements above are true. I understand that I am responsible to read and be familiar with and comply with the policies and procedures above."* The documents include the DSHS Administrative Policies 18.64 "Standards of Ethical Conduct for Employees" and 18.66 "Discrimination and Harassment Prevention."

On May 13, 2009, you and your supervisor, Paula Cook-Gomez, RN3 reviewed the "Nursing Department-Annual Competency and Training Checklist" which informed you about DSHS and WSH Policies in regards to DSHS Harassment Prevention, Diversity, and Workplace Violence.

The above policies are attached and incorporated by this reference.

A review of your personnel history reflects most recently you have received the following pertinent training:

ELT - Workplace Diversity	May 15, 2009
ELT - Workplace Harassment	May 15, 2009
ELT - Workplace Violence	May 15, 2009
Civil Behavior in the Workplace	March 27, 2009
Nursing Management & Leadership Training	April 12, 2006
Harassment Prevention for Supervisors	March 31, 2006
Workplace Harassment	March 31, 2006
ELT - Workplace Violence	March 31, 2006

Christopher Boyd
Written Reprimand
Page 5 of 6

Domestic Violence Training	January 7, 2006
ELT - Workplace Violence	January 7, 2006
ELT - Harassment Prevention	January 3, 2006
Orientation-RN-LPN	September 23, 2005
New Employee Orientation	July 23, 2004
Ethics	July 14, 2004

The training report is attached and incorporated by this reference.

On August 10, 2009, you signed and dated an evaluation where you were clearly aware of the expectations outlined in your performance evaluation related to your ability to work in a diverse environment, promote a friendly climate, practice integrity, and treat everyone with respect and dignity. As a RN2 and an employee of DSHS, you have a responsibility to use good judgment in the way you interact with co-workers. The Performance and Development Plan is attached and incorporated by this reference.

Every person who works at WSH contributes to the dignity and respect of all persons who work here. Employees serve as role models for personal behavior for your co-workers. You are responsible to treat each other with dignity and respect.

As a Registered Nurse, you provide direct services to clients at WSH. You are expected to fill in as the lead in the absence of the RN 3. Your pattern of unprofessional behavior fails to role model a positive and professional behavior and work ethic. As a state employee, working for the citizens of Washington and caring for the patients at WSH, employment brings you the expectation to be accountable for your behavior. State employees have to maintain standards of conduct that promote public trust, faith and confidence.

By taking a knife out of your locker, while in the break room area and describing to a Mr. Simpson the harm it could do to someone impressed upon your co-worker that it could be used as a weapon. This action could be construed as displaying a weapon. In addition, your inappropriate and threatening comments made in front of your co-workers created an environment where there was intimidation and feelings of retaliation for those who were involved in an incident with you, that was investigated and where findings were substantiated against you.

After careful consideration all of the information, I have determined this written reprimand is the appropriate action. I want to impress upon you the seriousness of your actions. In an effort to improve your behavior, in addition to the directives given to you in the letter dated January 30, 2012 regarding behavior, I am directing you to comply with the following by February 6, 2012:

- You are directed to read and comply with DSHS Administrative Policy 18.64: Standards of Ethical Conduct for Employees
- You are directed to take the Ethics on-line training located at http://hrd.dshs.wa.gov/Position_Management/Recruitment_and_Training_Support_Services/Employee_Agency_Training/Required_Agency_Training.htm
- You are directed to review with your supervisor expectations of your position and about ethical behavior
- To ensure such behavior will not be repeated.

A1-5

BOYD 005236

Christopher Boyd
Written Reprimand
Page 6 of 6

Be warned that failure to comply with department policies, procedures, supervisory expectations and directives and the Collective Bargaining Agreement may result in further disciplinary action up to and including dismissal.

Should you be experiencing personal problems that are impacting your ability to do your job, you may want to consider accessing the Employee Assistance Program (EAP). The EAP provides assistance with problem assessment, short-term counseling and referrals for all types of personal issues. You can access the EAP by calling 360-753-3260 in Olympia. I have attached Employee Assistance Program (EAP) pamphlet as a resource for you.

This action is subject to the grievance procedure set forth in the above mentioned Master Agreement.

Sincerely,



Jess C. Jamieson, Ph.D.
Chief Executive Officer
Western State Hospital

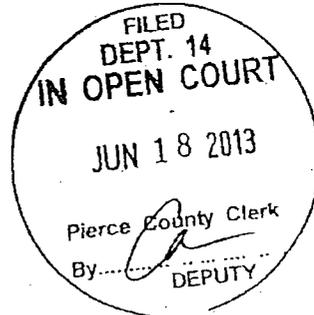
Attachments:

Investigation Report and related documents dated 12/2/10
DSHS Administrative Policy 18.64 Standards of Ethical Conduct for Employees
DSHS Administrative Policy 18.66 Discrimination and Harassment Prevention
WSH Policy 1.7.12 Code of Ethical Conduct
WSH Policy 1.9.4 Possession and/or Use of Firearms, Weapons and Explosives
WSH Policy 3.4.10 Workplace Violence
New Employee Checklist dated 9/14/05
DSHS Annual Review Checklist 5/5/08 and 8/7/09
Nursing Department-Annual Competency and Training Checklist dated 5/13/09
Training Printout
EAP Pamphlet

cc: Julia Cook, Acting Nurse Manager
Mike Dyer, RN4, Nurse Manager
Jack Dotson, RN4, Nurse Manager
Sue Thomas, HR Administrator
Lori Manning, HR Manager
Personnel File

A1-6

BOYD 005237



3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

The Honorable Susan K. Serko

**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

CHRISTOPHER BOYD,

Plaintiff,

v.

STATE OF WASHINGTON;
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; and WESTERN
STATE HOSPITAL,

Defendants.

NO. 12-2-07223-5

DEFENDANTS' MOTION FOR
JUDGMENT AS A MATTER OF
LAW PURSUANT TO CR 50

I. INTRODUCTION

Plaintiff presents this case as one of retaliation by the Hospital. It is not. To the contrary, it is and will continue to be undisputed that the Hospital did not retaliate against Mr. Boyd. After Plaintiff's presentation of the evidence, three things are undisputed; each of which call for dismissal of this case.

First, Plaintiff alleges five bases for an adverse employment action: (i) the Hospital's investigations into patient misconduct and threatening comments; (ii) Mr. Boyd's receipt of a written reprimand; (iii) Mr. Boyd's two-week suspension; (iv) Mr. Boyd's transfer from Ward C-4; and (v) Mr. Boyd's transfer to Ward C-8. As a matter of law four of these bases must fail. Washington law is clear. Being subjected to an investigation, receiving a written reprimand, or being transferred to a position without a change in employment the terms or conditions of

THE HOSPITAL'S CR 50 MOTION TO
DISMISS

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P O Box 2317
Tacoma, WA 98401
(253) 593-5243

1 employment, as a matter of law, does not rise to the level of an adverse employment action for
2 which the Hospital can be liable for retaliation. To the contrary, the only actionable adverse
3 employment action is Mr. Boyd's two-week suspension; which fails for other reasons.

4 Second, Plaintiff fails to show *any* causal link between the protected activity and the
5 adverse employment actions. At this point, Plaintiff has been provided the benefit of *months*
6 of discovery, and now, the benefit of eliciting all trial testimony beneficial to his case. Plaintiff
7 still has not identified any actor who, with knowledge of Mr. Boyd's sexual harassment claim,
8 did (or even could have) subjected Mr. Boyd to any actionable adverse employment action.

9 The absence of such a person is not, as plaintiff suggested *in limine*, mere pretext; it is a
10 fundamental shortfall in Plaintiff's legal claim which merits dismissal of his case.

11 Third and finally, even if actionable, the Hospital had any number of non-retaliatory
12 reasons for taking the actions it did. The Hospital had every right, rather an obligation, to
13 investigate Mr. Boyd for the allegations of patient misconduct and for making comments
14 which could be construed as threatening. These investigations were properly initiated,
15 properly executed by the members of Mr. Boyd's chain of command and, ultimately,
16 concluded Mr. Boyd should be subjected to discipline. Further, and while not actionable,
17 Mr. Boyd's transfers, wherein he argues he was removed from nursing duties, were the result
18 of reassignments due to investigation and then Mr. Boyd's own requests for reasonable
19 accommodation. Finally, Plaintiff fails to present *any evidence* (albeit sufficient evidence) as
20 to why his placement in Ward C-8 was retaliatory pretext. This testimony and/or documentary
21 evidence is not merely insufficient, but wholly lacking, and therefore calls for dismissal.

22 For these reasons, the Hospital moves for judgment as a matter of law dismissing
23 Plaintiff's case in its entirety. To the extent Plaintiff's case is permitted to go forward, it
24 should do so only on the issue of Mr. Boyd's twoweek suspension, as this is the only legally
25 cognizable adverse employment action remaining in Plaintiff's case.
26

1 **II. RELIEF REQUESTED**

2 Pursuant to CR 50(a), defendants State of Washington, Department of Social and
3 Health Services, and Western State Hospital (collectively herein as "the Hospital") hereby
4 move for entry of judgment as a matter of law. Plaintiff has been fully heard in this matter and
5 fails to present any legally sufficient evidentiary basis for a reasonable jury to find in his favor.
6 Therefore, the Hospital moves to have Plaintiff's claim for retaliation dismissed with prejudice.

7 **III. STATEMENT OF FACTS**

8 The facts relevant to the Hospital's CR 50(a) Motion and this case are undisputed and
9 as follows:

10 **A. Investigation Into Mr. Boyd's Patient Misconduct**

11 On December 26, 2009, Mr. Boyd was working as an RN2 on C-4 and covering RN2
12 duties on Ward C-1 (because neither Ms. Cook-Gomez nor the covering RN3 on C-1 were on
13 shift). At 1 a.m., Mr. Boyd received a call from Rod Bagsic, an LPN 2, asking for assistance with
14 a medication order for a patient (Patient J) on Ward C-1. Mr. Boyd failed to respond to this
15 request for approximately 45 minutes. At that time, Mr. Bagsic called again asking for assistance.
16 This time, Mr. Boyd answered the phone but identified himself as another employee, Manuel
17 Guingab.¹ Mr. Bagsic was overheard to say, "I'm not playing games" and, at that point, contacted
18 Kara Himmelsbach, RN4, for assistance. After involving Ms. Himmelsbach, Mr. Boyd arrived
19 on Ward C-1, at which point Mr. Boyd failed to perform a patient assessment.

20 Hours later, but on that same day, supervisor of Ward C-1, Patricia Maddox, arrived for
21 her shift, where she was told by a number of her employees (on Ward C-1) about Mr. Boyd's
22 conduct that previous night. As trained, Ms. Maddox requested her staff submit to her written
23 statements regarding what they witnessed that night. In the following days, Ms. Maddox received
24

25 ¹ Plaintiff alleges this conversation was a "joke" between Mr. Boyd and Mr. Bagsic. See Trial Testimony of
26 Manuel Guingab. Assuming, for the purposes of this motion, plaintiff's rendition of the facts is accurate, it remains
undisputed that Mr. Boyd, again, failed to respond to Mr. Bagsic's second request for a patient assessment.

1 those statements and referred the issue up her chain of command, to RN4 Annette Southwick and
 2 the Human Resources department. Ultimately, Paula Cook-Gomez, Mr. Boyd's immediate
 3 supervisor, was assigned to complete the investigation into Mr. Boyd's alleged patient
 4 misconduct. Ms. Cook-Gomez interviewed eight witnesses: Edwina Kawamura, Ginni Ratcliff,
 5 Mark Hansen, Rod Bagic, Tim Humbert, Irma Ward, Manuel Guingab, and Kara Himmelsbach.
 6 The statements made and testimony by those witnesses presented has been undisputed: Mr. Boyd
 7 failed to respond to a call for a patient assessment for an hour and a half

8 **B. Investigation Into Mr. Boyd's Making Threatening Comments**

9 Ms. Cook-Gomez was assigned to begin the investigation into Mr. Boyd's patient
 10 misconduct on January 14, 2010. The next day, on January 15, 2010, Ms. Cook-Gomez
 11 overheard Mr. Boyd make two statements which she perceived as threatening: (i) the best way of
 12 "off somebody" is with a long range assault rifle; and (ii) the best way to get rid of a "woman's
 13 body" is to put it in the trunk of the car with a spare tire and set it on fire. Numerous other
 14 witnesses overheard Mr. Boyd make these statements, and observed Paula Cook-Gomez in his
 15 immediate presence (testimony indicates within mere feet of her).

16 As before, Ms. Cook-Gomez was instructed by her immediate supervisor, Annette
 17 Southwick RN4, to have those witnesses submit written statements regarding what they had
 18 heard. Ms. Cook-Gomez collected those statements in the following days and referred them up
 19 her chain of command, to Ms. Southwick and the Human Resources department. This time, Ms.
 20 Maddox was assigned to complete the investigation into Mr. Boyd's threatening comments. Ms.
 21 Maddox interviewed six witnesses to Mr. Boyd's threatening comments: Paula Cook-Gomez,
 22 John Simpson, Andy McCants, Karen Milton, Kennard Ray, and Chris Boyd. The statements
 23 made and the testimony by those witnesses presented has also been undisputed: Mr. Boyd made
 24 comments in the workplace that could be construed as threatening.
 25
 26

1 **C. Mr. Boyd's Allegations of Sexual Harassment**

2 Prior to receiving any discipline for the above misconduct, Mr. Boyd participated in a
3 pre-disciplinary meeting on December 1, 2010. By the time this meeting took place, Mr. Boyd
4 had been on reassignment for nearly 11 months and had been outside Ms. Maddox's and Ms.
5 Cook-Gomez's chain of command for that duration.

6 Those present at the pre-disciplinary meeting included Mr. Boyd, Mr. Boyd's union
7 representative, Mr. Boyd's attorney, Jess Jamieson the then-CEO of the Hospital, and Peggy
8 Nelson with the Hospital's HR Department. It was at this pre-disciplinary meeting, on
9 December 1, 2010, that Mr. Boyd first alleged that the investigations were biased as Ms.
10 Maddox had been sexually harassing Mr. Boyd since 2007.

11 As a result of these allegations, two things happened. First, the Hospital initiated an
12 investigation into Mr. Boyd's allegations of sexual harassment. The Washington State Patrol
13 was called, conducted an investigation into the allegations, and concluded that no sexual
14 harassment occurred.² The WSP investigation did flush out allegations that Ms. Maddox had
15 used the term "penis" inappropriately in the office. Ms. Maddox received a written reprimand
16 for this. Second, the Hospital's Incident Management Office was assigned to re-investigate
17 each of the allegations. Mr. David Rivera, Jr. was assigned and interviewed (in some cases re-
18 interviewed) 12 individuals with knowledge of the misconduct. Mr. Rivera's investigation
19 concluded Mr. Boyd did, indeed, neglect the needs of Patient J. On November 9, 2011, Mr.
20 Boyd received his second (amended) Notice of Intent to Discipline which resulted in a two-
21 week suspension without pay for his committing patient misconduct and a written reprimand
22 for making statements in the workplace which could be construed as threatening.

23
24
25 ² Trial Exhibit 147 (Washington State Patrol Administrative Investigation Report re: Alleged Sexual
26 Harassment by Patricia Maddox authored by Detective Clint Thompson).

1 **D. Mr. Boyd's Transfers to Nursing Administration and Ward C-8**

2 During the pendency of these investigations, and as a matter of course with investigations
3 into misconduct of this weight, on January 21, 2010, Mr. Boyd was placed on an alternate
4 assignment in Nursing Administration.

5 On January 27, 2010, the afternoon after his interview regarding both allegations of
6 misconduct, Mr. Boyd allegedly caught his foot in a door at WSH, fell, and was injured. He
7 was out on leave for eight months. Mr. Boyd returned to work on September 1, 2010, with the
8 restriction that he cannot lift or move any weight of greater than 10 pounds (later increased to
9 40 pounds). This 40 pound lifting restriction precluded Mr. Boyd from returning to nursing
10 duties; as nurses at the Hospital must be able to assist in patient take-downs when necessary.
11 Accordingly, Mr. Boyd returned to the same alternate assignment as when he left on L&I, in
12 Nursing Administration.

13 After Mr. Rivera conducted his reinvestigations into Mr. Boyd's misconduct, Mr. Boyd
14 was removed from alternate assignment and placed into Ward C-8 on January 24, 2012. *It*
15 *bears noting that by this time, Mr. Boyd had been removed from Ms. Maddox's supervision for*
16 *two years.* Mr. Boyd claims that while on Ward C-8, he believed he was understaffed and that
17 his complaints to management went unheard. Plaintiff further claims this retaliatory
18 understaffing caused the murder (an intentional killing) of Paul Montefusco. He now claims
19 this placement in Ward C-8 and the resulting PTSD from seeing the body of Mr. Montefusco
20 was the result of the retaliation for the filing of his sexual harassment complaint. Contrary to
21 his position in opening statements and to this Court on the parties' *limine* motions, Plaintiff has
22 offered *no evidence* that (i) Ward C-8, specifically, was understaffed; (ii) Ward C-8 was any
23 more or less understaffed than any other wards at the Hospital; (iii) that understaffing caused
24 the murder of Paul Montefusco; or (iv) any other evidence suggesting that a placement in Ward
25 C-8 would have a chilling effect upon Mr. Boyd's willingness to oppose what he believed to be
26 sexual harassment.

1 **E. Procedural Posture**

2 The Hospital brings this motion at the close of Plaintiff's case in chief, on June 18,
3 2013. Plaintiff has been provided the full benefit of presenting his case and has been duly
4 heard in the matter.

5 **IV. STANDARD OF REVIEW**

6 **A. CR 50 Standard of Review**

7 CR 50(a) permits a court to enter judgment as a matter of law if, "during a trial by jury,
8 a party has been fully heard with respect to an issue and there is no legally sufficient
9 evidentiary basis for a reasonable jury to find or have found for that party with respect to that
10 issue." Judgment as a matter of law is thus appropriate when, viewing the evidence most
11 favorable to the non-moving party, the court can say as a matter of law that there is no
12 substantial evidence or reasonable inference to sustain a verdict for the non-moving party.³
13 "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person
14 of the truth of the declared premise."⁴ Motions for judgment as a matter of law under CR 50
15 are decided under the same standard as motions for summary judgment under CR 56.⁵

16 **B. Plaintiff's Retaliation Claims Must Be Dismissed**

17 An employee demonstrates a prima facie case of retaliation by showing "that (1)
18 he or she engaged in a statutorily protected activity; (2) an adverse employment
19 action was taken; and (3) there was a causal link between the employee's
20 activity and the employer's adverse action."⁶

21 Here, Plaintiff fails to present any evidence to establish the second and third elements to his
22 prima facie case. For these two reasons and because Plaintiff cannot rebut the Hospital's
23

24 ³ E.g., *Delgado Guijosa v Wal-Mart Stores, Inc.*, 144 Wash 2d 907, 915, 32 P.3d 250 (2001) (quoting
Sing v. John L. Scott, Inc., 134 Wash.2d 24, 29, 948 P.2d 816 (1997)).

⁴ *Id.* (quoting *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)).

⁵ *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

⁶ Plaintiff's Response to Defendants' Motion for Summary Judgment at p. 17 (citing *Estevez v Faculty
26 Club of Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005)).

1 articulated legitimate, non-retaliatory reasons for taking the disciplinary actions it *did* take, this
2 case should be dismissed.

3 **1. Plaintiff's Retaliation Claims Premised Upon The Investigations, Receipt**
4 **Of a Written Reprimand And Transfer to Ward C-8 Should Be Dismissed**
5 **As None Of These Acts Constitute An Adverse Employment Action**

6 In order to appropriately address the legal insufficiency of Mr. Boyd's stated adverse
7 employment actions, it is necessary to first address their scope. In his Response to Defendants'
8 Motion for Summary Judgment, Plaintiff alleges:

9 Here, Boyd has suffered myriad adverse employment actions. In the first phase
10 of retaliation, after Boyd's complaint to Maddox, Boyd faced retaliatory
11 investigations, first for the December 26, 2009 incident and then for allegations
12 of threatening statements... In addition, Boyd was placed on reassignment, and
13 removed from many of his job responsibilities. When Boyd complained higher
14 up the chain of command, the retaliation only grew worse: he received a written
15 reprimand and suspension, further reassignment, and- most troubling of all - he
16 was placed on a ward without adequate support, an act of retaliation that led to
17 the death of Paul Montefusco.

18 Plaintiff's adverse employment actions, therefore, breakdown as such:

- 19 1. Mr. Boyd was subjected to investigations into the patient care misconduct and for
20 making comments which could be construed as threatening in the workplace.
- 21 2. Mr. Boyd was placed on reassignment pending these investigations.
- 22 3. Mr. Boyd received a written letter of reprimand.
- 23 4. Mr. Boyd was suspended for two-weeks without pay.
- 24 5. Mr. Boyd was transferred to Ward C-8.

25 Four of these stated bases for retaliation do not rise to the level of an actionable adverse
26 employment action under Washington law.

The Division 2 case of *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004)
provides the Washington State authority on establishing an adverse employment action. *Kirby*
states:

⁷ Plaintiff's Response to Defendants' Motion for Summary Judgment at p. 19 (emphases added; original
citations omitted).

1 Washington courts have defined "adverse employment action." According to
 2 our Supreme Court, discrimination requires "an actual adverse employment
 3 action, such as a demotion or adverse transfer, or a hostile work environment
 4 that amounts to an adverse employment action." *Robel v. Roundup Corp.*, 103
 Wn. App. 75, 10 P.3d 1104 (2000), *rev'd on other grounds*, 148 Wn.2d 35, 74
 n.24, 59 P.3d 611 (2002).

5 Federal law provides further guidance. An actionable adverse employment
 6 action must involve a change in employment conditions that is more than an
 "inconvenience or alteration of job responsibilities," *DeGuisepe v. Vill. Of*
 7 *Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995), quoting *Crady v. Liberty Nat'l*
Bank & Trust Co. of Indiana, 993 F.2d 132 (7th Cir. 1993), such as reducing an
 8 employee's workload and pay, *ray v Henderson*, 217 F.3d 1234, 1243-44 (9th
 Cir. 2000). In contrast, yelling at an employee or threatening to fire an
 9 employee is not an adverse employment action. See *Munday v Waste Mgmt. of*
N. Am. Inc., 126 F.3d 239, 243 (4th Cir. 1997).⁸

10 *Kirby* also stands for the proposition that actions which are disciplinary or investigatory in
 11 nature do not constitute adverse employment actions, citing the same cases as above.⁹ With
 12 the exception of Mr. Boyd's two-week suspension without pay, none of the alleged bases for
 13 retaliation rise to the level of an actionable adverse employment action.

14 a. Investigations Into Mr. Boyd's Misconduct

15 It is undisputed that the Hospital had the right (albeit an obligation) to investigate Mr.
 16 Boyd for the allegations of misconduct. Such investigations do not constitute an adverse
 17 employment actions. *Kirby* is clear. Where events or actions are "disciplinary or investigatory
 18 in nature" and were "mere inconveniences that did not have a tangible impact on [] workload
 19 or pay," such actions do not constitute adverse employment actions.

20 Here, Plaintiff fails to present any evidence that the investigations into his misconduct
 21 were not "disciplinary or investigatory in nature" under *Kirby*. To the contrary, Mr. Boyd
 22 admits (and this testimony is corroborated by a number of plaintiff's other witnesses) that had
 23 the allegations into Mr. Boyd's patient care misconduct been true, he could have been
 24 subjected to discipline. It is accordingly undisputed that when the Hospital receives an

25 ⁸ *Kirby*, 124 Wn App. at 465 (citations in original).

26 ⁹ *Id.*

1 allegation which, if true, could amount to discipline, it has an obligation to investigate that
2 allegation. The investigation, itself, cannot form the basis of an adverse employment action.
3 The Hospital has the same obligation with respect to the allegations of Mr. Boyd's threatening
4 comments, which admittedly, if true, would rise to the level of a crime and merit some form of
5 discipline.

6 Accordingly, Mr. Boyd cannot avoid the inescapable conclusion that the Hospital's
7 investigation into his misconduct was, most obviously, investigatory in nature. Mr. Boyd's
8 claim for retaliation premised upon his being subjected to "retaliatory investigations"¹⁰ should
9 be dismissed.

10 **b. Mr. Boyd's January 21, 2010, Reassignment To Nursing**
11 **Administration Pending Investigations**

12 Kirby makes it clear that where actions are "investigatory in nature", the actions do not
13 constitute an adverse employment action.

14 Here, Mr. Boyd was placed in Nursing Administration on January 21, 2010,¹¹ after the
15 Hospital received notice of allegations that Mr. Boyd made statements which could be
16 construed as threatening while in the presence of his supervisor, Ms. Cook-Gomez. Pursuant
17 to policy, these statements had to be investigated. Also pursuant to policy, until such
18 investigation could be concluded, Mr. Boyd *must* be placed on temporary reassignment. There
19 is no evidence, and Plaintiff has not sought to offer any, that but-for the investigations into his
20 misconduct, Mr. Boyd would not have been placed into a temporary assignment to Nursing
21 Administration. Therefore, and because Plaintiff's transfer was the result of an *investigation*
22 (not *discipline*), this basis should also fail.

23 ¹⁰ Plaintiff's Response to Defendants' Motion for Summary Judgment at p. 19.

24 ¹¹ It is worth noting that Mr. Boyd worked in Nursing Administration for one month before going out on
25 L & I leave for 11 months. Upon returning to work, Mr. Boyd was again placed in Nursing Administration due to
26 a permanent 40-lb lifting restriction. This second stint in Nursing Administration cannot, in candor, be the result
of the pending investigations and, therefore, will be addressed below in Defendants' non-retaliatory reasons
briefing.

1 Plaintiff may argue the *Kirby* language does not parse with other Washington authority
 2 finding a reassignment with "significantly different responsibilities" may constitute an adverse
 3 employment action.¹² However, this case presents a very different set of circumstances. While
 4 *Burlington* provides a cause of action for a transfer to a job with significantly different
 5 responsibilities, *Burlington* did not address a transfer made in the context of a temporary
 6 reassignment pending investigation. Here, it is undisputed that Mr. Boyd would not have been
 7 placed on reassignment to Nursing Administration but-for these investigations into his
 8 misconduct. The Hospital had no, and did not attempt to form any, independent reason for the
 9 transfer. Accordingly, this case is more akin to *Kirby*, which finds that actions taken in an
 10 investigatory light do not constitute adverse employment actions.

11 **c. Mr. Boyd's Written Letter of Reprimand**

12 *Kirby*, again, supports the finding that Mr. Boyd's retaliation claim premised upon his
 13 receipt of a letter of written reprimand should be dismissed. A letter of written reprimand
 14 (without more) is purely "disciplinary in nature," and cannot constitute an actionable adverse
 15 employment action.¹³ Again, the test as to whether or not an action rises to the level of an
 16 adverse employment action is whether the action (here, alleging sexual harassment) would have
 17 dissuaded a reasonable worker from engaging in protected activity. Here, written reprimand
 18 did not constitute or lead to a demotion or adverse transfer (as required by *Robel*¹⁴), an
 19 inconvenience or alteration of job responsibilities (as required by *DeGuiseppe*¹⁵), nor did it rise
 20 beyond the level of being "disciplinary or investigatory in nature" (under *Kirby*¹⁶).

21 Accordingly, Plaintiff cannot base his claim for retaliation upon receipt of this written
 22 reprimand. This issue should not be before the jury, and should be dismissed.

23
 24 ¹² See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

¹³ *Kirby*, 154 Wn.2d at 465.

¹⁴ 103 Wn. App. at 88-90 (2000).

¹⁵ 68 F.3d at 192 (7th Cir. 1995).

¹⁶ *Kirby*, 154 Wn.2d at 465.

1 d. **Mr. Boyd's Transfer to Ward C-8**

2 Finally, Mr. Boyd has failed to present any evidence that his placement in Ward C-8
3 (after Mr. Boyd's doctor removed his permanent 40-pound lifting restriction) was, in terms,
4 adverse. Again, an actionable adverse employment action must involve a change in
5 employment conditions that is more than an "inconvenience or alteration of job
6 responsibilities" such as reducing an employee's workload and pay."¹⁷ As one treatise has
7 stated:

8 The mere fact that a job assignment is less appealing to an employee or causes
9 some modest stress not present in the previous position does not in itself make a
10 transfer or reassignment an adverse employment action. The issue is whether
11 there was a change in the terms or conditions of the employee's employment
12 that had a significant detrimental effect on his or her opportunities for
13 promotion or professional development—a decrease in compensation, job title,
14 or level of responsibility, or opportunities for promotion. An employee's mere
15 dissatisfaction with this or that aspect of a new position will not rise to the level
16 of an adverse action; speculation about the future adverse consequences from
17 the reassignment will not be sufficient to bring the issue into dispute.¹⁸

18 Further, the fact that the plaintiff may be transferred to the "busiest" part of the facility is not
19 sufficient to establish an adverse employment action.¹⁹

20 Here, the mere fact that Mr. Boyd was transferred to Ward C-8 is not, in and of itself,
21 an adverse employment action. Mr. Boyd received no change in pay, no reduction in workload
22 from where he was previously assigned; in fact, this placement met with Mr. Boyd's requests
23 to return to patient care. Plaintiff fails to present any evidence that Mr. Boyd's job duties on
24 Ward C-8 were any more or less appealing than they would have been on another Ward or in
25 another job placement. To this end, there has been much commentary on the staffing levels in
26 Ward C-8. To succeed on this claim, Plaintiff must have put forth competent evidence that
Ward C-8 was, in fact, understaffed and/or that Ward C-8's understaffing problems were

¹⁷ Kirby, 124 Wn. App. 454, 465.

¹⁸ 6 Emp. Coord. Employment Practices § 49-8.

¹⁹ See *Daniel v. Boeing*, 764 F.Supp.2d 1233 (W.D. Wash. 2011).

1 somehow *worse* than other possible placement options at WSH. Plaintiff has failed to present
2 *any* evidence of any of these predicates.

3 Contrary to Plaintiff's initial representations (to this Court and the jury), The Joint
4 Commission Report does not stand for the proposition that the Hospital (or Ward C-8 in
5 particular) was understaffed; rather, it states that there was "insufficient monitoring." This
6 insufficient monitoring means that staff present on the wards in question failed to adequately
7 monitor the patients in question (whether it be failing to conduct rounds, failing to adequately
8 assess patients during those rounds, or else). Without more, Plaintiff fails to meet his burden
9 to show that Mr. Boyd's transfer meets the definition of an actionable adverse employment
10 action. This claim should be dismissed.

11 **C. Mr. Boyd Fails To Show Any Causal Link Between His Engaging In Protected**
12 **Activity And Subsequent Adverse Employment Actions**

13 Assuming, *arguendo*, that plaintiff has alleged an actionable adverse employment
14 action, Plaintiff has not provided any evidence that any of these adverse actions related to or in
15 retaliation for his complaints. Plaintiff falls even shorter of proving retaliation was a
16 substantial factor motivating the adverse actions.²⁰

17 It goes without saying that retaliation claimants must present evidence from which a
18 reasonable fact finder can conclude that the Decision Maker(s) (those individuals responsible
19 for directing the adverse employment action) were aware that the employee engaged in
20 protected activity. As stated in *Graves v. Department of Game*, 76 Wn. App. 705, 887 P.2d
21 424 (1994), "[t]he third requirement [being a causal connection between the opposition and
22 adverse employment action] is met by establishing that the employee participated in an
23 oppositional activity, the employer knew of the opposition activity, and the employee was
24

25
26 ²⁰ *Allison v Housing Auth' Of City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1992).

1 discharged.²¹ Washington cases are clear: Where the Plaintiff fails to establish a causal link
 2 between the protected activity and the adverse employment action, the claim for retaliation
 3 must be dismissed.²²

4 Here, Plaintiff fails to identify any such person(s) for his retaliation claim.

5 Specific to Plaintiff's only actionable adverse employment action (being his two-
 6 week's suspension without pay), Plaintiff has failed to present any evidence that the person
 7 who determined such discipline is appropriate was aware of Mr. Boyd's complains of sexual
 8 harassment. Worse, Plaintiff fails to present any evidence as to the identity of the person who
 9 determined such discipline was appropriate. Without a "bad actor," Plaintiff's claims for
 10 retaliation must fail as a matter of law.

11 Plaintiff makes no better showing as to his remaining adverse employment claims.
 12 While Mr. Boyd testified that he rebuffed Ms. Maddox's sexual advances in April 2008, he
 13 fails to show that Ms. Maddox played any role *whatsoever* in the decisions (i) to investigate his
 14 patient misconduct and/or threatening statements; (ii) transfer him to Nursing Administration
 15 pending these investigations; (iii) issue to him a written reprimand; (iv) suspend him for two
 16 weeks; or ultimately (iv) transfer Mr. Boyd to Ward C-8. To the contrary, Mr. Boyd was (and
 17 had been) out of Ms. Maddox's supervision and/or chain of command for *two years* when he
 18 was ultimately disciplined for the misconduct and then transferred to Ward C-8. Plaintiff does
 19 not and cannot identify any other person with a similar retaliatory motive who *would have*
 20 played such a role. For this reason, Plaintiff fails to meet the third element of a prima facie
 21 case of retaliation, and his claim must be dismissed.

22
 23 ²¹ *Id.* at 712 (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991),
 quoted with approval in *Allison*, 59 Wn. App. 624 (1990).

24 ²² See *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005)
 25 (recognizing each element to a retaliation claim must be proved by a preponderance of the evidence, or the case
 26 should be dismissed); *Becker v. Washington State Univ.*, 165 Wn. App. 235, 266 P.3d 893 (2011), *rev. denied*,
 173 Wn.2d 1033, 277 P.3d 668 (2012) (trial court properly dismissed retaliation claim where plaintiff presented
 no evidence of causal link).

1 **D. Even If Mr. Boyd Establishes A Prima Facie Case of Retaliation, The Evidence Is**
 2 **Undisputed That The Hospital Had Legitimate, Nonretaliatory Reasons For**
 3 **Taking The Actions Herein Alleged As Adverse Employment Actions Which Were**
 4 **Not Pretextual.**

5 The analytical framework for retaliation cases is found in both federal and state law.²³

6 First, the employee must make out a prima facie case of retaliation.²⁴ This establishes a
 7 rebuttable presumption of retaliation. The evidentiary burden then shifts to the employer to
 8 produce a legitimate, non-retaliatory reason for the adverse employment action.²⁵ This is a
 9 burden of production, not persuasion, and the relevant inquiry is whether the employer
 10 honestly believed the reason when he or she made the relevant decision.²⁶ Merely second-
 11 guessing the employer's reasoning falls far short of establishing pretext.²⁷

12 If the employer produces some evidence of a nondiscriminatory reason for the
 13 discharge, the temporary presumption of retaliatory action established by the prima facie
 14 evidence is rebutted and removed.²⁸ Once the presumption is removed, the burden shifts back
 15 to the employee, and the employee must then create a genuine issue of material fact by
 16 showing that the employee's stated reason for the adverse employment action was a pretext for
 17 what was a retaliatory purpose.²⁹

18 ²³ See, *McDonnell Douglas*, 411 U.S. 792 (1973) as later clarified in *Reeves v Sanderson Plumbing*
Prods. Inc., 530 U.S. 133 (2000), and finally adopted in Washington by *Hill v BCTI Income Fund-I*, 144 Wn.2d
 19 172, 185-87, 23 P.3d 440 (2001).

20 ²⁴ *Milligan v Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002).

21 ²⁵ *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988).

22 ²⁶ *Hill*, 144 Wn.2d at 190 n. 14 ("It is not unlawful for an at-will employee to be discharged because he
 23 or she is *perceived* to have misbehaved..." (emphasis added); *Villiarimo v Aloha Air, Inc.*; 281 F.3d 1054, 1063
 24 (9th Cir. 2002) ("In judging whether Aloha's proffered justifications were false, it is not important whether they
 25 were *objectively* false (e.g., whether Villiarimo actually lied). Rather, courts only require that an employer
 26 honestly believed its reason for its actions, even if its reason is foolish or trivial or baseless." (quotation marks
 omitted). Where they are not inconsistent with Washington law, federal authorities are persuasive. *Hill*, 144
 Wn.2d at 180.

²⁷ *Hill*, 144 Wn.2d at 190 n. 14 ("[C]ourts must not be used as a forum for appealing *lawful* employment
 decisions simply because employees disagree with them."); *Lewis v. St. Cloud State Univ.* 467 F.3d 1113, 1137
 (7th Cir. 2006) (Courts "do not sit as a super-personnel department and second guess business decisions."
 (quotation marks omitted)).

²⁸ *Hill*, 144 Wn.2d at 182.

²⁹ *Grimwood*, 110 Wn.2d at 364.

1 To establish pretext, the employee must prove the proffered nonretaliatory reasons are a
 2 “sham” or not to be believed. An employee can demonstrate that the reasons given by the
 3 employer are not worthy of belief with evidence that: (1) the reasons have no basis in fact, or
 4 (2) even if based in fact, the employer was not motivated by these reasons, or (3) the reasons
 5 are insufficient to motivate an adverse employment decision.³⁰ If an employee fails to do this,
 6 the employer is entitled to dismissal as a matter of law.³¹

7 Plaintiff has gone to great lengths to confuse the issues in this case, alleging time and
 8 again that “the Hospital” had knowledge of Mr. Boyd’s protected activity and “the Hospital”
 9 took subsequent action. However, in painting the decision making authority with such a broad
 10 brush, plaintiff fails to establish any actor with the intent requisite to support his claim for
 11 retaliation. *Kirby*, once again, makes it clear that plaintiff has the burden of establishing his
 12 evidence of retaliatory intent and imputing that intent to the defendant.

13 Specifically, *Kirby* addressed the issue of whether plaintiff’s immediate supervisor’s
 14 comments that plaintiff was a member of the “old guard” and getting “gray-haired old captains
 15 to leave” was sufficient to establish a pretextual discriminatory motive behind his failure to be
 16 promoted.³² Finding in the negative, and upholding the trial court’s grant of summary
 17 judgment, the Court found plaintiff could not establish pretext because that supervisor *was not*
 18 *involved* in the promotion decisions. The *Kirby* court, citing *Price Waterhouse v. Hopkins*, 490
 19 U.S. 228, 277 (1989) (O’Connor J. concurring) made it clear: “[S]tatements by non-decision
 20 makers are insufficient to establish discriminatory intent.”³³

21 Here, Plaintiff’s broad-brush allegations that Patricia Maddox had an axe to grind with
 22 Plaintiff fail to rebut the non-retaliatory reasons proffered by the Hospital for taking the actions
 23

24 ³⁰ *Chen v State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997).

25 ³¹ *Kastanis v Educ Employees Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26 (1993), *Grimwood*, 110
 26 Wn.2d at 365

³² *Kirby*, 124 Wn. App at 467.

³³ *Id.* At 467.

1 alleged as retaliatory. As in *Kirby*, plaintiff cannot establish pretextual retaliatory motive
2 because Ms. Maddox was not the supervisor involved in *any* of the adverse employment action
3 decisions. For simplicity, these will be discussed as enumerated above. Again, it is assumed
4 for the limited purpose of this argument, that Plaintiff has proven that such actions constitute
5 adverse employment actions under Washington law and that Plaintiff has sufficiently presented
6 evidence of causation. Plaintiff has not.

7
8 **1. Plaintiff Fails To Rebut The Hospital's Non-Retaliatory Reason For Investigating The Allegations Into Mr. Boyd's Patient Misconduct And Threatening Remarks.**

9 It is undisputed by Plaintiff (and, in fact, Plaintiff admits) that the Hospital, upon
10 receiving allegations of Plaintiff's patient misconduct and threatening remarks *should have*
11 initiated the investigation into such misconduct. Again, it is undisputed that the subject matter
12 of those allegations would rise to the level of a violation of the Hospital's policies (albeit a
13 crime), and such allegations should be investigated. The issue for the Hospital (and for this
14 Court or the jury) is not whether the allegations were true,³⁴ but rather, whether the Hospital's
15 articulated reason for instituting the investigations is non-retaliatory in nature. Here, it is not
16 disputed by Plaintiff that the Hospital articulated a legitimate, non-retaliatory basis for
17 investigating Mr. Boyd for this alleged misconduct.

18 Further, plaintiff fails to make any showing that investigating such misconduct was
19 pretext for retaliation. Again, Plaintiff points the finger at Ms. Maddox; however, the
20 testimony is undisputed that Ms. Maddox was not the individual (read: decision maker) to
21 decide whether to investigate these allegations or not. Such a decision comes from within Ms.
22 Maddox's chain of command, and there has been no showing that such a person (once
23

24 ³⁴ *Hill*, 144 Wn.2d at 190 n. 14 ("It is not unlawful for an at-will employee to be discharged because he
25 or she is *perceived* to have misbehaved..." (emphasis added); *Villarimo v Aloha Air, Inc.*, 281 F.3d 1054, 1063
26 (9th Cir. 2002) ("In judging whether Aloha's proffered justifications were false, it is not important whether they
were *objectively* false (e.g., whether Villarimo actually lied).

1 identified) (i) knew of Mr. Boyd's sexual harassment complaint; or (ii) possessed any
 2 retaliatory motive to Mr. Boyd. For these reasons, Plaintiff fails to establish pretext or
 3 otherwise rebut the legitimate, non-retaliatory reasons articulated by the Hospital. Plaintiff's
 4 claim should be dismissed.

5 **2. Plaintiff Fails To Rebut The Hospital's Non-Retaliatory Reason For**
 6 **Transferring Mr. Boyd To Nursing Administration.**

7 For the same reasons as above, it is undisputed by Plaintiff that when the Hospital is
 8 investigating allegations into patient misconduct and threatening remarks of this type, it is
 9 customary to place the subject of those investigations into alternate assignment *away* from the
 10 subject matter of those investigations. Here, plaintiff admits that his transfer to Nursing
 11 Administration pending those investigations was proper. This, too, should be dismissed.

12 **3. Plaintiff Fails To Rebut The Hospital's Non-Retaliatory Reason For**
 13 **Issuing Mr. Boyd A Written Reprimand.**

14 The standard for pretext is not whether the discipline was "right or wrong," but whether
 15 the discipline was a farce for retaliation.³⁵ Here, Plaintiff has offered no evidence (i) to rebut
 16 the finding that the Hospital had ample evidence (in the form of third-party, independent
 17 witness statements) to issue the written reprimand based upon the factual record before it at the
 18 time; and (ii) that receipt of his written reprimand was pretext for retaliation. Even if Patricia
 19 Maddox could be said to have the requisite intent, it is undisputed that Ms. Maddox did not,
 20 *and could not*, have been involved in issuing the written reprimand. For this reason, as well,
 21 Plaintiff's claim must fail.

22
 23
 24
 25
 26 ³⁵ See *supra*, fn 26

1 **4. Plaintiff Fails To Rebut The Hospital's Non-Retaliatory Reason For**
 2 **Suspending Mr. Boyd For Two-Weeks.**

3 For the same reasons stated immediately above, Plaintiff's claim that his two-week
 4 suspension was pretextual must also fail. It has been undisputed that Plaintiff received the
 5 two-week suspension for failing to respond to a call for patient assessment.³⁶

6 Accordingly, the issue becomes whether Plaintiff has presented *any evidence* that the
 7 Hospital's stated reason for this discipline (being that Mr. Boyd admitted he did not assess the
 8 patient) was pretextual. Plaintiff does not offer any such evidence. To this end, there is an
 9 absence of testimony as to who, in fact, issued the two-weeks suspension. Without an actor,
 10 Plaintiff cannot possibly articulate how such a person made that decision and/or why that
 11 reason is pretext for retaliation. Accordingly, this, too should be dismissed.

12 **5. Plaintiff Fails To Rebut The Hospital's Non-Retaliatory Reason For**
 13 **Transferring Mr. Boyd To Ward C-8.**

14 The Hospital has put forth evidence that Mr. Boyd was placed in Ward C-8 by Julia
 15 Cook, Psychiatric Nurse Executive, for the purposes of bettering Mr. Boyd's career. In this
 16 placement, Mr. Boyd could receive the nursing experience he did not receive working nights
 17 on habilitative mental health, and would be working with one of the most experienced chains
 18 of command in the hospital. The Hospital has therefore articulated, and presented evidence of,
 19 its non-retaliatory motive for placing Plaintiff in Ward C-8.

20 Plaintiff fails to present any evidence that such a placement was retaliatory. He cannot
 21 show any animus (or knowledge that Plaintiff engaged in protected activity) on the part of
 22 Ms. Julia Cook; the absence of which vitiates pretext. Plaintiff likewise fails to point to any
 23 person who may, even collaterally, have been involved in the decision to place Mr. Boyd in
 24 Ward C-8 with any retaliatory intent. Therefore, Plaintiff fails to present evidence by which a

25 ³⁶ Plaintiff attempts to confuse this issue as well, claiming his discipline was for failing to administer
 26 medication to a patient. Plaintiff's Notice of Intent to Discipline Letter and Amended Notice of Intent To
 Discipline Letter (Trial Exs. 116 and 151) makes this clear.

1 fact-finder could conclude his placement in Ward C-8 was retaliatory. This claim should be
2 dismissed.

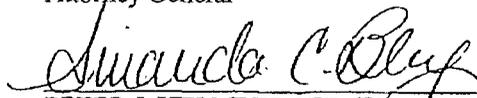
3
4 **V. CONCLUSION**

5 Plaintiff has received the benefit of months of discovery and now two full weeks of
6 trial to articulate the reasons by which he believes he was retaliated against by Western State
7 Hospital. Having been fully heard, Plaintiff's case still contains a number of legal
8 shortcomings. Most of his claim is premised upon adverse employment actions which are not
9 actionable under Washington law; therefore failing to establish the second element in a prima
10 facie case. Even if actionable, Plaintiff fails to articulate how his engaging in protected
11 activity substantially caused such employment action. Plaintiff, then, fails to establish the third
12 element of a prima facie case. Even if Plaintiff makes his case, he cannot rebut the articulated
13 non-retaliatory reasons by the Hospital for taking the actions it did. Plaintiff's speculative
14 theory that Patricia Maddox (RN3 on Ward C-1) orchestrated a hospital-wide conspiracy to
15 punish him lacks the requisite temporal, managerial, and practical proximity to survive this
16 motion

17 For these reasons, and the reasons stated herein, the Hospital respectfully requests this
18 Court grant its motion to dismiss Plaintiff's claims as a matter of law.

19 DATED this 18th day of June, 2013.

20 ROBERT W. FERGUSON
21 Attorney General

22 
23 PETER J. HELMBERGER, WSBA No. 23041
24 AMANDA C. BLEY, WSBA No. 42450
25 Assistant Attorney General
26 Attorney for Defendants

INSTRUCTION NO. //

If a supervisor performs an act motivated by retaliatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is relied on by the employer and is a substantial factor in the ultimate employment action, then the employer is liable for retaliation.



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

WESTERN STATE HOSPITAL

W27-19 * 9601 Steilacoom Blvd. S.W. * Tacoma Wa 98498-7213 * (253) 502-8900

January 5, 2012

CONFIDENTIAL

REGULAR/CERTIFIED MAIL

Christopher Boyd
[REDACTED] CT SW
Federal Way, WA 98023

Subject: Suspension Without Pay

Dear Mr. Boyd:

In accordance with the Collective Bargaining Agreement between the State of Washington and the Service Employees International Union Healthcare (SEIU) 1199NW, this is official notification that you will be suspended without pay from your position as a Registered Nurse 2 (RN2) with the Department of Social and Health Services (DSHS), Aging and Disability Services Administration (ADSA) at Western State Hospital (WSH) **effective January 9, 2012 through January 23, 2012**. This action is a result of (1) your knowingly evading two requests for assistance to meet a patient's needs, (2) you willfully impersonated another staff member over the telephone, (3) requesting a subordinate staff member to impersonate you over the telephone, (4) providing false information surrounding the medication order obtained for a patient, (5) your use of profane language in the presence of co-workers, (6) interfering with a subordinates ability to perform their duties in meeting the clinical needs of a patient, and (7) failing to comply with DSHS and WSH policies and procedures.

Basis for Discipline

On December 1, 2010, a pre-disciplinary meeting was conducted to allow you the opportunity to address the above. Present at the meeting were you, myself, your Shop Steward, Katherine Dexter, your Attorney Saphronia R. Young, and Human Resource Consultant 4, Peggy Nelson. During the meeting you made allegations that the investigation was not fair and thorough due to the witnesses being coerced into writing statements by your supervisor, PM, Registered Nurse 3 (RN3), regarding the incident that occurred on December 29, 2009. You also made an allegation that you were being sexually harassed by Ms. M. As a result of these allegations the disciplinary process was pending to allow the allegations you raised to be investigated.

On February 3, 2011, an Interagency Referral Report (IRR) was submitted to the Washington State Patrol (WSP), Case Number D-11-022 requesting an investigation be conducted in regards to the allegations by you against PM of sexual harassment. On April 14, 2011, the Washington State Patrol (WSP) informed Ms. Flowers that your attorney, Ms. Young, had informed them that you declined to be interviewed because you had concerns about having to re-live the experience. On July 26, 2011, WSP Detective, Clint Thompson completed the investigation into the allegation that PM, RN3, sexually harassed you and found insufficient evidence to support the allegation.



Boyd
01090368



Ex. 38

A4-1

Investigative process

On March 3, 2011, the WSH Incident Management Office (IMO) was assigned to investigate any irregularities, and/or thoroughness in the original investigation dated May 25, 2010. Kris Flowers, IMO Manager, assigned the case to David Rivera, Jr., Investigator.

On May 5, 2011, Mr. Rivera completed the investigation into the incident that occurred on December 26, 2009. Based on the re-investigation, evidence shows that the original investigation was done fairly and thoroughly, and produced the same facts as the original investigation conducted by Paula Cook-Gomez, Registered Nurse 3 on May 25, 2010. During this investigative process several attempts were made to meet with you, in order to complete the investigation, but they were unsuccessful. Therefore, the investigative process was completed and your original statement was utilized.

All parts and provisions of the original Notice of Intent to Discipline letter dated October 14, 2010, remain in full force and effect. A copy of that letter is attached and incorporated by this reference and contains the charges against you that subject you to discipline. Both investigation reports have been considered when determining the level of this discipline imposed.

Pre-Disciplinary Meeting

In view of your misconduct as set forth above, and in accordance with the Master Agreement, a pre-disciplinary meeting was conducted on November 22, 2011 at 1:30 p.m. in CEO conference room. Besides you and I, present at this meeting were your SEIU union representative, Paul Vilja, your attorney Saphronia R. Young, and Peggy Nelson, Human Resource Consultant 4. During the meeting you:

- (1) Denied avoiding the request to provide assistance to a patient. Based on your phone conversation with the LPN you felt that the patient had already received the medication needed for sleeping. You felt that the patient didn't need additional medication at that time. It was a nursing decision and didn't want to over medicate the patient. As the RN it was your decision.
- (2) Denied that you intentionally or maliciously meant to impersonate being another staff member on the phone. You said that you did not want to leave two staff on the ward and was thinking about Mr. Guingab and his whereabouts when you answered the phone and said C4 Emanuel. Instead of arguing with the LPN you just handed the phone to Mr. Guingab and went to C1.
- (3) Denied that you requested Mr. Guingab to impersonate you over the phone.
- (4) Denied providing false information surrounding the medication order obtained for a patient. You had already made the chart notes and believed that the LPN pulled the medication and had given it to the patient. However, the LPN came back after you had completed the charting stating that he could not obtain the medication from the Pyxis.
- (5) You stated that the LPN was getting aggressive with you and that you said you were on the crapper.
- (6) Denied interfering with a subordinate's ability to perform their duties. It was your decision as the RN to give the PRN's and not the LPN's. The patient had already been given three (3) PRN's and you had consulted with the RN about that. You further stated that to hinder the LPN would also be hindering you in performing your duties. You felt the LPN was

Christopher Boyd
Suspension Without Pay
Page 3 of 3

undermining you as the RN. It was a nursing decision and you still would not give the medication to the patient at that time.

In summary, you stated that you are a good employee and have contributed a lot to the hospital and that you did not do what you are being accused of.

I have carefully considered all of the evidence regarding the incidents mentioned above and your work history. I have come to the conclusion that your actions support the decision to suspend you. As a Registered Nurse 2 in a leadership role and as a State employee, you have a duty to act professionally, to exercise self-control, to model appropriate and acceptable behavior, to provide positive leadership to staff, and to be responsive to the therapeutic needs of the clients. By your actions as outlined above, you failed to comply with DSHS and WSH policies and failed to act professionally within the workplace.

This action is intended to impress upon you the seriousness of your behavior and it will not be tolerated. I am directing you to ensure that such behavior will not be repeated. You are to comply with all DSHS and WSH policies, rules, regulations; workplace rules and instructions and the MA. Be warned, failure to comply with departmental policies, procedures, supervisory directives, expectations, and the MA may result in further disciplinary action, up to and including dismissal.

This letter also serves as your official notification that you are being released from your alternate assignment. In accordance with the Collective Bargaining Agreement - Article 5, you are being reassigned to position number EF99E located in PTRC-Central Ward C-8, effective January 21, 2012. Your scheduled shift will be 6:45 a.m. to 3:15 p.m., Monday through Friday with rotating Saturday/Sunday off. Your new supervisor will be Nanette Del Torre, Registered Nurse 3 and her contact number is (253) 756-2134.

I have attached an EAP pamphlet as a resource for you. Their services are free to state employees and they may be reached Olympia at (360) 753-3260. For additional information you may go to their website at: www.dop.wa.gov/EAP.

This action is subject to the grievance process set forth in the above mentioned Master Agreement.

Sincerely,



Jess C. Jamieson, Ph.D.
Chief Executive Officer
Western State Hospital

Attachment:

Notice of Intent of Discipline dated 10/14/10
Employee Assistant Program (EAP) Pamphlet

cc: Julia Cook, Acting PNE
Michael Dyer, RN4
Margaret Maddox, Chief, HR Operations
Sue Thomas, Human Resource Administrator
Lori Manning, Human Resource Manager
Katherine Dexter, Chair, SEIU
Personnel File

Boyd
01090370

A4-3

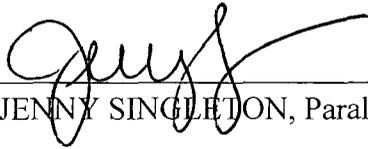
CERTIFICATE OF SERVICE

I certify that I served a copy of this document on James Beck,
plaintiff's counsel of record, on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by Amy Kuja

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

DATED this 22nd day of July, 2014, at Tacoma, Washington.



JENNY SINGLETON, Paralegal

FILED
COURT OF APPEALS
DIVISION I
2014 JUL 22 PM 1:38
STATE OF WASHINGTON
BY _____
DEPUTY