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NO. 62742-2-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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GLEND A WILLIAMS,

Respondent,

v.

SEATTLE PUBLIC SCHOOLS,

Appellant.

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REPLY BRIEF OF APPELLANT

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Lawrence B. Ransom, WSBA #7733  
KARR TUTTLE CAMPBELL  
Attorneys for Appellant  
1201 Third Ave., Suite 2900  
Seattle, WA 98101  
(206) 223-1313

Jessie L. Harris, WSBA #29399  
WILLIAMS, KASTNER & GIBBS PLLC  
Attorneys for Appellant  
Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98101  
(206) 628-6600

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## 1. INTRODUCTION

The District has assigned error to the following trial court rulings: (1) refusal to instruct the jury on RCW 28A.405.230; (2) admission of Wes Felty's hearsay testimony under ER 803(a)(3); (3) refusal to permit Elizabeth Guillory to testify regarding Venus McLin's statements as exception to the hearsay rule; and (4) denial of the District's motion for partial directed verdict. Williams argues that these assignments are too few and too insignificant to warrant the relief sought by the District. However, the law is clear: a determination that any one of the assigned errors prejudiced the District requires reversal.

Williams' unsupported contention that the number and scope of the trial court's errors factor into this Court's analysis is just one example of Williams' repeated attempts to emphasize her version of the facts at the expense of the law in order to convince the Court to deny the District's appeal. The legal arguments in Williams' opposition focus almost exclusively on the District's purported failure to apply the appropriate legal standard to each assignment of error. However, it is Williams who fails to recognize the applicable rules of law. Similarly, Williams' unfounded suggestion that the District misrepresents, or otherwise omits, critical facts underscores Williams' own act of

conveying a misleading account of the record. Williams' nineteen page recitation of trial testimony can only be viewed as a blatant attempt to garner sympathy given that the supposed facts are not at the core of the District's appeal.

For the reasons set forth herein and in its opening brief, the District respectfully requests that the Court reverse the judgment of the trial court and remand this case for a new trial.

## 2. ARGUMENT

a. The trial court erred in its refusal to give the District's Proposed Instruction No. 13 based on RCW 28A.405.230.

In response to the District's first assignment of error, Williams maintains that the District's proposed instruction failed to meet the legal standard for jury instructions. Resp. Br. 21-26.<sup>1</sup> Further, Williams argues that the error was not properly preserved, and that if even it was, it caused no prejudice. *Id.* at 27-29. Williams' arguments fail.

(i) The District's proposed instruction met the legal standard for jury instructions.

Jury instructions are sufficient if they (1) allow the parties to argue their theories of the case, (2) do not mislead the jury, and (3) when taken as a whole properly inform the jury of the law to be applied.

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<sup>1</sup> The District refers to Williams' Opposition Brief as "Resp. Br." throughout this Reply Brief.

*Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997). Contrary to Williams' claims, the District applied the standard correctly.

a) Ability to argue theory of the case.

Williams claims the trial court's refusal to give the District's proposed instruction was not reversible error because the District was able to argue its theory of the case at trial. Resp. Br. 21. This argument ignores the express language of the first prong of the legal standard and the case law interpreting the same. The question is not, as Williams argues, whether the District was able to argue its theory of the case to the jury in a manner that might negate some of the prejudice suffered by the court's refusal to give the requested instruction. Resp. Br. at 21-22. The proper inquiry is whether there was sufficient evidence to support an instruction on the District's theory of the case. *Bell*, 147 Wn.2d at 177; *Williams*, 132 Wn.2d at 259-60 (quoted above). If so, the trial court was required to give the proposed instruction. *Id.* The District submits that there was sufficient evidence and that it suffered prejudice as a result of the trial court's failure to instruct the jury on RCW 28A.405.230.

Notably, Williams cites *Joyce v. Department of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005), for the proposition that “failure to give such an instruction will not be reversible error if the party is not prevented from arguing his theory of the case.” Resp. Br. 22. However, that is not the holding in *Joyce* – at least in so much as Williams suggests that the holding precludes an instruction so long as a party is permitted to argue its theory during its closing argument. In *Joyce*, Plaintiff offered a policy directive as evidence of negligence, but the trial court refused to provide an instruction proffered by the State that clarified that a violation of the directive was not negligence *per se*. 155 Wn.2d 324-25. The appellate court found that the State was not meaningfully allowed to argue its theory of the case -- through the instructions -- because the jury was misdirected by the trial court’s refusal. *Id.* Accordingly, *Joyce* supports the District’s interpretation of the clear language of the standard for jury instructions.

Williams’ theory of the case is that she was the victim of unlawful retaliation in response to a sexual harassment claim she made against a school principal, and that the retaliation included her demotion from an assistant vice principal to a teaching position. In support of this theory, Williams discussed -- at length -- the circumstances surrounding

the District's handling of her transfer to a subordinate certificated position. In response, the District argued that any adversity Williams suffered was wholly unrelated to her sexual harassment claim and that she was demoted for a non-retaliatory reason. The District further argued that its handling of Williams' demotion was consistent with its legal authority.

In support of its theory, the District proffered evidence regarding the circumstances leading up to Williams' demotion. 9/3 RP 103-104; 149-152. The District also discussed the letter Williams received notifying her of her transfer, which contained a clear statement that her transfer to a subordinate certificated position was authorized by RCW 28A.405.230. Ex. 54. Further, the District offered evidence of the process afforded Williams, including her opportunity to appeal the decision to the school board and the timing of her meeting with the school board (well before the decision was to become effective), both governed by RCW 28A.405.230. 9/3 RP 101-106, 151. What the District was not able to argue was that Williams' reassignment was carried out in accordance with a statute of the State of Washington and that Williams would be "heard" by the school board – according to the

express terms of a statute – before any reassignment or demotion could be implemented.

The fact that the District’s handling of Williams’ demotion was consistent with the relevant statutory authority was central to the District’s theory of the case. Without an instruction from the trial court that the statute was, in fact, the law, the District was unable to give full force and effect to its argument, to its significant prejudice. The District’s trial counsel could not say to the jury – as he should have been able to do – that “The court has instructed you that this, RCW 28A.405.230, is the law and you can see that the District followed the law.” Accordingly, the trial court erred when it refused to give the instruction and the District was significantly prejudiced as a result.

The District maintains that because of the trial court’s failure to instruct on RCW 28A.405.230, it is highly likely the jury did as Williams’ counsel urged and believed that the District did not follow proper procedure regarding Williams’ “opportunity to be heard” prior to her reassignment’s taking effect, resulting in substantial prejudice to the District. The prejudicial effect was magnified by Williams’ strident assertion during closing argument that the District violated Williams’ due process rights. 9/9 RP 121-122.

Williams' suggestion that her closing remarks were "not about due process, but about retaliatory motivation" is disingenuous. Resp. Br. 20. There is no question Williams' argument was expressly about due process, and this conclusion is not based on a "single phrase" that was "taken out of context" as Williams suggests in her brief. Resp. Br. 22. Rather, the District's argument is based on two full paragraphs of closing remarks during which Williams questions why "both sides (don't) get to talk about the issues and present evidence and argument" and how such a process is central to our "whole culture and system," that "everybody gets to be heard before important decisions are made." 9/9 RP 121-122.

As troubling as the comments themselves, is evidence of Williams' acute awareness of the District's concerns with the potential for inflammatory due process arguments from the inception of trial, as discussed during consideration of motions in limine. CP 548. Williams candidly told the court she would not make a due process argument, and then she violated her own pledge. CP 619. This increased the prejudicial impact of the court's refusal to give the District's proposed instruction on RCW 28A.405.230.

In its opening brief, the District pointed out that at least one juror identified a concern about the process leading up to Williams' demotion, because the juror submitted a question on this issue. CP 840; 9/3 RP 191. Williams suggests that the District's reference to the juror's question is a request for improper scrutiny of jury motivation or reasoning. Resp. Br. 29. The District is not, however, seeking to attack the verdict based on improper juror motivation, as was the situation in the *Linton* case cited by Williams.<sup>2</sup> Rather, the District is drawing this Court's attention to the fact that at least one juror had an express concern about the investigation preceding Williams' demotion, including her opportunity to tell her side of the story before the decision could become effective. These concerns could have been directly addressed by the District if the jury had been instructed on RCW 28A.405.230.

b) The instruction was not misleading.

Williams argues the District's proposed instruction on RCW 28A.405.230 "changed the meaning of the law" and was therefore misleading. Resp. Br. 26. Although Williams suggests some conscious effort on the part of the District to alter the statute, the difference in

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<sup>2</sup> *State v. Linton*, 156 Wn.2d 777, 788, 132 P.3d 127 (2006).

language between the proposed instruction and the statute is clearly a typographical error.

The statute reads:

Such board, upon receipt of such request, shall schedule the meeting for no later than the next regularly scheduled meeting of the board, and shall notify the administrator in writing of the date, time and place of the meeting at least three days prior thereto. At such meeting the administrator shall be given the opportunity to refute any facts upon which the determination was based and to make any argument in support of his or her request for reconsideration.

RCW 28A.405.230

The proposed instruction reads:

Such board, upon receipt of such request, shall schedule the meeting for no later than the next regularly scheduled meeting of the board, and shall be given the opportunity to refute any facts upon which the determination was based and to make any argument in support of his or her request for reconsideration.

CP 607. The typographical error is obvious in light of the fact that the balance of the proposed instruction refers to “his or her” request for reconsideration, clearly referring back to the administrator and not the board, as suggested by Williams.

The trial court’s refusal to provide the instruction clearly was not based on any characterization of the typographical error – or any other part of Proposed Instruction No. 13 – as a misstatement of the law, as

neither the court nor Williams' counsel articulated that as a reason for not giving the instruction. Rather, the trial court determined the instruction was inappropriate, without reference to the accuracy of the quotation of the statute.<sup>3</sup> 9/9 RP 74-75. It is the court's responsibility to write the instructions, not the parties, 9/9 RP 40, and an instruction should not be – and was not – refused due to a typographical error. For the reasons set forth above, the District maintains that the instruction was appropriate and the trial court's refusal to give it constitutes reversible error.

(ii) The error was properly preserved.

Williams claims the District waived any argument on appeal relating to her closing argument on due process, “having not objected during or after the closing.” Resp. Br. 24. The District is not assigning error to Williams closing argument. The error is the trial court's failure to give the instruction. Reference to Williams' closing argument demonstrates the prejudice suffered by the District. The District took proper and timely exception to the court's refusal to give the instruction. 9/9 RP 81; CR 51(f). The error was thus properly preserved.

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<sup>3</sup> Had the trial court or Williams' counsel suggested that misstatement of the statute was a concern, the typographical error was easily correctable.

- (iii) The District is not required to demonstrate an abuse of discretion with respect to jury instructions.

This court reviews jury instructions *de novo* for errors of law. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Williams' contention that the District argues for a different standard of review is not based on any legal authority, but rather on a footnote in the District's opening brief. Resp. Br. 29-30. This argument misconstrues the intent of the footnote.

At footnote 25 of its opening brief, the District states that "the court abused the discretion it might have had concerning wording of instructions had it agreed that an instruction on RCW 28A.405.230 was or might be appropriate to the case." The phrase used in the footnote was intended to mean only that the court failed to provide necessary input in fashioning the final language of the proper instruction, given its refusal to consider the proposed instruction. Williams' argument that the District's footnote 25 reflects some concession about the applicable standard is without merit and contrary to law.

- (iv) The entire verdict must be reversed.

The District argues that because the trial court did not instruct on RCW 28A.405.230, it is likely the jury did as Williams' counsel urged and concluded that the District retaliated against Williams by refusing to

let her be “heard” prior to her demotion. The jury verdict was based on a factual finding of retaliation, without identification of the specific acts which may have convinced the jury on this point. Because the verdict cannot be segregated with respect to what acts (or cumulative effects) were retaliatory, and what amount of damages may have been attributable to the issue on which the trial court failed properly to instruct, the entire verdict must be reversed.

In support of its request for reversal, the District cited *Thola v. Hentchell*, 140 Wn. App 70, 164 P.3d 524 (2007). Williams challenges the applicability of *Thola*. Resp. Br. 30. In reply, the District maintains its reliance on *Thola*. In *Thola*, the appellate court found that the trial court failed to instruct the jury on the issue of preemption, and thus did not accurately state the law governing the jury’s decision. *Id.* at 85. The jury issued a general verdict, and the appellate court saw that it was impossible to segregate the award and determine whether and how much of the verdict was for damages for the preempted causes of action. *Id.* Accordingly, the court in *Thola* reversed the entire verdict and remanded. *Id.* The District here seeks the same result based on the same principles that required reversal in *Thola*.

b. The trial court erred in admitting hearsay testimony under ER 803(a)(3).

The District assigned error to the trial court's admission of the hearsay statements of David Hookfin under ER 803(a)(3) on the grounds that consideration of Hookfin's intent was improper because (1) he was not a party, and (2) he was not someone with authority to make decisions about the terms of Williams' employment. Williams suggests the District's contention that Hookfin's state of mind was "irrelevant" to the issues before the jury invokes an improper relevancy component to ER 803, thereby creating a new standard of appellate review. Resp. Br. 31-32. Williams' argument reflects a misunderstanding of the District's position.

The trial court erred as a matter of law when it determined that it could apply ER 803(a)(3) to David Hookfin's statements. Williams' retaliation claim was based on RCW 49.60.210(1). The statute provides in relevant part:

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

By the express terms of the statute, Williams could have named Hookfin as an individual defendant. She did not. She sued the District.

Accordingly, Williams must prove that Hookfin's behavior can be imputed to the District.

The District maintains Hookfin's behavior cannot be attributed to the District because Hookfin was a co-worker, not a supervisor. In response, Williams points to Hookfin's responsibility over facilities issues, including location and furnishing of offices, as grounds for imputation. Resp. Br. 33-34. Williams cites no legal authority for this interpretation, and the District's own review of case law on this point reveals a lack of established precedent.

There is, however, guidance in cases involving the same statute, Chapter 49.60 RCW. To impute liability to an employer for a co-worker's actions in a hostile workplace claim under Chapter 49.60 RCW, the plaintiff has the burden of proving "that the employer authorized, knew or should have known of the harassment, and (b) failed to take reasonably prompt and adequate corrective action." *Estevez v. The Faculty Club of the University of Washington*, 129 Wn. App 774, 795, 120 P.3d 579 (2005). The District suggests that a similar test should be applied here.

Although Williams categorized Hookfin's act of taking all his furniture out of the space as "unusual," Ingraham's principal testified

that Hookfin had brought the furniture with him from his previous school when he moved to Ingraham, and then moved it to his new office in the building. 9/8 RP 23. Accordingly, his act of moving furniture could hardly be viewed as unlawful conduct. In any event, despite Williams' claims to the contrary, there is photographic evidence that her office was, in fact, furnished at the time she was asked to move locations. 9/8 RP 19-24. Therefore, even if there were questions about Hookfin's motives, the District took action to remedy the situation. Hoofkin's actions, including his statements, should not have been imputed to the District.

Given Williams' failure to establish grounds for imputing Hoofkin's behavior to the District, the question of whether Hookfin's alleged behavior constituted an adverse employment action is immaterial. Similarly, Hookfin's state of mind and the motivations for his actions or statements are irrelevant. The trial court's decision to admit Hookfin's hearsay statement was improper, whether this Court elects to review the case *de novo*, on the grounds the court improperly invoked ER 803(a)(3), or for an abuse of discretion – both of which were asserted by the District on appeal. Ap. Br. 22.<sup>4</sup>

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<sup>4</sup> The District refers to its opening brief as "Ap. Br." in this reply.

c. The trial court improperly excluded Elizabeth Guillory's testimony on the grounds of inadmissible hearsay.

On appeal, the District assigns error to the trial court's refusal to permit Elizabeth Guillory to testify about what Venus McLin reported at a meeting on May 2, 2007 regarding Williams' statements. In her opposition, Williams argues (1) the error was not properly preserved because the District failed to make an offer of proof, and (2) the error was harmless because the evidence was cumulative and irrelevant. Resp. Br. 35-36. Again, Williams' arguments are unpersuasive.

An offer of proof performs three functions: "it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *Thor v. McDearmid*, 63 Wn. App. 193, 204, 817 P.2d 1380 (1991). ER 103(a)(2) does not specify the procedure which must be followed or allowed in making an offer of proof. *Id.* Although it may be the "desirable practice" to have offers of proof in the form of questions and answers from the witness under certain circumstances, if the substance of the excluded evidence is apparent, the offer is sufficient. *Id.*

The record here demonstrates that the District made a sufficient offer of proof in the form of summaries by counsel, based in part of the testimony of previous witnesses. Consider the exchange between counsel at the time the statement was sought to be offered:

Q (to Guillory): What, if anything, did you and Mr. Campbell – what information, if anything – if any were you and Mr. Campbell given during that meeting (with Venus McLin)?

Ms. Huffington: I'm going to object on what will clearly be hearsay grounds, if she says what this parent was supposed to have said.

Mr. Harris: Your Honor, it's not offered for the truth of the matter asserted.

Ms. Huffington: It may well be if the parent says, "Glenda Williams said" blank.

Mr. Harris: Your Honor, I think we covered this with Mr. Campbell's testimony as well. The statement is not offered for the truth. It's offered to show what prompted certain actions which ultimately led to Ms. Williams' transfer to a non supervisory position, which is an issue in this case.

Ms. Huffington: In Mr. Campbell's case, the pertinence was his reaction which was relevant. This specific reaction is not relevant.

The Court: Do we need a side bar? I'm not really clear how this involves Ms. Guillory.

Mr. Harris: Ms. Guillory was present during that meeting as well.

The Court: Well, I understand she was present, but if I understand correctly, she was not a decision-maker in terms of anything that transpired with Ms. Williams. So, I'm not sure why we need to hear the hearsay again. It was offered for the limited purpose of the statement being said, but the jury has already heard that.

9/8 RP 100-101.

Williams was demoted because the District's administration believed that Williams had inappropriately told a parent, in the course of an impartial District investigation, that other Roosevelt High School administrators were unfairly targeting black students. Guillory was prepared to testify as to what Venus McLin reported at a meeting on May 2, 2007, in which she and Campbell were present, regarding Williams' statement that Williams believed Roosevelt administrators were targeting black students.

Opposing counsel and the court were thus fully aware of the substance of Guillory's proposed testimony on this point because five days earlier, during the District's cross-examination of Williams, the District was permitted to introduce McLin's statement, over a hearsay objection, on the grounds that it was evidence of what Ms. Williams was told was the reason for her demotion. 9/3 RP 103. McLin's statement during the meeting also came in, over a hearsay objection, during George Campbell's direct examination, not for the truth of the matter

asserted, but to demonstrate the effect on Campbell and on his decision-making with respect to any action taken against Williams. 9/3 RP 148-152.<sup>5</sup> On these facts, Williams cannot successfully argue that there was no general awareness as to the substance of Guillory's testimony. Therefore, ER 103(a)(2) was satisfied.

Despite the admission of McLin's statement through other witnesses, the evidence was not cumulative. Williams denied making the statement to Venus McLin that the Roosevelt administrators were targeting black students. 8/27 RP 108-109. Accordingly, it was important for the District to introduce the substance of McLin's statement, not just to inform the jury of the information available to the District leading up to Williams' demotion, but to corroborate Campbell's recollection and challenge Williams' claim that she never made the statement. As the District's counsel argued at the time the testimony was offered, Guillory was at the meeting where McLin reported Williams' statements regarding the Roosevelt administration. Therefore, Guillory's testimony was relevant for the purpose of establishing the

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<sup>5</sup> Contrary to statements made in both parties' briefs, at the time the District sought to introduce Guillory's testimony, Venus McLin had not yet testified as to her conversation with Guillory and Campbell. The substance of McLin's statements came in, for the first time, on cross-examination of Williams. 9/3 RP 103. McLin testified immediately after Guillory on September 8, 2009. 9/8 RP 77, 133.

basis for the District's decision to demote and to challenge Williams' suggestion the McLin's account was untruthful.<sup>6</sup>

The trial court abused its discretion when it refused to admit Guillory's statement. The District was prejudiced in that it was denied the opportunity to present evidence of both Campbell's and Guillory's recollection of the facts giving rise to Williams' demotion and to present evidence attacking Williams' credibility. The District respectfully requests this Court reverse and remand on this ground.

d. The District's Assignment of Error #4 regarding the trial court's failure to grant the District's motion for partial directed verdict.

(i) Granting the District's Motion for Partial Directed Verdict was the appropriate relief.

At the close of Williams' case, the District moved for a partial directed verdict, asking the court to find a lack of evidence to support Williams' claims that her transfers to Rainer Beach and Ingraham High

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<sup>6</sup> Williams contends that Guillory's testimony is irrelevant because there was no evidence in the record showing, among other things, "what was considered in the demotion decision, or what factual conclusions were pertinent to that decision." Resp. Br. 36. However, this argument ignores the fact that the trial court expressly admitted Williams' statement to McLin during Campbell's testimony for the sole purpose of establishing what prompted certain actions which ultimately led to Ms. Williams' transfer. 9/3 RP 103, 142. This was precisely the evidence Williams now claims was never presented. The fact that Guillory was not a decision maker with respect to Williams' demotion is immaterial to the admissibility of the statement for the limited purposes argued by the District.

School constituted adverse employment actions for purposes of a retaliation claim. 9/4 RP 73-94. The court reserved ruling on the issue. *Id.* at 94. The District renewed its request for a ruling prior to closing arguments. 9/9 RP 3-4. Ultimately, the trial court denied the District's motion and refused to give a limiting instruction, finding that, although there did not appear to be sufficient evidence particularly as to the Rainer Beach transfer, the jury would simply be instructed to "base their verdict upon evidence, not upon speculation, guess or conjecture . . . ." 9/9 RP 21, 31.

In response to the District's appeal of this error, Williams maintains that a motion for directed verdict was not the proper legal mechanism for removing the unsupported transfers from the jury's consideration. Resp. Br. 37. The District disagrees.

A motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 20 948 P.,2d 816 (1997). "Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the

verdict can rest." *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968). "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Brown v. Superior Underwriters*, 30 Wn. App 303, 306, 632 P.2d 887 (1980).

Based on the aforementioned legal principals, it is clear that (1) there was no evidence to sustain a verdict for Williams based on the transfers, and (2) a fair minded and rational person could not be persuaded to find retaliatory animus on those facts. The trial court's refusal to exclude these acts (the transfers to Rainier Beach and Ingraham) on the District's motion for partial directed verdict put any verdict in favor of Williams in jeopardy – as the trial court so clearly warned Williams' counsel.

Moreover, even if a motion for directed verdict was not the appropriate avenue, a limiting instruction could have cured the potential harm. As discussed in its opening brief, the District expressly requested such an instruction following the trial court's denial of its motion. 9/9 RP 22. This request was also denied, resulting in precisely the same harm sought to be avoided by the motion for partial directed verdict.

9/9 RP 31. Accordingly, the trial court abused its discretion in failing to provide the District with relief on either ground.

(ii) The District applied the correct legal standard.

In the alternative, Williams contends that the legal standard on which the District's motion was based was rejected by the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway Company v. White*, 548 US 53, 126 S. Ct 2405 (2006). More specifically, Williams argues the District's definition of what constituted an "adverse employment action" was "too narrow" in that the District only argued that transfers were not adverse because they were equivalent positions for equal pay. Resp. Br. 38-39.

Although the District did make this assertion, the District also clearly acknowledged, both in its brief and at oral argument on the motion for direct verdict, that the retaliation provision upon which Williams' claim was based required a showing that the District's acts of transferring Williams to Rainer Beach and Ingraham was effectively punishment for her act of reporting sexual harassment. CP 93; 9/9 RP 5-27. This argument is on all fours with the Supreme Court's holding in *Burlington Northern* which requires a showing of a connection between Williams participation in the protected activity (the reporting) and the

alleged adverse employment action (the transfers). *Burlington Northern*, 548 US at 71; See also *Estevez v. The Faculty Club of the University of Washington*, 129 Wn. App 774, 798, 120 P.3d 579 (2005).

In its discussion with counsel during argument on the motion for directed verdict, the trial court expressly acknowledged a lack of evidence to establish that Williams' transfer to Rainer Beach was an adverse employment action, finding that Williams failed to proffer evidence the transfer was retaliatory. 9/9 RP 21. In fact, the trial court's denial of the District's motion was based, at least in part, on its conclusion that Williams was not actually claiming that these transfers were retaliatory, but rather that there were concerns with how the transfer was effectuated. 9/9 RP 31. Yet, following the trial court's comments to this effect, Williams' counsel informed the court of her express intention to argue that the transfers were, in fact, retaliatory. *Id.* at 33. The court warned Williams that if she made that argument, she would be putting the whole verdict in jeopardy based on the evidence presented. *Id.* Despite this admonition, that is exactly what Williams argued, 9/9 RP 89-91, and she has in fact put her verdict in jeopardy!

Notably, Williams continues in her efforts to argue that the Rainier Beach and Ingraham transfers were motivated by retaliatory animus, devoting nearly five pages to this point in her opposition brief. Resp. Br. 40-44. Conspicuously missing from her narration is any response to the District's arguments with respect to the trial court's warning, or the court's conclusion that there was a lack of evidence in the record to support a finding that these transfers were unlawfully motivated.

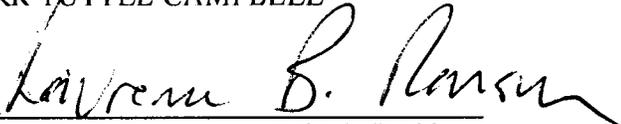
The District was prejudiced by the trial court's failure to grant its motion for partial directed verdict, or in the alternative to craft a limiting instruction, because it is highly likely, given the outcome, that the jury did as Plaintiff asked and found both transfers to be evidence of retaliation. The District respectfully requests that this Court reverse and remand on these grounds.

### 3. CONCLUSION

The District requests that judgment on the jury's award and related award of attorneys fees and costs be vacated and reversed, and the case remanded for a new trial for the reasons set forth in the District's Opening and Reply briefs.

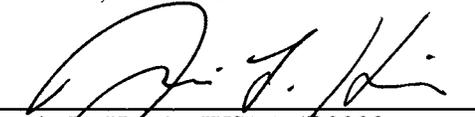
RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August, 2009.

KARR TUTTLE CAMPBELL

By 

Lawrence B. Ransom, WSBA #7733  
Attorneys for Appellant  
1201 Third Avenue, Suite 2900  
Seattle, WA 98101  
(206) 223-1313

WILLIAMS, KASTNER & GIBBS PLLC

By 

Jessie L. Harris, WSBA #29399  
Attorneys for Appellant  
Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98101  
(206) 628-6600

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 6<sup>th</sup> day of August, 2009, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellant," to be delivered by messenger to the following counsel of record:

Counsel for Respondent:

Jean E. Huffington  
MCKAY HUFFINGTON & TYLER, PLLC  
14205 SE 36<sup>th</sup> Street, Suite 325  
Bellevue, Washington 98006  
(206) 903-8600

DATED this 6th day of August, 2009, at Seattle, Washington.



Heather L. White

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