



The following pretrial order is lodged with the court pursuant to L.R. 16.6.

**1. Nature of the Action.** Plaintiff alleges five claims: Retaliation in violation of Section 504 of the Rehabilitation Act of 1973(29 USC § 794); violation under color of state law of right to free speech under the First Amendment; violation of the Equal Pay Act (29 USC § 206(d)); a whistle-blower claim under state law (ORS 659.530), and defamation. Trial will be to a jury, and the parties have consented to trial and entry of judgment by a magistrate judge.

**2. Subject Matter Jurisdiction.** This court has jurisdiction pursuant 29 USC § 794a, 29 USC § 216b; redress for the First Amendment violation under 42 USC § 1983; and supplemental jurisdiction over the Oregon statutory and common law claims.

**3. Agreed Facts.** [Facts marked with an asterisk are agreed to but disputed as to relevance.]

1. To the extent required, a tort claim notice was sent to Defendant Portland Public Schools (“PPS”).

2. Plaintiff, PAMELLA E. SETTLEGOODE ("**Dr. Settlegoode**"), is a citizen of the United States, residing in Multnomah county in the State of Oregon. Until employed by PPS, she had no paid experience as a teacher in public schools and no employment of any kind in special education or degree in special education.

3. Dr. Settlegoode earned a Bachelor of Science degree in Physical Education from the University of Tampa; a Master of Science degree in Physical Education from Portland State University; and a Ph.D. from the University of Oregon.

4. Dr. Settlegoode started at Step 4 of PPS pay scale.

\*5. PPS hired Dr. Settlegoode with an "emergency certificate" because she had no regular certificate to teach Adaptive Physical Education ("APE").

6. Defendant, **PPS**, also known as Multnomah County School District No. 1 is a recipient of federal funds subject to § 504 of the Rehabilitation Act; and a government entity authorized under the laws of Oregon. One or more of the students receiving instruction from Dr. Settlegoode were covered by § 504 of the Rehabilitation Act.

7. Defendant, SUSAN WINTHROP ("**Winthrop**") is employed as a supervisor in the special education department of **PPS**, and was the immediate supervisor of Dr. Settlegoode . Winthrop has worked as a speech therapist or administrator with students for more than 28 years.

\*8. Winthrop has no degree in special education or physical education.

9. Defendant, ROBERT CREBO ("**Crebo**"), was employed as Director of Special Education of **PPS**, and supervised **Winthrop**.

10. Defendant, LARRY WHITSON ("**WHITSON**") is employed as supervisor of a deaf and hard of hearing program, and employed by **PPS**. He had no supervisory authority over Dr. Settlegoode.

11. During Dr. Settlegoode's first year and second year of employment with the School District as an APE teacher, she was assigned to work with students with disabilities at various sites for **PPS**. During the 1998-1999 and 1999-2000 school years (hereinafter "1998 School Year" and "1999 School Year," respectively) Dr. Settlegoode was assigned to Applegate Elementary School; and the following high school building locations: Cleveland, Franklin, and Marshall. During the 1998 School Year, she was assigned to Grant High School, and that assignment was replaced with an assignment to Wilson High School during the 1999 School Year. During both the 1998 and 1999 School Years, Dr. Settlegoode was assigned to PCC Southeast.

12. Dr. Settlegoode was employed beginning in the 1998 School Year by **PPS**, as an

APE teacher. She continued to be employed by **PPS** during the 1999 School Year ("second year") in the same position.

13. Dr. Settlegoode periodically participated in Individual Education Program ("IEP") meetings. During such meetings, she made *good faith* recommendations or disclosed her beliefs based upon evaluations of students for their needs or program deficiencies to other participants, including parents and other teachers of disabled students.

14. Many disabled students in the Special Education Program of **PPS** (which includes APE) are the beneficiaries of federal funds received by **PPS** under Section 504 of the Rehabilitation Act.

15. On March 1, 1999, Winthrop signed a **FINAL REPORT ON PROBATIONARY TEACHER** ("March 1, 1999, Report"), prepared by Winthrop regarding the performance of Dr. Settlegoode, based upon all observations and other information available to her before March 1, 1999. The statements made by Winthrop in the report were truthful.

16. The March 1, 1999, Report, indicated in part that:

“(2-22-99) Dr. Settlegoode continues to demonstrate competence in effective communication and interaction with colleagues, parents, students, and community personnel.”

\* \* \*

“She (Dr. Settlegoode) participates in the SMART program (reading with a student)...”

\*17. Benjamin Canada, superintendent of **PPS**, encouraged Blanchard Education Service Center and Child Services Center employees (which included APE employees) to participate in the SMART program in his memo dated March 18, 1999.

18. In December 1998 and January 1999, Dr. Settlegoode wrote three letters related to a special education student, S.H., and an educational assistant, Tom Sontag. The first letter, dated December 8, 1998, was addressed to Betty Welch, with a courtesy copy sent to Winthrop,

the second letter dated December 16, 1998, and third letter dated January 13 or 18, 1999, were addressed to both Winthrop and Welch.

19. At all material times, Dr. Settlegoode was employed to work a fulltime equivalent ("FTE") of 0.8, equal to four days per week. The four days have been regularly scheduled Monday through Thursday of each week of the school calendar during the 1998 and 1999 School Years.

20. During the 1998 and 1999 School Years, **PPS** and Winthrop expected Dr. Settlegoode to provide instruction to students with disabilities assigned to her on each day of her four day per week schedule. **PPS** and Winthrop did not expect Settlegoode to provide instruction four days per week to each of her assigned students.

21. During the 1998 and 1999 School Years, Dr. Settlegoode received wages in excess of an 0.8 FTE for coaching a track team consisting of one or more student athletes with disabilities at Cleveland High School.

22. Dr. Settlegoode received a notice dated May 14, 1999, informing her of an IEP meeting set for May 25, 1999, regarding a Grant student in special education, S.H. She attended the IEP meeting at Grant H.S. She has repeatedly (orally and in writing) dissented from the motor (physical fitness) goals for S.H.. These goals were written by someone else.

23. During Dr. Settlegoode's employment with the School District, she made certain assertions regarding the special education program, in *good faith*. She alleges the assertions made were on topics as generally described in paragraph 12 of the Amended Complaint, as follows:

“Dr. Settlegoode reported incidents and situations in which her disabled students were subjected to discrimination; not provided free and appropriate education including after-school activities that was equal or equivalent to services provided to non-disabled students; inadequate facilities or services; hazardous facilities; improper employee conduct, including falsified reports or lack of required reports; mismanagement of funds; and other violations of laws ("deficiencies"). She made reports of these deficiencies at various times to her supervisors including **Winthrop** and **Crebo**, and **PPS** through its superintendent, Dr. Ben Canada.”

24. Dr. Settlegoode sent Crebo two letters dated June 11, 1999, with attachments, containing statements made in *good faith* regarding what she perceived as special education deficiencies at Grant and systematic discrimination against students with disabilities at her assigned school locations. Copies of these letters were also sent to Carol Matarazzo and Canada. Crebo sent copies to Winthrop. Winthrop responded to Crebo with a memo dated June 15, 1999.

25. Included in Ms. Winthrop's memo of June 15, 1999, were the following statements which were true:

“Unfortunately, S.H's special education teacher (Judy Wright) did not follow through appropriately; beginning in January, she did not send S.H. to APE and therefore, that portion of his IEP was not implemented. An IEP review to delete APE was not held until May. I believe that some of the problems at Grant were the result of poor management by the special education teacher (Judy Wright).

\* \* \*

“Throughout this school year Pamela has been critical of general education in Portland Public Schools (comparing it to Appalachia), special education (PPS has a back of the bus mentality), and administrators in both general and special education.

\* \* \*

“It is of concern to me that (Dr. Settlegoode) has the potential to defame my character and damage my professional reputation.”

26. A meeting was held on July 13, 1999, between Crebo, Winthrop, and Welch regarding, among other things, the letters Dr. Settlegoode sent to Crebo. Winthrop made notes during the meeting which reflected that she was to prepare a draft response to Dr. Settlegoode for Crebo and copied to Dr. Canada, Carol Matarazzo, and Winthrop. The main points she was to cover were listed in her notes.

27. In her process of drafting the response to Settlegoode, Winthrop made notes to organize a response. For those issues raised by Dr. Settlegoode and addressed in the response she indicated with a check mark.

28. Crebo signed a letter dated August 20, 1999, addressed to Dr. Settlegoode at her home. The topics and order of the sections of the letter corresponded to the left hand column of numbered topics in Winthrop's meeting notes: 1, 4, 2, 3, 5. Included in the letter drafted by

Winthrop and signed by Crebo was the statement: “Throughout your letters and notes you are disrespectful in your references to special education administrators; I find this unacceptable.” In the next paragraph the letter goes on to defend and speak highly of Winthrop.

\*29. Dr. Settlegoode sent a letter to Canada dated November 21, 1999. Dr. Canada read only the first page of this letter and referred it to Crebo, whom he considered as the expert in special education. Canada did not respond orally or in writing to Dr. Settlegoode regarding her November 21<sup>st</sup> letter or her June 11<sup>th</sup> letter to Crebo and copied to him.

30. Dr. Settlegoode distributed copies of the November 21, 1999, letter she sent to Dr. Canada to her APE co-workers.

31. Before December 3, 1999, Susan Winthrop had received a copy of a letter from Crebo to Dr. Settlegoode August 20, 1999, and had received a copy of or reviewed the original or a copy of the letters from Dr. Settlegoode dated June 11, 1999, referred to in Crebo’s letter of August 20, 1999.

32. Before December 3, 1999, Dr. Canada, Matarazzo, and Welch had received a copy of a letter from Crebo to Dr. Settlegoode dated August 20, 1999 (R/A #19) and had received a copy of or reviewed the original of the letter from Dr. Settlegoode to Crebo dated June 11, 1999, referred to in Crebo’s letter of August 20, 1999.

33. On or about December 3, 1999, Winthrop, in her capacity as Dr. Settlegoode’s supervisor wrote and sent to her a document memorializing an oral reprimand which indicated that if Dr. Settlegoode made statements that promoted an adversarial relationship or share with parents or students differences she may have with **PPS**, dismissal may occur.

34. On December 8, 1999, Crebo sent a letter to Settlegoode (Exh. 25), in which he referred to her November 21<sup>st</sup> letter to Dr. Canada. Crebo directed Settlegoode to discontinue written communications by stating in part:

“As your supervisor, Susan Winthrop, has indicated to you these long, written communications are not an effective way to deal with issues. In fact, you have been directed to discontinue this practice and meet with your supervisor to discuss any issues

about which you are concerned.”

35. On December 14, 1999, Winthrop delivered to Settlegoode, an evaluation dated December 10, 1999. Under section 3, Settlegoode received two “I”s (Improvement suggested) and comments specifically addressing her written communications and statements to parents.

36. It was appropriate for parents of disabled students in special education in the School District who were receiving APE instruction from Dr. Settlegoode to contact her for information, answers to questions, or to address concerns or complaints about their child’s adapted physical education during Dr. Settlegoode’s work time.

37. If parents communicated with Dr. Settlegoode regarding their child’s program of instruction, services, or IEP indicated that they were not satisfied with the program, services or IEP, it was appropriate for Dr. Settlegoode to properly direct the parents to contact Dr. Settlegoode’s supervisor, the school principal, or the Oregon Department of Education for information, answers to questions, or to address concerns or complaints about their child’s education.

38. All students at PPS may try out for and compete in interscholastic track and field teams.

\*39. Disabled students assigned to Settlegoode during the 1999 School Year received adapted physical education instruction no more than two days per week directly from her.

40. During the 1998 and 1999 School Years, students with disabilities on the Special Olympics track program at Cleveland received coaching services from Dr. Settlegoode no more than two times per week.

41. During the 1998 and 1999 School Years, students at Cleveland who were members of the general track team for which all students may try out, received coaching services from the coaching staff as much as five times per week as well as on some weekends for major invitational competitions.

42. On January 27, 2000, Crebo and Winthrop jointly signed a memorandum to



Dr. Canada regarding Dr. Settlegoode, wherein the following statement, among others, was made: "It is likely that Pamela will not be recommended for renewal."

43. The January 27, 2000, memorandum mentioned and relied in part upon two complaints, referring to one by Whitson and a second by Gail Reynolds, another APE teacher.

\*44. Whitson's complaint was dropped. Reynolds and Dr. Settlegoode reached a mutual understanding during a private mediation that Ms. Reynolds was withdrawing her complaint against Dr. Settlegoode, but beyond a statement to that effect, the settlement was supposed to be kept confidential.

\*45. During one of Dr. Settlegoode's union grievances, the School District referred Reynolds' complaint as evidence to support its position.

46. APE teachers submitted a document entitled "ADAPTED PHYSICAL EDUCATION ISSUES," dated February 9, 2000 (Exh. 13), to PPS. The document arose out of discussions among APE teachers that began in a meeting regarding Dr. Settlegoode's November 21, 1999, letter to Dr. Canada.

\*47. Crebo submitted his resignation on or about February 11, 2000 to be effective June 30, 2000.

48. On February 23, 2000, Dr. Settlegoode received a "FINAL REPORT ON PROBATIONARY TEACHER" for the second year dated 2-18-00, that recommended non-renewal for 2000-2001. Dr. Settlegoode was not renewed a third year probationary status for 2000.

49. During the 1999 School Year, Winthrop contacted school administrators at schools where Dr. Settlegoode was assigned and solicited comments from them regarding Dr. Settlegoode's performance. Other probationary APE teachers during the first or second year included Sarah Spella, Derek Barnes, and Katherine Smith.

50. During the 1999 School Year, Winthrop told Dr. Settlegoode that tennis was not appropriate curriculum at Applegate for her APE class at Applegate Elementary. Winthrop

directed Dr. Settlegoode to discontinue tennis instruction at Applegate Elementary. Winthrop gave the directive to discontinue tennis instruction at Applegate after an observation of Dr. Settlegoode's class where, among other things, she was hit in the face with a tennis ball. Winthrop referred Dr. Settlegoode to a PPS 1992 curriculum guide.

\*51. Bonnie Doyle, another APE teacher has taught tennis in a group setting for APE at Brooklyn Elementary during three school years, before the time she was supervised by Winthrop.

52. Bonnie Doyle provided Dr. Settlegoode a copy of documents related to In re J.B from February 18, 1992, because as Doyle listened to problems Settlegoode was having, it appeared to her like the same experience Doyle had at Lane Middle School.

53. Concerns regarding some EAs raised by Dr. Settlegoode were similar to concerns often raised by other APE teachers. Like Dr. Settlegoode, Doyle was not comfortable asking an EA to do some teaching tasks that the District said it was acceptable to have an EA do. Doyle also had time and space and scheduling accessibility issues at Franklin High School similar to ones Dr. Settlegoode reported. Doyle did not have keys to the Franklin gym, like mainstream PE teachers did, which posed timing problems.

54. Winthrop and Welch received a letter or copy thereof from a special education teacher (Wright) on or about February 22, 1999, containing a complaint about Dr. Settlegoode. The letter was also copied to the EA and the parent of S.H.

55. Whitson participated in an IEP meeting on November 4, 1999. On November 9, 1999, Whitson wrote a memorandum regarding Dr. Settlegoode. Before writing the memorandum, Whitson met with Winthrop and discussed his concerns.

56. On August 24, 2000, Settlegoode obtained a 0.5 FTE position as Visiting Assistant Professor of Health, Human Performance and Athletics with Linfield College, where she is currently employed. Dr. Settlegoode is paid a base salary of approximately \$16,760 plus benefits. In addition, Dr. Settlegoode received an extra duty appointment in the Education

Department to supervise student teachers interning public schools. She received \$780.00 for each two students supervised during each semester of the 2000-2001 school year.

#### **4. Claims and Defenses.**

##### **CLAIM ONE**

(Retaliation under the Rehabilitation Act)

*(A) Plaintiff contends:*

1. PPS students with disabilities taught by Dr. Settlegoode were the beneficiaries of federal funding subject to section 504 of the Rehabilitation Act. Dr. Settlegoode was within the zone of interest of the Act's requirements for the benefit of her students with disabilities.

2. During the 1998 and 1999 School Years, Dr. Settlegoode's assignment included teaching APE to several students with disabilities located at several schools in PPS. During the 1999 School Year, Settlegoode was assigned to Portland Community College Southeast.

3. PPS intentionally did not provide Dr. Settlegoode and her students adequate scheduling, equipment, facilities, or other support, to properly teach, consult, coach, or supervise the instruction of disabled students or locations assigned to her. PPS intentionally assigned to Dr. Settlegoode students located at several different school locations in a manner such that she could not reasonably provide appropriate instruction to disabled students in a non-discriminatory manner. Although assigned to a campus of PCC, Winthrop advised Dr. Settlegoode not to provide any services to disabled students at PCC.

4. Dr. Settlegoode in good faith reported incidents and situations in which she believed disabled students of PPS were subjected to discrimination, not provided free and appropriate education including after-school activities were equal or equivalent to services provided to non-disabled students, inadequate facilities or services, hazardous facilities, improper employee conduct, including falsified reports or lack of required reports, mismanagement of funds, and other violations of laws ("deficiencies"). She made reports of

these deficiencies at various times to her supervisors including **Winthrop, Crebo, and PPS** through its superintendent, Dr. Canada, and School Board member Karla Wenzel.

5. Dr. Settlegoode's recommendations and reports were based upon her professional and academic experience, with a M.S. in physical education and a Ph.D. in curriculum and instruction. Her recommendations were based upon an assessment of the individual students ("IEP"), and PPS would not provided the level of service recommended to meet the needs of students with disabilities.

6. Winthrop has no education or experience in physical education or as a classroom teacher, and was not qualified to determine the effectiveness or appropriateness of Dr. Settlegoode's course of instruction.

7. In response to Dr. Settlegoode's reports, Defendant **PPS**, intentionally retaliated against her. As a part of Defendant PPS's retaliation against Dr. Settlegoode, she was coerced to violate the Act and when she protested or refused to do so, her contract was not renewed for the 2000-2001 school year and she was discharged at the close of her second school year, including but not limited to the following, examples:

(A) Winthrop told Dr. Settlegoode to discontinue volunteering in the SMART program during her lunch;

(B) Winthrop subjected Dr. Settlegoode to increased surveillance during her second year, while PPS and Winthrop failed to produce any notes of "Principal's Comments" regarding Dr. Settlegoode for the first year, or any notes of "Principals Comments" for any other probationary APE teacher she supervised during 1999, 2000, or 2001 school year to the present.

(C) Winthrop did instruct any other APE teachers to not teach tennis at the elementary level, and 1992 curriculum guide was outdated, and not intended for special education where students received individualized programs to meet their

needs. Racquet sports are endorsed by the U.S. Tennis Association at the elementary school level.

(D) Winthrop in an attempt to humiliate Dr. Settlegoode, Winthrop went to another APE teacher, Sara Spella, and lied by claiming that Dr. Settlegoode wanted to observe Spella's class. Winthrop then suggested to Dr. Settlegoode that she observe Sarah Spella's class, who started as an APE teacher the same year as Settlegoode, and had no prior teaching experience. Dr. Settlegoode and Sara Spella met, but could not resolve class conflicts, and Dr. Settlegoode did not want to cancel her own classes. Dr. Settlegoode told Winthrop she would like to observe a teacher more experienced.

(E) At the start of the 2000 school year, she was assigned to two additional elementary schools and Wilson in place of Grant. The APE team knew that was too heavy a load for an 0.8 FTE and took the two elementary schools Winthrop had assigned.

(F) Though Dr. Canada read on one page Dr. Settleoode's letter to him which stated: "My reporting of events has reaped for me professional retaliation, beginning shortly after my report on S.H.'s fraudulent IEP at Grant High School;" he referred her letter back to the persons retaliating against her: Crebo and Winthrop, who did not address any substantive concerns raised.

8. As a consequence of Defendant **PPS**'s discriminatory and retaliatory acts described above, Dr. Settlegoode is entitled to injunctive and other equitable relief, including reinstatement to a teaching position; and if reinstated, Settlegoode should not be compelled to violate section 504 of the Act, nor should Defendant **PPS** be permitted to discharge or otherwise retaliate against Dr. Settlegoode if she refuses to violate the Act or in good faith reports violations of the Act.

9. Based upon PPS's intentional acts, by and through Winthrop and Crebo, Settlegoode is entitled to compensatory damages for her stress, pain and suffering from a thyroid condition induced by the stress, mental anguish, and damage to her reputation in the amount of \$300,000.00.

10. Dr. Settlegoode has retained the services of one or more attorneys in this action, and if she prevails is entitled to her reasonable attorney fees pursuant to 29 USC § 794a(b).

### Defense

#### *(B) Defendants contend:*

1. Defendants deny Dr. Settlegoode's contentions except to the extent agreed in the Agreed Facts section.

2. Defendants further contend as a matter of law that Dr. Settlegoode may not challenge the substance of PPS programs as asserted in contentions 1 and 2, above.

3. PPS decided not to renew Dr. Settlegoode for third-year probationary status because of demonstrated deficiencies in writing IEPs and evaluating special education students, poor management of classes, lack of student engagement, insufficient monitoring of students as a group, and her inability to effectively and appropriately interact and communicate with administrators, supervisors, educational colleagues, and others.

4. Winthrop has an outstanding record, especially in supervising and evaluating staff. She endeavors to give first year probationary teachers the benefit of the doubt in evaluation reports, but expects improvement in matters she draws to the teacher's attention. In the 1998 school year, or before the start of the 1999 school year, Winthrop drew to Dr. Settlegoode's attention that she needed to improve her ability to write IEP's, her monitoring of students as a group, and her ineffective communication style.

5. Winthrop and Welch received a letter or copy thereof from a special education teacher (Wright) on or about February 22, 1999, containing a complaint about Dr. Settlegoode. The letter was also copied to the EA and the parent of S.H.

6. Whitson participated in an IEP meeting on November 4, 1999. On November 9, 1999, Whitson wrote a memorandum regarding Settlegoode. Before writing the memorandum, Whitson met with Winthrop and discussed his concerns.

7. Winthrop and Crebo welcome information from staff, including APE staff, about concerns regarding PPS programs they supervise. From time to time, several APE teachers have complained to Winthrop about shortcomings they perceived in PPS programs, including concerns raised by Dr. Settlegoode. None of these persons has been retaliated against, or even claimed to have been retaliated against, by Winthrop or Crebo.

8. Winthrop gave Dr. Settlegoode sample IEPs and told her to seek help from an experienced co-worker. Dr. Settlegoode acknowledges her difficulties in writing IEPs.

9. Dr. Settlegoode was reassigned from Grant High School after her behavior there had generated so many complaints against her by the Grant staff and community that the situation was untenable. Winthrop made this decision to give Dr. Settlegoode a fresh start elsewhere at a different high school (Wilson).

10. Winthrop did not instruct or advise any other APE teachers that tennis or racquet sports was not an appropriate curriculum at the elementary school level, because no other APE teacher under her supervision taught tennis at the elementary school level.

11. Doyle solved her "key" problem at Franklin by working effectively with Franklin administrators.

12. Winthrop generally regards the SMART program as a positive thing, if it does not interfere with teaching time. Dr. Settlegoode wanted to volunteer for this program between 9:30 and 10:00 a.m. which she claimed was "lunch time." Winthrop considered it important teaching time. Dr. Settlegoode never proposed to volunteer for the SMART program on Fridays, when she had no responsibilities as a PPS employee.

13. Dr. Settlegoode distributed copies of her November 21, 1999 letter to Canada to APE co-workers without their request. Several APE staff complained to Winthrop that they believed Dr. Settlegoode exhibited unprofessional, ineffective communications in that letter.

14. During her time of employment with PPS and since her contract was not renewed, Dr. Settlegoode has not seen any mental health professional to seek assistance with any alleged mental anguish related to her employment with PPS.

15. Settlegoode lacks standing to pursue a claim under the Rehabilitation Act.

16. Settlegoode failed to exhaust administrative remedies.

17. Settlegoode failed to reasonably mitigate her damages.

## **CLAIM TWO**

(Violation of free speech under the First Amendment, claim brought under 42 USC 1983)

*(A) Plaintiff contends:*

1. In addition to the allegations of claim one, the actions of **PPS, Winthrop, Crebo,** and **Whitson** were done under color of state law.

2. Dr. Settlegoode periodically participated in IEP meetings in person or in writing, in which she made recommendations or disclosed her beliefs as to students' needs or program deficiencies to other participants, including parents of disabled students.



3. Defendant **Whitson** participated in one or more IEP's in which Dr. Settlegoode participated, and Defendant **Whitson**: (A) improperly rewrote or falsified portions of one or more IEP's plans contributed to by Dr. Settlegoode; and (B) falsely reported to **PPS** that she was promoting an "adversarial" relationship. Whitson had a grudge against Dr. Settlegoode, because he had been involved in an earlier IEP team that changed Settlegoode's physical education portion of an IEP inappropriately, and when called to the attention of the responsible administrator, Whitson reversed the inappropriate change.

4. Defendants **Winthrop, Crebo, and PPS** ratified the conduct of Defendant Whitson by retaliating against Dr. Settlegoode, including but not limited to encouraging Whitson to formally complain; subjecting her to increased surveillance by contacting school administrators and parents about her performance; and continuing to use Whitson's complaint as part of her evaluation process, though determined to be unfounded as a result of a union grievance proceeding, and thereafter citing Whitson's complaint to the superintendent and in subsequent evaluations and its decision to recommend non-renewal of her contract.

5. Dr. Settlegoode's statements and reports about the status of disabled students' programs and program deficiencies were protected under federal laws regarding disabled students' education, and Dr. Settlegoode's right to free speech under the First Amendment to the U.S. Constitution.

6. **PPS** has a history of failing to provide a free and appropriate education to all disabled students in a non-discriminatory manner for several years prior to Dr. Settlegoode's employment, to the point that the APE team had given up and become complacent. PPS has a custom, pattern, or practice of attempting to coerce, discourage or preventing employees from disclosing information, examples include: (A) utilizing EA to "carry out" instruction in APE while, mainstream students received instruction from qualified physical educators; (B) making APE teachers itinerant and limiting students with disabilities APE instruction to "consults" or direct instruction by an APE teacher one day per week; (C) ignoring testing and evaluations; (D) IEPs

out of compliance, including back dating them; (E) failing to disclose changes made to IEP programs without input from APE teachers; (F) failing to include APE teachers in IEP meetings; (G) discouraging APE teachers from drawing conclusions or making any recommendations in IEP meetings; (I) itinerant APE teachers were not entrusted with keys to facilities needed to teach, nor identified on master school schedules for allocating time or space; (J) failing to inform parents of children's needs that may be beyond what is made available at PPS; and (K) failing to provide access after school and interscholastic opportunities with reasonable accommodation, by limiting students with disabilities to "Special Olympics" and practice only two days per week rather than a division on track teams for students with disabilities, not necessarily retardation.

7. Defendants **Winthrop, Crebo, Whitson, and PPS** attempted to restrain Dr. Settlegoode's speech, including but not limited to one or more defendants, removing her from Grant H.S.; not employing her in a 1.0 FTE APE position she applied for just after her June 11, 1999, complaint to Crebo; instructing her not to write memorandums, letters of complaint, or to otherwise memorialize her observations; subjecting her to increased surveillance by contacting school administrators and parents about her performance; continuing to use Whitson's complaint as part of her evaluation process, though determined to be unfounded as a result of a union grievance proceeding, and thereafter citing Whitson's complaint in a memorandum to the superintendent and in subsequent evaluations and its decision to recommend non-renewal of her contract; not informing her of IEP meetings and deliberately scheduling IEP meetings regarding her students on her day off.

8. As a proximate result of defendants' discriminatory and wrongful acts, Dr. Settlegoode has past monetary losses and will suffer future losses in an amount to be determined at trial up to \$700,000.00. Truthful job search requires Dr. Settlegoode to respond on application forms in the field of public education in Oregon, whether the applicant has not been renewed in any previous employment.

9. The intentional conduct of Defendants **PPS, Winthrop, Crebo, and Whitson**, were illegal or in violation of societal norms and should be punished with punitive damages in the amount of one million dollars, or such other amount as determined at trial.

10. Dr. Settlegoode has retained the services of one or more attorneys in this action, and if she prevails is entitled to her reasonable attorney fees pursuant to 42 USC § 1988.

#### Defense

*(B) Defendants contend:*

1. Defendants deny Dr. Settlegoode's contentions except to the extent agreed in the Agreed Facts section.

2. Defendant reincorporate contentions asserted in defense to the first claim for relief.

3. The teacher hired to the 1.0 FTE position was better qualified than Dr. Settlegoode.

4. Dr. Settlegoode failed to reasonably mitigate her damages.

5. Defendant Whitson was privileged to communicate to the other defendants his perception that Dr. Settlegoode was promoting an adversarial relationship between the School District and parents of students served by the District.

6. Defendants were privileged to make statements and engage in conduct of which Dr. Settlegoode complains.

### **CLAIM THREE**

(Violation of Equal Pay Act)

(A) *Plaintiff contends:*

1. In addition to the allegations of claim one and two, during the 1998 and 1999 School Years of employment with **PPS**, Dr. Settlegoode was an athletic coach for more than five students participating on a track and field team located at Cleveland High School.

2. During the 1999 and 2000 track seasons, Dr. Settlegoode was paid an hourly rate based on her teaching salary for each year. During the 2000 track season, she was paid at the rate of \$27.71 per hour.

3. At various times during the course of her employment as a track coach at Cleveland, Dr. Settlegoode performed work equal in skill, effort, and responsibility to the work of certain male employee coaches, including the head track coach or assistant track coaches of the track team at Cleveland, who were paid a higher hourly wage based on a percentage of 15 and 16 percent of their annual salaries, pursuant to a collective bargaining agreement between PPS and the Portland Association of Teachers. This constitutes a violation of 29 USC § 206(d)(1). Dr. Settlegoode was required to exert more effort (which does not preclude an Equal Pay claim) due to PPS's failure to provide paid support staff, typically available to head track coaches. Dr. Settlegoode was required to exert a higher degree of skill and effort to supervise student athletes with disabilities.

4. The schedule for coaching in the collective bargaining agreement specifies the same pay for track coaches regardless of high school location, number of students, or number of competitions, except the team coached must have more than five students.

5. Had Dr. Settlegoode been paid a wage equal to that of the male employees who performed equal work to the work she performed, she would have been paid at a rate of not less than \$3,981.00 for the 1999 track season, and \$4,332.16 for the 2000 track season.

## Defense

### (B) *Defendants contend:*

1. Defendants deny Dr. Settlegoode's contentions, except to the extent agreed in the Agreed Facts section.
2. Defendants' actions were taken for non-discriminatory reasons and in good faith, specifically:
  - a. All male and female Special Olympics track coaches are paid without regard to sex in the same manner, namely at an hourly rate based on the coach's teaching salary;
  - b. The Special Olympics track program is different from the general interscholastic track team, which has more students, more competitions, and more practices (all of which are available to any student, whether in special education or general education);
  - c. All male and female general interscholastic track coaches are paid without regard to sex in the same manner.

## CLAIM FOUR

(Whistle-blower claim under ORS 659.530)

### (A) *Plaintiff contends:*

1. In addition to the allegations of claim one and two, to the extent required a tort claim notice was sent to **Defendant PPS**.
2. **Whitson** aided or abetted PPS, as defined by ORS 659.030(1)(g), in an unlawful employment practice by discouraging, restraining, or coercing Dr. Settlegoode to refrain from discussing or communicating any information that she believed evidenced a violation of federal law, state law, mismanagement or misuse of funds.

3. In violation of ORS 659.510, **Defendant PPS** through Crebo and Winthrop, and **Defendant Whitson** attempted to or took disciplinary action against Dr. Settlegoode, or attempted to discourage, restrain, or coerce Dr. Settlegoode to refrain from discussing or communicating any information that she believed evidenced a violation of federal law, state law, mismanagement or misuse of funds.

4. Dr. Settlegoode is entitled to the relief provided in ORS 659.035(3), ORS 659.530, and ORS 659.121, including the greater of \$250.00 or her compensatory damages alleged, injunctive relief including back pay and reinstatement, and reasonable attorney fees.

#### Defense

*(B) Defendants contend:*

1. Defendants deny Dr. Settlegoode's contentions, except that a tort claim notice was received and her reports were made in good faith.

2. Defendants reincorporate contentions asserted in defense to the first claim for relief.

3. Dr. Settlegoode has failed to reasonably mitigate her damages.

4. Any information about Dr. Settlegoode disseminated by Defendants Whitson, Winthrop, or Crebo was subject to a qualified privilege.

5. Dr. Settlegoode failed to exhaust a contractual remedy provided by the applicable collective bargaining agreement.

## CLAIM FIVE

(Defamation)

*(A) Plaintiff contends:*

1. In addition to the allegations of claim one, two, and four, Whitson, Winthrop, and Crebo published false and defamatory statements to others that Dr. Settlegoode was unprofessional, promoting adversarial relationships, and incompetent in the performance of her profession as a teacher.

2. Defendants **PPS** is liable for Dr. Settlegoode's damage to her reputation within Portland Public Schools and the community.

### Defense

*(B) Defendants contend:*

1. Defendants deny Dr. Settlegoode's contentions.

2. Dr. Settlegoode has failed to reasonably mitigate her damages.

3. Any statements made by or attributed to defendants were, in fact, true, and therefore not defamatory.

4. As a matter of law, any statements were expressions of opinion and therefore not defamatory.

5. Any statement made by Whitson, Winthrop, and Crebo was subject to a qualified privilege as a work-related statement made by an employee concerning another employee's work performance.

6. No evidence connects any damage to Dr. Settlegoode's reputation or any failures by Dr. Settlegoode to find employment with the alleged defamatory statements.

## COUNTERCLAIM

(Attorney fees)

(A) *Defendants contend:*

1. They are entitled to an award of their reasonable attorney fees under 42 USC § 2000e-5(k).

Defense

(B) *Plaintiff contends:*

1. The Christiansburg Garment Co. v. EEOC, 434 US 412, 421, 98 S Ct 694, 54 L Ed 2d 648 (1978) standard applies, and to the extent that defense attorney fees are available to a claim, the claims were not frivolous, meritless, or brought in bad faith, and if Defendants prevailed none of them would be entitled to attorney fees under the applicable standard.



## 5. Other Legal Issues.

a. Is there admissible evidence to suggest that Dr. Settlegoode's thyroid condition has been legally caused by defendants under the applicable standards as articulated in Daubert v. Merrill v. Dow, 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469 (1993); 43 F3d 1311 (9<sup>th</sup> Cir 1995) and other cases?

b. Can plaintiff present evidence of a custom, pattern, or practice of attempting to coerce, discourage, or prevent disclosure of information in view of her contentions and the Agreed Facts?

c. Defendants plan to raise legal issues in their motions in limine, including but not limited to the following:

(1) May Dr. Settlegoode present testimony that she believed PPS had a retaliatory motive before she has named with whom she discussed the matter, the circumstances under which the matter was discussed, and presented evidence that the discussion became a basis for retaliation?

(2) May IEPs of individual students be admitted?

(3) May Dr. Settlegoode ask past or present PPS employees to speculate on ways in which they might handle hypothetical situations?

(4) May Dr. Settlegoode introduce evidence of the communication method or style of other PPS employees?

d. Dr. Settlegoode plans to raise legal issues in motions in limine, including but not limited to the following: (1) PPS should not be permitted to make a claim of limited funding or lack of funding for any particular class of students.

e. Do defendants' defenses of privilege or exhaustion of a bargaining agreement apply to Oregon's whistle-blower statutory claim?

**6. Amendments to Pleadings.**

Plaintiff proposes to amend the pleadings to adjust the economic portion of her damages downward from \$700,000.00 to \$505,000.00 or such amount supported by the evidence and expert disclosures.

Plaintiff proposes to amend the pleadings to adjust the subjective damage portion of her claims from \$300,000.00 to \$500,000.00. She underwent thyroid surgery following the original complaint, and the effects thereof were not known until after the filing of her amended complaint.

Defendants propose amending their counterclaim for attorney fees to add that right under ORS 659.121.

PLAINTIFFS LAW FIRMS

DEFENDANTS' LAW FIRM

/s/ William R. Goode  
**William R. Goode**  
Of Attorneys for Plaintiff  
Oregon State Bar No. 84049

/s/ Melissa L. Rawlinson  
**Bruce A. Rubin**  
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Oregon State Bar No. 96406  
Of Attorneys for Defendants

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For Court Use Only

The foregoing Pretrial Order is:

Approved as lodged.

Approved as amended by interlineation and the pleadings are amended accordingly.

SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2001.

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**Janice M. Stewart**  
United States Magistrate Judge